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NATIONAL REPORTER SYSTEM — STATE SERIES

THE
SOUTHEASTERN REPORTER

VOLUME 91
PERMANENT EDITION

COMPRISING ALL THE DECISIONS OF
THE SUPREME COURTS OF APPEALS OF VIRGINIA AND WEST
VIRGINIA, THE SUPREME COURTS OF NORTH CAROLINA
AND SOUTH CAROLINA, AND THE SUPREME
COURT AND COURT OF APPEALS
OF GEORGIA

WITH KEY-NUMBER ANNOTATIONS

CONTAINING A TABLE OF SOUTHEASTERN CASES IN WHICH REHEARINGS
HAVE BEEN DENIED

JANUARY 27 — MAY 5, 1917

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

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WILLIAM N. MILLER. L. JUDSON WILLIAMS.⁵
CHARLES W. LYNCH.⁶ HAROLD A. RITZ.⁸

¹ Beginning January 1, 1917.

² Resigned March 1, 1917.

³ Became President March 6, 1917.

⁴ Appointed November 16, 1916.

⁵ Ceased to be President January, 1917.

⁶ Became President January, 1917.

⁷ Term expired December 31, 1916.

⁸ Elected December 31, 1916, to succeed John W. Mason.

COURT RULES

SUPREME COURT OF GEORGIA

Certiorari Rules Adopted December 18, 1916

Rule 1. No decision of the Court of Appeals will be reviewed by certiorari, unless the applicant give written notice to the clerk of the Court of Appeals, within ten days after the filing of the judgment, of his intention to apply to the Supreme Court for a writ of certiorari; nor unless such application for certiorari be filed with the clerk of the Supreme Court within thirty days from the filing of the judgment in the Court of Appeals.

Rule 2. Where an application is submitted to this court for a writ of certiorari to review a decision of the Court of Appeals, the petitioner must furnish, as an exhibit to the petition, a certified copy of the entire record of the case in the Court of Appeals, or, in lieu thereof, a copy of such record omitting the evidence if the evidence is not deemed necessary by the applicant. In either event the transcript shall contain a copy of the judgment and of the opinion or opinions of the Court of Appeals. If this court shall be of the opinion that the evidence is necessary for a determination of the question raised in the petition, the applicant will be required to furnish a certified copy of the evidence; and on his failure to comply with the order of this court in this respect the writ will be

denied. The petition shall contain a succinct abstract and statement of the matter involved, and the specific reason or reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Notice of the date of the filing of the petition, together with a copy of the petition, and brief, if any, in support of the same, shall be served on counsel for the respondent within three days after such date; the brief for respondent, if any, shall be filed within five days of such service. Oral argument will not be permitted on such petition.

Rule 3. All applications for a writ of certiorari to the Court of Appeals must be filed with the clerk of the Supreme Court, and shall be by him submitted to the court on the tenth day after such filing. The clerk of the Supreme Court shall give notice to the clerk of the Court of Appeals of the filing of all applications for the writ of certiorari.

Rule 4. Applications for certiorari shall be docketed as other cases. The costs in such cases shall be ten dollars, and shall be paid to the clerk on the filing of the application for certiorari. On failure to pay the costs, the clerk shall not file the application.

AMENDMENTS TO RULES

COURT OF APPEALS OF GEORGIA¹

Adopted on January 1, 1917, instead of Previous Rule 18

V.—DIVISIONS AND DISQUALIFICATION.

Rule 18. The Chief Judge shall assign the judges to the two divisions of the court, and may at any time change the personnel thereof by transferring one or more of the judges from one division to the other.

Rule 18a. The Chief Judge shall apportion the cases between the two divisions, and direct when each division shall occupy the bench.

Rule 18b. Whenever all the judges of either division are disqualified from hearing any case coming before that division, it shall be transferred to the other division. Where

not exceeding two judges in a division are disqualified, a full division shall be made by the Chief Judge temporarily assigning other judges to that division.

If in any case four or more judges are disqualified, so that there will not be three qualified judges to decide the case, a full division of three shall be made up by requesting the Governor to designate one or more judges of the superior courts to preside.

Whenever it shall become necessary to proceed under this rule, the matter should be brought to the attention of the court promptly. Counsel are expected to exercise due diligence in complying with this requirement.

¹ For other rules, see 57 S. E. x; 67 S. E. iv; 71 S. E. vii.

AMENDMENTS TO RULES

SUPREME COURT OF APPEALS OF VIRGINIA¹

II. BRIEFS.

Counsel for the appellant, or plaintiff in error, shall file in the clerk's office fifteen days before the argument of the case begins, a printed brief containing a concise abstract or statement of the facts of the case, and presenting succinctly the questions involved and the authorities relied on in support thereof, which brief shall be signed by some counsel practicing in this court. Counsel for the appellee or defendant in error, shall file his brief in the clerk's office at least eight days before the argument of the case begins. His brief shall be of like character with that required of the appellant, or plaintiff in error, except that no statement of the facts of the case shall be necessary unless that presented by the appellant or plaintiff in error is controverted, in which case he shall either restate the facts as he views them, or point out the matters or things controverted, giving reference to the pages of the record bearing on the controverted points. If the brief of counsel for the appellee or defendant in error does not conform to this requirement, the court may, if it deems proper, accept the statement of counsel for the appellant or

plaintiff in error as correct. The reply of the appellant or plaintiff in error shall be filed at least two days before the argument begins in which he shall insert all the authorities relied on by him; and no error other than such as shall be pointed out and insisted on in such brief, on the part of the plaintiff or appellant, shall (without leave of the court) be admitted as a ground for argument, on the hearing of the cause. No cause shall be proceeded in without such brief. But a party who has prepared and filed a brief may insist on a hearing when the cause is regularly called, although no brief shall have been filed by his adversary. If one of the parties omits to file such a brief, he cannot be heard, and the case will be heard *ex parte* upon the argument of the party by whom the brief is filed. The plaintiff or appellant may adopt the petition as his brief, provided it contains the statement of facts above required. If no brief be filed by either party, when a cause is called it shall stand continued until the next term, unless the court shall otherwise order.

April 5, 1917.

¹ For other rules, see 71 S. E. vii, 88 S. E. vi.

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THE SOUTHEASTERN REPORTER VOLUME 91

(106 S. C. 230)

HERNDON v. CAINE et al. (No. 9570.)
(Supreme Court of South Carolina. Dec. 27, 1916.)

EXECUTORS AND ADMINISTRATORS — 495(5) — RIGHT TO COMMISSIONS — "SALE."

Where an executor had power under a will to manage an estate until the time for distribution and to sell property for the payment of debts, and an administrator with will annexed, appointed after the executor's death, divided the property, consisting of stocks, bonds, and real estate, among the devisees and legatees under the will in accordance with an order of the court, authorizing him to convey the property to certain of the devisees for the prices agreed to be paid, the property having been delivered to the legatees and devisees in kind, there was no element of a sale, and the administrator was not entitled to commissions on such conveyances under Civ. Code 1912, § 3653, entitling executors and administrators to commissions for money received and paid out during the continuance of their administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2099; Dec. Dig. — 495(5).]

Appeal from Common Pleas Circuit Court of Laurens County; John S. Willson, Judge.

Action by John N. Herndon as administrator with will annexed of the estate of E. M. Caine, deceased, against Mrs. Rosa I. Caine and others. From a judgment of the circuit court, reversing a judgment of the probate court for the defendants, defendants appeal. Reversed.

W. C. Irby, Jr., and F. P. McGowan, both of Laurens, and Walter H. Powell, of Whiteville, N. C., for appellants. Simpson, Cooper & Babb, of Laurens, for respondent.

GARY, C. J. This appeal involves the right of the plaintiff to certain commissions. Dr. E. M. Caine died on 3d of October, 1898, leaving a will wherein he appointed Frank Hammond his executor, who acted as such, until his death in January, 1914. Shortly after the executor died, John M. Herndon was appointed administrator cum testamento annexo.

The third, eighth, and fifteenth clauses of the will are as follows:

Third. "My executor upon my death shall take charge of my whole estate, real and personal and manage the same as in his discretion is best, making from time to time such changes in

the investments as in his opinion may be advantageous to my estate, to which end I hereby authorize and empower him to make good title to any of my property, and to do any and all things necessary to give him as executor, full control and management of my property. From present prospects, it is probable that there will be on hand at the time of my death, or soon thereafter, considerable cash, coming from the insurance that I have on my life, for the benefit of my estate, and from other sources; it is not likely, therefore, to be necessary to sell any of my property or disturb any investments, for the purpose of paying anything I may owe or meeting any demands at that time. As a general rule, I would advise against disturbing investments, unless there be manifest and good reason therefor, especially as regards real estate investments."

Eighth. "I direct that my executor make a general distribution of my estate, when my youngest child attains the age of twenty-one years, giving to my wife Rosa I. Caine—if she be then living and not having married after my death—one third; and to my children then living, each an equal share of the remaining two thirds.
* * *

Fifteenth. "I am satisfied that the income from estate, will be more than enough for the support and maintenance for my wife and children, as provided for in the sixth clause of this my will, but if it should not be, I authorize my executor with prudence to make up any deficiency out of the corpus of my estate."

The youngest child became of age on the 20th of September, 1915; and on the 30th of October, 1915, the plaintiff filed a partition for settlement of the estate in the probate court. Among the assets of the estate, which were in the hands of the executor, and which were received by the administrator, were certain stocks and bonds. The following statement appears in the record:

"These stocks and bonds were disposed of by the administrator, to some of the legatees at agreed valuations, aggregating \$20,605.00, and were transferred by him to those respectively taking same, and the takers executed and delivered to the administrator, receipts for the amounts taken by them, a copy of one of the receipts being hereinafter set out, all of the receipts being in the same form. The receipts so executed and delivered to the administrator, included the price of the stocks and bonds, the price of the real estate, and the amount of cash received by the makers respectively, and the amount due on notes of the maker held by the administrator."

The copy of the receipt to which reference is made is as follows:

"Laurens, S. C. Oct. 20, 1915.

"Received from J. N. Herndon, administrator estate of E. M. Caine, fifty eight hundred and

thirty-three $\frac{33}{100}$ dollars as a portion of my interest in estate of E. M. Caine, in general division, including check for \$221.83, dated October 18, 1915.

"\$5,833.32. Mariogene O. Garlington."

During the year 1915, the plaintiff filed a complaint in the court of common pleas, in which it was alleged:

"That the said lands cannot be divided conveniently in kind amongst the devisees, without material injury to the interests of the several parties, and some of the said devisees do not desire to take any of the said real estate, on their distributive shares, and all of the said devisees desire that the said real estate be sold, the proceeds paid to the plaintiff as administrator, and divided amongst the legatees and devisees, in accordance with their respective interests, under the will of the said E. M. Caine, and the said legatees and devisees have agreed amongst themselves, as to the price at which said lands shall be sold to those agreeing to purchase the same, and said prices are reasonable and fair, and it would be to the best interest of all the parties having an interest in said estate, that the said agreement be confirmed, and the plaintiffs be permitted to sell to the legatees and devisees, agreeing to purchase the lots and parcels of land so agreed to be purchased by them."

His honor the circuit judge granted an order:

"That the plaintiff, John N. Herndon, as administrator cum testamento annexo, be, and he is hereby, authorized, empowered, and directed to convey the lands described in the complaint to the parties therein described, at the prices therein agreed to be paid, and execute and deliver to the said parties deeds of said premises conveyed, upon the said parties individually complying with the terms of the purchase, by paying the purchase money agreed to be paid. [Then follows in order a description of the lands to be conveyed, the prices to be paid therefor, and the names of the parties to whom the conveyances were to be made.]"

The probate judge ruled that the plaintiff was not entitled to commissions, for receiving and paying out the proceeds arising from the sale of the said stocks and bonds, and the real estate. On appeal to the circuit court, the judgment of the probate judge was reversed, and this is an appeal from the said ruling.

The administrator claims commissions of the 5 per cent. for receiving and paying out the proceeds arising from the sale of the stocks and bonds (valued at \$20,605) and from the sale of the real estate (valued at \$32,856.10) under section 3653 of the Code of Laws of 1912, which provides that executors and administrators shall, for their care, trouble, and attendance in the execution of their several duties, take, receive, or retain in their custody a sum not exceeding the sum of \$2.50 for every \$100 which they shall receive, and the sum of \$2.50 for every \$100 which they shall pay away, in credits, debts, legacies, or otherwise, during the course and continuance of their managements or administration. The plaintiff contends that the transactions between him and the said parties were the same, in effect, as if he had converted the said property into money, by a sale thereof to a third party, and had actual-

ly distributed the proceeds arising from the sale among the parties entitled to them. The intention of the testator was that the real and personal property should be divided in kind, unless it was necessary to sell the same, either for the purpose of paying the debts or for reinvestment. The manner in which the plaintiff administered the estate shows, beyond question, that it was not necessary to sell either the stocks and bonds or the real estate, for said purposes, as the stocks and bonds were delivered directly to the legatees in kind, and the lands themselves were conveyed to the devisees in kind, by order of the court.

Under the order of the court the administrator was authorized, empowered, and directed to sell the tracts of land therein described, to the parties therein designated, and at the prices mentioned, but he did not have the power and authority under the order to sell to any person except those therein named. The order was in conformity to the express intention of the testator, and the proceedings thereunder were, in effect, a settlement of the estate, in so far as the lands were concerned. There was not a single element of a sale, connected with the disposition of the stocks and bonds, or of the real estate. In the case of *College of Charleston v. Willingham*, 13 Rich. Eq. 195, the deed required the trustees to transfer and deliver to Charleston College the \$160,000, in the city of Charleston 6 per cent. stocks, which by the deed had been conveyed to them. In determining whether the trustees were entitled to commissions, the courts said:

"The delivery and transfer of the city stocks, in conformity with the direction of the deed, is not a sale; there is no * * * distinguishing element of a sale in such a transaction. But if, by any latitude of interpretation, such a transfer could be embraced under the description 'sales,' what are the proceeds of such sale? These constitute the only basis for the calculation of the 5 per cent. commissions. When a sale proper is effected, the money, or the thing received in exchange for the specific article sold, constitutes the proceeds of the sale. Such a use of the term 'proceeds' is appropriate and familiar. But what was received by, or proceeded to the trustees, from the transfer of this stock? Nothing whatever. This was a mere donation, a gratuity. Of such a transaction, from its very nature, there could be no 'proceeds.'"

In the case from which we have just quoted the rule as to commissions is thus correctly stated:

"Where the legacy is of a specific thing, and to be satisfied only by the delivery of that thing in kind, commissions upon the value of such legacy are not chargeable upon the general estate even much less upon the legacy itself. * * * But wherever a demand against the estate, whether debt, legacy, or distributive share, is to be or may be satisfied * * * in money, there, if, by assent or agreement between the parties, property, choses in action, stocks, etc., are given and received as money, and at a money value, commissions are chargeable upon the payment of such debt, legacy, or share, as commissions are chargeable upon every transaction which is substantially, though it may be not in form, the receipt and payment of money."

It was the intention of the testator that the property should be divided in kind, unless it became necessary to sell it, for the purpose of paying the debts or for reinvestment, neither of which contingencies arose.

Therefore, if the administrator had failed to divide the stocks and bonds and the lands in kind, he would have defeated the intention of the will, and such action would have been in violation of his trust.

Judgment reversed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(108 S. C. 220)

STATE v. FREELAND. (No. 9567.)

(Supreme Court of South Carolina. Dec. 28, 1916.)

1. STATUTES ⇨106(1) — TITLE — CODIFIED ACTS.

The constitutional requirement that every act shall relate to but one subject, which shall be expressed in the title, does not apply to codified acts, such as the Criminal Code.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 119; Dec. Dig. ⇨106(1).]

2. INDICTMENT AND INFORMATION ⇨110(3)—SUFFICIENCY OF INDICTMENT—WILLFULNESS AND KNOWLEDGE.

An indictment under Cr. Code 1912, § 405, providing that any one in possession of cocaine or a mixture thereof, with certain exceptions, shall be guilty of a misdemeanor, need not allege that defendant willfully and knowingly had possession of the cocaine; those words not being used in the statute.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294; Dec. Dig. ⇨110(3).]

3. POISONS ⇨4—ELEMENTS OF CRIME—INTENT—STATUTE.

Cr. Code 1912, § 405, providing that any person found in possession of any cocaine or compound thereof, etc., though it does not include willfulness or knowledge as elements of the offense, must be construed in the light of the fundamental principle of common law that an evil intent must concur with the act to make it a crime.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⇨4.]

4. POISONS ⇨9—CRIMINAL PROSECUTIONS—INSTRUCTIONS—KNOWLEDGE.

In a prosecution for possessing cocaine, an instruction that defendant should be acquitted if she did not know that she had it in her possession was too favorable to defendant, since culpable ignorance of such fact would not excuse her.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⇨9.]

5. POISONS ⇨9—BURDEN OF PROOF—IGNORANCE OF FACTS.

In prosecution for unlawfully possessing cocaine contrary to Cr. Code 1912, § 405, the burden is on defendant to show that she was honestly ignorant of the fact that she possessed cocaine, and that her ignorance was not due to her own fault.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⇨9.]

6. INDICTMENT AND INFORMATION ⇨111(2)—SUFFICIENCY—NEGATING EXCEPTIONS.

An indictment under Cr. Code 1912, § 405, making any person having possession of cocaine

or a mixture thereof, except when the vial containing it bears the name of the physician prescribing it and of the druggist compounding it, guilty of a misdemeanor, must negative the exception, since it is included within the enacting clause.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 296; Dec. Dig. ⇨111(2).]

Appeal from General Sessions Circuit Court of Greenwood County; Ernest Moore, Judge.

Leah Freeland was convicted of unlawfully having cocaine in her possession, and she appeals. Reversed.

D. H. Magill, of Greenwood, for appellant. Robt. A. Cooper, Sol., of Laurens, for the State.

HYDRICK, J. Defendant appeals from sentence on conviction for violation of section 405 of the Criminal Code, the pertinent provisions of which are:

"Any person who shall be found in possession of any cocaine, or any person who shall be found in possession of any compound or mixture thereof, except when the bottle, box or vessel containing said compound or mixture bears the name of the practicing physician prescribing it and the name of the druggist or pharmacist compounding or mixing it, shall be deemed guilty," etc.

The indictment alleged only that defendant did, at a time and place specified, "have and keep in possession cocaine, against the form of the statute," etc.

The appeal presents only three questions that need be considered:

[1] 1. The objection to the constitutionality of the statute on the ground that it violates the provision of the Constitution "that every act shall relate to but one subject and that shall be expressed in the title" was properly overruled, because that provision does not apply to codified acts. *Park v. Laurens Cotton Mills*, 75 S. C. 560, 56 S. E. 234.

[2] 2. The objection that the indictment was insufficient because it was not alleged that defendant "willfully and knowingly" had cocaine in her possession was also properly overruled. The statute does not use those words in defining the crime, but makes the mere possession of cocaine, except in certain circumstances specified, a misdemeanor. Therefore it was not necessary for the state to allege or prove guilty knowledge on the part of defendant. The absence of such knowledge is matter of defense, since every one may be presumed to know what he has in his possession. *Bish. Stat. Crimes*, § 358; 1 *Bish. Crim. Law*, §§ 302, 303, 307.

[3] Nevertheless, the statute must be read in the light of the fundamental principle of the common law, which is of general, though, perhaps, not of universal, application, that an evil intent must concur with an act to make it a crime. *Bish. Stat. Crimes*, §§ 132, 231.

[4, 5] In accordance with this principle the court instructed the jury that, if defendant did not know that she had cocaine in her possession, she should be acquitted. The instruction was really too favorable to defendant, in that it did not eliminate the possibility of willful or negligent want of knowledge. If she was culpably ignorant of the fact, her ignorance would not excuse her. The burden was upon her to show that she was honestly ignorant of the facts, and that her ignorance was not due to her own fault.

[5] 3. The mere possession of cocaine, or mixtures or compounds thereof, is not made a crime under all circumstances. In the same sentence in which the possession is denounced we find this:

"Except when the bottle, box or vessel containing said compound or mixture bears the name of the practicing physician prescribing it, and the name of the druggist or pharmacist compounding or mixing it."

Now, as the possession of cocaine, or any mixture or compound thereof, is not a crime, when the containing vessel is marked as required by the statute, an indictment which alleges merely the possession, without negating the exception, states no offense.

The rule for pleading statutes which contain exceptions or provisos is: "If there is an exception in the enacting clause (which means here that part of the statute which creates the offense), the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or subsequent statute, that is matter of defense, and is to be shown by the other party." 1 Bish. Crim. Prac. § 375 et seq. The case of *State v. Reynolds*, 2 Nott & McC. 365, is directly in point. There the indictment was under the statute which provides that, if any person shall play at any game with cards, etc., except whist, when there is no betting, etc., such person shall be guilty, etc., and the court held that the indictment was insufficient, because it failed to negative the exception. In discussing the rule above stated, the court said:

"But if they [exceptions] are contained in the enacting clause, it will be necessary to negative them, in order that the description of the crime may, in all respects, correspond with the act."

In such cases, if the exception is not negated, the crime is not charged substantially in the language of the act, so as to meet the requirement of section 83 of the Criminal Code. The only fact alleged (possession of cocaine) may have been true without violation of the act, if the containing vessel was marked as required by the act. Therefore the indictment should have been quashed. See, also, *State v. Casados*, 1 Nott & McC. 91; *State v. Raines*, 3 McCord, 533; *State v. Thomas*, 7 Rich. 481.

Judgment reversed.

GARY, O. J., and WATTS, FRASER, and GAGE, JJ., concur.

STATE v. MELLETTE (No. 9568.)

(Supreme Court of South Carolina. Dec. 26, 1916.)

1. HIGHWAYS §163(2) — OBSTRUCTION — OFFENSES.

Cr. Code 1912, § 635, providing that one placing an obstruction in any part of the highways who does not immediately remove it when required shall be guilty of a nuisance, and on conviction before a magistrate shall be fined and be liable for the expense of removal, applies only to the obstruction of public highways, that is, those highways that are under the jurisdiction of the state or county authorities, and does not apply to neighborhood roads, which are public highways only in the sense that the public have acquired the legal right to use them.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 445; Dec. Dig. §163(2).]

2. CRIMINAL LAW §90(3) — JURISDICTION — MAGISTRATE'S COURTS.

Under Const. art. 5, § 21, providing that the jurisdiction of magistrate's courts shall not extend to criminal cases wherein the punishment exceeds a fine of \$100 or 30 days, a magistrate's court had no jurisdiction as to an obstruction of a highway or neighborhood road, an indictable offense under the common law, where the penalty therefor has not been so limited.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 133; Dec. Dig. §90(3).]

Appeal from General Sessions Circuit Court of Clarendon County; John S. Wilson, Judge.

R. B. Mellette, Sr., was convicted in a magistrate's court for obstructing a neighborhood road by the removal of a bridge connecting it with a public highway, and from a reversal of the judgment and the dismissal of the prosecution, the State appeals. Affirmed.

P. H. Stoll, of Kingstree, and J. J. Cantey, of Summerton, for the State. Charlton Du Rant, of Manning, for respondent.

HYDRICK, J. The defendant was convicted in a magistrate's court for obstructing a neighborhood road by the removal of a bridge connecting it with a public highway. The circuit court reversed the judgment and dismissed the prosecution, on the ground that the magistrate's court was without jurisdiction of the offense charged. The state appealed.

[1] The case is ruled by *State v. Harden*, 11 S. C. 360, in which it was held that the statute under which defendant was indicted (Crim. Code, § 635) is applicable only to the obstruction of public highways, that is, those highways that are under the jurisdiction of the state or county authorities, such as are laid out or improved at the public expense, and that it is not applicable to that class of highways, commonly called neighborhood roads, which are public highways only in the sense that the public have acquired the legal right to use them.

[2] The obstruction of such highways (neighborhood roads) is an indictable offense at common law, but the penalty for the offense has not been limited by statute so as to give magistrates jurisdiction of it, since the Constitution (article 5, § 21) prescribes that their jurisdiction shall not extend to criminal cases where the punishment exceeds a fine of \$100 or imprisonment for 30 days. It has been held that the punishment for any offense must be so limited to confer jurisdiction of it upon magistrates. *State v. Williams*, 13 S. C. 546; *State v. Weeks*, 14 S. C. 400; *State v. Jenkins*, 26 S. C. 121, 1 S. E. 437; *State v. Madden*, 28 S. C. 50, 4 S. E. 810.

The case relied upon by the state (*State v. Wolfe*, 61 S. C. 25, 39 S. E. 179) is not to the contrary. The defendant in that case was indicted in the court of general sessions for obstructing a neighborhood road. The circuit court was of the opinion that, as the offense was not one of those mentioned in section 18 of article 5 of the Constitution, which gives that court concurrent jurisdiction with, as well as appellate jurisdiction from, inferior courts in all cases of riot, assault and battery, and larceny, the circuit court was without jurisdiction, and remanded the case to the magistrate for trial. This court reversed the judgment, and held that the indictment was not drawn under section 365 (now section 635) of the Criminal Code, and also that, as the same section of the Constitution (section 18 of article 5) provides that the court of general sessions shall have jurisdiction in all criminal cases, except those in which exclusive jurisdiction shall be given to inferior courts, and as the Legislature had not manifested an intention to give magistrates exclusive jurisdiction of the offense charged, the circuit court did have jurisdiction. Careful examination of the opinion of this court shows that it did not hold that the jurisdiction of the circuit court was concurrent with that of the magistrate, and thereby, inferentially, that the magistrate also had jurisdiction. The inference is the other way; for the court did hold that the indictment was not drawn under the statute, but under the common law, and adverted to the provision of the Constitution that the jurisdiction of magistrates shall not extend to cases where the punishment exceeds a fine of \$100 or imprisonment for 30 days, and to the fact that there was no statute so limiting the punishment for the offense charged and manifesting an intention to confer exclusive jurisdiction thereof upon magistrates, from which the logical inference is that the magistrate did not have jurisdiction.

The contention that, as the bridge connecting the neighborhood road with the public highway was built by the county authorities, its removal brought the case within the stat-

ute as an obstruction of the public highway, is untenable.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 237)

RICE v. HAMPTON. (No. 9571.)

(Supreme Court of South Carolina. Dec. 27, 1916.)

SALES \S 479(1)—REMEDIES OF SELLER—ELECTION—RETAKEING PROPERTY.

Under a contract which contained the ordinary provisions of a conditional sale of a piano giving the seller the right to retake possession to recover the purchase price, and also contained the ordinary provisions of a chattel mortgage given to secure a note for the purchase price, under which the seller could sell the piano at public sale and apply the proceeds to the payment of the note, the seller must elect whether to retake the piano under the conditional sale provisions or sell it under the mortgage provisions, and where he had taken possession and insured the piano as his own, though leaving it temporarily with the buyer subject to call under an agreement with the buyer, he could not thereafter sell it under the mortgage clause and recover the balance due on the price from the buyer.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 1418, 1419; Dec. Dig. \S 479(1).]

Appeal from Common Pleas Circuit Court of Union County; John S. Wilson, Judge.

Action by Evelina Rice, as administratrix of the estate of S. M. Rice, E. U., deceased, against Cardoza Hampton. Judgment for the plaintiff, and defendant appeals. Reversed, and new trial granted.

The contract on which the action was based was as follows:

Union, S. C., April 2, 1912.

For value received, I, Cordoza Hampton, residing at promise to pay to S. M. Rice, E. U., or order, three hundred twenty-five dollars at Union, S. C., in installments, namely: Fifteen dollars on the signing of this note, for which I hold receipt, \$8.33 1/3 dollars on the per month till 191. dollars on the day of, 191. Paid for dollars on the day of, 191., being the price of a standard style Moh. No. 105804, with interest from date at per cent. per annum.

And I agree that in default of payment of either of said installments at the time stated, then the full balance of this note remaining unpaid shall thereupon mature and immediately become due and collectable without further notice or demand. I also promise to pay all probating and recording fees attendant upon this note, if any. The said piano to remain the property of S. M. Rice, E. U., until it is paid for in full.

And I hereby agree not to remove said piano and to take good care of, and not to have it injured in appearance or otherwise, and be responsible for any damage to same by accident or otherwise; and in case of failure on my part to pay this note, or any part thereof at maturity, and if I move said property, it shall be constructive evidence of attempted fraud, and I shall be held accountable therefor same as in a case of breach of trust. I agree to forfeit any payments already made, and if none has been paid, and said has to be taken

back, I will pay to S. M. Rice, E. U., the amount of ten dollars, as rent or hire for the use of same in consideration of failure to pay the whole amount. And I hereby authorize and empower the said S. M. Rice, E. U., or his agent, to enter the premises wherever said piano may be found, and take and carry the same away, hereby waiving any action for trespass or damage thereof, and disclaiming any right of resistance thereto. The taking of the same back or claiming the whole purchase money is at the option of the said S. M. Rice, E. U. And if suit has to be brought for purchase money, and if failure to collect purchase money, said property to remain said Rice's with all above-mentioned privileges to recover same. And I do hereby agree that if the said S. M. Rice, E. U., is compelled to send agent or come himself to make collection more than once for each of above payments, I will pay the sum of one dollar for each trip thereafter.

And in order to better secure the payment of this note, I do hereby convey unto S. M. Rice, E. U., the following articles of personal property or other property, to wit:

The above-described piano and

But on this special trust, that if I fail to pay the said debt and interest or any part thereof on the above-specified day or days, then said S. M. Rice, E. U., or his agent, may seize said property and sell so much as may be necessary, by public auction, for cash, at once, without giving any notice in writing or otherwise, and apply the proceeds of such sale to the expenses of the seizure and sale, also ten per cent. for collector's fee, and then to the discharge of said debt, and interest on same, and pay any surplus to me; and I hereby waive all action for trespass, and disclaim all right of resistance against such seizure.

Given under my hand and seal this 2 day of May, A. D. 1912.

Witness:

..... Cardozia Hampton. [L. S.]
C. B. Blevins [L. S.]

No agent is authorized to make any verbal or written contract otherwise than is contained in this note.

Appearing in margin:

I hereby agree that if this contract is paid in full by Jan. 1, 1913, to deduct (\$35.00) thirty-five dollars,—No interest will be charged until after Jan. 1, 1913. S. M. Rice, E. U.

On back of contract:

Name—Cardozia Hampton (col).

Date of Sale—5/2/12

P. O.—Union, S. C.

On Whose Place—Own.

Distance and Direction from P. O.

.....
Name of Article—Piano. Amt. \$325.

How to be paid

Personally appeared before me C. B. Blevins and made oath that he saw the within named Cardozia Hampton and his..... act sign, seal and deliver the within paper. C. B. Blevins.

Sworn to and subscribed before me this 22 day of May, 1912.

I hereby appoint J. Hay Fant, sheriff, my agent, to collect the within bill sale 11th Aug., 1913. Jno. E. Hamblin, Attorney.

Macbeth Young, of Union, for appellant.
John K. Hamblin, of Union, for respondent.

GARY, C. J. This is an action upon a written instrument purporting to be a chattel mortgage or bill of sale, in which judgment is demanded for a deficiency alleged to be due, after applying the proceeds arising from the sale of the property, to a balance claimed by the plaintiff.

The defendant contends that it is not a chattel mortgage, but an optional contract between the vendor and the vendee wherein the vendor's remedies are set forth in the written instrument, and that the plaintiff, having proceeded against the property, is now estopped from recovering a money judgment.

By way of defense the defendant relies upon the following facts alleged in his answer:

"That after demand by the plaintiff in the spring or early summer of 1913 for the piano and its delivery to the plaintiff, the defendant herein was asked to keep the said piano, subject to delivery to drayman when called for, and defendant consented, and the plaintiff immediately took out insurance on the said piano and left same in the custody of the defendant, subject to call. The defendant then became the agent of the plaintiff, and so held the piano for plaintiff until January, 1915, when the drayman called for the same, and transported the same to the private residence of the plaintiff, that the defendant is informed and believes that the said piano was advertised for sale, and that it was alleged to have been sold at the private residence of the plaintiff, at an unusual hour, with no bidders, and the public not present, and that the so-called sale, was not attended by any one save the agent and seller of the plaintiff, who is said to have made one bid at his own sale at or before 9 a. m."

The piano was sold at public outcry for \$75, the only bid being made by W. J. Sarratt, who was agent and brother of the plaintiff, and was the auctioneer who sold the property. The plaintiff's family and the auctioneer were the only persons present at the sale.

The defendant contends that the sale was null and void, and that the delivery of the piano to the plaintiff in the spring or summer of 1913 estopped the plaintiff from resorting to any further remedies thereafter.

At the close of the plaintiff's testimony the defendant made a motion for a directed verdict, on the ground that the plaintiff had made an election, under the option contained in the contract, to take the property back, and not to sue for the contract price. The motion was refused. The jury rendered a verdict in favor of the plaintiff, and the defendant appealed.

The contract (which will be reported) recites that the sum of \$325 which the defendant promised to pay was the price of the piano therein mentioned, and that it was to remain the property of the plaintiff until it was paid for in full; that the defendant agreed to forfeit any payments already made if the piano had to be taken back, and would pay the plaintiff the amount of \$10 for the use of same in consideration of failure to pay the whole amount. The following provisions are also in the contract:

"The taking of the same back, or claiming the whole purchase money, is at the option of the said S. M. Rice, E. U. And if suit has to be brought for the purchase money, and if failure to collect purchase money, said property to remain said Rice's, with all above-mentioned privileges to recover same." "And in order to secure the payment of this note, I do hereby

convey unto S. M. Rice, E. U., the following articles of personal property, to wit: The above-described piano and

"But on this special trust, that if I fail to pay the said debt and interest, or any part thereof, on the above-specified day or days, then the said S. M. Rice, E. U., or his agent, may seize said property and sell so much as may be necessary, by public auction, for cash, at once, without giving any notice in writing or otherwise, and apply the proceeds of such sale to the expenses of the seizure and sale, also ten per cent. for collector's fee, and then to the discharge of said debt, and interest on same, and pay any surplus to me."

The contract is dated the 2d of May, 1912.

In the case of *Blackwell v. Mortgage Co.*, 65 S. C. 105, 43 S. E. 395, the court used this language:

"If the company had strenuously endeavored to invent a scheme by which it could escape all liability growing out of the acts of those agents whom necessity compelled it to employ in conducting the business of making loans, we are satisfied that it could not have devised one more nearly accomplishing this purpose."

And in the present case, if the vendor had strenuously endeavored to devise a scheme by which all rights and remedies were to be in his favor, we are satisfied that he could not have invented one more nearly accomplishing this purpose.

The question is not whether the contract must be construed as a mortgage, or as a conditional sale, but whether the vendor is estopped from resorting to the remedy applicable to a mortgage, after resorting to the remedy appropriate to a conditional sale, especially when such action would be prejudicial to the rights of the vendee.

The rule in such cases is thus stated in *Am. Process Co. v. Fla. Pressed Brick Co.*, 56 Fla. 116, 47 South. 942, 16 Ann. Cas. 1054:

"Where property is sold on credit and the title thereto retained by the vendor, upon a breach of the conditions of the sale the vendor may either treat the sale as absolute, and sue for the price thereof, or he may treat the sale as canceled and recover the property; but the vendor cannot pursue both courses, and the election to pursue either one of two inconsistent remedies may in law operate as an abandonment or a waiver of the other. The vendor may elect between inconsistent remedies, but he may not pursue inconsistent remedies for the enforcement of his property rights."

Again the court says:

"If the allegations of facts necessary to support one remedy are substantially inconsistent with those necessary to support the other, then the adoption of one remedy waives the right to the other. A party will not be permitted to enforce wholly inconsistent demands respecting the same right. It is not permissible to both appropriate and reprobate in asserting the same right in the courts."

Many decisions are then cited to sustain this proposition.

In a note to that case it is said:

"The recent authorities generally hold that, where property is sold on credit, and the title thereto is retained by the vendor, the latter upon a breach of the conditions of the sale, either may treat the sale as absolute and sue for the price thereof, or may treat the sale as canceled and recover the property."

Numerous authorities are cited to sustain this proposition.

The rule is thus announced in 9 R. O. L. 958:

"The doctrine of election of remedies applies only when there are two or more remedies, all of which exist at the time of election, and which are alternative and inconsistent with each other, and not cumulative, so that after the proper choice of one the other or others are no longer available. This is upon the theory that of several inconsistent remedies the pursuit of one necessarily involves or implies the negation of the others. Whether coexistent remedies are inconsistent is to be determined by a consideration of the relation of the parties, with reference to the right sought to be enforced, as asserted in the pleadings."

It may reasonably be inferred from the testimony that the vendor retook the piano in the spring or early summer of 1913, although he did not actually remove it until January, 1915, and that he intended to exercise his option of "taking the same back or claiming the whole purchase money." If such was his intention, he was estopped thereafter from resorting to the remedy applicable to a mortgage, as such remedies are inconsistent. Judgment reversed, and new trial granted.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(79 W. Va. 322)

ESKRIDGE et al. v. THOMAS et al.

(No. 3200.)

(Supreme Court of Appeals of West Virginia.

Nov. 28, 1916.)

(Syllabus by the Court.)

1. USURY \Leftrightarrow 8—STATUTES—NEGOTIABLE INSTRUMENTS LAW.

The act known as the Negotiable Instruments Law (chapter 81, Acts 1907; chapter 98a, Code 1913 [secs. 4172-4368]) does not, by implication or otherwise, repeal, limit, or qualify in any degree or in any particular, section 5, c. 98, Code 1913 (sec. 4164), declaring all contracts for the loan of money at a greater interest rate than now allowed by law void as to such excess.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 19, 243; Dec. Dig. \Leftrightarrow 8.]

2. BILLS AND NOTES \Leftrightarrow 376—USURIOUS CONTRACTS—VALIDITY.

A contract by statute declared void, because in part usurious, is as to such usury a nullity, and, although negotiable in form, no currency in the market and no innocence or ignorance on the part of the holder can impart validity to it.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 982-984; Dec. Dig. \Leftrightarrow 376.]

3. DISCOVERY \Leftrightarrow 19—BILL OF—CONSTRUCTION.

A bill merely praying an injunction to restrain the prosecution of an action at law until a discovery can be had in aid of the defense thereto, also prayed, is purely a bill of discovery, and not one for relief.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26; Dec. Dig. \Leftrightarrow 19.]

4. INJUNCTION \Leftrightarrow 163(1)—DISSOLUTION.

An injunction, awarded on such a bill, generally ought not to be dissolved on motion until

defendant has a reasonable opportunity to answer the interrogatories propounded to him, or plaintiff a like opportunity to coerce such answer by proper procedure.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357, 363, 364, 368; Dec. Dig. § 163(1).]

5. INJUNCTION § 160—DISSOLUTION.

A defendant who answers such a bill may, in lieu of a motion to dissolve the injunction, move for an order to require plaintiff to speed the cause as to a defendant not answering, under penalty of a dismissal thereof or dissolution of the injunction, enforceable thereafter by notice and motion. 16 Cyc. 463.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 346; Dec. Dig. § 160.]

6. DISCOVERY § 1—BILL OF—NATURE OF RELIEF.

A bill framed for the purpose of discovery to aid in defense of a law action is limited to that object, and its attainment by an answer to interrogatories operates to end the suit, although the bill also prays for an injunction to restrain temporarily the prosecution of that action.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 1; Dec. Dig. § 1.]

Appeal from Circuit Court, Upshur County.

Suit by R. S. Eskridge and others against Wellington Thomas and others, and the Traders' National Bank of Buckhannon. From a decree for complainants, the last-named defendant appeals. Affirmed.

Young & McWhorter, of Buckhannon, for appellant. Higginbotham & Outright, of Buckhannon, for appellees.

LYNCH, J. The plaintiffs made a negotiable note and several renewals of the same instrument payable to Wellington Thomas, who indorsed them in turn to the Traders' National Bank in due course. Neither the date of the transaction out of which the indebtedness originally arose, or of any of the renewals, is disclosed except the last one. On it the indorsee sued the makers and indorser. The former then filed their bill against the plaintiff in that action and the defendant Thomas to enjoin its further prosecution. They allege "usury in said note and the preceding notes and the transaction preceding the execution of the first note," and their lack of knowledge of the "amount of usury in said transaction," and "that it is material to them that said note be purged of the usury therein." Wherefore, "being remediless in the premises save by the aid of a court of equity," they pray that defendants "be required to make full, true, and perfect answer to every of the" interrogatories propounded in the bill.

In this manner plaintiffs seek to ascertain from defendants "whether interest has been paid on said note, original note and renewals thereof above 6 per cent., and, if so, to what extent" and, from Thomas, "whether in the first transaction, before the original note was executed," "there has been paid a

greater amount of interest than 6 per cent., and, if so, to what extent."

Upon these allegations, the others being purely formal, the injunction prayed was awarded in vacation. To the bill Thomas has not appeared for any purpose; nor have any proceedings been instituted to compel his attendance. The bank demurred, and, the demurrer being overruled, filed its answer, and therein averred the negotiation of the several notes in due course before maturity, without notice of any defect in the instrument or infirmity in the title of the indorser. These averments, replied to generally, the bank proved by its cashier Graham. By counsel for the parties it was agreed that at the time the original note was discounted, and at the time of the renewals thereof, neither the bank nor any member of its board of directors "had any notice or knowledge of any claim of usury on the part of the plaintiffs as between them and the payee Wellington Thomas." At this stage of the proceeding, the bank moved to dissolve the writ restraining the prosecution of the action at law. This motion the court denied, but modified the vacation order so as to permit the bank to proceed to judgment against Thomas.

The appeal awarded to it can be entertained only by reason of the authority conferred by clause 7, § 1, c. 135, Code (sec. 4981), as the order is interlocutory, not final. The demurrer and motion overruled raised precisely the same questions. To these our investigations necessarily are restricted. The facts are involved only incidentally.

[1-6] It should be remembered that the sole purpose of this suit is to test the conscience of the defendants, that plaintiffs may from them personally extract knowledge or information of the transaction and its sequential results in which they were joint or separate actors. The bill, while praying for general relief, apparently is a pure bill for discovery. It does not contain sufficient averments or prayer to permit the adjudication of the whole subject-matter involved in the law action. The authorities generally hold that a bill asking no relief other than discovery is limited to that object, and upon obtaining it by the answer of the defendant the suit is ended. This rule is sustained alike upon authority and principle. 1 Pom. Eq. § 191; Story Eq. § 1483; Mit. Eq. Pl. 16; Telephone Co. v. Mohler, 51 W. Va. 6, 41 S. E. 421. Nor does such a bill become one for relief because it seeks an injunction to stay the action at law until the discovery is obtained. Russell v. Dickeschied, 24 W. Va. 61. What plaintiffs assumed Thomas knew that they did not know, as an aid to their defense in the law action, was the real object prompting this proceeding, and not his admissions in pais. If any such admissions he made, they were available for use

upon the trial stayed by the injunctive process.

Plaintiffs evidently were satisfied with the answer of the respondent bank, else they would not have signed the agreed statement of facts. That statement precludes a denial of its verity. It was accepted as true. But they did not by proper procedure require or attempt to require Thomas to answer. Nevertheless, their delay to inaugurate such proceeding did not alone warrant dissolution of the injunction. They could not, from the very nature of the bill, take proof to support its averments; wherefore they were not in default. While *Shonk v. Knight*, 12 W. Va. 667, says a plaintiff must be diligent in his effort to procure the answer of all the defendants upon whom rests the gravamen of the charges contained in the bill, it states the general rule to be that an injunction ought not to be dissolved until all the defendants implicated have answered. *Russell v. Dickeschied*, 24 W. Va. 61, applies this general rule to the dissolution of an injunction awarded upon a pure bill of discovery enjoining prosecution of a detinue action, and holds that until the defendant has answered the injunction ought not to be dissolved. The record before us does not show lack of diligence on the part of the plaintiffs in not taking the necessary steps to coerce a response by Thomas to the interrogatories propounded to him. The injunction was granted March 10th; four days later the *Traders' National Bank* notified plaintiffs of its purpose to move a dissolution on March 15, 1916; the order refusing to dissolve was entered June 9th of the same year. At the same time, the court ruled upon the question of law raised by the demurrer. By its interposition the defendant challenged the legal sufficiency of the bill. For this delay plaintiffs were not in anywise responsible. They could not know what action the court would take on the demurrer or the motion to dissolve. Wherefore, the time intervening between the entry of the demurrer and the giving of the notice and the action of the court on both virtually operated in justification of plaintiffs' delay during that period. Besides, the defendant that answered was not wholly without a remedy for the default, if any, as by a motion for an order requiring plaintiffs to speed a hearing on penalty of a dismissal of the cause or dissolution of the injunction if thereafter they unduly delayed compliance with that requirement. We think, therefore, the court did not err in refusing to dissolve the injunction.

Although meager, the averments of the bill may be deemed and treated as formally sufficient. Section 26, c. 96, Code (sec. 4165), permits any defendant sued on a contract for the loan or forbearance of money at a greater rate of interest than 6 per cent. to plead the usury in general terms, to which

plea the plaintiff shall reply generally, and each party on the trial of that issue may introduce any available evidence that tends to sustain or traverse the existence of usury inhering in the contract in issue. Or the borrower may resort for aid in establishing the usurious character of the contract to section 7 (sec. 4166), which gives him the right to exhibit his bill in equity against the lender, and coerce him to state upon oath the money or thing lent and all transactions referable to such loan, and the interest or consideration thereof. These provisions are quite liberal, and perhaps were intended to render unnecessary the usual formal averments required either at law or in equity.

But chiefly it is not the lack of such formality of which the *Traders' National Bank* complains. To defeat the discovery sought by the bill, it relies in its answer and demurrer upon the construction or interpretation of certain sections of the *Negotiable Instruments Law*. It is contended that, although section 5, c. 96 (sec. 4164), declares void all contracts for the loan or forbearance of money as to any excess of interest charged above the legal rate, yet, under sections 52, 55, and 57 of the *Negotiable Instruments Act*, chapter 98a of the Code (secs. 4223, 4226, 4228), the defendant bank, as a holder in due course, took the instrument relieved of usury, if any, charged on the notes in the original transaction. Under section 52, it contends it was such a holder, because the instrument is complete and regular upon its face, was not overdue when negotiated, and the bank took it in good faith and for value, without notice that it had previously been dishonored, if such was the fact, or of any infirmity in the note or defect in the title of the indorser; that, under section 55, the title of Thomas was not defective, within the meaning of the act, unless he obtained the instrument or any signature thereto by fraud, duress or other unlawful means, or for an illegal consideration, or in breach of faith or under such circumstances as amount to fraud; and that, if he did so obtain it, respondent, as a holder in due course, took the instrument, by virtue of section 57, "free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

These sections do, it is true, attempt to afford ample protection to persons purchasing negotiable paper, and to give it such facility of circulation as the exigencies of commercial business may require; indeed, to obviate and avoid every impediment or obstruction that in any substantial degree tends to destroy confidence in instruments of that character. Business enterprises suffer inconvenience from anything that impedes the facile circulation of any medium

of exchange with banking institutions or money lenders. Financial emergencies arrest their progress frequently, and require immediate resort for relief to the monetary centers of influence. Business and industrial activities of every character depend in large measure for success upon the readiness with which they can float their bills and notes, checks, and other like instruments common in commercial usage. To meet these trade requirements, to facilitate the movement of capital, and to inspire confidence and correct some defects or deficiencies in the circulation of commercial paper, manifestly were some of the purposes to be subserved by the enactment of the Negotiable Instruments Law.

But, conceding the wholesomeness, materiality, and benign purpose of this legislation, that concession cannot be permitted to violate or ignore other equally beneficent and essential statutory provisions. These the lawmaking branch of the government, not the court, must repeal or amend, if necessary, to suit public convenience. It is not within the power or province of judicial tribunals to say what the law ought to be. Courts exercise a limited authority. They can legitimately inquire only what the Legislature intended when it enacted a statute. To them belongs the right of interpretation and construction, to ascertain what the principles governing a given state of facts are, and, when ascertained, to apply the principles to the facts, irrespective of the interests helped or hurt.

Unrepealed and unamended stands an enactment of an earlier date and of equal dignity with the Negotiable Instruments Law. Long ago competent authority declared:

"All contracts and assurances made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than 6 per cent., except where such greater rate is now allowed by law, shall be void as to any excess of interest agreed to be paid above that rate, and no further." Section 5, c. 96, Code.

This legislative declaration, taken from the Code of Virginia, materially altered and amended a yet earlier statute forfeiting both principal and interest where the rate charged exceeded that fixed by law, and a subsequent one forfeiting the interest only. Now the contract or assurance is void only as to the excess of interest above the legal rate.

To bring the note in controversy within the protection of the Negotiable Instruments Act, as contended by the bank, would in effect substitute "voidable" for "void" in section 5, c. 96. Much competent authority tends to support this argument. *Ewell v. Daggs*, 108 U. S. 145, 2 Sup. Ct. 408, 27 L. Ed. 682; *Weeks v. Bridgman*, 159 U. S. 547, 16 Sup. Ct. 72, 40 L. Ed. 253; *Myers v. Kessler*, 142 Fed. 730, 74 C. C. A. 62; *Gordon v. Levine*, 197 Mass. 263, 83 N. E. 861, 15 L. R. A. (N. S.) 243, 125 Am. St. Rep. 361; *Trust Co. v. Bank*, 136 Mich. 460, 99 N. W. 399, 112 Am.

St. Rep. 370, 4 Ann. Cas. 347. The contrary proposition is upheld in numerous decisions of equally respectable courts. They declare unenforceable by an innocent holder any instrument by statute declared to be void because usurious, or because it arose out of gaming or other transactions in violation of a statute. These are collated in *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. 399, 112 Am. St. Rep. 370, 4 Ann. Cas. 353. An act or contract so declared to be void has no legal force or effect. It is a nullity, and into it can be injected no vitality, although in some circumstances the conduct of the parties may be such as will upon equitable principles operate to estop them to deny they entered into or are bound by it, as where they accept the benefits thereof with knowledge of the infirmity. No currency in the market, and no degree of innocence or ignorance on the part of a holder for value, can impart validity to a negotiable instrument which is declared void by statute because based upon a gambling or usurious consideration. *Daniel & Douglass*, Neg. Inst. § 221. Speaking of notes made void by statute, the Kentucky court said in *Lawson v. Bank* (Ky.) 102 S. W. 324:

A statute that makes such notes void "is of a police nature, intended to prevent imposition and fraud. The Negotiable Instruments Act does not repeal this statute in terms nor does it by necessary implication. It has never been the policy of the courts to extend the doctrine of implied repeals further than the evident purpose of the last legislation required. The negotiable instruments statute is a most comprehensive piece of legislation. It goes into minutest detail in dealing with the subjects embraced by it. The whole scope of it is shown to be the dealing with commercial paper, so as to protect innocent purchasers * * * against mere defenses available as between the original parties. It gives such paper currency, free from original defenses. But it applies to paper that might have been obligatory between the parties. But, where the parties were never bound because the law made the note void, as contrary to public policy as expressed in the statutes, the Negotiable Instruments Act does not apply, and ought not to. The prevention of crime is of more importance than the fostering of commerce. The later act should be read in view of its purpose, and not as intending to repeal other statutes passed in the exercise of the police power of the state to suppress crime and fraud."

That is in substance what this court said in *Bank v. Jacobs*, 74 W. Va. 525, 82 S. E. 320, in which it was held that a paper negotiable in form for money lost in gaming is, under section 1, c. 97, Code (sec. 4168), void in the hands of the holder, even though he took it for value without notice of the character of the consideration.

The obvious purpose and effect in enacting the Negotiable Instrument Law was the embodiment of the general law merchant as it had been previously applied by the courts. The presumption is that when passing it the Legislature had in contemplation the existence of the usury statute and the decisions of Virginia and this state construing it as invalidating all contracts comprehended within its scope. It knew, as we must assume,

that, by a prior general rule, where a statute declares an instrument void it gathers no vitality by circulation, although upon such instrument an indorser may be held liable to a bona fide holder without notice. *Daniel Neg. Inst.* § 673. The Virginia court had already declared that as against an innocent holder no defense can be made against a negotiable instrument declared by the usury statute to be void. "The original taint adheres to the paper, in whosoever hands it may come. It is void, and the defense may be set up, as well against the innocent holder, as the usurer or gambler himself." *Taylor v. Beck*, 3 Rand. (Va.) 323. Where there is nothing in a statute indicating an intention to the contrary, the well-recognized doctrine is:

"That the Legislature did not intend to innovate upon, unsettle, alter, violate, repeal or limit another general statute or statutory system, the entire subject-matter of which is not directly nor necessarily involved in the [subsequent] act." *Bank v. Jacobs*, *supra*.

From these conclusions it follows that, as the rulings on the demurrer and motion to dissolve were not erroneous, our order will affirm the decree complained of, and remand the cause for further proceedings therein, agreeably with equitable principles governing courts of equity in cases of this nature.

(79 W. Va. 415)

DUTY v. THOMPSON et al.
(No. 3281.)

(Supreme Court of Appeals of West Virginia.
Dec. 14, 1916.)

(Syllabus by the Court.)

1. ELECTIONS — 260 — CANVASSING BOARD — RECANVASS.

After a county court, sitting as an election board of canvassers, has legally and completely canvassed the returns of an election, ascertained the results, entered the same upon its record, issued the certificates of election, and adjourned sine die, in the absence of a demand for a recount, it is functus officio and without power to reconvene and recount the votes cast.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 236; Dec. Dig. 260.]

2. ELECTIONS — 260 — CANVASSING — DECLARATION OF RESULT.

To declare the results of an election and issue certificates of election, without having recounted the votes, when no demand for a recount has been made, is not irregular, erroneous, nor incomplete procedure.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 236; Dec. Dig. 260.]

3. ELECTIONS — 260 — CANVASSING RESULT — DEMAND FOR RECOUNT.

A demand for a recount made after the board of canvassers has legally and fully canvassed the returns and declared and recorded the result comes too late and avails nothing.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 236; Dec. Dig. 260.]

4. PROHIBITION — 6(2) — WRIT OF—ISSUANCE.

A county court may be restrained from proceeding to recount votes for the office of state senator on a demand therefor made after it has legally ascertained and declared the result and

adjourned, by a writ of prohibition from this court.

[Ed. Note.—For other cases, see *Prohibition*, Cent. Dig. §§ 32, 33; Dec. Dig. 6(2).]

Petition by M. K. Duty for writ of prohibition against S. M. Thompson and others. Writ issued.

R. L. Gregory, of Parkersburg, S. B. Avis, of Charleston, and R. Dennis Steed, of Hamlin, for petitioner. Clyde B. Johnson, of Charleston, for respondents.

POFFENBARGER, J. On the eighth day after the county court of Wirt county, sitting as a board of canvassers, had completed the work of canvassing the returns of the election held in that county on the 7th day of November, 1916, declared the results thereof, entered the same upon its records, issued certificates of election in accordance therewith, and adjourned sine die, R. S. Blair, a candidate for the office of state senator, voted for in said county at said election, made a demand upon the members of said court for a recount of the ballots as to that office. They met and ordered that such recount be granted and fixed December 4, 1916, as the day for commencement thereof. M. K. Duty, the opposing candidate for the same office, asks a writ of prohibition to restrain them from proceeding to recount the ballots, on the ground that the demand for such action came too late.

In view of a statute expressly conferring it (section 89, c. 3 [sec. 111], Code), the jurisdiction of this court by prohibition in such case is not questioned, if the demand for a recount was deferred too long.

[1-4] The time limit on such a demand has not been judicially ascertained or declared in this state. Our reports disclose nothing more than a dictum in *Hebb v. Cayton*, 45 W. Va. 578, 32 S. E. 187, to the effect that it is too late to ask a recount after the result of the election has been entered upon the record. This opinion of Judge Brannon, expressed in marking the distinction between a case supposed and the one under consideration, accords with uniform decisions in all other jurisdictions. Not a single departure from the rule has been cited or found. The numerous cases asserting the proposition are cited by the text-writers. 9 R. C. L. title "Elections," § 115; Cooley, Const. Lim. (7th Ed.) p. 936; McCrary, Elec. 267, 268, 269; Am. & Ency. L. 750; 15 Cyc. 383.

The character of the "canvass of the returns" required by the statute, differing, it is said, from that of the canvass in some other states, is relied upon as affording strong reason for departure from the general rule respecting the time limit upon demands for recounts. Though our canvass does not include the counting of the ballots, it is necessarily an entire and complete function in itself, final and decisive, in the absence of a

recount or contest. Nor does omission of the count of votes from the faces of the ballots imply lack of such a count in the election procedure, considered as a whole; for it takes place at the election precincts, before the inspection and consideration of the returns by the board of canvassers. In the absence of a recount allowed by the statute upon demand, this count is conclusive as to the prima facie right to the office. As a recount is not contemplated, except upon a demand therefor, the canvass may be completed without it, however close the result may be. Whether it is wise to omit a more careful and formal count than that made at the election precincts is a legislative, not a judicial, question. The statute makes a clear distinction between the canvass and the recount. It gives the recount, upon demand therefor, after the canvass, but before declaration of the result. If not demanded, it does not take place, and if it does occur, the result thereof goes into the final result entered upon the record wherefore it logically should take place before the result is declared. It would be at variance with common knowledge to say competing candidates do not know an election result is close until after the returns have been canvassed. It is always known, and the law very properly assumes, that if a candidate desires a recount, he can make his demand therefor before the result is officially declared and certificates issued. No form of demand having been prescribed, the candidate making the demand need not be personally present for the purpose, nor appear by attorney. After it has been made, the proceeding need not be so hastened or rushed as to deny a candidate having several recounts pending in different counties reasonable and fair opportunity to protect his interests. Hence the argument *ab inconvenienti* is not well founded. A time limit is necessary, and to require a candidate to make his demand for a recount or waive it before a declaration of the result is not unreasonable.

The limit fixed by the authorities generally applies in states in which the canvass does not include the counting of the votes. In New York the canvass was made, a few years ago, as it is here. *People v. Canvassers*, 126 N. Y. 392, 27 N. E. 792; *People v. Canvassers*, 129 N. Y. 469, 29 N. E. 361. After the board has completed its work in that state and adjourned, it is *functus officio*, and cannot be reconvened. *People v. Greene Co.*, 12 Barb. (N. Y.) 217; *People v. Reardon*, 49 Hun, 425, 3 N. Y. Supp. 560; *Hadley v. Mayor*, 33 N. Y. 603, 88 Am. Dec. 412.

The canvass is no doubt made in many other states as it is here, and this rule seems to apply everywhere.

Though the county court is *ex officio* a canvassing board, its function is not different from that of a board specially constitut-

ed for the purpose. It does not sit continuously as a canvassing board. When the result is legally and properly ascertained, its powers as such board for that election cease. Judge Brannon's statement in *Alderson v. Commissioners*, 32 W. Va. 454, 9 S. E. 363, to the effect that the body is continuous, must be considered in the light of its context. It is continuous only until the function is legally performed, and failure to recount the votes, in the absence of a demand, is not an omission of duty. Having omitted no duty, and having completed its work, the board cannot reconvene and recount the votes, nor otherwise affect the result shown by the record they have made. *Cooley, Const. Lim.* 784.

These principles and conclusions constrain us to award the writ prayed for.

(146 Ga. 196)

ARMOUR FERTILIZER WORKS v. LACY.
(No. 125.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. EXECUTION OF—33—PROPERTY SUBJECT—LIFE ESTATE.

Charles P. Lacy died, leaving a will which was duly probated in 1909; and after payment of all debts, the executors assented to all the legacies. By item 2 of the will it was provided: "I give and bequeath to my son, C. Hill Lacy, five hundred dollars, without restrictions; and I give him that certain tract of land in Taliaferro county, known as the John Reynolds place, containing four hundred and fifty acres of land, more or less, subject to the restrictions and limitations, hereinafter stated in this will, to that part of my estate that I give to my six daughters." By item 5 it was provided: "I direct that as soon as possible after my death all of my property, except that which has already been bequeathed above, be by my executors converted into cash or its equivalent, and be divided into six equal parts, and be held by my executors as trustees for each of my six daughters as above mentioned, the title to each said party to be invested in or made to my executors as trustees for them and their children, and that each share shall be so invested that the income from the investment be given to each of my children (six daughters). This also refers to the land given to my son, C. H. Lacy, and no part of the principal sum and should they die before each of their children shall have become of age, each one's share shall continue to remain in my executors, and the income from each such share to be used for the support of their respective children and husband, until each child shall become of age, and then the share of each, is to be divided equally among their children and husbands and their estates; and should it be necessary for any property belonging to my daughters as their estates be sold, the proceeds from the sale shall be at once reinvested and restricted as above, and such sale or change of property must be authorized by the ordinary in the county in which they reside." By item 6 it was provided: "The estate given to each of my said daughters and sons and wife is a fee for life, with remainder for their children, or, if no children, to the survivor, except that of my wife, Mary Ann Lacy, whose share must be governed as aforementioned in this will." In 1915 a *fi. fa.* in favor of the Armour Fertilizer Works against C. H. Lacy was levied upon the life estate of C. H. Lacy in

the land bequeathed to him by item two of the will. The executors declined to qualify as trustees, and by order of court C. P. Lacy was appointed as trustee for the children of O. H. Lacy. C. P. Lacy, as trustee under the will, interposed a claim. Upon the trial, the evidence being as indicated above, the judge directed a verdict finding the property not subject. *Held*, a life estate is subject to levy and sale under execution against the life tenant. *North Georgia Fertilizer Co. v. Leming*, 138 Ga. 775, 76 S. E. 95.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 76-82, 86, 87; Dec. Dig. ¶33.]

2. TRUSTS ¶9—CREATION—BENEFICIARY.

In this state a trust estate cannot be created in property for the benefit of a person sui juris. Civ. Code 1910, § 3737; *Gray v. Obear*, 54 Ga. 231; *Thompson v. Sanders*, 118 Ga. 930, 45 S. E. 715.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 6, 7; Dec. Dig. ¶9.]

3. EXECUTION ¶41—PROPERTY SUBJECT THERETO.

Where a testator, by the terms of his will, bequeathed land to trustees for the use of his son, who is sui juris, during his life, with remainder over, upon his death, to his children, the life estate is subject to levy and sale under an execution against the son while in the hands of the trustee, notwithstanding there are minor children living who are beneficiaries of the trust. *American Mortgage Co. v. Hill*, 92 Ga. 297, 18 S. E. 425. Accordingly, it was erroneous in this case to direct a verdict finding the property not subject.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 49, 89-94; Dec. Dig. ¶41.]

Error from Superior Court, Taliaferro County; B. F. Walker, Judge.

Action by the Armour Fertilizer Works against C. Hill Lacy, in which execution was levied against the life estate of defendant, and C. P. Lacy, who was appointed trustee, interposed a claim. There was a judgment for claimant, and plaintiff brings error. Reversed.

Noel P. Park, of Greensboro, for plaintiff in error. Samuel H. Sibley, of Union Point, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 137)

MOORE v. TURNER et al. (No. 126.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶254—REVIEW—QUESTIONS PRESENTED FOR REVIEW.

M. owned land in Atlanta, which was incumbered by specified liens in favor of various persons. T. and P. owned farm lands in Wilkes county, which were unincumbered. There was a contract for exchange of the lands, on the basis that for the city lands, subject to the incumbrances, T. and P. should convey the farm lands and pay a difference, some in cash and the balance in deferred payments to be secured by incumbrance on the lands. In pursuance of the contract deeds were exchanged and possession delivered by the parties respectively. T. and P. made the cash payment, gave notes for the deferred payments, and executed

a security deed on the property, receiving from M. his bond to reconvey. The bond contained the following recitals: "The obligor herein further agrees and covenants that he will cancel the loan deed upon which this bond for title is based, upon receiving from the obligees herein, or their assigns, at any time during the existence of his present loan deed, of a new loan deed covering all the above-described property, and which shall be a first lien thereon, excepting a mortgage or loan deed of fifteen thousand (\$15,000.00) dollars, which this obligor agrees may be placed upon said premises in lieu of the present existing prior indebtedness to which his present loan deed is subject by its terms." Subsequently T. and P. negotiated for loans on the land at 8 per cent. per annum for five years, aggregating the amount specified in the bond, with which to discharge the prior liens, and, to the end that the loans might be made, called upon M. to cancel his security deed in terms of his bond and accept a new security deed, subject only to the security of the loans above mentioned. M. declined, without stating any reason, to cancel his security deed and accept the substitute therefor. T. and P. immediately offered to rescind the contract, which offer was refused. As a result T. and P. were unable to obtain the loans. The holders of the prior liens foreclosed them and caused the property to be levied upon and sold, so that T. and P. lost it. Subsequently T. and P. instituted an equitable action against M., alleging all that is stated above, and further, in substance, as follows: The conduct of M. in refusing to cancel his security deed was with the fraudulent intent to put it out of the power of T. and P. to negotiate the loans, so that the property might be brought to forced sale under the prior liens, and that he might become the purchaser. He had damaged them in the sum of \$20,000, and was attempting to sell the farm lands, and there was danger of the notes falling into the hands of innocent purchasers. Plaintiffs elected to rescind the contract, and to that end offered to return to M. all that they had received from him, and to fully restore the status. The prayers were for rescission, cancellation of the deeds, injunction, and process. An amendment to the petition was allowed over objection. At the hearing the court sustained the demurrer to those portions of the petition which sought to recover damages, and overruled the demurrer upon all other points, thus leaving the petition to stand as an action for rescission and accounting. The defendant excepted. *Held*:

There being no exception to the judgment striking so much of the petition as seeks damages, the only questions relate to the sufficiency of the allegations to state grounds for cancellation of the deeds and for rescission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1458, 1487; Dec. Dig. ¶254.]

2. VENDOR AND PURCHASER ¶342—REMEDIES OF PURCHASER—BREACH OF CONDITION.

The covenant to surrender the security deed and accept a substitute was not a condition precedent, and the remedy for a breach of the covenant is an action for damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1018, 1019; Dec. Dig. ¶342.]

3. DEEDS ¶19—BREACH OF CONTRACT.

"An absolute deed of conveyance will not, at the instance of the grantor, be canceled merely because of a breach by the grantee of a promise made by him, in consideration of which the deed was executed." *Christian v. Ross*, 145 Ga. 284, 88 S. E. 986.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. ¶19.]

4. EXCHANGE OF PROPERTY \Leftrightarrow 8(3)—REMEDIES—PETITION—SUFFICIENCY.

It was error to overrule the general demurrer to the petition.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 16½; Dec. Dig. \Leftrightarrow 8 (3).]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by R. N. Turner and another against W. R. Moore. A demurrer to the petition was overruled, and defendant brings error. Reversed.

J. M. Pitner, of Washington, Ga., and Moore & Pomeroy, of Atlanta, for plaintiff in error. S. H. Sibley, of Union Point, W. O. Wilson, of Atlanta, and I. T. Irvin, Jr., of Washington, Ga., for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 181)

LUCKEY v. ANDERSON. (No. 117.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

INTERLOCUTORY INJUNCTION.

There was no abuse of discretion in refusing an interlocutory injunction in this case.

Error from Superior Court, Jefferson County; R. N. Hardeman, Judge.

Action between W. T. Luckey and S. D. Anderson. From the judgment, Luckey brings error. Affirmed.

M. C. Barwick, of Louisville, for plaintiff in error. G. C. Anderson and R. G. Price, both of Louisville, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 167)

CUNNINGHAM v. SILVEY-DOUGHERTY HAT CO. (No. 110.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

VERDICT—EVIDENCE—SUFFICIENCY.

While the evidence upon the main issue in this case is somewhat vague and equivocal, it cannot be said that, considered in its entirety, it is insufficient to support the verdict rendered.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action between D. F. Cunningham and the Silvey-Dougherty Hat Company. There was a judgment for the latter, and the former brings error. Affirmed.

Covington & Perry, of Moultrie, for plaintiff in error. Jas. L. Dowling, of Moultrie, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 167)

GARY v. GASKINS et al. (No. 111.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

DENIAL OF INJUNCTION—PROPRIETY.

Under the evidence in the case, which was conflicting, the court did not err in denying the injunction prayed.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between J. H. Gary and F. W. Gaskins and others. There was a judgment, denying an injunction prayed, and the former brings error. Affirmed.

E. K. Wilcox, of Valdosta, and Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. W. R. Smith, of Nashville, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 176)

MOORE & CO. v. DAUGHERTY, ALLEN & CO. (No. 115.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. INJUNCTION \Leftrightarrow 35(1)—TITLE—EVIDENCE.

Where the plaintiff and defendant claim title to timber from a common source, and the plaintiff's deed is the older, it is not necessary for the plaintiff to show title in the common propositus. If the older deed is not attacked, it will prevail over the younger deed.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 77; Dec. Dig. \Leftrightarrow 35(1).]

2. INJUNCTION \Leftrightarrow 48—TRESPASS—CONTINUED TRESPASS.

Equity will restrain a solvent trespasser from committing repeated and continuous trespasses. Where the claim of title of both parties is derived from a common source and the plaintiff's deed is the older and is not attacked for any defect or irregularity, and where the defendant, though solvent, threatens to continue to go on the land (the timber upon which had been boxed for turpentine use before the application for injunction) for the purpose of hacking, scraping, and removing the crude gum from the trees from day to day, equity will restrain the trespasser from such recurring trespasses.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 101; Dec. Dig. \Leftrightarrow 48.]

3. JUDGMENT \Leftrightarrow 632—ADMISSIBILITY IN EVIDENCE.

In an action to enjoin the boxing and scraping of pine trees for the purpose of extracting and removing the crude gum, it is irrelevant to show that in another case a party not in privity with the defendant had obtained against the plaintiff a pendente lite injunction against doing acts of the same nature as those sought to be enjoined by the plaintiff in the present action.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1148; Dec. Dig. \Leftrightarrow 632.]

Error from Superior Court, Clinch County; J. I. Summerall, Judge.

Bill by Moore & Co. against Daugherty,

Allen & Co. There was a judgment for defendants, and plaintiff brings error. Reversed.

Moore & Co. and Daugherty, Allen & Co. are each engaged in the business of extracting gum from pine trees and manufacturing the same into turpentine products. The former filed a petition to enjoin the latter from cutting, boxing, and extracting the crude gum from the pine trees on two lots of land in Echols county, alleging that the cutting, boxing, and working of the timber as the defendants were doing and threatening to do would not only be a continuing trespass giving petitioner a new cause of action against them from day to day, thereby resulting in a multiplicity of suits, but the same would be a destructive trespass on account of which damages would be incapable of exact computation and from which trespass there would be no adequate and complete remedy at law. In their answer the defendants denied the title of the plaintiffs to the timber and their right to injunction. They averred that they had completed the boxing of all the timber upon the two lots of land, and that it was their intention to work the same for turpentine purposes in the usual manner, and offered to give bond to protect the plaintiffs on account of any recovery for damages. On a hearing for an interlocutory injunction it appeared that the land in controversy was originally granted to Thomas Taylor. The plaintiffs introduced in evidence a deed from Martha A. Cramer and others describing themselves as the sole heirs at law of Thomas Taylor, to Rollin J. Nelson, dated January 2, 1896, and mesne conveyances from Rollin J. Nelson to themselves conveying the right to the timber on the land for turpentine purposes. The defendants introduced in evidence a quitclaim deed from Martha A. Cramer, describing herself therein as the surviving heir at law of Thomas Taylor, to J. L. Sweat, dated September 1, 1915, and a lease from J. L. Sweat to themselves granting the right to use the timber for turpentine purposes. The court refused a temporary injunction, but provided in his judgment that:

"It appearing that irreparable loss will result unless the turpentine boxes cut upon lots 317 and 318 in the thirteenth district in Echols county are worked pending said suit by getting the crude gum dipped therefrom and distilled and the said boxes cornered, hacked, and chipped, and the same raked around and protected from fire, it is ordered that in addition to the solvency of the defendants that they give bond with good security which they have voluntarily offered to do, in the sum of \$3,000, to be approved by the clerk of said court, conditioned to pay to plaintiff such damages as they may be entitled to recover upon the trial of said case, provided they shall prevail upon said trial, with the right to enter judgment thereon, the same as upon bonds given in appeal cases, said defendants to keep an accurate, full, and complete account of the working of said boxes and of all of the crude gum dipped and distilled therefrom and to make

and file a report thereon with the clerk of said court on said trial."

The plaintiffs except to this judgment.

Whitaker & Dukes, of Valdosta, for plaintiff in error. J. L. Sweat, of Waycross, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. Though the plaintiffs allege that they had perfect title to the land, they failed to exhibit such title, and did not bring themselves within the timber cutters' act, codified in Civil Code 1910, § 5504. If the plaintiffs are entitled to a writ of injunction, it must be based on equitable principles. Both parties claim title under conveyances which recited that the land had been granted to Thomas Taylor, and that the grantor in each conveyance claimed to be his heir at law. The plaintiffs' deed is made by Martha A. Cramer and others claiming to be his sole heirs at law. So far as the abstract of the deed in the record discloses, this deed is joint and does not purport to convey the undivided interest of any particular heir. The deed under which the defendants derive title to the timber purports to have been made by Martha A. Cramer and contains a recital that she is the surviving heir at law of Thomas Taylor. Thus it appears that both claim title under Martha A. Cramer, and there is no testimony attacking the genuineness of either deed. The plaintiffs' deed being many years older than that under which defendants derive their title, will prevail over the younger deed. It appearing that both parties claim under a common grantor, the plaintiffs are relieved of the necessity of showing title into such common grantor. *Florida Yellow Pine Co. v. Flint River Naval Stores Co.*, 140 Ga. 321, 78 S. E. 900. As between the plaintiffs and the defendants, the plaintiffs are vested with the superior title, which would authorize a recovery for the alleged trespass. It remains therefore to determine whether under the allegations and facts appearing at the hearing they showed a right to an interlocutory injunction.

[2] 2. One ground of the plaintiffs' claim for an injunction is that the defendants declared their intention of operating the trees which they had boxed for the purpose of utilizing the crude gum and that this would amount to a frequent trespass of their property and that the frequency of trespasses is a ground for equitable interference. It is now well established that a continuing trespass will be restrained by injunction until the final hearing, although the parties may be solvent. The theory of equitable jurisdiction on this ground is discussed by Mr. Justice Cobb in *Gray Lumber Co. v. Gaskin*, 122 Ga. 342, 50 S. E. 164. As the learned justice very pertinently remarked in that suit:

"Ought the plaintiff to be harassed and annoyed by being required to bring a new suit every day as long as the trespasses continue.

when the whole controversy could be settled in one suit?"

It would be abhorrent to a sense of justice that a wealthy trespasser could say to the true owner of land:

"I know that I have no title and right to cut the trees on your land, or to work the same for turpentine purposes, but because of my wealth I have the right to use your property for my personal gain by repeated and continuous trespasses, and your only remedy is an action for damages."

The defendants appealed to the trial court to be permitted to protect the property from loss resultant from continuously operating the turpentine farm. As the plaintiff has the superior title, no equity can arise in favor of the defendant to protect the plaintiff in the management and control of his property against his express and most vigorous dissent. As was said in *Loudermilk v. Martin*, 130 Ga. 525, 61 S. E. 122:

"Whether the defendants were solvent or insolvent, the plaintiff, to prevent a multiplicity of suits for damages occasioned by trespasses, could maintain an injunction against the cutting and removal of timber by persons who had no right to cut and remove it, where the evidence showed that the trespasses were being committed and would be continued from day to day."

We do not see that there is any difference between a trespass committed by hacking and scraping trees and the removal of the crude gum from day to day, and one committed by cutting and removing the trees. In *Strain v. Stark*, 135 Ga. 687, 70 S. E. 568, the plaintiffs and defendants were in possession of adjoining lots of land under claim of title, and there was a dispute between them as to the location of the dividing line. The defendants were proceeding to cut the timber on the disputed territory, and the plaintiffs filed their petition to enjoin them. On an interlocutory hearing the evidence was conflicting as to the location of the dividing line, and this court held that it was proper to grant a temporary injunction until the final hearing. In *Florida Yellow Pine Co. v. Flint River Naval Stores Co.*, 140 Ga. 321, 78 S. E. 900, the plaintiff sought to enjoin the defendant from cutting, boxing, and extracting gum from the trees on a described tract of land. The defendant was engaged in that work at the time application was made for a writ of injunction. The evidence tended to show that the defendant would continue to cut, box, and extract gum from the trees, and the court granted a temporary injunction. This court upheld that interlocutory injunction on the ground that a trespass may be restrained in equity where it is a continuing one and will give rise to a multiplicity of suits, although the trespasser may be solvent. Under the facts of the case it was an abuse of discretion to refuse an injunction.

[3] 3. Over objection the court allowed in evidence a certified copy of an interlocutory order passed in the case of *T. J. Pierce v. Moore & Co.* on January 29, 1915, enjoining

the latter from working the timber on the two lots of land in controversy until the final termination of the case, or otherwise ordered by the court. This evidence was clearly inadmissible. The parties to the case are not the same. The judgment is not final, but only preservative of the status. The defendants showed no privity with Pierce, and such testimony could not be otherwise than harmful to the plaintiffs.

Judgment reversed. All the Justices concur.

(146 Ga. 198)

ANTHONY et al. v. STANDARD, Com'r, et al. (No. 127.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

TAXATION — 301(7) — LEVY — AMENDMENT — EVIDENCE.

In a tax levy for county purposes for 1915, made by the commissioner of Wilkes county, dated September 15, the third item was as follows: "Contingent expenses, 36%, \$7,022.74." In an action commenced in December to enjoin the collection of taxes under such levy, this item among others was attacked as invalid. On January 10th, prior to the interlocutory hearing, an amendment was duly made to the tax levy as follows: "Georgia, Wilkes County. January Term, 1916, of the Court of the Commissioner of Roads and Revenues, Sitting for County Purposes. Whereas it is known to us that for years, under the system of keeping accounts of this office, for convenience a considerable part of the county funds were kept under the head of contingent funds, and it appearing that in 1915 in the spring there was a deficiency in the funds for the purpose of lifting the quarantine on cattle, and there were funds in the county treasury not needed at that time, but which would be needed later, under the head of public buildings and bridges, \$3,000.00 was transferred temporarily from said last-named fund to said contingent fund, and used mainly in lifting the quarantine on cattle by eradicating the cattle tick; and whereas, it is known to us that \$5,000.00 was borrowed later in 1915, to be used to supply casual deficiencies, which fund was deposited to the account of contingent expense; and whereas it is necessary to reimburse said fund of public buildings and bridges the sum so transferred \$3,000.00, and repay the said loan \$5,000.00; and whereas it was for these purposes the levy for contingent expenses made on Sept. 15, 1915, was laid: Therefore it is ordered that the levy of taxes made on the 15th day of Sept., 1915, for the county of Wilkes be and the same is hereby amended as follows: By adding to the paragraph beginning 'To pay Contingent expenses, 36%,' between the word 'expense' and the word '36%,' the following words, to wit: 'To replace to the account of public buildings and bridges the \$3,000.00 transferred from that fund to contingent expenses during the year 1915, and to repay the lawful loan \$5,000.00 borrowed to supply casual deficiencies during the year of 1915.' This 10th day of January, 1916. W. T. Standard, Com'r R. & R., Wilkes Co." When the amendment to the tax levy was offered in evidence by the defendants, it was objected to on the grounds: "(1) That, the year 1915 having expired at the time such amendment of said tax levy was attempted to be made, the commissioner of roads and revenues had no authority of law to amend said tax levy by changing a levy of taxes illegally made to a levy for another and different purpose, as to these plaintiffs, and in that way undertake to make such

illegal levy legal. (2) Because the transfer of the sum of \$3,000.00, levied for public buildings and bridges, to another and different purpose, and the expenditure of such fund for such other and different purpose, to wit, the payment of contingent expenses, and expenses of eradicating the cattle tick, being illegal, said commissioner of roads and revenues could not legally levy a tax to repay such fund so illegally used. (3) Because, it not appearing from said amendment and order what nor how any casual deficiency existed, or that a casual deficiency of revenues did actually exist, the language of said order 'and to repay the lawful loan \$5,000.00 borrowed to supply casual deficiencies during the year 1915,' did not constitute a legal tax levy, nor was such a levy of taxes authorized under the laws of said state, nor did such amendment make such tax levy for 'contingent expenses' a legal levy of taxes." *Held*, that there was no error in admitting in evidence the amendment, which was more nearly like that allowed in *Sullivan v. Yow*, 125 Ga. 328, 54 S. E. 173, than that dealt with and held not good in *Wright v. Southern Ry. Co.*, 137 Ga. 801, 74 S. E. 529. In the case at bar, as stated in the brief of counsel for defendant in error, neither the amount of taxes nor the per cent. to be collected was altered. The amount to be paid by each taxpayer remained the same, and the amount going to each fund was unchanged. The amendment simply explained that "contingent expenses," a term unknown to county taxation, was intended to mean certain things, and that the levy, which was of uncertain meaning, was intended to raise money for certain definite and legal purposes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 505, 508; Dec. Dig. ¶301(7).]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Proceedings between G. T. Anthony and others and W. T. Standard, Commissioner, and others. There was a judgment for the latter, and the former brings error. Affirmed.

W. A. Slaton and Colley & Colley, all of Washington, Ga., for plaintiffs in error. J. M. Pitner, of Washington, Ga., and S. H. Sibbey, of Union Point, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 210)

MAYOR AND COUNCIL OF CITY OF SUGAR VALLEY v. MILLS. (No. 133.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(*Syllabus by the Court.*)

1. MUNICIPAL CORPORATIONS ¶214(1) — CHARTER—CONSTRUCTION.

The charter of the town of Sugar Valley, as incorporated by the act of 1887 (Acts 1887, p. 631), when considered in connection with the general law as embodied in Civ. Code 1910, § 1646, authorizes the mayor and council of that town, in their corporate capacity, to employ physicians for the purpose of treating smallpox patients within the incorporate limits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 582, 586; Dec. Dig. ¶214(1).]

2. MUNICIPAL CORPORATIONS ¶220(3) — ACTIONS—PETITION—SUFFICIENCY.

In an action by a physician against the municipality, for services rendered to a smallpox patient within the incorporate limits, allegations that "the mayor of the town * * * employed

him [plaintiff] to treat these cases of smallpox, and he further avers that the council of said town also employed him to treat said cases," are not sufficient allegations of employment by the municipality in its corporate capacity to withstand a demurrer which challenges the petition on the ground that it does not allege that the plaintiff made the contract with the mayor and council of the town of Sugar Valley in their corporate capacity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 608; Dec. Dig. ¶220(8).]

3. PLEADING ¶221 — DEMURRER — IMPROPER OVERRULING.

As the petition was subject to demurrer, the error in overruling the demurrer entered into the further trial of the case and rendered it nugatory.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 567; Dec. Dig. ¶221.]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by G. W. Mills against the Mayor and Council of City of Sugar Valley. There was a judgment for plaintiff, and defendant brings error. Reversed.

Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

ATKINSON, J. [1] 1. The town of Sugar Valley was incorporated by act of 1887 (Acts 1887, p. 631). Section 1 of the act is as follows:

"Be it enacted by the General Assembly of Georgia, that the town of Sugar Valley, in the county of Gordon, be, and the same is hereby incorporated as a town, under the name of the town of Sugar Valley. The corporate powers of said town shall be vested in a mayor and five councilmen and by the name of the mayor and council of the town of Sugar Valley they may sue and be sued, plead and be impleaded, and exercise all other corporate powers that may be necessary in performing their duties."

Section 6 of the act is as follows:

"Be it further enacted, that said mayor and councilmen shall have power and authority to pass all laws and ordinances that they may deem necessary for the government of said town and the protection of property from loss by fire or damage therein, provided that they be not repugnant to the Constitution and laws of this state and of the United States."

There was no other general welfare clause, or clause in regard to the right to make contracts, in the charter. These provisions of the charter of the town of Sugar Valley are supplemented by the general law, as contained in the Civil Code, § 1646, which is as follows:

"The ordinary of each county, or the corporate authorities of any town or city in this state within the limits of which the smallpox has appeared, or may appear, are authorized and empowered to provide a suitable hospital for those so afflicted, and to furnish them with medical or any other attention that in their judgment those so afflicted may require."

When considered together, the foregoing provisions of the law confer authority upon the mayor and councilmen of the town of

Sugar Valley, Ga., to employ a physician for the purpose of treating smallpox patients within the incorporate limits.

[1, 2] 2. The petition alleged that the mayor and council of the town of Sugar Valley was indebted to the plaintiff, G. W. Mills, for professional services as a physician, rendered to a smallpox patient within the incorporate limits, in an amount as set forth in an itemized statement; also that the plaintiff informed the mayor of the town of Sugar Valley of the condition of the patient before his services began, and that, if she was to be treated by him, the mayor and council of the town of Sugar Valley would have to pay for the services, and "he was employed to treat the cases" as shown by the account. An amendment was allowed, alleging that the patient, who was a married woman, and her husband were unable to pay for the medical attention needed; and "that the mayor of the town of Sugar Valley employed him [plaintiff] to treat these cases of smallpox; and he further avers that the council of said town also employed him to treat said cases, and authorized him to treat them." One ground of demurrer to the petition as amended was that it was not "alleged that plaintiff made any contract with the mayor and council of the town of Sugar Valley in its corporate capacity." Construing the petition most strongly against the pleader, it is not to be accepted as alleging that the mayor and council, acting in their corporate capacity, entered into a contract with the plaintiff. The language should be construed as alleging that the mayor at one time informally employed the plaintiff, and that at another time the council informally employed him, to treat the smallpox patient. In *Wiley v. Columbus*, 109 Ga. 295, 34 S. E. 575, it was held:

"When the charter of a city distinctly specifies the manner in which the municipal authorities shall contract in its behalf, a petition which in loose and general terms alleges that 'the city' employed plaintiff to do a certain thing, and which does not set forth the terms of the alleged contract with him, or contain allegations showing that such contract was in fact made in the manner prescribed by the charter, is demurrable."

In the course of the opinion it was said by Lewis, J.:

"As a general rule of law, when authority is delegated by the Legislature to a municipality to enter into contracts in a certain specified manner, it becomes the duty of any person dealing with such municipality in a contractual relation to see that there has been a compliance with the mandatory provisions of the law limiting and prescribing its powers. It would follow from this principle that when a suit is instituted by one against a municipality upon a contract, it should be clearly shown in the petition setting forth the cause of action that the contract was valid under the charter powers conferred upon the city. While the suit in this case is properly brought against the city of Columbus, yet the petition alleges no fact which shows through what agency the city acted in making the alleged contract of employment. Under the charter, it

could only be made through its mayor and board of aldermen."

See, also, *Eureka Fire Hose Mfg. Co. v. Eastman*, 16 Ga. App. 630, 85 S. E. 929. In *3 McQuillin on Municipal Corporations*, 2600, § 1177, it is said:

"It is well settled that the members of a common council, board, or committee cannot separately and individually enter into a contract which will bind the municipality, but they must act as a body at a regular or special meeting of which such notice shall have been given as required by law."

In *Town of Pelham v. Pelham Telephone Co.*, 131 Ga. 325, 62 South. 186, it was said:

"Express municipal assent to the occupation of a city's streets by a telephone company can only be shown by formal municipal action, and not by mere * * * declarations of witnesses that such municipal assent was given. Parol statements of witnesses that certain improvements were made or work was done 'with the full knowledge and consent of the municipal authorities of said town, including the mayor and council of said town,' and that a telephone company had established and maintained in the town a telephone system, with poles, wires, and other fixtures in, on, and over the streets, 'all by the consent of the municipal authorities of said town,' and that a witness, who has been a member of the town council and of a committee thereof, has designated and pointed out in the streets of said town where to locate the poles and wires, 'receiving his authority to do so from the town council of said town in regular meetings,' and other like statements, were not admissible in evidence."

The charter of the town of Sugar Valley, supplemented by the general law (Civil Code, § 1646), provides that the municipality may enter into contracts for medical services to smallpox patients, through the instrumentality of the mayor and councilmen of the town. This contemplates formal action by the mayor and councilmen when duly assembled. An agreement, entered into privately with the mayor and at another time with the councilmen, will not suffice. It was erroneous to overrule the ground of demurrer quoted above.

[3] 3. The ruling announced in the second headnote does not require elaboration.

Judgment reversed. All the Justices concur.

(146 Ga. 206)

PORTER v. HARRIS et al. (No. 130.)
(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

ASSIGNMENTS OF ERROR.

The assignments of error are too indefinite to raise any question for decision by this court.

Error from Superior Court, Clarke County; O. H. Brand, Judge.

Action between Americus Porter and W. H. Harris and others. From the judgment, Porter brings error. Writ of error dismissed.

J. Thomas Heard, of Athens, for plaintiff in error. Tate Wright, of Athens, for defendants in error.

ATKINSON, J. Writ of error dismissed. All the Justices concur.

(146 Ga. 214)

STEINHEIMER et al. v. BRIDGES et al.
(No. 135.)

(Supreme Court of Georgia. Nov. 18, 1916.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR — 728(3) — ASSIGNMENT OF ERROR — EXAMINATION OF WITNESSES.**

In an action of ejectment the plaintiffs sued as heirs at law of Abraham Steinheimer. At the time of the decedent's death he held as transferee a bond for title from the Equitable Mortgage Company to J. M. Bridges, covering the land in dispute, issued in connection with a security deed executed by Bridges to the Mortgage Company. The decedent also held a quitclaim deed from the Equitable Mortgage Company, covering the land described in the bond for title. The defendants were the heirs of Bridges. There was evidence from which the jury might have found: (a) That the transfer of the bond for title to Steinheimer was fraudulent, to avoid payment of debts; (b) that it was in good faith, under an arrangement with Steinheimer to pay all debts and convey to the wife of Bridges such of the property as might be left after the debts had been paid off; (c) that the transfer was an unconditional sale to Steinheimer. The land was a cultivated farm on which the Bridges family had resided for a number of years, and there was no dispute as to the fact of its possession; but the evidence was conflicting as to whether Bridges surrendered possession to Steinheimer in pursuance of the transfer. *Held:*

Where a question is propounded to a witness on direct examination, to which objection is interposed, and the court refuses to allow the question to be answered, an assignment of error based upon such refusal should show that at the time of the ruling complained of the court was informed what answer was expected to be elicited from the witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3012; Dec. Dig. 728(3).]

2. EVIDENCE — 471(27) — EXPRESSION OF OPINION—ACTUAL POSSESSION.

Under the facts of this case, it did not amount to an expression of opinion for a witness to testify that a named person was in actual possession of the land in dispute. *Sweeney v. Sweeney*, 121 Ga. 293, 48 S. E. 984; *Copeland v. Jordan*, 144 Ga. 636, 87 S. E. 1034.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2172; Dec. Dig. 471(27).]

3. TRIAL — 258(1)—INSTRUCTIONS—REQUEST.

If upon appropriate request it would have been proper to charge certain principles of law, it was not a proper mode of making the request to read such principles from an opinion in the reports of the Supreme Court, and then hand the book to the judge with the request for him to charge such principles. *Houser v. State*, 58 Ga. 79 (2); *Ward v. National Bank*, 145 Ga. 551, 89 S. E. 578.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 646; Dec. Dig. 258(1).]

4. EJECTMENT — 110 — INSTRUCTIONS — EVIDENCE.

There was evidence which would have authorized the jury to find that the ancestors of the plaintiffs and the defendants had entered into an arrangement to defeat the creditors of the ancestor of the latter, and that the title under which the plaintiffs claimed was acquired in pursuance of such arrangement; but the evidence did not demand such finding. There being evidence which would have authorized the finding that the transaction between the parties was in good faith and for the purpose of enabling the ancestor of the plaintiffs to pay off

all of the debts of the ancestor of the defendants and to reconvey any property that might remain after paying the debts, and that the ancestor of the defendants did not surrender possession in pursuance of the transfer of title to the ancestor of the plaintiffs, the charge to the effect that if the jury should find that the ancestor of the defendants had made an absolute deed to the ancestor of the plaintiffs, and in pursuance thereof had surrendered possession of the land, the defendants could not attack the validity of such conveyance, was not erroneous, as against the plaintiffs, on the ground that it should have gone further and charged that whether or not there was a surrender of possession the defendants could not resist the title of the plaintiffs because the conveyances above mentioned were made in pursuance of a transaction to defraud creditors.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. 110.]

5. EJECTMENT — 110—INSTRUCTIONS—TITLE.

The sole basis of title relied on by plaintiffs was through conveyances by the ancestor of the defendants, and it was not erroneous to give the following in charge: "Before the plaintiffs would be entitled to recover, they must show that Abraham Steinheimer had a deed to the land described in the petition, and that he had a good and valid title to the land."

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. 110.]

6. DOCUMENTARY EVIDENCE.

When considered in connection with other evidence, it was not error to admit a certain deed to other land, and a bill of sale to certain personalty, from the defendants' ancestor to the plaintiffs' ancestor, on the ground that they were irrelevant.

7. GROUNDS FOR NEW TRIAL—SUFFICIENCY OF EVIDENCE.

Other grounds of the motion for new trial, not specifically dealt with, complain of certain excerpts from the charge of the court, on the ground that they were not authorized by the evidence; and others complain that the verdict was contrary to certain excerpts from the charge. There was no merit in any of these grounds. The evidence was sufficient to authorize the verdict for the defendants, and the discretion of the trial judge in overruling the motion for new trial will not be disturbed.

Error from Superior Court, Fayette County; *W. E. H. Searcy, Jr., Judge.*

Ejectment by A. A. Steinheimer and others against A. O. Bridges and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Lester C. Dickson, of Fayetteville, and Dorsey, Shelton & Dorsey, of Atlanta, for plaintiffs in error. J. W. Wise, of Fayetteville, and E. J. Reagan, of McDonough, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 191)

DENNIS v. STATE. (No. 122.)

(Supreme Court of Georgia. Nov. 17, 1916.)

*(Syllabus by the Court.)***1. CRIMINAL LAW — 814(6)—INSTRUCTIONS—EVIDENCE.**

After defining express and implied malice and instructing the jury that malice is an unlawful intention to kill without justification or

mitigation, the further instruction that "a person may form the intention to kill, do it instantly, and regret it as soon as it is done" was not erroneous as not being adjusted to the facts of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. ¶814(6).]

2. CRIMINAL LAW ¶822(7) — INSTRUCTION — MALICE.

Taken in connection with its context, the statement in the court's instruction that "malice is implied from any deliberate act, however sudden," will not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1994, 3158; Dec. Dig. ¶822(7).]

3. CRIMINAL LAW ¶1172(7) — HARMLESS ERROR — INSTRUCTIONS.

An inaccurate instruction not tending to prejudice the accused, and authorizing an acquittal of murder under circumstances wherein the law does not excuse a homicide, will not require a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3160; Dec. Dig. ¶1172(7).]

4. CRIMINAL LAW ¶958(1) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

There was no abuse of discretion in refusing a new trial because of alleged newly discovered evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2396; Dec. Dig. ¶958(1).]

Error from Superior Court, Pike County; W. E. H. Searcy, Jr., Judge.

Clarence Dennis was convicted of murder, and brings error. Affirmed.

Redding & Lester, of Barnesville, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

EVANS, P. J. Clarence Dennis was convicted of the murder of his father, and sentenced to be hanged. The testimony offered by the state tended to show that the decedent was an old negro who lived with his wife. Their son, the defendant, lived near by. On the night of the homicide the decedent called to his wife, who was at the house of the defendant, to find out what had become of his whisky. His wife and son came to the house of the decedent, who accused both with having moved his whisky. The son went off, presently returned with a gun, and, as he entered the house, declared his intention to kill his father, and fired upon him, inflicting a mortal wound. The court refused to grant him a new trial, and he excepted.

[1] 1. The court instructed the jury on express and implied malice, defining those terms in the language of the Code sections. Continuing his instruction, the court further stated that malice is an unlawful intention to kill without justification or mitigation, and "it is not necessary that the deliberate intention should exist for any particular length of time. * * * A person may

form an intention to kill, do it instantly, and regret it as soon as it is done." The latter part of the instruction is assigned as error, and is criticized as not being adjusted to the facts of the case. This criticism is without merit. *Bailey v. State*, 70 Ga. 617(2).

[2] 2. This excerpt appears in the court's instruction: "Malice is implied from any deliberate act, however sudden." Standing alone, this excerpt is clearly an inaccurate statement of the law, because malice cannot be legally implied from any act; but when this excerpt is considered in connection with the context, it is apparent that the court was illustrating that malice may be implied from any deliberate act or intention to unlawfully kill a human being, however sudden; and it was not calculated to mislead the jury.

[3] 3. The prisoner's statement authorized an instruction on the law of voluntary manslaughter. This was given by the court, and no exception is taken to the court's formulation of the law on that phase of homicide. The court further charged the jury fully and clearly on the subject of justifiable homicide. The closing sentence of the court's instruction on the subject of voluntary manslaughter, which was just before he began his instruction on justifiable homicide, is made a ground of exception. The excerpt complained of is that, "if there was a just cause for the passion, it is not murder, but justifiable homicide." Clearly this instruction is an inaccurate statement of the law, possibly a lapsus linguae; but the use of the expression under the facts of the case will not require a new trial. Following his instruction on the subject of justifiable homicide, the court reverted to the law of voluntary manslaughter, and properly applied the same in concrete form to the facts of the case. Under such facts the inaccurate instruction was not calculated to prejudice the prisoner; it authorized an acquittal of murder under circumstances that do not under the law excuse a homicide.

[4] 4. Where a motion for new trial is made on the ground of newly discovered evidence, such ground must be sustained by affidavits as to the residence, associates, means of knowledge, character, and credibility of the witnesses by whom the newly discovered testimony is expected to be delivered. Civil Code, § 6086. There was no compliance with this provision of the statute. Furthermore, the evidence was not of such character as required the granting of a new trial. There was no abuse of discretion in overruling the motion for new trial on this ground.

Judgment affirmed. All the Justices concur.

(146 Ga. 250)

BRYANT v. ROLLINS. (No. 160.)

(Supreme Court of Georgia. Dec. 13, 1916.)

*(Syllabus by the Court.)***VERDICT AND DENIAL OF NEW TRIAL APPROVED.**

The evidence authorized the verdict for the defendant, and no ground of the motion for a new trial is sufficient to require a reversal.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by J. F. Bryant against J. C. Rollins. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. G. Glenn and M. C. Tarver, both of Dalton, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, for defendant in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(146 Ga. 294)

CLARY-HARPER CO. v. PHILLIPS.

(No. 186.)

(Supreme Court of Georgia. Dec. 14, 1916.)

*(Syllabus by the Court.)***CHARGE—INACCURACIES.**

The inaccuracies in the portions of the charge complained of are not of such a character as to afford ground for the grant of a new trial upon motion of the plaintiff. The evidence authorized the verdict in favor of the defendant.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action between the Clary-Harper Company and F. H. Phillips, survivor. There was a judgment for the latter, and the former brings error. Affirmed.

P. B. Johnson, of Thomson, for plaintiff in error. Jno. T. West, of Thomson, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 263)

DOBY v. ALMAND & GEORGE. (No. 170.)

(Supreme Court of Georgia. Dec. 13, 1916.)

*(Syllabus by the Court.)***1. BILLS AND NOTES §138—SURETY—RENEWAL NOTE.**

As against the complaining party the following charge was not erroneous: "Now, the defendant insists that after the first note was given by them as joint principals, that he, S. C. Doby, and his brother, R. B. L. Doby, dissolved their old partnership, that S. C. Doby sold out his interest to a third party and that he had no interest in it, and when this renewal note was signed he simply signed it as security. Well, on that question, the court charges you, gentlemen, that if the original note was a joint note given by them as joint principals, and both bound on it, that when the same parties came in and gave a renewal note in lieu of the other note, and without any additional consideration, that that would also be a joint debt, and not one of se-

curity for another, unless it should appear to you, gentlemen, from the evidence, that the plaintiffs, Almand & George, agreed at the time of the giving of the second note that the note would be renewed by giving a new one by R. B. L. Doby as principal and S. C. Doby as security. For, unless the plaintiffs agreed to that, they would still be joint principals on the second note; but of course if the plaintiffs agreed to that, and the defendant signed it with that understanding, then he would be a security. Whatever the truth about that is, gentlemen, you will determine from the evidence."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 338, 339; Dec. Dig. § 138.]

2. SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict against the defendant.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action by Almand & George against S. C. Doby. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. R. Irwin, of Conyers, for plaintiff in error. L. B. Norton, of Lithonia, for defendant in error.

HILL, J. Judgment affirmed. All the Justices concur.

(146 Ga. 195)

WEAVER et al. v. BANK OF BOWERSVILLE. (No. 124.)

(Supreme Court of Georgia. Nov. 17, 1916.)

*(Syllabus by the Court.)***PERMANENT INJUNCTION—GRANTING.**

The court did not err in refusing to grant a permanent injunction, the hearing being a preliminary one.

Error from Superior Court, Hart County; J. N. Worley, Judge.

Action between Jennie E. Weaver and others and the Bank of Bowersville. There was a judgment for the latter, denying permanent injunction, and the former brings error. Affirmed.

J. S. Haley, of Canon, for plaintiffs in error. W. L. Hodges and A. G. & Julian B. McCurry, all of Hartwell, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 180)

SAFFOLD et al. v. EVANS et al. (No. 116.)

(Supreme Court of Georgia. Nov. 17, 1916.)

*(Syllabus by the Court.)***1. EXECUTION §170—LEVY—INJUNCTION.**

A judgment was rendered in the superior court of Chatham county against Saffold and Larsen. A f. fa. issued thereon, and was levied. The defendants filed an equitable petition to enjoin the levy, because of certain irregularities pertaining to the rendition of the judgment. On the interlocutory hearing an amendment was allowed by which the plaintiffs alleged that the levy was excessive, asked for a set-off of an amount which one of the defendants claimed

against the plaintiffs, and set up a portion of the land levied upon had been released by the plaintiffs. The defendants pleaded that the matters of attack upon the validity of the judgment had been passed upon, and were res adjudicata; that the plaintiffs in a previous petition had sought to enjoin the levy on substantially the same ground as alleged in the present petition; and that the injunction had been refused, and this judgment had been affirmed by the Supreme Court. The court refused an injunction, and the plaintiffs excepted. *Held*:

There was no error in refusing an injunction on the ground of release, because the release was upon condition, and it did not appear that the condition had been complied with.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497, 519; Dec. Dig. § 170; Judgment, Cent. Dig. §§ 786, 789.]

2. EXECUTION § 170—LEVY—SET-OFF.

While in an appropriate case an indebtedness on open account may be set off against a judgment when the holder of such judgment is insolvent, in the present case there was no abuse of discretion in refusing an injunction, because the amount of the alleged equitable set-off was less than the amount of the judgment, and there was no tender of the difference.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 497, 519; Dec. Dig. § 170; Judgment, Cent. Dig. §§ 786, 789.]

3. INTERLOCUTORY INJUNCTION.

There was no abuse of discretion in refusing an interlocutory injunction.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action by F. H. Saffold and others against W. J. Evans and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

O. C. Crockett, of Dublin, and Arthur W. Jordan, of Swainsboro, for plaintiffs in error. Travis & Travis, of Savannah, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 206)

HUNNICUTT v. TALLULAH FALLS RY. CO. (No. 181.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

NONSUIT.

Under the evidence there was no error in granting a nonsuit.

Error from Superior Court, Rabun County; J. B. Jones, Judge.

Action by T. M. C. Hunnicutt against the Tallulah Falls Railway Company and others. From judgment of nonsuit, Hunnicutt brings error. Affirmed.

W. S. Paris, of Clayton, Sisk & West, of Franklin, N. C., and Claud Estes, of Macon, for plaintiff in error. Sam Kimzey, of Cornelia, McMillan & Erwin, of Clarksville, and Blanton Fortson, of Athens, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 214)

ALABAMA GREAT SOUTHERN R. CO. v. TITTLE. (No. 134.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

SUFFICIENCY OF EVIDENCE—NO ERROR.

No error of law is complained of, and the evidence is sufficient to uphold the verdict.

Error from Superior Court, Dade County; A. W. Fite, Judge.

Action between the Alabama Great Southern Railroad Company and William Tittle. From the judgment, the railroad company brings error. Affirmed.

Payne & Hale, of Chattanooga, Tenn., for plaintiff in error. Martin G. Smith, of Trenton, and Rosser & Shaw, of La Fayette, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(146 Ga. 204)

ALLEN v. ALLEN et al. (No. 129.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. DESCENT AND DISTRIBUTION § 82—CONVEYANCE OF INTEREST—SUFFICIENCY OF DESCRIPTION.

Thompson Allen died intestate in 1875, leaving an estate consisting of realty and personalty. Among the heirs of the deceased were the widow, Mary W. Allen, and a son, J. D. Allen. In 1893 J. D. Allen wrote and signed a paper (not under seal) attested by one witness, which, omitting formal parts, was as follows: "To whom it may concern: I hereby certify that, on account of the love and affection I bore my mother, shortly after my father's death in the year 1875 I signed away to her my rights to any interests in the estate of my father; and I further certify that I have neither right nor title to, claim or interest in, the said estate, further than a verbal assurance from my mother that I could always have a home as long as I should choose to live upon any portion of said estate. I now by special permission reside upon the 'mill tract'—pay the taxes upon it as agent in charge for the use thereof." The paper was recorded as a deed in 1904 and again in 1906. The widow, being the person referred to in the paper as the mother of the maker, died in 1912, and the paper was found in a "deed box" among her papers. No other paper was found purporting to be a deed by J. D. Allen, conveying his interest in the estate. There was a deed dated December, 1875, in which J. D. Allen joined the other heirs in conveying their interests in the estate of Thompson Allen to their mother for and during her life. J. D. Allen died in August, 1896. Subsequently, in a proceeding against the administrator of the estate of Thompson Allen for an accounting and distribution, to which all of the heirs of Thompson Allen except one were parties, T. D. Allen, claiming as sole heir of J. D. Allen, set up a claim to a distributive share of the estate. The administrator and the other heirs produced the paper signed by J. D. Allen (quoted above) for the purpose of showing that J. D. Allen had conveyed his interest in the estate of Thompson Allen to his mother, and that when he died he left no interest in that estate which could descend to his heirs. The pa-

per was attacked as void for uncertainty as to description of the property, for indefiniteness as to covenants, and as ineffective for any purpose; and on such grounds its admission in evidence was resisted. It was further contended that, if the paper amounted to anything, it should be held to refer to a life estate only, as set out in the deed already mentioned, from the several children of Thompson Allen, including J. D. Allen, to their mother. Certain evidence was also admitted, over objection, as declarations by the widow while in possession, to the effect that J. D. Allen's share in the estate was hers, and declarations by J. D. Allen to the same effect. The case was submitted to the judge, by consent, to be tried without a jury. The evidence objected to was admitted, and judgment was rendered for defendant, which, in effect, declared that T. D. Allen had no interest in the estate. *Held:*

The paper was sufficiently definite as to description of the property (Butrick v. Tilton, 141 Mass. 93, 6 N. E. 563 [3]; *Harriss v. Howard*, 126 Ga. 325, 55 S. E. 59; *Derrick v. Sams*, 98 Ga. 397, 25 S. E. 509, 58 Am. St. Rep. 309; *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843), and its terms were broad enough to comprehend all interest the maker had in the estate of his deceased father.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 318-321; Dec. Dig. ¶ 82.]

2. ESTOPPEL ¶ 19 — INTEREST IN ESTATE — CONVEYANCE.

The paper did not contain any words of conveyance; and, whether or not it was sufficient as a conveyance, it was sufficient to estop the maker, as against the administrator and the other heirs, from denying that he had conveyed his interest in his father's estate to his mother, as recited in the paper. *McCleskey v. Leadbetter*, 1 Ga. 551, 557; *Coldwell Co. v. Cowart*, 138 Ga. 233, 237, 75 S. E. 425. The estoppel would also extend to plaintiff as a privy in estate to the maker. *Harris v. Amoskeag Co.*, 101 Ga. 641-643, 29 S. E. 302.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 25; Dec. Dig. ¶ 19.]

3. DESCENT AND DISTRIBUTION ¶ 87 — EVIDENCE ¶ 236(5), 273(2) — PROCEEDING FOR ACCOUNTING AND DISTRIBUTION.

There was no error in admitting the paper in evidence, nor, in connection therewith, in admitting the declarations of the maker and of his mother, as before mentioned.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 330-336; Dec. Dig. ¶ 87; *Evidence*, Cent. Dig. §§ 880, 1111, 1112; Dec. Dig. ¶ 236(5), 273(2).]

4. SUFFICIENCY OF EVIDENCE.

The evidence authorized the judgment for the defendant.

Error from Superior Court, Banks County; C. H. Brand, Judge.

Action by T. D. Allen against Thompson Allen, Jr., and others. Judgment for defendants, and plaintiff brings error. *Affirmed.*

J. J. & Sam Kimzey, of Cornelia, for plaintiff in error. W. A. Charters and H. H. Perry, both of Gainesville, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 163)

PHOENIX BANK v. SHIRLING. (No. 108.)
(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

NEW TRIAL ¶ 156—HEARING—ORDER.

A motion for new trial was made during the term at which the verdict was rendered, and a rule nisi was issued returnable at a named time and place in vacation. At the time the rule was issued a separate order was passed providing that: "If for any reason said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, or at such time and place as the presiding judge may fix on the application of either party, of which time and place the opposite party shall have at least five days' notice. If for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term thereafter. It is further ordered that the movant have until the hearing, whenever it may be, if stenographic report is used, but, if not used therein, ten days from date to prepare and present for approval a brief of the evidence in said case, and the presiding judge may enter his approval thereon at any time, either in term or vacation, and if the hearing of the motion shall be in vacation, and the brief of evidence has not been filed in the clerk's office before the date of the hearing, said brief of evidence may be filed in the clerk's office at any time within ten days after the motion is heard and determined." At the time designated in the order nisi for the hearing of the motion for new trial the stenographer had not completed his report of the evidence, and "the hearing of the motion was continued," by consent, until another date in vacation, without any written order therefor. On the morning of the last-named date the movant did not appear or present a brief of evidence for approval. The respondent was present and moved the court to dismiss the motion for new trial, on the ground that the movant had failed to prosecute his motion and present a brief of the evidence for approval. The court declined to entertain the motion; but at 1 o'clock, at the close of the morning chambers, the motion to dismiss was renewed, and the following order was duly entered: "The within motion dismissed for want of prosecution." At half after 2 o'clock on the same day the attorney for the movant appeared and filed a written motion, upon grounds fully set forth, to reinstate the motion for new trial, and to be allowed to present for approval his brief of evidence; counsel for the respondent having in the meantime left the court. Upon this last motion the judge issued a rule requiring respondent to show cause why the motion to reinstate should not be granted. On the hearing at a later date, which also was in vacation, the respondent filed written objections, on the ground that the judge, having formally dismissed the motion for new trial, had lost jurisdiction and could not entertain the motion to reinstate. The judge held the case up for consideration, and at a later date in vacation passed an order overruling the objections and reinstating the case, and thereafter in vacation, having approved the brief of evidence, passed an order granting a new trial. The respondent excepted to the judgment reinstating the case and the judgment granting a new trial. *Held:*

The language in the order providing for the hearing of the motion for new trial in vacation that, if for any reason the motion should not be heard and determined at the time and place appointed, the motion for new trial "shall be

heard and determined at such time and place in vacation as counsel may agree upon, or at such time and place as the presiding judge may fix on the application of either party," was insufficient to authorize the court, with the verbal consent of counsel for both parties, to fix a subsequent date in vacation for the hearing without any written order therefor. *Atlanta, Knoxville & Northern R. Co. v. Strickland*, 114 Ga. 998, 41 S. E. 501, and citations. In the absence of such a written order so continuing the case, the hearing went, by force of the written order and by operation of law, over to the next term. *Eady v. Atlantic Coast Line R. Co.*, 129 Ga. 363, 58 S. E. 895; *Holtzendorf v. Dillard*, 136 Ga. 241, 71 S. E. 132. It follows that the court was without jurisdiction to dismiss the motion for new trial, and that the subsequent orders reinstating the case and granting the motion for new trial were void for want of jurisdiction, but that the motion for new trial is still pending in the trial court, to be completed and determined under the original order.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 316; Dec. Dig. ¶ 156.]

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action between the Phoenix Bank and B. O. Shirling. From the judgment, the Bank brings error. Reversed.

Hatcher & Hatcher and McCutchen & Bowden, all of Columbus, for plaintiff in error. T. T. James and Geo. Y. Harrell, both of Lumpkin, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 173)

MILLER v. SOUTHERN EXPRESS CO.
SOUTHERN EXPRESS CO. v. MILLER.

(No. 114.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT ¶ 133(3)—POSSESSION AND USE OF PREMISES — ACTION BETWEEN LESSEES.

Where a common lessor let two buildings, with an alley between them, to two tenants, with the right in each to the use of the alley "for the purpose of ingress and egress only," and one of the tenants transacted his business of repairing automobiles in the rear of the building occupied by him, to which place he and his customers obtained access by means of the alley, and the other tenant, an express company, loaded and unloaded its express packages from a side door in the building opening on the alley, a petition, brought by the former tenant against the latter, to recover damages for "improper obstruction" of the alley by the loading and unloading of its wagons, does not set forth a cause of action, in the absence of specific allegations that the defendant used and unreasonably obstructed the alley for the purpose indicated for an unreasonable length of time, to the injury of the plaintiff.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 467-469; Dec. Dig. ¶ 133(3).]

2. DEMURRER IMPROPERLY OVERRULED.

The court erred in overruling the demurrer to the petition.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by L. W. Miller against the Southern Express Company. Judgment for defendant, and plaintiff brings error, and defendant files a cross-bill of exceptions. Reversed on the cross-bill of exceptions. Main bill of exceptions dismissed.

Larsen & Crockett, of Dublin, for plaintiff in error. J. S. Adams, of Dublin, and Robt. C. & Philip H. Alston, of Atlanta, for defendant in error.

HILL, J. According to the petition in this case, L. W. Miller, the plaintiff, was the lessee of a certain storeroom in Dublin, in the rear of which he hired and repaired automobiles. The defendant, the Southern Express Company, was also the lessee from the same lessor of a certain storeroom on the opposite side of an alley from Miller. Under this contract of lease the plaintiff had "the right, in common with other tenants now renting other buildings from [the lessor], to use of the alley now open between the building now occupied by E. Dreyer and the Southern Express Company, for the purpose of ingress and egress only." The defendant was one of the "other tenants" just referred to, and held under a contract similar to that of the plaintiff, and had "the right, in common with plaintiff, to the use of the aforementioned alley for the purpose of ingress and egress only." It was alleged that the defendant interfered with the plaintiff's enjoyment of the alley, and made improper use of the way, "by leaving its wagon standing in the same for unreasonable lengths of time while the wagon loaded and unloaded at a door opening into said alley, and by not continuing the drive through the alley to the rear of defendant's place of business, and thus leave the way obstructed to the use of plaintiff and those who visited his place in the course of business." Plaintiff and his customers brought their cars to the rear of his building, which was reached by the use of the alley, for repairs and other purposes. This way was for a time the only one to and from the rear of the premises; and, although plaintiff's landlord attempted to relieve the situation by opening another way to connect with a back street, it was not as convenient and satisfactory to his customers, and did not save plaintiff from being damaged as set out in the petition. By so obstructing the alley the defendant has injured the plaintiff's business, by preventing his customers from readily and easily passing to the rear of his premises, or from entering at all, and by causing customers to have to wait until the defendant could clear the way; and by reason of the delay thus caused, plaintiff's customers have become dissatisfied with the annoyance attending the bringing of their business to him, and have gone to others where they did not meet with similar inconvenience, and have ceased to patronize

plaintiff altogether, or only occasionally. There was a general falling off of the plaintiff's business, due to this cause alone; and he had this knowledge from his customers. Plaintiff often remonstrated with the agent of the Southern Express Company in charge of the business and its employes, regarding the wrongful use and obstruction of the alley, and protested against its actions; nevertheless the company willfully and maliciously persisted in its course of action, and continued wantonly to injure plaintiff's business, for which reason defendant is liable to plaintiff for punitive and exemplary damages. Plaintiff sued for \$1,000 as damages.

The defendant filed its demurrer to the petition, which was overruled, and it excepted *pendente lite*; and this exception is now before this court by way of cross-bill of exceptions. The defendant answered the petition, making a denial of its material allegations, and averring that it had abused no privilege granted to it under the contract of rental, and had exercised no authority or control other than that covered by the contract already referred to. The case proceeded to trial, and at the conclusion of the plaintiff's evidence the court granted a nonsuit, to which judgment the plaintiff excepted.

[1, 2] 1. In the view we take of this case it is not necessary to consider the exception to the grant of a nonsuit. We think the court erred in overruling the demurrer to the petition. No cause of action is set out by the plaintiff. Each tenant, under their respective contracts, had the right to use the alley for the purpose of "ingress and egress only." What does this language mean? Surely it does not mean, as contended by the plaintiff in error in the main bill of exceptions, that each party was to pass through and over the alley without stopping, and that they could not stop there and transact their accustomed business by loading and unloading their wagons, provided they did it in a reasonable time so as not to injure the other party. The very purpose of the use of the alley was for the transaction of the business of the respective tenants. The business of the defendant in the use of the alley was in loading and unloading its express at a side door in its building, and in doing this it was not exceeding what it had a right to do. The fact that the plaintiff's business was conducted from the rear of his building, and he and his customers had to obtain access through the alley, does not alter the case. The defendant had a right to the use of the alley for the purpose of entering it with its wagons and of loading and unloading them within a reasonable time.

Did the defendant occupy the alley for the transaction of its customary business for an unreasonable length of time, to the injury of the plaintiff? It is true that in the petition it is alleged generally, and rather loosely,

that the defendant was "thus improperly obstructing the said alley," and similar general expressions; but the demurrer only admits facts well pleaded, and the petition nowhere sets out with definiteness facts showing that the defendant improperly obstructed the alley to the injury of the plaintiff. On the contrary, it appears that it was merely doing what they had the right to do; and we think that such general expressions as the above cannot amount to allegations that the defendant was using the alley contrary to the meaning of the contract in this case. The plaintiff certainly knew, at the time of entering into the lease contract, that the defendant was one of the "other tenants" then using the alley, because it is so stated in his contract set out in the petition. And the defendant had the right to the use of the alley for the purpose of ingress and egress, which included the right to load and unload its wagons in a reasonable time; and there is nothing to indicate that this was not done, except the most general allegations and conclusions of the pleader, which must be most strongly construed against him.

Judgment reversed on the cross-bill exceptions. Main bill of exceptions dismissed. All the Justices concur.

(146 Ga. 243)

WALLS et al. v. STEED. (No. 151.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

REVIEW ON APPEAL.

No error of law is complained of, and the verdict is supported by the evidence.

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Action between C. M. Walls and others, and B. D. Steed. From the judgment the parties first mentioned bring error. Affirmed.

Smith, Reese & Smith, of Carrollton, for plaintiffs in error. Frank S. Loftin, of Franklin, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(146 Ga. 189)

SCRUTCHENS v. STATE. (No. 120.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. QUESTIONS REVIEWABLE.

As the judgment must be reversed on other grounds, and the same question is not likely to arise on another trial, the grounds of the motion for new trial complaining of the refusal by the court to grant a continuance will not be decided.

2. CRIMINAL LAW — 365(2) — EVIDENCE — REGESTÆ.

In the seventh, eighth, and ninth grounds of the motion for new trial, the admission of certain evidence therein set out, over the objection of the accused, was assigned as error on the ground that it was immaterial and irrelevant.

evant. The evidence so admitted was as follows: "When I [Gray] come out [meaning out of depot], he [defendant] called me [Gray] a son of a bitch, and I [Gray] hit him." "I went into the depot and could not find the handcuffs, and come back out, and Joe Scrutchins was cursing everybody black and blue; he was using these words 'by God' and 'God damn' freely. I don't know who he was referring to." "They carried Joe [defendant] to the calaboose. He tried to fight around there a while; Mr. Monroe and Mr. Gray and Ernest Smith was the ones that I saw carrying him, dragging him; they had trouble in carrying him." *Held*, that the evidence was admissible as *res gestæ*, and was relevant and material as tending to show the animus of the accused on the occasion of the homicide. See *Revel v. State*, 26 Ga. 275; *Helms v. State*, 138 Ga. 826(1), 76 S. E. 353; 2 Wharton's Criminal Evidence, § 923; 1 *Michie on Homicide*, 670, and cases cited.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 807; Dec. Dig. ¶ 365(2).]

3. HOMICIDE ¶ 169(3)—EVIDENCE—ADMISSIBILITY.

The court erred in admitting in evidence, over objection by the accused that it was irrelevant and immaterial, testimony as to a conversation which took place between the accused and the witness more than a year prior to the homicide, and in permitting the witness to testify that he thought from such conversation that the accused entertained ill feeling towards the decedent; such evidence being as follows: "I think there was feeling. I had Mr. Collins [the deceased] as cut foreman then, and he fired Joe's [the accused] boy; and Joe come up to the office, cursing Mr. Collins, and wanted me to put the boy back. And I do not remember the cursing words Joe said in regard to that; but the substance was that if he [Collins] had turned him [defendant] off he would have fixed him, or something to that effect. That was a little bit over a year ago." *Pound v. State*, 43 Ga. 89; *Horton v. State*, 110 Ga. 739, 35 S. E. 659.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 343; Dec. Dig. ¶ 169(3).]

4. HOMICIDE ¶ 309(4)—EVIDENCE—CHARGE.

On the trial of one indicted for murder there was evidence tending to show that the son of the accused informed him that the decedent had cursed the wife of the accused, and immediately thereafter the accused and the decedent met; whereupon the accused asked the decedent why he had cursed his wife, and the decedent replied that he had not cursed her, and the accused replied that he was a damned liar. There was evidence as to some other continued altercation, during which they each, while 10 or 12 feet apart, stooped to get rocks from the ground, and the accused first secured a rock, and while the decedent was still in a stooping position, trying to pick up a rock, the accused threw his rock at the decedent, who was struck on the head, sustaining a wound which resulted in his death, which occurred during the night following the day of the encounter. One of the witnesses stated that the rock was about the size of his fist. *Held*, that such evidence was sufficient to require a charge of the law of involuntary manslaughter as defined in Pen. Code 1910, § 67; and therefore it was erroneous for the judge, without request, to omit to charge on the subject of involuntary manslaughter and by his charge to restrict the jury to consideration of murder, justifiable homicide, and voluntary manslaughter. See *Kelly v. State*, 145 Ga. 210, 88 S. E. 822, and cases cited.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 653; Dec. Dig. ¶ 309(4).]

5. CHARGES—IMPROPRIETY.

The remaining grounds of the motion for new trial complain of excerpts from the charge given to the jury, and of the refusal to give

certain requested instructions without modification or change. None of the complaints so presented was of such character as to require the grant of a new trial.

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Joe Scrutchens was convicted of homicide, and he brings error. Reversed.

C. C. Pittman, Paul F. Akin, and Neel & Neel, all of Cartersville, for plaintiff in error. Joe M. Land, Sol. Gen., of Calhoun, Jas. R. Whitaker, of Cartersville, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

FISH, C. J. Judgment reversed. All the Justices concur.

(146 Ga. 193)

ANDERSON v. STATE. (No. 123.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶ 809—INSTRUCTIONS—EVIDENCE.

The indictment charged the crime of infanticide as having been committed in a particular way "and by ways and means to such grand jurors unknown." An instruction that if the jury was satisfied beyond a reasonable doubt that the defendant "killed such child by any one or more of the ways set forth in the indictment, or killed it in any other manner," they would be authorized to convict, was not likely to mislead the jury as authorizing a conviction in case the death of the infant was due to accident, where there was no evidence or contention at the trial that the death was the result of misadventure.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1961-1967; Dec. Dig. ¶ 809.]

2. HOMICIDE ¶ 286(2)—INSTRUCTIONS—"MALICE."

The definition of "malice" as an ingredient of the crime of murder was not open to the criticism made against it.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 587-590; Dec. Dig. ¶ 286(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Malice*.]

3. HOMICIDE ¶ 309(3)—INSTRUCTION ON INVOLUNTARY MANSLAUGHTER—EVIDENCE.

The evidence did not authorize a charge on involuntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 652; Dec. Dig. ¶ 309(3).]

4. ASSIGNMENTS OF ERROR—SUFFICIENCY OF EVIDENCE.

Other assignments of error are without merit, and the evidence supports the verdict.

Error from Superior Court, Terrell County; W. C. Worrill, Judge.

Mary Anderson was convicted of murder, and brings error. Affirmed.

R. R. Jones, of Dawson, for plaintiff in error. B. T. Castellow, Sol. Gen., of Cuthbert, R. R. Arnold, of Atlanta, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

EVANS, P. J. The defendant was convicted of the murder of her newly born babe,

and recommended to mercy. The court refused to grant a new trial, and she excepts.

[1] 1. The indictment charged that the defendant did kill and murder her female child, "by then and there wrapping cloth and clothes about the head and face of such child in a manner to prevent its respiration, and by placing such child in a trunk and closing said trunk, thereby suffocating, strangling, bruising, and crushing said child, and by ways and means to said grand jurors unknown." The court instructed the jury that if the evidence satisfied them beyond a reasonable doubt that the child was born alive, and that the defendant "killed such child by any one or more of the ways set forth in this bill of indictment, or killed it in any other manner," they would be authorized to convict. It is insisted that under this instruction the jury could have convicted the defendant, although the death of the child may have been the result of accident. There was nothing in the evidence to suggest a theory of accident. The prisoner made no statement. The court just previously to this instruction had defined the crime of murder and its constituent elements, and had charged the jury that malice was the willful and deliberate purpose of unlawfully taking life. Under these circumstances we do not think the jury likely to have been misled into construing the charges as having reference to a death by misadventure, but rather that the court's language had reference to the unlawful and deliberate killing of the child either in the way described in the indictment or in some other manner not known to the grand jury.

[2] 2. After defining malice in the language of the Penal Code and further elaborating the legal meaning of the term, the court continued:

"Nor does malice necessarily mean ill will, hatred, or personal animosity toward any particular individual. But malice in the abstract, that is to say legal malice, means nothing more than the willful and deliberate purpose to unlawfully take human life. That is its meaning as it is used in the definition of murder, regardless of the motive from which it may spring up, whether from hatred, personal animosity, avarice, love, jealousy, or any other emotion which prompts and sways the human heart."

The criticism is that it was probable that the jury misconstrued its application, in that it indicated that the matters necessary for the crime of murder might be inherent in any and every emotion of a human being. The court was differentiating the popular idea of malice, in the sense of revenge or hatred, from malice in its legal sense, which is but an intent to take human life where the law neither justifies nor in any degree excuses that intention, if the killing should take place as intended. The language of the court was substantially in accord with the rule as laid down in *Taylor v. State*, 105

Ga. 746, 31 S. E. 764, and it is not open to the criticism made of it.

[3] 3. The plaintiff in error complains of the failure of the court to charge on the subject of involuntary manslaughter. The evidence did not authorize such charge. The defendant was a colored school-teacher, unmarried, and boarded with a family consisting of the head of the family and his wife and a niece about 13 years of age. The latter testified that the defendant came home from school one afternoon, immediately went to her room, locked the door, and complained of being sick. The witness, through an opening in the door, saw the defendant get on the floor in a kneeling position, heard a groan, and saw her give birth to a baby. She heard the baby cry, and saw the defendant wrap the baby in some of her underclothes, place it in a trunk, and lock the trunk. Afterwards the defendant called for the witness and asked her to bring some warm water. The next morning the defendant was seen to open the trunk, take from it a bundle, and to leave the house with it, to a place nearby, where the bundle, containing the dead body of the child, was found buried. Various corroborative circumstances were shown. Under this evidence involuntary manslaughter was not involved.

[4] 4. Other assignments of error are without merit. The evidence authorized the verdict, and no sufficient cause appears for the granting of a new trial.

Judgment affirmed. All the Justices concur.

(146 Ga. 160)

LOVE v. LOVE. (No. 107.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

EXCEPTIONS, BILL OF \S 56(2)—CERTIFICATION.

Where a bill of exceptions was tendered to the presiding judge three times, and each time he declined to certify it as true, unless certain corrections were made, and when it was tendered to him a fourth time he signed a certificate in which it was stated that certain parts of the bill of exceptions were "incorrect," this did not amount to a certificate that the bill of exceptions "is true," and the writ of error must be dismissed.

[Ed. Note.—For other cases, see Exceptions, Bill of; Cent. Dig. \S 94; Dec. Dig. \S 56(2).]

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action between Savannah Love, by next friend, and Peter Love. There was a judgment for the latter, and the former brings error. Writ dismissed.

J. S. James, of Atlanta, for plaintiff in error. Astor Merritt, of Douglasville, for defendant in error.

GILBERT, J. The following certificate appears in the record in this case:

"I do hereby certify that the foregoing bill of exceptions was tendered me December 15, 1915. On said December 15, or the 16th, I examined said bill of exceptions, found the same incorrect, noted my objections thereto in writing, attached same to said bill of exceptions, directed said bill of exceptions left with the clerk of the superior court of Douglas county, as directed by the Hon. J. S. James, counsel of record for Savannah Love, December 15 or 16 last. Thereafter, on December 29th, I received said bill of exceptions a second time. Upon examination thereof I found the objections formerly noted to said bill of exceptions contained in said bill of exceptions when received the second time. Thereafter, on December 30th, I returned said bill of exceptions to Hon. J. S. James, with objections noted thereto in writing and attached thereto. On January 7, 1916, I received said bill of exceptions a third time. Upon examination thereof I found said bill of exceptions contained the objectionable facts thereinbefore objected to and noted, which objections counsel had failed to remove. Thereafter, on January 11, 1916, I returned said bill of exceptions to Hon. J. S. James a third time, with a third objection noted thereto in writing and attached thereto, all of which objections are attached to said bill of exceptions. On this the 26th day of January I received the foregoing bill of exceptions a fourth time, together with statement from counsel for plaintiff that he declined to correct said bill of exceptions to conform to the objections noted in writing by me thereto, and requested that I make such certificate as my remembrance of the case dictated. Therefore I hereby decline to certify to that part of said bill of exceptions noted in objections signed by me of date of January 11, 1916, and the other objections attached to said bill of exceptions, which read as follows: 'The defendant objected to said evidence because it was a record adjudging Savannah Love insane, and because Peter Love admitted in his answer that she was insane.' This part of said bill of exceptions is incorrect, and I decline to verify the same. With the above exception, I do hereby certify that the foregoing bill of exceptions is true and correct, and contains all the evidence and specifies all the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Douglas county is hereby ordered to make out a complete copy of such part of the record in said case as is in this bill of exceptions specified, and certify the same as such, and cause the same, together with the attached objections to said bill of exceptions, to be transmitted to the present term of the Supreme Court, that the errors alleged to have been committed may be considered and corrected."

Also in the record appears a paper tendered by counsel for the plaintiff in error to the judge, which is referred to in the above as "the foregoing bill of exceptions."

Where in a certificate to a bill of exceptions "the judge certifies that the bill of exceptions 'as amended' is true, * * * the writ of error must be dismissed." While the judge may supply omissions in the bill of exceptions by notes or otherwise, if so doing has the effect of showing that in part the bill of exceptions is not true, it will work a dismissal. Jarriel v. Jarriel, 115 Ga. 23, 41 S. E. 262. Where in the certificate of a bill of exceptions the judge certifies that the bill of exceptions, "as modified by the note attached and made a part thereof, is true," and such note shows that the bill of exceptions is in large part not true, the writ of

error must be dismissed. *Priester v. Bray*, 138 Ga. 60, 74 S. E. 757. A certificate to a bill of exceptions, wherein the judge certifies that it is true "except as hereinafter qualified," and then adds a qualification, does not amount to a certificate that the bill of exceptions is true, and the writ of error must be dismissed. *Central Ry. Co. v. Mills*, 143 Ga. 47, 84 S. E. 120.

The bill of exceptions in the instant case is not certified by the trial judge as true; and it follows that the writ of error must be dismissed. All the Justices concur.

(146 Ga. 232)

ALLEN et al. v. HARRIS & SATTERFIELD.
(No. 144.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** \S 538(3)—**DEFENSES—FAILURE OF CONSIDERATION—INSTRUCTIONS.**

This was a suit upon a promissory note for \$200, it being one-half of the purchase price of an engine bought by defendant, the principal in the note, from the plaintiffs. The defenses pleaded were breaches of express warranties relating to the engine, and total failure of consideration. The charge fairly instructed the jury as to the respective contentions of the parties. In view of the defenses set up and the instructions given the jury, it was not error for the court to fail to charge the jury as follows: "That if they found from the evidence that the use of the engine was not worth more than the payment defendant had made on it, and that defendant had tendered it back for the notes sued upon, then, if they believed from the evidence that the engine was not reasonably suited for the uses intended, they should find for defendant."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1910; Dec. Dig. \S 538(3).]

2. **VERDICT—EVIDENCE—SUFFICIENCY.**

The evidence authorized the verdict, and the refusal of a new trial was not error.

Error from Superior Court, Forsyth County; H. C. Hammond, Judge.

Action between C. C. Allen and another and Harris & Satterfield. There was a judgment for the latter, and the former brings error. Affirmed.

L. E. Wisdom, of Cumming, and Wm. M. Johnson, of Gainesville, for plaintiffs in error. Geo. F. Gober and W. I. Heyward, both of Atlanta, and C. L. Harris, of Cumming, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 243)

SOUTHERN RY. CO. et al. v. JACKSON.
(No. 152.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. **DAMAGES** \S 52 — **PERSONAL INJURIES — RIGHT TO RECOVERY—RAILROAD ACCIDENT.**

If a woman exercising ordinary care in walking across a railroad track at a street crossing in a city, attended by her two small children, discovers that she is about to be run

down by an engine approaching the crossing in a grossly negligent manner, and leaps from the track and falls to the ground, and one of her children is run down and mangled by the engine in her presence, and the woman on account of the fall sustains a shock and endures pain and suffering therefrom, she has a right of action for the wrong to herself. The petition was not subject to general demurrer.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 100, 255; Dec. Dig. ¶52.]

2. DAMAGES ¶51 — PERSONAL INJURIES — NERVOUS SHOCK.

But if the woman, having crossed the railroad track, did not leap and fall or sustain any personal injury, the fact that she witnessed the mangling of the child and became frightened and suffered a severe nervous shock therefrom would not entitle her to a recovery. *Godard v. Watters*, 14 Ga. App. 722, 82 S. E. 304; *Sanderson v. Nor. Pac. Ry. Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509; *Huston v. Freemansburg*, 212 Pa. 548, 61 Atl. 1022, 3 L. R. A. (N. S.) 49, 68; *C. & O. R. R. Co. v. Robinett*, 151 Ky. 778, 152 S. W. 976, 45 L. R. A. (N. S.) 433, 445; *Conley v. United Drug Co.*, 218 Mass. 238, 105 N. E. 975, L. R. A. 1915D, 830, 838. See, also, *Sappington v. A. & W. P. R. Co.*, 127 Ga. 178, 56 S. E. 311.

(a) Applying the foregoing principles to the uncontradicted evidence, a verdict for the plaintiff was unauthorized.

(b) Certain portions of the charge upon which error was assigned were contrary to the rulings herein announced; and the judge also erred in refusing certain requests to charge which properly embodied the principles stated above.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 103, 255, 256; Dec. Dig. ¶51.]

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action by Callie Jackson against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Reversed.

Battle & Hollis, of Columbus, and J. W. Culpepper, of Fayetteville, for plaintiffs in error. J. W. Wise, of Fayetteville, and E. J. Reagan, of McDonough, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 256)

SEABOARD AIR LINE RY. v. WINHAM. (No. 164.)

(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR ¶1078(3)—RAILROADS ¶344(4)—ABANDONMENT OF EXCEPTION—PLEADING.

In an action for damages against a railroad company the petition alleged, among other things, the following in substance: The defendant left a box car standing at a public crossing in a town in such position that one end extended to about midway of the crossing, leaving about ten feet of the crossing unobstructed; and it was unusual and unnecessary to leave such cars so standing on the crossing. The plaintiff was traveling, as a guest of another person, along the street in a buggy, which was being drawn by a horse. The horse "was a trustworthy and gentle animal,

and prior to said date was not afraid of a box car." On approaching the crossing the horse saw the car and stopped; the driver handed plaintiff the reins, and got out to lead the horse by the car. The horse "led willingly and did not seem frightened until he got on the track. * * * When the front wheel of the buggy struck the rail of the railroad track * * * and made a little noise that caused said horse to look up at the end of the car, * * * and * * * he became frightened at the car" and ran away, throwing the plaintiff out and causing her to be injured.

Held:

(a) The petition was sufficient to withstand a general demurrer. *Louisville & Nashville R. Co. v. Barnwell*, 131 Ga. 791, 63 S. E. 501; 3 Elliott on Railroads, § 1264; 33 Cyc. 1153; *Whitnant v. Southern States Portland Cement Co.*, 2 Ga. App. 598, 605, 59 S. E. 920. See, also, *City of Rome v. Suddeth*, 116 Ga. 649, 42 S. E. 1032.

(b) The exception to the overruling of the special demurrer was not referred to in the brief of counsel for the plaintiff in error, and will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258; Dec. Dig. ¶1078(3); Railroads, Cent. Dig. § 1109; Dec. Dig. ¶344(4).]

Fish, C. J., and Hill, J., dissenting.

Error from Superior Court, Wheeler County; W. W. Sheppard, Judge.

Action by Myrtice Winham against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Gelger, of Mt. Vernon, for plaintiff in error. Eschol Graham, of McRae, and L. C. Underwood, of Mt. Vernon, for defendant in error.

ATKINSON, J. Judgment affirmed.

FISH, C. J., and HILL, J., dissent. The other Justices concur.

(146 Ga. 206)

LOUISVILLE & N. R. CO. v. STAFFORD. (No. 182.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. TRIAL ¶194(17)—CROSSING ACCIDENTS—INSTRUCTIONS.

In an action against a railroad company for damages from injuries to an automobile and to the person who was operating it, where it appeared that the injury occurred on a public crossing, and that at the time of the injury the plaintiff was driving his car in violation of the statute in regard to running automobiles over railroad crossings, and that the defendant was violating the statute and a city ordinance in regard to running trains over public crossings within the city, it was not erroneous to refuse to charge the jury, upon request: "If you find from the evidence in this case that the plaintiff did not have his automobile under control, or was operating it at a rate of speed greater than six miles per hour, at the time he approached the railroad crossing, then I charge you that in either event he would not be in the exercise of ordinary care for his safety, and would not be entitled to recover in this case, and your verdict would be for the defendant."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 466; Dec. Dig. ¶194(17).]

2. RAILROADS — 348(1) — CROSSING ACCIDENTS.

The evidence was sufficient to authorize the verdict for the plaintiff.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138, 1140, 1141; Dec. Dig. 348(1).]

Fish, C. J., and Beck, J., dissenting.

Error from Superior Court, Cherokee County; H. L. Patterson, Judge.

Action by I. S. Stafford against the Louisville & Nashville Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Stafford brought suit against the Louisville & Nashville Railroad Company, for damages on account of injuries to his person and to his automobile, caused by a collision at a public street crossing in Canton, Ga. The petition alleged that the crossing was at street grade in a very populous section of that city, and was used constantly by pedestrians as well as drivers of vehicles. On the morning of the 11th of May, 1914, as the plaintiff was just upon and attempting to go over this crossing, the defendant's passenger train, without warning or notice, struck his automobile, causing the injuries. He alleged the train was then running at the rate of 30 to 40 miles per hour, in violation of the laws of Georgia, and the ordinances of the city of Canton; that it was the duty of the defendant to have its train under control, and not to run at a greater rate of speed than 5 miles per hour, and that its servants should have warned the plaintiff of the approach of the train, by tolling of bell or by other means, and that they were negligent in failing to do either. On the trial the plaintiff testified, among other things, as follows:

"As I approached the crossing I was running the machine from 8 to 10 miles per hour. I didn't have any notice or warning of the approach of any train, and there wasn't any ringing of the bell, or sounding of a gong given as the train approached the crossing, and as I approached it. In approaching the crossing coming back into Canton, there are houses and trees built up there near the track, and it cuts the view off from seeing the train until you get in from 15 to 18 feet of the track. * * * I was in 15 to 18 feet of the track when I first saw the train, and when I saw it I put on my brakes and turned my car to the right, to keep from going between the rails. I thought by turning to the right, I would turn sideways to the track while I was stopping, and possibly he would miss me, in turning while I was stopping. When I saw the train it was making from 25 to 30 miles per hour, and he was giving no signal in the ringing of the bell after I came in sight of the train. I put my brakes on and stopped the car in an effort to keep the train from hitting me and the automobile. My brakes and car were in good working order. I turned the car to the right. I could not have gone on across and kept it from hitting me, because I would have been just between the rails. * * * When I saw the train, I was in 15 to 18 feet of the track, going between 8 and 10 miles. The train was making between 25 and 30 miles. * * * There is a slight grade upon the railroad crossing—going to the crossing. * * *

On a slightly upgrade such as that was there, I could stop the car on a rise in 25 or 30 feet. No, I would not have to run 25 or 30 feet at a 10-mile speed to stop the car. I could stop in 15 feet. I don't think I could stop it in 10 feet. I could stop in 5 or 6 feet, running 5 miles per hour. Running 6 miles per hour on the same grade, I suppose it would be about the same. * * * I was running about 10 or 12 miles that morning. Eight or 10 miles was what I was running. I don't think I was running over 10 miles at the outside. Ten miles per hour is a slow speed for a Ford. * * * When I got in a distance of from 15 to 18 feet of the track, I saw this train coming. The train was about 50 feet away at that time. The engine was in some 50 feet of me when I first saw it. After I slammed on the brakes and stopped the car, and made the turn, the engine was some 12 or 15 feet to my position. * * * I heard some ladies hollering before I got up to where I saw this train. I didn't know that they were calling my attention to the fact that the train was approaching."

The jury returned a verdict for the plaintiff. The defendant made a motion for new trial, and excepted to a judgment overruling the motion. Other facts sufficiently appear in the opinion.

E. W. Coleman, of Canton, and D. W. Blair, of Marietta, for plaintiff in error. Howell Brooke, of Canton, and N. A. Morris and Geo. D. Anderson, both of Marietta, for defendant in error.

ATKINSON, J. [1] 1. Error is assigned on a refusal to charge the jury thus:

"If you find from the evidence in this case that the plaintiff did not have his automobile under control, or was operating it at a rate of speed greater than six miles per hour, at the time he approached the railroad crossing, then I charge you that in either event he would not be in the exercise of ordinary care for his safety, and would not be entitled to recover in this case, and your verdict would be for the defendant."

A person cannot recover damages from a railroad company for injury done to himself or his property: (a) When the injury is done by his consent or is caused by his own negligence (Civil Code, § 2781); (b) where after the negligence of the railroad company commenced and was apparent, or the circumstances were such that an ordinarily prudent person would have reason to apprehend its existence, the plaintiff by the exercise of ordinary care could have avoided the consequences to himself of the defendant's negligence (Civil Code, § 4426; *W. & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306, 54 L. R. A. 802; *Williams v. Southern Ry. Co.*, 126 Ga. 710, 55 S. E. 948). Except as just indicated, the plaintiff can recover for injury done by the negligence of the railroad company, notwithstanding his own negligence, in some degree less than that of the defendant, may have contributed to cause the injury; in which case the plaintiff's negligence goes merely in reduction of damages. Civil Code, §§ 2781, 4426; *Americus, etc., R. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105. The request to charge does not properly apply.

these principles to the facts of the case. The railroad company might be negligent per se in violating the city ordinance and the statute in regard to running trains over public crossings, and the plaintiff might be negligent per se in violating the statute in regard to running automobiles while approaching and crossing railroad tracks; but it would not necessarily follow that the negligence of the plaintiff would be the proximate cause of the injury, or that it would be as great as that of the defendant, or that the plaintiff by the exercise of ordinary care could have avoided the consequence of the defendant's negligence after it commenced or became apparent, or the circumstances would have afforded reason to apprehend its existence. The question of negligence and the degree of negligence of the respective parties would be for the jury under the particular facts. The railroad company could be guilty of negligence per se, under the city ordinance, in failing to toll the bell and in running its train over the crossing at a speed slightly over 5 miles per hour; but the jury could say that it would be guilty of a greater degree of negligence by failing to toll the bell, and in running the train over the crossing at 25 or 30 miles per hour. And the plaintiff would be guilty of negligence per se in approaching the crossing at a greater rate of speed than the statute prescribed, but the degree of his negligence would in all cases depend on the circumstances. If there was no train in the vicinity, no danger from disobeying the statute would exist. If not otherwise negligent, his negligence would consist in disobeying the statute. As the circumstances might enhance the danger his negligence would increase; but whether it should bar a recovery under the circumstances must be left to the jury. So also the time when the negligence of the defendant came into existence and was apparent or should have been apprehended, and whether after it became so the plaintiff by the exercise of ordinary care could have avoided the consequences thereof to himself, were questions for the jury. The evidence reported in the statement of facts, concerning the circumstances in which the injury was committed, was not sufficient, under the application of the foregoing principles, to take the case from the jury. As the requested charge, if given, would have invaded the province of the jury, it was properly refused.

[2] 2. The evidence was sufficient to support the verdict.

Judgment affirmed. All the Justices concur, except FISH, C. J., and BECK, J., dissenting.

BECK, J. (dissenting). The plaintiff was violating a criminal statute at the time of the injury received by him, and his violation of the statute was the efficient cause of the injury. The great weight of authority is

against his right to recover under this state of facts, although the defendant may have been guilty of violating the statute in reference to crossings.

FISH, C. J., concurs in the dissent.

(146 Ga. 257)

ROBINSON v. BROWN, Governor. (No. 166.)
(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. BAIL \S 77(2)—FORFEITURE—TIME.

Where a criminal recognizance was forfeited at one term, and a scire facias was issued and made returnable to a later term and was duly served before that term, and when at the term to which it was returnable the case against the principal was called, and upon his failure to appear forfeiture absolute was taken, such forfeiture was not premature.

[Ed. Note.—For other cases, see Bail, Cent. Dig. \S 341-349, 403; Dec. Dig. \S 77(2).]

2. BAIL \S 77(1)—FORFEITURE—WHAT LAW GOVERNS.

The fact that the case was not entered upon any calendar and that upon the appearance day of the term (which in the civil division of the court was subsequent to the day upon which the forfeiture was had) the case was not marked in default does not affect the ruling just stated. Procedure in the matter of forfeiting criminal recognizances is controlled by the law contained in sections 960, 961, and 962 of Penal Code 1910; and the law which controls procedure in other civil suits, contained in sections 5653, 5654, and 5655 of the Civil Code 1910, is not applicable to the forfeiture of a criminal bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. \S 335-340, 379; Dec. Dig. \S 77(1).]

Error from Superior Court, Fulton County; Hill, Judge.

Scire facias by J. M. Brown, Governor, against J. M. Robinson. Judgment for plaintiff, and defendant brings error. Affirmed.

C. G. Battle, Morris Macks, and S. A. Massell, all of Atlanta, for plaintiff in error. Hugh M. Dorsey, Sol. Gen., E. A. Stephens, and J. Walter Le Craw, all of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 260)

KENDALL et al. v. PARKER et al. (No. 168.)
(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. EXEMPTIONS \S 123—SCHEDULE—VALIDITY.

A debtor seeking to take the benefit of the exemption commonly called the statutory or short homestead, "shall make out a schedule of the property claimed to be exempt, and return the same to the ordinary of the county." Civ. Code 1910, \S 3416, 3417. A schedule of property so returned to the ordinary must be of particular property falling within the classes specified in the statute. A schedule which purports to be an exemption, wherein no effort is made to specify any particular property as exempt, but setting forth an exact copy of the entire statute contained in Civ. Code 1910, \S 3416, embracing all of the various classes of property

which may be included in a schedule as exempt from levy and sale, is void.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 147; Dec. Dig. ¶123.]

2. EXEMPTIONS ¶123 — SCHEDULE — EFFECT OF VOID SCHEDULE.

Such void schedule may be disregarded by an officer, and the property therein set forth be levied on. *Piedmont Nat. B. & L. Ass'n v. Bryant*, 115 Ga. 417, 41 S. E. 661; *Marcrum v. Washington*, 109 Ga. 296, 34 S. E. 585.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 147; Dec. Dig. ¶123.]

3. SHERIFFS AND CONSTABLES ¶168(1) — WRONGFUL LEVY — ACTION FOR DAMAGES — PLEADING — SCHEDULE OF EXEMPTIONS.

Under the foregoing rulings, the court did not err in sustaining a general demurrer to a petition seeking to recover damages against a levying officer and the sureties on his bond, for levying on and selling personalty of the character which could be claimed under a proper schedule as exempt under section 3416 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 398, 399; Dec. Dig. ¶168(1).]

4. AMENDMENT TO PETITION.

If the amendment to the petition, alleging that the schedule had been signed by the head of the family, and setting forth a certified copy of the schedule as it appeared of record in the ordinary's office, had been allowed, the petition would not then have set forth a cause of action.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by V. H. Kendall and others against L. F. Parker and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Mahaffey & Mahaffey, of Jefferson, and Alex W. Stephens, of Atlanta, for plaintiffs in error. Gober & Jackson and W. I. Heyward, all of Atlanta, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 245)

BATTLE v. HOLMES. (No. 154.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. NEW TRIAL ¶18 — GROUNDS — REFUSAL TO STRIKE ANSWER.

A refusal to strike the answer of the defendant is no proper ground of a motion for a new trial. *Hawkins v. Studdard*, 132 Ga. 265, 63 S. E. 852, 131 Am. St. Rep. 190; *Eldorado Jewelry Co. v. Hitchcock*, 136 Ga. 22, 70 S. E. 6; *Crawford v. Wilson*, 142 Ga. 734, 83 S. E. 667.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29; Dec. Dig. ¶18.]

2. TRIAL ¶85 — RECEPTION OF EVIDENCE — OBJECTION.

"An assignment of error upon the admission of a given portion of the testimony of a witness is not well taken when it appears that the excerpt was objected to in its entirety and some material portion of it was admissible." *Higgs v. State*, 145 Ga. 415.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222, 223-225; Dec. Dig. ¶85.]

3. SALES ¶92 — RETURN OF PROPERTY — EXECUTED AGREEMENT — STOPPEL.

Where after the sale of personal property the vendor agrees to take it back, and in pursuance of such agreement receives the property from the vendee, the agreement having been executed, the vendor cannot thereafter claim that it was invalid for the want of consideration. There was no error in refusing the request to charge the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 257, 259; Dec. Dig. ¶92.]

4. VERDICT APPROVED.

Though conflicting, the evidence was sufficient to support the verdict for the defendant.

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by J. J. Battle against James Holmes. Judgment for defendant, and plaintiff brings error. Affirmed.

T. H. Parker, of Moultrie, for plaintiff in error. W. A. Covington and Jas. Humphreys, both of Moultrie, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 157)

BOWEN v. SMITH-HALL GROCERY CO. (No. 106.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ¶231(3) — REVIEW — SUFFICIENCY OF OBJECTIONS BELOW.

An objection to evidence as incompetent is not sufficiently specific to avail in the reviewing court. To make such an objection available here, the grounds upon which counsel in the court below claimed that the evidence was incompetent should have been stated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ¶231(3); Trial, Cent. Dig. §§ 194, 195.]

2. MUNICIPAL CORPORATIONS ¶822(4) — ACTIONS — CARE.

The court erred in charging the jury, in substance, that if the defendants did not use ordinary care and the plaintiff did not, then the plaintiff could not recover. This charge should have been qualified by limiting the effect of the plaintiff's failure to use ordinary care to some particular fact causing or contributing to the happening which resulted in the plaintiff's injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1761; Dec. Dig. ¶822(4).]

3. MUNICIPAL CORPORATIONS ¶808(7) — INJURIES — VIOLATION OF ORDINANCE.

The ordinance set out in the petition appears to have been a sanitary measure; and, so considered, its violation would not be negligence per se as to persons driving along the highway, though such violation might be negligence as a matter of fact relatively to the plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1691; Dec. Dig. ¶808(7).]

4. NEW TRIAL ¶128(1) — MOTION FOR — GROUNDS.

Grounds of a motion for a new trial should be complete in themselves; and when a particular ground is under consideration, reference to

other grounds should not be required in order to understand the assignments of error.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 257; Dec. Dig. ¶128(1).]

5. TRIAL ¶193(1)—PROVINCE OF COURT—OPINION.

An expression or intimation of opinion by the trial judge upon the facts of the case is error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 436; Dec. Dig. ¶198(1).]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Grady Bowen against the Smith-Hall Grocery Company. There was a judgment for defendants, and plaintiff brings error. Reversed.

Rosser & Shaw, of La Fayette, M. C. Tarter, of Dalton, and W. M. Henry, of Rome, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, for defendants in error.

BECK, J. Grady Bowen brought suit for damages against the Smith-Hall Grocery Company, a partnership doing business in the city of Dalton. The petition as amended contained, among other allegations, the following: 'The defendants' storehouse and place of business fronts on Hamilton street, the principal business street of the city, upon which at all times of the day there is a large amount of travel by pedestrians and vehicles. At the time of the injury complained of there was in force in the city the following ordinance:

"The proprietor of each business house must keep a covered garbage can outside of his place of business, in which must be placed all refuse, garbage, and trash from said place of business, to be called for by the proper city officers."

On the day of the injury the defendants, through their employes, placed upon and near the street and sidewalk in front of their place of business a large amount of trash and loose sheets of paper, without putting it in a receptacle or confining it in any way. The sheets of paper were light and were naturally liable to be blown about the street by even a slight breeze, and naturally tended to excite and frighten even quiet and steady horses. The plaintiff, who was a capable driver, was driving two reasonably well broken, steady, and roadworthy horses along the streets. The wind blew some of the paper on the horses and against their legs, which frightened them and caused them to run away, overturning the vehicle, breaking the tongue out of it, and causing the plaintiff to be violently thrown to the ground, to his serious personal injury. He alleged that the violation of the city ordinance was negligence per se on the part of the defendants; but, without regard to the ordinance, that they were negligent in placing the trash and paper where it was deposited.

The defendants demurred to the petition, upon several grounds. The questions made by the demurrer were ruled adversely to the

plaintiff upon a former trial in the court below, and upon writ of error the judgment of the lower court was reversed. *Bowen v. Smith-Hall Grocery Co.*, 141 Ga. 721, 82 S. E. 23, L. R. A. 1915D, 617. On a subsequent trial the verdict was against the plaintiff; and his motion for a new trial was overruled.

[1] 1. An objection to evidence as incompetent is not sufficiently specific to avail in the reviewing court. To make such an objection available here, the grounds upon which counsel in the court below claimed that the evidence was incompetent should have been stated. And so, where evidence was objected to as irrelevant and incompetent, and the court admitted the evidence, this ruling will not be reversed if the evidence was not irrelevant; and this court will not go further and consider the question as to whether or not the evidence was incompetent for any other reason than that of the alleged irrelevancy.

Several other grounds of the motion for a new trial complained of the admission of evidence. In some of them the movant failed to state the grounds of objection made at the time the evidence was offered; in others the objections were stated in such a confused manner that it is impossible to ascertain definitely what specific objections were raised to the testimony complained of; and consequently no ruling is made in reference to the evidence contained in the grounds which are defective in the respects just indicated.

[2] 2. Complaint is made of the following charge of the court:

"Now, if the defendants in this case used ordinary care, then the plaintiff cannot recover; if they did not use ordinary care, and the plaintiff did not, then he cannot recover; but if they did not use ordinary care, and the plaintiff did use ordinary care, and could not by the exercise of ordinary care have prevented the injury to himself, he can recover."

The court stated the law too strongly in favor of the defendants in charging the jury that:

"If they did not use ordinary care, and the plaintiff did not, then he cannot recover."

This charge was liable to be understood by the jury as instructing them that if the plaintiff was negligent in any respect he could not recover. There was some evidence that the pole of the buggy to which the horses were harnessed was defective, and that the plaintiff knew this; and the defendants introduced evidence to show that the injuries were caused by the plaintiff's having this defective pole, and that if he had bought and substituted a sound pole for the old and defective one, the occurrence upon which the suit is based would not have taken place. That was a question for the jury. The jury might have thought that the plaintiff was negligent and did not exercise ordinary care in the matter of replacing the old pole with a new one, but in view of all the evidence they might have thought that the failure to

substitute a new pole was not the cause of the overturning of the buggy and of the consequent injuries to the plaintiff, and that it did not even contribute to this happening; and yet, under the charge last quoted, they were instructed in general terms that if the plaintiff did not use ordinary care he could not recover, although the defendants may have been negligent in the respects alleged in the petition. The charge as to the effect of the lack of ordinary care upon the part of the plaintiff should have been qualified by stating that if the plaintiff did not use ordinary care and this failure to use ordinary care was the cause of the injuries, then he could not recover. The effect of the failure on the part of the plaintiff to use ordinary care should have been confined to those things which caused or contributed to the happening which resulted in the injury.

[3] 3. The ordinance set out in the petition appears to have been a sanitary measure; and so considered, its violation would not be negligence per se as to persons driving along the highway, though such violation might be negligence as a matter of fact relatively to the plaintiff. *Bowen v. Smith-Hall Grocery Co.*, supra.

[4] 4. The exceptions to the charge complained of in the fifth ground of the amended motion for a new trial were numerous and elaborate, and some of them vague and indefinite. We have sustained one of the exceptions, and held that giving the charge quoted was error. In several of the grounds of the motion assigning error upon excerpts from the charge, in addition to the grounds of error specifically stated, error is assigned in the following language: "This charge was error for the reasons stated in ground 5." While the specific complaint against the charge in each of these several grounds was considered, we will not return to ground 5 of the motion to ascertain what were the exceptions to the charge set forth there. Each ground of the motion should be complete in itself, and we should not be referred to other grounds to see what questions were there raised. And this criticism upon the manner of making exceptions is especially pertinent here, as it appears that some of the exceptions to the charge set forth in ground 5 of the motion could have no possible relevancy to those other grounds wherein we are referred to a consideration of the exceptions in the fifth ground.

[6] 5. The following charge of the court is also excepted to:

"I charge you further that these defendants being merchants, as the proof shows uncontradicted, they had the right to use and did use paper in the transaction of their business, as all other merchants use of a like kind."

The last clause of this instruction seems to be an expression of opinion upon the facts of the case, and as such was error.

While certain other portions of the charge

were not entirely accurate, they were not, for any reasons stated in the assignments of error, cause for the grant of a new trial.

Judgment reversed. All the Justices concur.

(146 Ga. 252)

AIKEN v. DAVIDSON. (No. 162.)

(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS §182, 188, 193—ALLOWANCE TO WIDOW—PRIORITY—DETERMINATION OF CLAIM—EFFECT OF SEPARATION.

"Upon the death of any person testate or intestate, leaving an estate solvent or insolvent, and leaving a widow, or a widow and minor child or children, or minor child or children only, it shall be the duty of the ordinary, on the application of the widow, or the guardian of the child or children, or any other person in their behalf, on notice to the representative of the estate (if there is one, and if none, without notice), to appoint five discreet appraisers; and it shall be the duty of such appraisers, or a majority of them, to set apart and assign to such widow and children, or children only, either in property or money, a sufficiency from the estate for their support and maintenance for the space of twelve months from the date of administration, in case there be administration on the estate, to be estimated according to the circumstances and standing of the family previously to the death of the testator or intestate, and keeping in view also the solvency of the estate." Civ. Code 1910, § 4041.

(a) The year's support when allowed is to be preferred before all other debts against the estate, including burial expenses and expenses of the last illness. Civ. Code 1910, §§ 4000, 4041.

(b) Where appraisers have made their return setting apart specified property for the widow, and a caveat is filed by a creditor, the solvency or insolvency of the estate may properly be taken into consideration. *Mulherin v. Kennedy*, 120 Ga. 1080 (1), 48 S. E. 437.

(c) The fact that at the time of the death of the decedent his wife had for a number of years been living in a state of separation from him would not bar her as a widow from claiming the benefit of the statute allowing a year's support. *Smith v. Smith*, 112 Ga. 351 (2), 37 S. E. 407.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 651, 686-693, 698-700, 708-712; Dec. Dig. §§ 182, 188, 193.]

2. APPLICATION FOR YEAR'S SUPPORT — MOTION TO STRIKE GROUNDS OF CAVEAT DENIED.

Applying the rulings announced in the preceding notes, there was no error in refusing to sustain the motion to strike certain grounds of a caveat to the return of the appraisers.

3. NEW TRIAL NOT REQUIRED.

Some of the grounds of the motion for a new trial were not approved by the trial judge; others were too indefinite to present any question for decision. None of the remaining grounds show error requiring the grant of a new trial.

4. SUFFICIENCY OF EVIDENCE — REFUSAL OF NEW TRIAL NOT ERRONEOUS.

The verdict finding for the applicant a sum less than that set apart by the appraisers was authorized by the evidence. The refusal to grant a new trial was not erroneous.

Error from Superior Court, Jasper County; J. B. Park, Judge.

Application by Virginia Aiken for allow-

ance for support from decedent's estate, and B. N. Davidson files a caveat to the return of the appraisers. From the judgment, the applicant brings error. Affirmed.

W. S. Florence, of Monticello, and E. H. George, of Madison, for plaintiff in error. A. S. Thurman and Greene F. Johnson, both of Monticello, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 218)

RICHTER v. CHATHAM COUNTY et al.
(No. 137.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. COUNTIES \S 177 — COUNTY BONDS — ISSUANCE.

A county may issue bonds to be paid for with funds derived from public taxation, and procure a judgment of the court confirming and validating the same only when the Constitution and laws of the state have been fully complied with.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 268; Dec. Dig. \S 177.]

2. CONSTITUTIONAL LAW \S 63(3) — COUNTIES \S 178 — DELEGATION OF LEGISLATIVE AUTHORITY — STATUTE.

The act of the Legislature approved August 11, 1915 (Laws 1915, p. 54), authorizing the county officers of Chatham county to establish a system of registration for that county, which system alone was considered by the court in arriving at the number of qualified voters, is unconstitutional because it is a delegation of legislative authority.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 110-112, 114; Dec. Dig. \S 63(3); Counties, Cent. Dig. \S 269-273; Dec. Dig. \S 178.]

3. COUNTIES \S 183(4) — BONDS — VALIDITY.

Where there is no legal evidence from which a court can determine whether two-thirds of the qualified voters have given their assent to the incurring of a debt, for which it is proposed to issue bonds, a judgment confirming and validating such proposed bonds is unauthorized.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 281; Dec. Dig. \S 183(4).]

Atkinson, J., dissenting.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Petition by the State by Walter C. Hart-ridge, Solicitor General, to validate bonds of the County of Chatham, and George H. Richter intervened and demurred to the petition. The demurrer was overruled, the bond issue validated, and intervener brings error. Reversed.

On October 2, 1915, a petition was filed in the superior court by the solicitor general, representing the state under the act of 1897 (Acts 1897, p. 82), for the purpose of validating certain bonds of the county of Chatham, voted upon in an election held on September 21, 1915. On October 6, 1915, George H. Richter, a citizen of Chatham county, became a party to the proceeding, and demurred to the

petition. On October 15, 1915, Chatham county filed its answer to the petition. Subject to the demurrer, Richter filed his answer to the answer of Chatham county, denying the allegations therein contained, and objecting specifically to the validation of \$400,000 of bonds for school purposes. He also filed an amendment to his answer in which he specifically objected to the validation of \$50,000 of bonds for a reformatory building. On October 25, 1915, Richter also demurred to the first paragraph of the sixteenth paragraph of the answer of Chatham county. Upon the hearing on October 29, 1915, Richter further demurred to paragraphs 2, 3, and 4 of the petition of the state. The presiding judge overruled both of the demurrers of Richter, whereupon he filed his answer denying paragraphs 2, 3, and 4 of the petition of the state. The court also overruled the demurrer of Richter to the first paragraph of the sixteenth paragraph of the answer of Chatham county. Chatham county, over objection, amended its answer. On January 15, 1916, an order was entered validating the entire issue of bonds. To this order Richter excepted.

Geo. H. Richter, of Savannah, in pro. per. Walter C. Hartridge, Sol. Gen., Wm. B. Stephens and Geo. T. Cann, all of Savannah, for defendants in error.

GILBERT, J. (after stating the facts as above).

[1] 1. A county may issue bonds to be paid for with funds derived from public taxation, and procure a judgment of the court confirming and validating the same only when the Constitution and laws of the state have been fully complied with. One requirement, among others, is that bonds of this character may only issue when two-thirds of the qualified voters have given their assent to incurring the debt. Park's Code, \S 6563. This assent must be expressed in an election held for that purpose under the rules provided by the General Assembly. Park's Code, \S 441.

"In determining the question whether or not two-thirds of the qualified voters * * * voted in favor of the issuance of said bonds, the tally sheets of the last general election held in said county * * * shall be taken as a correct enumeration of the qualified voters thereof." Civil Code 1910, \S 443.

[2] Where legislative provision has been made as to the registration of voters in such a bond election, and where such provision is applicable in a particular county, such registration will be considered rather than the general rule provided by Civ. Code 1910, \S 443. *Gracen v. Savannah*, 142 Ga. 143, 82 S. E. 453. It is insisted by the defendant in error that such provision has been made, and that the same is applicable in the county of Chatham. Acts 1915, p. 54. The first section of this act provides:

"That the county officers having charge of the levying of taxes for any county having a city

therein which now has or which may hereafter have a population of not less than 60,000, nor more than 150,000, may establish a system of registration whereby the electors of said county qualified to vote for members of the General Assembly may be registered in order to ascertain those voters entitled to vote at any election held to determine whether such county shall incur any new debt."

The second section of the act provides that the system of registration which it sought to authorize, when established, "shall control as to who are those entitled to vote at any such election." Numerous assaults were made upon the constitutionality of this statute. It is insisted by the plaintiff in error that this act is unconstitutional, among other reasons, because it is a delegation of legislative authority to county officers. In *Wayman v. Southard*, 10 Wheat. 1, 43, 6 L. Ed. 253, Chief Justice Marshall said:

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the Legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."

The defendant in error insists that the act in question does not constitute such a delegation of legislative authority as to bring it in conflict with the Constitution, and cites as authority for his contention the case of *Southern Ry. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, and also the case of *Early County v. Baker County*, 137 Ga. 126, 72 S. E. 905. The courts have expended much time and thought upon this subject, but the principle has nowhere been stated more clearly than by Mr. Justice Crawford in the case of *Georgia Railroad v. Smith*, 70 Ga. 694, in the following language:

"The difference between the power to pass a law and the power to adopt rules and regulations to carry into effect a law already passed, is apparent and strikingly great, and this we understand to be the distinction recognized by all the courts as the true rule in determining whether or not in such cases a legislative power is granted. The former would be unconstitutional, whilst the latter would not."

This language is quoted approvingly in *Southern Railway Co. v. Melton*, supra, by Mr. Justice Lumpkin, where an elaborate and instructive discussion of this whole subject will be found. The General Assembly in the act in question made no effort to legislate anything in regard to the system of registration proposed for Chatham county. It simply authorized the county officers to establish a system of registration. This was the grant of legislative authority, and is repugnant to the Constitution, which vests the legislative power of the state in the General Assembly. Article 3, § 1, par. 1, of the Constitution, Civil Code 1910, § 6410.

[3] Having held that the local system of registration was invalid, and it not appearing that the court had before it the tally sheets of the last general election held in said county, nor any other legal evidence of the num-

ber of registered voters, the judgment validating the bonds was unauthorized.

Judgment reversed. All the Justices concur, except ATKINSON, J., dissenting.

(146 Ga. 261)

BURKS v. LASSETER. (No. 169.)

(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

TRIAL \S 170 — DIRECTION OF VERDICT — INSUFFICIENT PLEAS.

The affirmative pleas failing to state a valid defense against the claim of the plaintiff for a breach of a contract, the court did not err in striking them upon demurrer. The pleas having been stricken, a verdict for the plaintiff necessarily followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 390-394; Dec. Dig. \S 170.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by J. T. Lasseter, Jr., against B. B. Burks. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Anderson & Rountree, of Atlanta, for plaintiff in error. Candler, Thomson & Hirsch, of Atlanta, for defendant in error.

BECK, J. Lasseter, after having sued out an attachment which was levied upon property of Burks and returned to the superior court, filed his declaration alleging the following in substance: He purchased a certain lot of land from Burks, made a cash payment of \$50, gave his promissory notes for the balance of the purchase money, and received from Burks a bond for title. These notes he afterward satisfied, and then he demanded of Burks a deed to the lot of land, but Burks failed and refused to make it. After the execution of the bond for title the plaintiff discovered that Burks was not the owner of the property therein described and never became the owner. The property, at the date of the bond for title, was owned by one Reese, subject to a bond for title which had been given by Reese to one Smith and one Plunkett, who gave their promissory notes for the land; and upon the failure to pay these notes suit had been brought by Reese against Smith and Plunkett, which resulted in a judgment against them; and after filing a deed to Smith and Plunkett, the property was levied upon as the property of Smith and Plunkett, sold at sheriff's sale, and bought in by Reese, the sheriff executing and delivering to Reese a deed to the property. In order to protect himself against loss the plaintiff was forced to buy in the property from Reese for the sum of \$938, after having first notified Burks of the claim of Reese and having demanded of Burks that he pay off and satisfy that claim, with which demand Burks refused to comply. Plaintiff had incurred certain expenses and attorney's fees.

The defendant filed an answer, admitting

most of the material allegations in the petition, but denying the allegation that the notes given by the plaintiff for the purchase money of the property had been paid in full. The defendant further filed certain affirmative pleas in substance as follows: The plaintiff knew at the time of the purchase of the property that Burks did not have title. The defendant had for value transferred the notes for the purchase money to Plunkett. He had bought the property from Smith and Plunkett and had taken their bond for title, conditioned to convey the property on payment of the balance of the purchase money, which was to be paid in certain stated annual payments. The plaintiff and Plunkett were partners in business at the time of the purchase of the property by plaintiff from defendant, and the offer to buy was made by plaintiff through Plunkett. Plunkett had urged defendant to make the sale to plaintiff upon the terms set forth in the bond for title, and had agreed that, if he would do so, Plunkett would take the notes made by the plaintiff to the defendant and cause them to be applied to the notes which the defendant had made to Smith, and that the plaintiff knew of this, as Plunkett had made the statements in his hearing. The plaintiff did not pay the notes at maturity, but after maturity; and if he had paid them at maturity Smith and Plunkett would have been able to pay Reese, and Reese would never have brought suit levied upon the land. The purchase price of the land which the plaintiff agreed to pay the defendant was more than the amount which the plaintiff paid to Reese in order to get a good title.

The court struck these pleas and directed a verdict for the plaintiff for \$938. We are of the opinion that the court correctly held that these pleas were demurrable. The knowledge of the plaintiff that Burks did not have title at the time of the sale was immaterial. He had a right to rely upon Burks' contract to execute a good and sufficient title; and when Burks failed to do so after the purchase money notes given by plaintiff were paid, this was a breach of contract for which the plaintiff could recover damages. Time was not of the essence of the contract as contained in the bond between Burks and the plaintiff; and if Burks sold and transferred to a third person the notes given by the plaintiff, and the plaintiff subsequently paid off and discharged these notes, although the transferee accepted a less amount than their face value in satisfaction of them, Burks could not complain of this. Nor were the promises of Plunkett as to the application of the payments of the notes binding upon the plaintiff. Although Plunkett may have been a partner of Lasseter in some other business, they were not partners in the purchase of the land; and as to the land transaction be-

tween Burks and the plaintiff Plunkett was a third party. The affirmative plea set up no valid defense against the claim of the plaintiff, and the court did not err in striking them upon demurrer. A verdict for the plaintiff necessarily followed. No question as to the measure of damages is properly raised by the assignments of error in the bill of exceptions; the only assignment being that the court erred in sustaining the demurrers to the affirmative pleas of the defendant, and that the court erred in directing and permitting said verdict to be rendered and said judgment to be entered, "to which action of the court in directing and permitting said verdict to be rendered and such judgment to be entered the defendant excepted, and now excepts and assigns the same as error, upon the ground that the same was contrary to law." No evidence is brought up in the record, and none is specified as necessary to the understanding of the errors assigned. And so, even if error were assigned upon the verdict upon the ground that an improper measure of damages had been applied in the case, this assignment could not be passed upon, in the absence of the evidence.

Judgment affirmed. All the Justices concur.

(146 Ga. 333)

YOUNG et al. v. HARRIS et al. (No. 197.)
(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

JUDGES ~~§~~46—DISQUALIFICATION—INTEREST.

An attorney whose contract with his client provides that he is to be paid a certain sum in all events, and a larger sum if the attorney's client is successful, has no such interest in the subject-matter of the litigation as to disqualify the judge, who is a brother of the attorney, from presiding in the cause.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 213; Dec. Dig. ~~§~~46.]

Hill, J., dissenting.

Error from Superior Court, Walker County; A. W. Fite, Judge.

Action by Don Harris and others against J. C. Young and others. There was a judgment for plaintiffs, and defendants bring error. Reversed.

Shattuck & Shattuck, Earl Jackson, and Paul D. Wright, all of La Fayette, and Barry Wright, of Rome, for plaintiffs in error. Wm. E. Mann, of Dalton, and R. T. Wright, of Chattanooga, Tenn., for defendants in error.

EVANS, P. J. On March 25, 1916, A. H. Neal and others, as citizens and taxpayers, for themselves and on behalf of other citizens and taxpayers, brought a petition to the superior court of Walker county against John C. Young and others, as commissioners of roads and revenues of Walker county, the city of La Fayette and the mayor and council thereof, the Little-Cleckler Construction

Company, the Horn-Brannon Company, and T. H. Payne & Co., as defendants, to enjoin the execution of certain contracts for the building of a courthouse. Petitioners asked that these contracts be declared illegal and be canceled, and that the board of roads and revenues be restrained from levying taxes for the purpose of carrying out the contracts, etc. Certain plaintiffs who joined in the case employed, with other counsel, R. T. Wright, Esq., and agreed to pay him a fee certain, and an additional fee in the event they prevailed on the trial of the case. This petition was presented to Hon. A. W. Fite, judge of the superior courts of the Cherokee circuit, who issued a rule to show cause why a temporary injunction should not be granted. In the rule nisi Judge Fite stated that he assumed jurisdiction on account of the disqualification of Judge Moses Wright of the Rome circuit. On the interlocutory hearing it was admitted that R. T. Wright, Esq., was a brother of Judge Moses Wright of the Rome circuit, and that he had contracted with his client to charge him \$50 if the plaintiffs lost their suit, and \$75 if they were successful. Judge Moses Wright is the judge of the superior courts of the Rome circuit, which embraces the county of Walker, the venue of the action. Judge Fite is the judge of the superior courts of an adjoining circuit. Under the statute, Judge Fite's authority to entertain jurisdiction in the case depends on Judge Wright's disqualification.

A judge is not disqualified to preside in a case because his brother is the attorney for one of the parties, and the size of his fee is dependent on his success in the case. There is no statute or canon of law which disqualifies a judge on the ground of relationship to the attorney of one of the parties to a cause. Such disqualification must result only when he has a pecuniary interest in the subject-matter of the litigation. This is made clear by Mr. Justice Cobb in the case of *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108. That case concerned the allowance of alimony to be paid by the husband to the wife, which included counsel fees. The wife's attorney, in the event she prevailed, would be allowed reasonable counsel fees, which fees would go directly to the attorney as a part of the sum decreed to be paid by the husband. In the opinion it is made plain that, having direct pecuniary interest in the res, the attorney's relation to the case was that of a quasi party. In the instant case the attorney has no interest in the res; he can recover nothing from the adversary party by virtue of his contract with his client, which is altogether outside of the subject-matter of the litigation. Such a contract gives the attorney no more interest in the litigation than if his contract were that his fee should be one sum should the trial occur at the first term, and a different sum should the trial take place at a later term. Were the rule otherwise, it

would be impossible for a judge to ever preside in a case where one of the attorneys is a kinsman within the fourth degree of consanguinity or affinity. The statute gives the attorney a lien for his fees in cases where the same are for a fixed amount. It is the client's recovery which furnishes the property against which the lien may be asserted. If the judge be disqualified because the attorney related to him contracts with his client that his fee is to be one sum if he loses and another if he wins, he would, by parity of reasoning, be also disqualified in every case when he is related to the attorney; because the attorney can only assert his statutory lien on property recovered in the suit. Judge Wright was not disqualified, and the entire proceeding before Judge Fite was unauthorized by law, and void as being *coram non judice*.

Judgment reversed. All the Justices concur except—

HILL, J. (dissenting). Was Judge Wright, of the Rome circuit, disqualified from presiding, under the facts of this case, so as to confer jurisdiction on Judge Fite, of the Cherokee circuit? The evidence on this point tended to show, in fact, it is stated in the bill of exceptions, that:

"It is admitted that R. T. Wright, attorney for plaintiffs, has a conditional fee in the case, being \$50 if plaintiffs lose, and \$75 if they win. He is a brother of Judge Moses Wright."

In the case of *Roberts v. Roberts*, 115 Ga. 259, 41 S. E. 616, 90 Am. St. Rep. 108, this court held:

"A judge who is related within the fourth degree of consanguinity or affinity to counsel for the applicant in an application for alimony in which an allowance for counsel fees is asked is disqualified from presiding in the case; and this is true notwithstanding counsel have a binding contract with the applicant which obligates her to pay them fees commensurate with their services, independently of whether the applicant for alimony and counsel fees is successful or not."

See *Shuford v. Shuford*, 141 Ga. 407, 81 S. E. 115; *State Mutual Insurance Co. v. Walton*, 142 Ga. 765, 83 S. E. 656; *King v. Thompson*, 59 Ga. 380(3); 23 Cyc. 585(2).

Section 4642 of the Civil Code of 1910 is as follows:

"No judge or justice of any court, no ordinary, justice of the peace, nor presiding officer of any inferior judicature or commission, can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor of which he has been of counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the consent of all the parties in interest: Provided, that in all cases in which the presiding judge of the superior court may have been employed as counsel before his appointment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless the judge decline so to do."

It is insisted that the disqualification contemplated by this law is where the judge is

related within the fourth degree of consanguinity or affinity to either party to the cause. In construing the word "party," as used in that Code section, Mr. Justice Cobb, in the opinion in the Roberts Case, asks this question:

"Should the word 'party,' in the section of the Code just referred to, be given the technical and narrow meaning of one who is a party to the record and absolutely bound by the judgment in the case? Or should that word be construed more liberally, and include any one who is peculiarly interested in the result of the suit, although not a party to the record, and not necessarily bound by the judgment therein, notwithstanding he would be benefited by the judgment if rendered in a particular way?"

And, after citing authorities from outside jurisdictions and showing that they are not uniform in construing the various statutes disqualifying a judge on account of relationship to a "party," some of them construing the word "party" to mean an actual party, and others giving the word a broader construction, he says:

"In the light of the rule which has been followed in this state with reference to a juror who is related to a person interested in the result of the suit, although not a party to the record, we think the proper construction to be placed upon the word 'party,' in the section of the Code which declares when a judge shall be disqualified, is the broad meaning which would include any one peculiarly interested in the result of the case, and not the narrow and technical meaning which would limit the rule to a person who was a party to the record. The reasons at the foundation of the rule which forbid a juror from sitting in a case where he is related to some one peculiarly interested in the result of the suit would also apply in the case of a judge who was in a similar situation. If one not a party to the record, but directly and peculiarly interested in the result of the cause, would be such a party thereto as to disqualify one of his kinsmen from being a juror, he would also be such a party as to disqualify his kinsmen from presiding as judge."

I think the principle ruled in the Roberts Case is applicable to the case at bar. While the two cases are not identical in their facts, yet the principle ruled, it seems to me, is applicable to both cases. It is insisted that the Roberts Case does not apply to one like the present, and that what is said by Judge Cobb in the opinion is not controlling here, for the reason that in that case (an alimony case) the fee of the related attorney was dependent on the result of the case. The writer fails to see any distinction of principle underlying the two cases. In the Roberts Case the fee of the attorney depended on the result of the case as decided by the judge. In the instant case (an application for injunction) the amount of the fee of the relative attorney depends on the result of the case under the decision of the judge. If the judge refuses the injunction, the attorney receives \$50. If he grants the injunction, the attorney receives \$75. It is not a question of what a given judge might or might not decide. It is a question of whether the fee of a relative who is employed in the case is de-

pendent upon the decision of the judge trying the case. If the decision in the Roberts Case and the argument upon which it is based is sound, it is equally sound in the instant case. And while I do not commend the practice of a judge of the superior court assuming jurisdiction in such case until the judge of the circuit in which the cause of action originated has first recused himself (for the reason that it leads to great confusion), yet the statute gives him that right; and if the statute is wrong, the Legislature of the state alone has the power to correct the evil. What was said in the case of Brantley v. Greer, 71 Ga. 11, to the effect that a judge who happens to be related within the fourth degree to an auditor is disqualified from awarding him costs in the case is admittedly obiter.

I think that Judge Wright was disqualified from presiding in the case, and that Judge Fite had jurisdiction.

(146 Ga. 338)

HARRIS et al. v. YOUNG et al. (No. 198.)
(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 350—WRIT OF ERROR—DECISIONS REVIEWABLE.

A "fast" writ of error will not lie to an order vacating a judgment granting a temporary injunction. *Stubbs v. McConnell*, 119 Ga. 21, 45 S. E. 710.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. \S 350.]

Error from Superior Court, Walker County; *Moses Wright, Judge.*

Action by Don Harris and others against J. C. Young, Commissioner, and others. There was a judgment vacating a temporary injunction, and the former bring error. Writ dismissed.

R. T. Wright, of Chattanooga, Tenn., and Wm. E. Mann, of Dalton, for plaintiffs in error. Shattuck & Shattuck, Paul D. Wright, and Earl Jackson, all of La Fayette, and Barry Wright, of Rome, for defendants in error.

HILL, J. This case having been prematurely brought to this court, the writ of error is dismissed. All the Justices concur.

(146 Ga. 290)

PRATT v. TOWN OF DECATUR. (No. 183.)
(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. RULINGS ON EVIDENCE.

The rulings of the court excluding and admitting evidence pending the trial were not erroneous for any of the reasons stated in the motion for a new trial.

2. CHARGE—INACCURACY—NEW TRIAL.

While there were certain inaccuracies in those portions of the charge to the jury com-

plained of in the motion, they were not of such character, in view of the entire record, as to require the grant of a new trial.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action between F. B. Pratt and the Town of Decatur. There was a judgment for the latter, and the former brings error. Affirmed.

Green, Tilson & McKinney, of Atlanta, for plaintiff in error. L. J. Steele, of Decatur, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 168)

HILL et al. v. LEWIS et al.
LEWIS et al. v. HILL et al.
(No. 112.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

JUDGMENT ~~405~~—MODIFICATION—GROUNDS.

Under the pleadings in this case and the facts shown, the defendant in error in the main bill of exceptions was not entitled to the reformation or remolding of the decree which had been rendered in a prior action between parties, of whom the parties to the present case are representatives.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 766, 767; Dec. Dig. ~~405~~.]

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Petition by J. T. Hill and another, administrators of J. J. Dennard, deceased, against J. A. Lewis, as administrator of the original defendant, H. B. Lewis, and in which others intervened. There was a judgment granting defendants some of the relief sought, and plaintiffs bring error, and defendants assign cross-errors. Reversed on the main bill of exceptions, and affirmed on the cross-bill.

J. T. Hill and J. W. Dennard, as administrators of J. J. Dennard, deceased, presented to the judge of the superior court of Pulaski county a motion or petition in writing, praying the court for an order or decree placing petitioners in possession of certain land, and that the equity of defendants in the land be forever barred. An order nisi was granted. The defendant H. B. Lewis having died, his administrator, J. A. Lewis, presented a response to this petition, and asked that the decree upon which the petitioners based their application for the writ of possession be remolded. The decree just referred to had been rendered in an action wherein J. J. Dennard was plaintiff and H. B. Lewis and others were defendants. The essential facts appearing in the record of that suit are as follows: J. J. Dennard proceeded against four named defendants as intruders upon two lots of land, aggregating 405 acres, under Civil Code, § 5380. The defendants tendered the counter affidavit provided for by

that section, and remained in possession of the land. The plaintiff then filed his petition to the superior court, praying that he recover possession and mesne profits, that the land be decreed to be in him, and that a receiver be appointed to take charge of the land and rent it pending the suit. He described the recorded deeds under which he claimed title, and alleged that he had held exclusive, uninterrupted, and peaceable possession for over 20 years; that the defendants entered without his consent, without any title; that they were insolvent; and that, if they were permitted so to remain, he would be damaged without redress, the rental value of the land being \$400 a year, etc.

The defendants answered, in effect, that they held possession as tenants under H. B. Lewis, who they were advised and believed was the true owner. They prayed that he be allowed to intervene and be made a party defendant; and they vouched him into court to defend his title. He was allowed by order of court so to intervene; and his answer was, in substance, as follows: About September 7, 1889, the plaintiff sold the land to intervenor and his father, J. W. Lewis, for \$1,500, taking their notes for the price, and executing and delivering to them his bond for title. He put them in possession of the land, and thereafter they held adverse, continuous, peaceable, public, and uninterrupted possession until the death of J. W. Lewis in July, 1911, since which date intervenor has so held. Upon the faith of the contract of sale and purchase they expended, with plaintiff's knowledge, labor, and money in clearing the land and erecting permanent improvements thereon. After they had done this, the plaintiff by fraudulent means (described) obtained from J. W. Lewis the bond for title and destroyed it.

Plaintiff was notified that intervenor insisted upon the sale and would resist the effort to retake the land, whereupon plaintiff agreed that he would not insist upon a rescission of the contract but would make good and sufficient title to the land upon the payment of \$1,605, and granted time to the intervenor, upon terms, to make payment. A verdict was rendered and a decree was entered thereon that the plaintiff be required to convey the land to intervenor upon payment of \$1,733.40; and thereupon the following decree was entered:

"It is adjudged and decreed by the court that he, said J. J. Dennard, be, and he is hereby, required to specifically perform his said contract with the said H. B. Lewis upon the payment to him by the said H. B. Lewis of the sum of \$1,733.40, the purchase money of said lands within 60 days from this date; and upon the payment of said sum of money to the said J. J. Dennard by the said H. B. Lewis it is considered, ordered, and adjudged by the court that the title to said two lots of land, to wit, lots Nos. 2 and 9 in the Eighth district of Pulaski county, Ga., vest in and become the property of the said H. B. Lewis.

"It is further ordered and decreed that in the event the plaintiff, J. J. Dennard, prosecutes a motion for new trial in said case, that then and in that event the said H. B. Lewis shall have 60 days after said motion for new trial is finally disposed of within which to pay said purchase money to the said J. J. Dennard."

The plaintiff, Dennard, made a motion for a new trial, and, the motion being overruled, the case was brought by a writ of error to this court and the judgment of the lower court was affirmed. This left the decree recited above, which was in favor of the intervenor H. B. Lewis, to stand. Upon considering the petition or application for a writ of possession by the administrators of J. J. Dennard and the response of the administrator cum testamentum annexo of H. B. Lewis, the court granted the following order:

"After consideration of all the pleadings in this case, it is ordered, considered, and adjudged by the court as follows:

"(1) That the defendant J. A. Lewis, administrator of the estate of H. B. Lewis, deceased, have until the 15th day of November, 1915, to pay to plaintiffs, J. T. Hill and J. W. Dennard, administrators of the estate of J. J. Dennard, deceased, the sum of \$1,733.40, and interest thereon from 14th day of December, 1914, at 7 per cent. per annum, and upon the payment of such sums on or before said date, November 15, 1915, the title to said lots of land Nos. 2 and 9 in the Eighth district of Pulaski county vest in and become the property of the estate of the said H. B. Lewis, deceased, but in the event of a failure to pay said sums of money as above provided and within the time provided, all the rights of his administrator in and to said two lots of land be and same is forever foreclosed and barred, and the sheriff of said county is authorized and instructed to put the plaintiffs, J. T. Hill and J. W. Dennard, administrators as aforesaid, in possession of said two lots of land in controversy.

"(2) It further appearing that this suit was originally against John Lewis, Hardy Lewis, Green Lewis and Andrew Lewis, and that they were all parties to this proceeding, having been served and having appeared at the trial of said case, and having disclaimed said two lots of land in question, claiming that H. B. Lewis was the owner of said lands and their landlord, and they or some of them being now in possession of said land under H. B. Lewis or otherwise, it is ordered that in the event of the failure of the said J. A. Lewis, administrator of H. B. Lewis, to pay said sums of money as provided in the first section of this decree, and within the time provided, the clerk of this court issue a writ of possession directing the sheriff of Pulaski county to put the plaintiffs, J. T. Hill and J. W. Dennard, administrators of the estate of J. J. Dennard, in possession of said lands and ousting all of said defendants, J. A. Lewis, administrator of the estate of H. B. Lewis, John Lewis, Green Lewis, Hardy Lewis, and Andrew Lewis, therefrom.

"(4) That in the event J. A. Lewis, administrator of H. B. Lewis, pays said sums of money as provided for in paragraph 1 of this order to J. T. Hill et al., the clerk of this court is ordered to issue a writ of possession in favor of said J. A. Lewis, administrator, and against all the other defendants, John, Green, Hardy, and Andrew Lewis, directing the sheriff of said county to put the said J. A. Lewis, administrator, in possession of said two lots of land."

To this judgment of the court J. T. Hill and J. W. Dennard, administrators, etc., excepted.

Hall & Grice and Chas. J. Bloch, all of Macon, for plaintiffs in error. John P. Ross, of Macon, and H. E. Coates, of Hawkinsville, for defendants in error.

BECK, J. (after stating the facts as above). We are of the opinion that the court erred in granting the order which, in effect, remolded the decree rendered by the jury in the original action brought by J. J. Dennard, wherein H. B. Lewis intervened and became a party defendant. In his intervention he made allegations appropriate to a petition for a specific performance, and among other prayers there was one for specific performance, and the jury in the case returned a verdict sustaining his contentions made in the intervention; and thereupon a decree was taken. If that decree was not authorized by the verdict in the case, or if it imposed conditions which the verdict did not authorize the judge to write into the decree, the defendant should have excepted to the decree in time upon that ground. But he did not. The verdict was in his favor, and he stood upon that and upon a decree based upon the verdict. The plaintiff in the original action, J. J. Dennard, was dissatisfied with the verdict and the decree, made a motion for a new trial and sought to have them set aside, excepted to the judgment of the lower court refusing him a new trial, and brought the case to this court, where a judgment adverse to him was rendered, by which the judgment of the lower court in favor of H. B. Lewis was affirmed. And it was too late for Dennard's administrator, after the lapse of time fixed by the decree within which the purchase price of the land should be paid, to have that decree remolded so as to give him further time. That decree conferred vested rights upon both the plaintiff and the defendant to the proceedings, and neither could set it aside upon petition in the nature of a bill of review without making a showing which would be necessary to sustain a petition in the nature of a bill of review. Though in response to the motion in this case improper conduct upon the part of the opposite parties is alleged, no fraudulent conduct is made to appear. No conduct of the opposite party, in the slightest tinged with fraud, is shown that occurred subsequently to the decree rendered and which the court undertook to remold. If the making of the deed referred to by J. J. Dennard subsequently to the sale of the lands to H. B. Lewis was fraudulent in its nature, that deed was recorded before the trial of the former case, and knowledge could have been had of its existence by the exercise of proper diligence. Whatever rights J. J. Dennard and H. B. Lewis may have had to the property in dispute and whatever their mutual obligations to the same, they were fixed by the decree rendered in that original suit and were merged in the decree. In the case of Cunningham v. Schley, 68 Ga. 105, it was said: by Google

"When a party to a contract seeks to enforce the same by bill for specific performance, and obtains a decree thereon, the contract is merged into the decree. Such contract and the decree founded upon it will not be set aside at the instance of the party who took it, on the ground that the defendants refuse to fully comply with it, and that on account of insolvency they cannot be compelled by execution to do so, as provided in the decree. Especially will such decree stand in the absence of any allegation of fraud, accident, or mistake, or that insolvency had occurred since it was rendered."

It follows from what is said above that the court erred in remolding the decree as prayed by the defendant in error and in enlarging the time in which the administrator of H. B. Lewis had to pay the money as a condition to the vesting of the title to said land in the estate of H. B. Lewis. On the contrary, the court should have granted the prayers of petitioners, the plaintiffs in error, for a writ of possession. The foregoing decision also decides the questions made in the cross-bill of exceptions adversely to the plaintiff in error in the cross-bill.

Judgment reversed on the main bill of exceptions and affirmed on the cross-bill. All the Justices concur.

(146 Ga. 173)

HILL et al. v. LEWIS et al. (No. 113.)
(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

MODIFICATION OF JUDGMENT.

Under the preceding case of Hill v. Lewis, 91 S. E. 40, the judgment of the court in this case was unauthorized.

Error from Superior Court, Pulaski County; J. L. Kent, Judge.

Action between J. T. Hill and others, administrators, and J. A. Lewis, administrator, and others. There was a judgment for the latter, and the former bring error. Reversed.

Hall & Grice and Chas. J. Bloch, all of Macon, for plaintiffs in error. John P. Ross, of Macon, and H. E. Coates, of Hawkinsville, for defendants in error.

BECK, J. Judgment reversed. All the Justices concur.

(146 Ga. 190)

JOHNSON v. STATE. (No. 121.)
(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1178—APPEAL—GROUND FOR NEW TRIAL—ABANDONMENT.

The first ground of the amendment to the motion for new trial is not referred to in the brief of counsel for plaintiff in error, and will therefore be considered as abandoned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.]

2. CRIMINAL LAW §695(6)—RECEPTION OF EVIDENCE—OBJECTION.

Where evidence is objected to in its entirety, some portion of which is admissible, such

objection is not well taken, though some of the evidence may be inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1637; Dec. Dig. § 695(6).]

3. WITNESSES §40(1)—COMPETENCY—AGE.

The mere fact that a witness is but 13 years of age is not, without more, ground to exclude his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 97; Dec. Dig. § 40(1).]

4. INSTRUCTION ON ALIBI.

The instruction complained of in the motion for new trial on the subject of alibi is in accord with the ruling made in the case of Harrison v. State, 83 Ga. 129(3), 9 S. E. 542, and is therefore not cause for new trial.

5. CRIMINAL LAW §954(5) — MOTION FOR NEW TRIAL—STATEMENT OF GROUNDS.

A ground of a motion for new trial in the following language: "Because the court erred in not charging the jury in this case, as requested by defendant's counsel in writing, on the law of 'manslaughter,'" is too general and indefinite to present any question for decision.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2366; Dec. Dig. § 954(5).]

6. MOTION FOR NEW TRIAL—AMENDMENT.

No ground of the amendment to the motion for new trial, not hereinbefore dealt with, is meritorious.

7. SUFFICIENCY OF EVIDENCE — DENIAL OF NEW TRIAL.

The verdict is supported by the evidence, and the court did not err in refusing to grant a new trial.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Son Johnson was convicted of crime, and brings error. Affirmed.

John R. Cooper, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 164)

FORD v. FORD. (No. 109.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. DIVORCE §130 — SUFFICIENCY OF EVIDENCE—CRUEL TREATMENT.

The evidence authorized the verdict granting a total divorce to the libellant, and the amount of permanent alimony awarded.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 442-445; Dec. Dig. § 130.]

2. TRIAL §193(2) — INSTRUCTION — EXPRESSION OF OPINION.

The statement of the court in his charge to the jury, and while stating the contentions of the plaintiff, that "the libellant asks for an allowance out of her husband's estate for her support, when you have divorced the two according to the prayers of the petition," is not objectionable on the ground that it contains an expression of opinion by the court to the effect that a divorce in favor of the plaintiff would, of course, be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 437; Dec. Dig. § 193(2).]

3. TRIAL §256(1)—INSTRUCTIONS—REQUEST.

The ground of the motion complaining of the court's failure to cover, in his charge to the jury, certain issues made by the defend-

ant's answer is without merit. If the defendant desired more particular instructions, he should have made a written request for them.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628, 633; Dec. Dig. § 256(1).]

Fish, C. J., dissenting.

(Additional Syllabus by Editorial Staff.)

4. DIVORCE. § 27(1) — GROUNDS — "CRUEL TREATMENT."

"Cruel treatment" as a ground of total or partial divorce within the meaning of Civ. Code 1910, § 2946, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62, 76, 81, 82; Dec. Dig. § 27(1).]

For other definitions, see Words and Phrases, First and Second Series, Cruelty.]

Error from Superior Court, Tift County; W. E. Thomas, Judge.

Action by Mrs. Ida Ford against Iverson L. Ford. Judgment for the plaintiff, and defendant brings error. Affirmed.

R. D. Smith, of Tifton, and R. S. Foy, of Sylvester, for plaintiff in error. Middlebrooks & Pennington and T. H. Burruss, Jr., all of Madison, J. S. Ridgill, of Tifton, and John W. Crenshaw, of Atlanta, for defendant in error.

BECK, J. Mrs. Ida Ford brought a libel for divorce against her husband, Iverson L. Ford. There was also a prayer for permanent alimony. The jury upon the trial returned a verdict granting a total divorce and awarding permanent alimony in the sum of \$7,500. The defendant made a motion for a new trial, which was overruled.

[1] 1. The plaintiff in error insists that the general grounds of his motion for a new trial should be sustained, and that the verdict should be set aside because of a lack of evidence to support it. With this contention we cannot agree. The libelant bases her suit and her right to a total divorce upon certain alleged acts of cruel treatment, and there was evidence submitted from which the jury were authorized to find that the allegations of cruel treatment were sustained. In case of cruel treatment by either husband or wife, the jury in their discretion may grant either a total or partial divorce. Civil Code, § 2946.

[4] "Cruel treatment," within the meaning of this section, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. *Stoner v. Stoner*, 134 Ga. 368, 67 S. E. 1030. In the case of *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, Candler, J., in a full discussion and clear analysis of the prior decisions of this court, defined the expression "cruel treatment," giving substantially the definition employed in the later case of *Stoner v. Stoner*, supra, and disapproving the rul-

ing upon this subject in the case of *Myrick v. Myrick*, 67 Ga. 771. And when we hold in this case that the allegations of cruel treatment are supported by the evidence, we are applying the sound rule laid down in the case of *Ring v. Ring* and the earlier cases cited and quoted in support of the *Ring* Case. In substance, the testimony of the plaintiff, who appeared as a witness on her own behalf, showed that before the happening of the occurrence which caused the final separation, the husband and wife had become estranged. He had plainly intimated, if he had not directly charged, in remarks made to the wife a few weeks before the final separation, that she was taking certain trips away from home to meet other men, and that her relations with other men had become improper. Mrs. Ford had then separated from her husband and begun to occupy a different room, but yielded to his entreaties and returned to him. But in November, 1913, a scene of violence took place between the wife and husband, when a certain young man was making a visit to the home of the Fords for the purpose of calling upon their daughter. This young man afterwards married the daughter. Mr. Ford had conceived a violent antipathy for the young man; but Mrs. Ford insisted that he should be permitted to visit at their house, as he and the daughter were to be married, and she preferred their meeting at home to their meeting somewhere else. Mr. Ford said the young man was not a gentleman. Mrs. Ford insisted that he was. Mr. Ford insisted that she had nothing to do with it. She took a contrary view, and announced her view emphatically. Mr. Ford then called Mrs. Ford a "lie." He walked toward her, held his finger in her face, and put his teeth in her face (to employ her own language, though she evidently did not mean that he bit her, but merely thrust his face close into hers), and then called her a "stinking lie." Mrs. Ford then slapped him. He had called her a "lie" three or four times, and when he applied this term the third or fourth time she slapped him. He then struck her three times—struck her on both sides of the face and once in the mouth. He then attempted to follow up the blows, and would have continued to strike her, but the daughter seized him and told him not to hit her mother again. The blows, the wife testified, were painful and humiliating. She separated from him, and did not again cohabit with him, though she remained in a separate room in the house. This is the testimony of the wife. The jury had the right to accept it as true. As a matter of fact, it was corroborated in several particulars by witnesses introduced by the defendant.

We will not stop to inquire whether the two or three blows inflicted by the husband upon the face of the wife required a finding that the husband was guilty of such cruel

treatment as the statute provides may give the right to a total divorce, or whether the jury might not have found that the striking of these blows, under the circumstances narrated, were the mere result of a temporary ebullience of temper, and that they were not sufficient to, and did not, jeopardize the life or limb or health of the wife or create a reasonable apprehension on her part that her body or health was in danger. But we are fully persuaded that the jury were authorized to find that, all the circumstances being considered, the conduct of the husband on the occasion to which we are referring amounted to cruel treatment, that cruel and painful and humiliating blows were struck, and that they were of such a character as to create in the mind of a woman a reasonable apprehension that her health and body were in danger. That being true, they were authorized to find a verdict granting a total divorce.

[2, 3] 2, 3. The rulings made in headnotes 2 and 3 require no elaboration.

Judgment affirmed. All the Justices concur, except

FISH, C. J. (dissenting). I cannot agree with the other members of the court in holding that the acts set out in the majority opinion constitute cruel treatment, under the definition of those words laid down in the cases of *Ring v. Ring*, 118 Ga. 183, 44 S. E. 861, 62 L. R. A. 878, *Brown v. Brown*, 129 Ga. 246, 58 S. E. 825, *Cureton v. Cureton*, 132 Ga. 745, 65 S. E. 65, *Stoner v. Stoner*, 134 Ga. 368, 67 S. E. 1030, and *Miller v. Miller*, 139 Ga. 282, 77 S. E. 21; the definition given in those cases being to the effect that "cruel treatment," as a ground for total divorce—

"is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health."

(146 Ga. 296)

WALKER v. WESTERN & A. R. CO. (No. 189.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. RAILROADS \S 397(1)—OPERATION—INJURIES TO PERSONS ON TRACK—EVIDENCE.

In an action by a widow for damages from the homicide of her husband by a train while walking along the tracks of the defendant railroad company, it was competent to bring out testimony, on cross-examination of the plaintiff's witnesses, to the effect that the place at which the injury occurred was in the switching yards of the defendant, and that engines were frequently operated at the place in switching and otherwise moving cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1344, 1351, 1355; Dec. Dig. \S 397(1).]

2. FORMER DECISION CONTROLLING—GRANT OF NONSUIT ERRONEOUS.

Under the pleadings and the evidence, the case is controlled, so far as it relates to the question of nonsuit, by the principles ruled in *Wright v. Southern Railway Co.*, 139 Ga. 448,

77 S. E. 884, and it differs from *Fowler v. Georgia Railroad, etc., Co.*, 133 Ga. 664, 66 S. E. 900, in which the place of injury was in the separate switch yards proper of the defendant company. It was erroneous to grant a nonsuit.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Cassie Walker against the Western & Atlantic Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. Tye, Peeples & Tye, of Atlanta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 279)

DORSEY v. BYROMVILLE MFG. CO. (No. 177.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 634—RECORD—DEFECTS—DISMISSAL.

The bill of exceptions complains of error in the trial of a case brought to the November term, 1912, of Dooly county superior court, and the transcript contains a record of a cause brought to the January term, 1913, of the city court of Vienna; and, the clerk of the superior court of Dooly county having certified that no such case as that described in the bill of exceptions was brought to the November term, 1912, of the superior court of Dooly county, it is manifest that the bill of exceptions and the transcript apply to different cases; and, there being no record of any such case as that described in the bill of exceptions, the bill of exceptions must be dismissed. *Walker v. Evans*, 85 Ga. 882, 12 S. E. 1070.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2775, 2829; Dec. Dig. \S 634.]

Error from Superior Court, Dooly County; W. F. George, Judge.

Action between S. W. C. Dorsey and the Byromville Manufacturing Company. From the judgment, Dorsey brings error. Dismissed.

Jule Felton, of Montezuma, for plaintiff in error. W. V. Harvard, of Vienna, and E. F. Strozler, of Cordele, for defendant in error.

EVANS, P. J. Writ of error dismissed. All the Justices concur.

(146 Ga. 246)

WILLIAMS v. EMPIRE LIFE INS. CO. et al. (No. 156.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

INSURANCE \S 137(2)—LIFE INSURANCE—POLICIES—VALIDITY.

Under the evidence as contained in the statement of facts agreed upon by the parties, the court, to whom the case was submitted without the intervention of a jury, did not err in rendering a judgment in defendant's favor.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 234; Dec. Dig. \S 137(2).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Mollie Williams, administratrix, against the Empire Life Insurance Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

This case was submitted to the court for trial without the intervention of a jury, upon a statement of facts agreed upon by the parties, which, omitting the immaterial parts, was as follows:

The defendant was a life insurance corporation under the laws of Georgia. The insured, Barnett Williams, died intestate on July 18, 1913. The plaintiff was the legally qualified administratrix of his estate, and had a right to maintain this action. A true copy of the policy attached was to the petition. The plaintiff had complied with the law and with the terms of the policy relative to notice and proofs of death. The original application upon which the policy was issued is a part of the agreement of facts. At the time the insured made said application he was apparently in good health, and the examining physician did not detect any trouble or disease existing. The policy sued on was delivered on July 15, 1913, after having been approved for issuance by the company on July 10, 1913. At the time the policy was delivered the insured was desperately ill from appendicitis, for which, on July 14, 1913, he had been operated upon in order, if possible, to save his life; and that from said disease he died on July 18, 1913. He did not pay in cash the first premium upon the policy, but gave to the agent of the insurer his note for the amount of it (\$23.19) upon making the application. The note was never paid, but was tendered back to the plaintiff, and demand was by the defendant for the return of the policy. The plaintiff refused to accept the note or return the policy. She tendered to the insurer the amount of the note after the death of the insured, and the insurer refused to accept the money so tendered. The company knew nothing of the illness of the insured when it sent the policy to its local agent for delivery, but this agent knew of the illness of the insured and of the operation, and delivered the policy to him with full knowledge of his physical condition. Plaintiff introduced the following receipt:

"Received from B. Williams, of Flowery Branch, Ga., the sum of twenty-three dollars and nineteen cents, being the semiannual premium on policy No. 33584, due on the 10th day of July, 1913, which pays the premium up to the 10th day of January, 1914. This receipt, to be valid, must be signed by the president or secretary and countersigned by an authorized agent of the company. Countersigned this 15th day of July, 1915.

"S. H. Rogers, Secretary.

"H. T. Pirkle, Agent."

The application to the defendant for insurance was made by Barnett Williams, aged 20 years, on July 3, 1913, and was given to its agent, H. T. Pirkle. The policy was made payable to the estate of the insured, and was for \$1,500, "for which binding receipt was given, and the policy to be dated July 10, 1913." The application contained the following:

"It is hereby agreed that all the foregoing statements and answers and also those I make to the company's medical examiner are warranted to be full, complete, and true, and are offered to the company as a consideration for the contract, which shall not take effect until this application has been accepted by the company at the home office in Atlanta, Ga., and the first premium shall have been paid to and accepted by the company or an authorized agent during

the life and good health of the person herein proposed for a policy. I have read a sample blank form of the policy applied for to be insured on the above-named plan, and I hereby accept the conditions of the same; and I agree that no statement, promises, or information made or given by the person soliciting or taking this application shall be binding on the company unless such statement, promises, or information be reduced to writing and presented to the officers of the company at the home office. This application and the policy hereby applied for, taken together, shall constitute the entire contract between the parties hereto."

In the application it appears that the following questions were asked the insured by the medical examiner, and the following answers given:

"Q. Have you any reason to believe yourself now not to be in perfect health? A. No. Q. Have you any appendicitis? A. No."

These questions and answers were made a part of the policy. The policy contained the following stipulations:

"No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to bind the company by making any promise or making or receiving any representation or information. These powers can only be exercised by the president or secretary, and will not be delegated. This policy and the application therefor constitute the entire contract. This contract is made in consideration of the payment in advance to the company of twenty-three and nineteen one hundredths (\$23.19) dollars, on the delivery of this policy to the insured while in good health, and the payment of a like amount thereafter to the company at its home office in the city of Atlanta, Georgia, on the 10th day of July and January in each and every year," etc.

The court rendered a judgment in favor of the defendant. The plaintiff made a motion for a new trial, which was overruled.

Thos. H. Scott, of Atlanta, and C. N. Davie and B. P. Gaillard, both of Gainesville, for plaintiff in error. F. A. Hooper and R. C. & P. H. Alston, all of Atlanta, for defendants in error.

BECK, J. (after stating the facts as above). The instant case is not identical in its facts with the case of *Reese v. Fidelity Mutual Life Association*, 111 Ga. 482, 36 S. E. 637. But upon the controlling question it is very similar to that case, and we are of the opinion that the ruling there made is controlling here. The reasoning upon which that ruling is based, and which is entirely applicable to the facts of the present case, is sound and supported by the authorities adduced to support the conclusions reached.

Judgment affirmed. All the Justices concur.

(146 Ga. 238)

JONES v. BLACKWELDER. (No. 148.)
(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 302(8)—REVIEW—ASSIGNMENTS OF ERROR—GROUNDS FOR NEW TRIAL.

Grounds of a motion for a new trial, based upon the admission or exclusion of evidence, which embrace utterly superfluous and unneces-

sary matter, such as colloquies between counsel on both sides, or between counsel and the court, recitals of irrelevant facts, and other like things, to such an extent as to bury the question sought to be raised in a mass of needless phraseology, and thus render it difficult, if not impracticable, for this court to ascertain what was the ruling or other conduct of the court complained of, will not be considered. Applying this ruling to the grounds of the motion in this case relating to the admissibility of evidence, none of them are made in such a manner as to present a question for determination by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. ¶302(3).]

2. LANDLORD AND TENANT ¶286—DISPOSSESSION OF TENANT—ACTIONS—INSTRUCTIONS.

Where a dispossession warrant is sworn out against a tenant holding over, to recover possession of land and double rent under section 5385 et seq. of the Civil Code of 1910, it is error for the court on the trial to charge the jury to look to the evidence and see what the tenant had possession of, whether he merely had possession of a house and barn, or a number of acres of land, and, if a number of acres, how many acres, and see for how long he held possession of the property, and what the rental value of it was for the time he did hold possession after the expiration of his contract, and whatever the jury found that rental value to be the landlord would be entitled to recover.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1198; Dec. Dig. ¶286.]

3. LANDLORD AND TENANT ¶216—HOLDING OVER—DAMAGES.

In such case the measure of damages would be, if the evidence authorized it, an amount double the rental value for the entire premises for the time the premises were held over by the tenant beyond his term.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 861-865; Dec. Dig. ¶216.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by C. W. Jones against D. F. Blackwelder. There was a judgment for plaintiff, and, deeming the award insufficient, he brings error. Reversed.

Maddox & Doyal, of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendant in error.

HILL, J. This case was here on a previous occasion. On the facts recited in that record this court held, reversing the judgment of the court below, that the case was still in court. Jones v. Blackwelder, 143 Ga. 402, 85 S. E. 122. Subsequently the case was tried and resulted in a verdict for the plaintiff, who, being dissatisfied as to the amount awarded by the verdict, moved for a new trial, which was refused, and he excepted.

[1] 1. The first headnote requires no elaboration.

[2, 3] 2, 3. The court charged the jury:

To "look to the evidence and see what Mr. Blackwelder held possession of, if anything; see whether he merely held possession of a house, of a barn, of a house and barn, or a number of acres of land, and, if a number of acres, how many acres, and see for how long he held possession of the property, and what the

rental value of it was for the time he did hold possession of [it] after the expiration of his contract, and whatever you find that rental value to be Mr. Jones is entitled to recover double that value at your hands."

Error is assigned on this charge; and it is insisted that inasmuch as Blackwelder had rented the whole farm, and there was no issue as to possession (the answer of the tenant having been withdrawn), the possession would not be divisible, but the tenant would be chargeable with the whole, and that the court should have so instructed the jury. We think the portion of the charge excepted to was error requiring a new trial. It was calculated to lead the jury to believe that the plaintiff could only recover as double rent the rental value of that portion of the premises he testified he was in actual physical possession of, which under the evidence was less than the whole. He should have charged them that the plaintiff was entitled to recover, under the statute, if the evidence authorized it, an amount double the rental value of the premises for the time they were held over by the tenant beyond his term. Stanley v. Stembridge, 140 Ga. 750, 79 S. E. 842. The plaintiff was not entitled to recover the "reasonable rental value of all of said farm for the period of one year doubled," as contended, but, if the evidence authorized it, he would be entitled to recover an amount double the rental value of the entire place rented, for the time the premises were held over by the tenant beyond his term. The entire premises rented by the tenant would be presumed to be in his possession as a tenant holding over; and the landlord could recover double the rental value for the whole during the period he was deprived of possession, in the absence of proof that a portion of the premises had been turned back to and received by the landlord, or that the latter had retaken possession of a part thereof.

There are other assignments of error on portions of the charge, but they revolve around the rulings above made, and on the next trial the charge can be adjusted to the decision here rendered.

Judgment reversed. All the Justices concur.

(146 Ga. 200)

SOUTHERN RY. CO. v. WILLIAMS.

(No. 128.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. CARRIERS ¶358—CARRIAGE OF PASSENGERS—PAYMENT OF FARE—CONDITIONS PRECEDENT.

Where a passenger upon a train of a railway company is asleep upon reaching the destination called for by his ticket, and is awakened by the conductor at a station further on, where the passenger expresses a desire to continue his journey until the train meets the next train going the direction of his original destination, and offers to pay his fare therefore, it is not

a condition precedent to continuing his journey that he tender unpaid fare for the distance already traveled, in the absence of a demand therefor by the conductor; and if in these circumstances, and with no other sufficient reason therefor, the conductor eject him from the train, the railway company is liable in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1434-1438; Dec. Dig. ☞358.]

2. DAMAGES ☞216(1)—INSTRUCTIONS — PROPRIETY.

Where the trial judge in his charge to the jury stated correctly and clearly the rule as to the measure of damages recoverable for pain and suffering, and in connection therewith, and closely following, used the expression that the "measure" of damages is a question for the jury, it is manifest that the court meant the "amount," and such expression was not harmful.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549; Dec. Dig. ☞216(1).]

3. ASSIGNMENTS OF ERROR—SUFFICIENCY.

There is no merit in the other assignments of error.

Error from Superior Court, Gwinnett County; C. H. Brand, Judge.

Action by T. M. Williams against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

T. M. Williams brought suit against the railway company for damages from personal injuries. The case was tried, and the jury rendered a verdict for the plaintiff for \$750. The railway company made a motion for a new trial, which was overruled, and it excepted. Among other things, the plaintiff alleged as follows: On a day named he purchased from the defendant company a first-class ticket in Atlanta, Ga., from that point to Duluth, on its line of railway. At 8:45 p. m. he boarded the defendant's train to go to Duluth. The conductor took up his ticket. The plaintiff was tired, and soon after boarding the train he fell asleep. When the train reached Duluth he was still asleep, and did not know that he had reached his destination. For this reason he remained on the train, and when Buford was reached the conductor awoke him and told him that he had arrived at his station. The plaintiff left the train, and when he had stepped upon the ground he saw that he was at Buford instead of Duluth. Not desiring to remain in Buford for the night, in an emergency he determined to board the train and continue the journey until he could reach Gainesville, or some other point, to meet the next train returning to Duluth. He boarded the train while it was standing, and requested the conductor to carry him thereon until he could meet the next train returning to Duluth, but the conductor refused to comply with his request; and the plaintiff then offered to pay the conductor the necessary fare on the train until he could reach the next train returning to Duluth, which was refused. The conductor became angry, cursed and abused the plaintiff, and called a policeman of the town to eject him from the

train. While the plaintiff was standing on the platform, the policeman seized him by the arm, giving him a terrific jerk. As he did so the conductor pushed and kicked the plaintiff from the platform and landed him on the ground. As the plaintiff struck the ground, the policeman hit him over the head with a pistol, cutting his head, causing the blood to flow freely, and causing him intense pain and suffering. He was able and willing to pay his fare, not only from Duluth to Buford, but also from Buford on to the point to which he wished to continue his journey on the train; and "he offered to pay said fare." He contended that he was not a trespasser; that his ejection from the train was wrongful, and a breach of duty by the railway company as a common carrier; that the refusal of the conductor to allow him to pay his fare was also a breach of duty on the part of the company; and that the manner in which he was ejected was wrongful and unlawful, and caused him much physical pain and suffering and much mental pain and anguish, and humiliated him in the presence of his fellow passengers. The defendant admitted the jurisdiction of the court, and that it had damaged the plaintiff.

Blanton Fortson, of Athens, Dobbs & Wisdom, of Buford, D. M. Byrd, of Lawrenceville, and John J. & Roy M. Strickland, of Athens, for plaintiff in error. O. A. Nix and I. L. Oakes, both of Lawrenceville, for defendant in error.

GILBERT, J. (after stating the facts as above). [1] 1. The fourth ground of the amended motion for a new trial complains that the court refused a request to charge the jury the following:

"If you believe from the evidence that the plaintiff, Williams, bought a ticket to Duluth, and that the train stopped at Duluth a sufficient length of time for passengers to get off, and that the station was called, it was the duty of Williams to get off. If you further believe that Williams did not get off at Duluth, but went on to Buford, and there alighted without paying his fare from Duluth to Buford, then I charge you that Williams could not require the conductor to permit him to get back on that train until he paid or tendered his fare from Duluth to Buford, and from Buford to the point he desired to go."

There was evidence to show that the plaintiff was asleep upon reaching Duluth, the point of his destination. Upon reaching Buford he was awakened, and given an opportunity to get off. Realizing that he was not at his station, and it being late at night, he determined to continue his journey until he met the next train returning toward Duluth. The plaintiff had the money in his pocket, and offered to pay his fare to the conductor from Buford until he could meet the returning train, and offered to pay it from where he might meet such train back to Duluth. Though conflicting on these points, there is

evidence to show that the conductor peremptorily refused to grant the plaintiff passage on the train upon any condition; but, calling in the aid of a town policeman, with curses and kicks, abusive language and blows, the plaintiff was forcibly expelled from the train, and that he bled profusely, suffering much physical pain and mental anguish. There is no evidence to show that the conductor made any demand upon the plaintiff that he pay his fare from Duluth to Buford before he could ride further on the train. The conductor himself testified:

"He did not pay his fare from Duluth to Buford. Nobody asked him for anything."

The trial judge states in a note to this ground of the motion that at no time during the trial was it contended that the plaintiff could not recover because he had not paid his fare from Duluth to Buford, and that the record shows that no demand was made by the conductor, as a condition precedent, that the plaintiff pay fare from Duluth to Buford before he could ride further. Counsel for the plaintiff in error rely upon the cases of *Coyle v. Southern Ry. Co.*, 112 Ga. 121, 37 S. E. 163, and *Wilson v. Southern Ry. Co.*, 143 Ga. 189, 84 S. E. 445. An examination of these cases will show quite a different state of facts from those in the present case. In neither of these cases was the passenger asleep upon reaching his destination, and in both of them a demand was made by the proper official of the company for back fare. In the present case the conductor made no demand for back fare, and therefore no tender on the part of the plaintiff was necessary. It follows that the judge did not err in refusing the request to charge contained in the fourth ground of the amended motion.

[2] 2. The fifth ground of the amended motion for a new trial complains of the following charge of the court:

"If you believe from all the evidence in the case that the plaintiff, Williams, under the rules hereinafter stated and under the evidence submitted to you, was illegally ejected or put off the train or the platform of said train, then I charge you that this illegal ejection is an act for which damages are recoverable. The measure of damages is a question for the jury."

An examination of the preceding paragraph in the charge of the court shows that he was here charging the jury on the question of the measure of damages recoverable for pain and suffering, and that he stated to them that the law furnished "no standard by which to measure the amount, except the enlightened consciences of impartial jurors." It is clear to this court that the jury understood the correct principle of law as charged by the judge, and that no harm was done to the railway company by the use of the word "measure" in the last sentence of the excerpt quoted, where it is manifest from the context that the court meant "amount." *Atlanta, Knoxville & Northern Ry. Co. v. Bryant*, 110 Ga. 247, 34 S. E. 350 (1).

Counsel for the plaintiff in error contend that the court should have charged that the railway company had a right to refuse passage to the plaintiff, because of his condition. There was no request for a charge of this character; and if there had been, there was no evidence to show that the conductor refused the plaintiff passage on account of his condition. Therefore there was no evidence to authorize such a charge. As above stated, the evidence of the conductor was that the plaintiff "did not pay his fare from Duluth to Buford. Nobody asked him for anything." Later the conductor testified that he said to the plaintiff, at Buford, "You can't go on this train without paying your fare," and "I told him we couldn't take him without paying his fare." The policeman testified that, when the plaintiff at Buford expressed a determination to continue his journey, the conductor told the plaintiff that "he would be glad to carry him if he would pay his fare." In the light of the evidence, the trial court did not err in charging the jury at different times, in effect, that the plaintiff had no right to ride further on the train "without paying or offering to pay the fare demanded of him by the conductor."

[3] There was no merit in any of the assignments of error. The evidence supported the verdict, and it was not excessive.

Judgment affirmed. All the Justices concur.

(146 Ga. 341)

DOUGLAS v. JENKINS. (No. 200.)

(Supreme Court of Georgia. Dec. 19, 1916.)

*(Syllabus by the Court.)***EXECUTION — 171(2)—INJUNCTION—NATURE OF REMEDY—ADEQUATE REMEDY AT LAW.**

The court erred in granting the injunction. When that part of the petition which was based upon the theory that the *fi. fa.* (against the enforcement of which injunction was sought) was a cloud upon the title of plaintiff was stricken upon demurrer, to which ruling there was no exception, the only purpose that an injunction could serve would be to prevent enforcement of the execution by levy; and relatively to this branch of relief sought, the plaintiff will have an adequate remedy at law, when a levy of the execution is actually made, by filing a claim as provided by statute.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 498, 499; Dec. Dig. —171(2).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by M. K. Jenkins against E. L. Douglas. Judgment for plaintiff, and defendant brings error. Reversed.

Lee Douglas, of Atlanta, for plaintiff in error. E. M. & G. F. Mitchell, of Atlanta, for defendant in error.

GILBERT, J. Jenkins filed an equitable petition to enjoin Douglas from paying off a debt secured by a loan deed to a city lot and from thereafter levying a certain execution upon the land. The allegations of the petition are in substance as follows: Jenkins and Corley, as tenants in common, possessed a certain city lot, each owning one undivided half interest. They executed to Barton a deed to this lot to secure a loan, and held a bond for title for its reconveyance upon the payment of the loan. On June 8, 1913, Corley, by a written transfer, conveyed to Jenkins, for a valuable consideration, his bond for title interest in the lot, Jenkins assuming the entire indebtedness against the lot. In this transaction there was a balance due Corley by Jenkins of \$200, which was not paid until November 6, 1913, at which time Corley executed a deed conveying his half interest in the lot to Jenkins. This deed was recorded January 12, 1914. On June 13, 1913, Douglas brought suit against Corley for an alleged indebtedness in no way connected with the transactions referred to above, and on July 8, 1913, obtained a judgment against him. An execution was issued on this judgment, and it is this execution that Jenkins alleges Douglas is threatening to levy upon the undivided half interest of Corley in the city lot originally owned jointly by Jenkins and Corley, after he has first paid up the loan on the said city lot. Jenkins prayed that this execution be declared void, and that it be canceled as a cloud on his title. Douglas filed a demurrer to the petition. The court overruled the demurrer in the main, but sustained that part of it which challeng-

ed the allegation, as to the execution being a cloud on the title of Jenkins. Douglas excepted to the overruling of the demurrer in the main.

It will be observed that the petition does not allege that the execution has been levied, nor that the sale under it is about to take place, nor that the sheriff has the execution with the intention of levying, nor even that Douglas had paid off the Barton loan and procured a reconveyance of the legal title to Corley, or to Corley and Jenkins. The allegation in this particular is that Douglas is threatening to levy. It does appear, however, from the petition, that when Jenkins took an assignment of the equitable interest of Corley, he did not make payment in full, and he did pay \$200 to Corley, the balance due, after Douglas had obtained his judgment against Corley, and had properly recorded the same on the general execution docket.

"The extraordinary * * * remedy of injunction does not lie in favor of one who has a complete and adequate remedy at law." *Johnson v. Gilmer*, 113 Ga. 1146, 39 S. E. 469; Civ. Code 1910, § 4538.

"If a petition is filed which prays for some extraordinary relief, such as injunction, receiver, re-exeat, and the like, and it is apparent from the facts alleged that the rights of the parties can be fully protected by the use of some recognized legal remedy, such as attachment, garnishment, claim, illegality, and the like, then the existence of such a remedy would be a sufficient reason for refusing to grant the extraordinary equitable relief and for striking on demurrer so much of the petition as prays for such relief; or, if the only relief prayed was of the extraordinary character, for sustaining a demurrer to the entire petition and dismissing the case." *Teasley v. Bradley*, 110 Ga. 497, 505(4), 35 S. E. 782, 786 (78 Am. St. Rep. 113).

Applying the above-stated rule, we do not think the allegations of the petition entitled the plaintiff to an injunction. The effect of an injunction would necessarily have been to prevent the defendant from contesting the bona fides of the transaction between Jenkins and Corley, and from contesting the right to subject the \$200 paid to Corley after the rendition of the judgment against him in favor of Douglas.

We think that, under the claim laws of this state, the plaintiff has an ample and complete remedy for all of his rights, should the threatened levy actually take place. By filing a claim and setting up his title he may avail himself of every legal and equitable right, including the issue of whether or not the judgment against Corley is void. A claim case, though on the law side of the court, partakes of the nature of an equitable proceeding. "Our claim laws are peculiar to our state. Very few of the states have any proceedings like our claims." Where a plaintiff in execution asserts by his levy the liability of the property to pay his judgment, and the claimant alleges title, the issue is, Is the title of the claimant good against the

judgment? And on the trial of such issue the claimant may impeach the judgment and prove it fraudulent on the trial. *Williams v. Martin*, 7 Ga. 377. "Ex necessitate, the trial of a claim is, quasi, an equitable proceeding—not made so expressly, by the Legislature, but becoming so in the inherent necessity of the case." *Colquitt v. Thomas*, 8 Ga. 258, 264.

Since the procedure acts of 1884-85, p. 36, and 1887, p. 64, and probably before, either party in a claim case by proper amendments may have adjudicated any right, legal or equitable. The superior courts of this state, on the trial of any civil case, shall give effect to all the rights of the parties, legal or equitable, or both, and apply on such trial remedies or relief, legal or equitable, or both, in favor of either party such as the nature of the case may allow or require. Civ. Code 1910, §§ 5406, 5407. These acts have been construed with the utmost liberality, to the end that all the remedies and relief to which the respective parties in any civil cause might be entitled should be applied and accorded in one action. *Ford v. Holloway*, 112 Ga. 851, 38 S. E. 373; *Carstarphen Warehouse Co. v. Fried*, 124 Ga. 544, 546, 52 S. E. 598.

From what has been said we think it is obvious that there is an adequate and complete remedy for the assertion and exercise of every legal right, without resorting to the harsh and extraordinary remedy sought by the plaintiff.

Judgment reversed. All the Justices concur.

(146 Ga. 290)

SUTTON et al. v. FLANDERS, Ordinary.
(No. 184.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS §527
(1), 535, 537(8) — JUDGMENT — ACTION
AGAINST ADMINISTRATOR — PLEADING — COLLATERAL ATTACK ON JUDGMENT.

On the trial of a suit brought by an ordinary, for the use of the heirs at law of a decedent, against an administrator and the sureties on his bond, such suit being based upon a judgment rendered by the ordinary, on a citation for settlement, in favor of the heirs against the administrator, which judgment the administrator refused to pay, the sheriff having returned nulla bona as to him, it was not error to strike the paragraph of the defendant's answer to the effect that the uses of the plaintiff were not the heirs at law of the decedent, and that the sureties were not bound by the judgment of the ordinary against the administrator.

(a) The judgment of the ordinary adjudicated that the plaintiffs were the heirs of the decedent, and that they were entitled to recover the amount of the judgment from the administrator.

(b) In a suit based on such judgment the plaintiffs may, if the evidence authorize it, recover the amount thereof against the administrator and the sureties.

(c) Such judgment cannot be collaterally at-

tacked by the sureties, or by the administrator, in an answer filed to the suit.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2355, 2462, 2556; Dec. Dig. §527(1), 535, 537(8).]

2. EXECUTORS AND ADMINISTRATORS §537
(10)—ACTIONS—QUESTIONS FOR JURY.

There being no evidence upon which to base it, the court erred in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2487, 2569-2574; Dec. Dig. §537(10).]

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action by J. R. Flanders, Ordinary, for the use of Ila Sutton and another, as heirs of W. M. Sutton, against J. J. Sutton and others. Judgment for defendants, and plaintiff brings error. Reversed.

Saffold & Jordan and Williams & Bradley, all of Swainsboro, for plaintiff in error. Walter F. Grey and T. N. Brown, both of Swainsboro, for defendants in error.

HILL, J. This is the second appearance of this case in the Supreme Court. See *Flanders v. Sutton*, 143 Ga. 764, 85 S. E. 914.

John R. Flanders, ordinary, suing for the use of Ila Sutton and Willie Sutton, as heirs at law of the estate of W. M. Sutton, deceased, brought suit against J. J. Sutton, as administrator upon the estate of W. M. Sutton, and alleged substantially as follows: J. J. Sutton qualified as permanent administrator of the estate of W. M. Sutton on March 5, 1894, and on the same date executed an administrator's bond as principal, with W. M. Durden and D. B. Durden as sureties, payable to the ordinary or his successors in office, in the sum of \$3,000, conditioned to pay such persons as might be entitled to receive them such sums out of the estate of W. M. Sutton, deceased, as they might be entitled to. Ila Sutton and Willie Sutton, heirs of W. M. Sutton, brought suit in the court of ordinary against J. J. Sutton, as administrator, for settlement, and on July 7, 1913, in that court recovered judgment against J. J. Sutton personally for the sum of \$382.44, and execution on the judgment issued on August 26, 1913. On the same date the sheriff of the county made an entry of nulla bona as to property of the estate, and also as to property of J. J. Sutton. The defendants are now due Ila Sutton and Willie Sutton the sum of \$382.44, besides legal interest from July 7, 1913, and refuse to pay; wherefore the plaintiff prays judgment for that amount. The defendants denied each paragraph of the petition, and held the plaintiffs to strict proof. The sureties specially averred that, if liable at all, they were not liable to the plaintiffs, who were not the heirs of W. M. Sutton, and were not entitled to any portion of his estate, but were illegitimate children of the widow of W. M. Sutton, born after his death, and that, while

J. J. Sutton may be estopped from defending against the judgment, the obligation of the sureties being *stricti juris*, they are not liable upon such a judgment, especially when they were not parties to the suit in which it was obtained, etc. On motion the court ordered stricken the paragraph of the answer attacking the judgment. The plaintiff amended by striking from the petition the name of D. B. Durden, whose death had been suggested of record. The court directed a verdict for the plaintiff. W. M. Durden and J. J. Sutton excepted.

[1] 1. Counsel for the plaintiffs in error argued but two questions in this court. The first is upon the exception to the striking of that portion of the plea to the effect that the plaintiff's usees, Illa and Willie Sutton, were not legitimate children of the decedent, and that the sureties on the bond of the administrator were liable only to the heirs at law of the decedent, and were not bound by the judgment of the court of ordinary in favor of such usees against the administrator, J. J. Sutton, especially as they were not parties to that suit. One of the conditions of the bond was that the administrator should deliver and pay to such persons such sums as they might be entitled to receive out of the estate of W. M. Sutton. In default of the administrator's complying with the terms of his bond, the sureties agreed to become bound and liable. According to the petition, the court of ordinary had adjudged in effect that Illa and Willie Sutton, the usees of plaintiff, were distributees of the estate of W. M. Sutton, and were entitled to recover \$382.44, which being unpaid by the administrator, the ordinary brought the present suit to recover the amount of that judgment for the usees. We do not think that the judgment of a court of ordinary, finding as above indicated, can be collaterally attacked as is attempted in the answer stricken. The court did not err in striking that portion of the answer excepted to. Nor was it error to strike the name of one of the defendants, D. B. Durden, against whom the plaintiff was proceeding. *Rogers v. Chambers*, 112 Ga. 258 (3), 37 S. E. 429.

The judgment of the court of ordinary adjudicated that the plaintiffs were heirs of W. M. Sutton, deceased, and that they were entitled to recover the amount named in that judgment. Furthermore, that judgment cannot be collaterally attacked by the administrator and the sureties on his bond, by setting up facts which negative the idea that the plaintiffs are heirs of the decedent. Moreover, if the administrator, who is the defendant in that judgment, fails or refuses to pay the judgment, the administrator and his sureties are liable in a suit on the bond based on the judgment against the administrator which he fails or is unable to pay. The court did not err in striking the paragraph of the defendants' answer excepted to.

[2] 2. The court erred in directing a verdict for the plaintiff. The allegations of each paragraph of the petition were denied by the defendants' answer (except the seventh, which alleged only refusal to pay), and strict proof of the allegations was insisted upon. The record contains no proof anywhere that there was a judgment of the court of ordinary against the administrator. It is true it was alleged in the petition that there was such judgment; but each paragraph of the petition was denied by the answer; and unless there was some evidence before the court that the ordinary had so adjudged, the court would not be authorized, merely upon the allegations of the petition, to direct a verdict for the plaintiff in a suit based upon such judgment. Indeed, if any evidence at all was offered on behalf of the plaintiff in the court below, the record does not disclose it, and the bill of exceptions does not specify it.

There being no evidence upon which the court could base the direction of a verdict for the plaintiff, the judgment must be reversed. All the Justices concur.

(146 Ga. 277)

KILPATRICK v. RICHTER. (No. 175.)
(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. GAMING — 14 — SALE FOR FUTURE DELIVERY.

If one of the parties to a contract for the sale of cotton for future delivery, apparently valid on its face, enters into the contract evidenced by the writing with no intention of delivering the actual cotton, but upon the understanding that a settlement is to be had by the contracting parties on the day appointed for delivery, based on the difference between the market price at that time and the contract price, and such intention is known to the opposite party at the time of signing the writing, the transaction will be regarded as a wager, and not an enforceable contract.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 25, 26; Dec. Dig. ¶14.]

2. VERDICT APPROVED.

The evidence authorized the verdict.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by I. T. Kilpatrick against R. D. Richter. From the judgment, Kilpatrick brings error. Affirmed.

K. S. Anderson and E. H. George, both of Madison, and Cobb, Erwin & Rucker, of Athens, for plaintiff in error. Middlebrooks & Pennington and T. H. Burruss, Jr., all of Madison, and Lewis, Davison & Lewis, of Greensboro, for defendant in error.

EVANS, P. J. [1] 1. This is the third appearance of this case. See 139 Ga. 643, 77 S. E. 1065, and 143 Ga. 470, 85 S. E. 319. The subject-matter of the suit is a contract for the sale of cotton to be delivered in the future. It was first before this court on a

writ of error to a judgment on demurrer; and it was held that the contract on its face was valid and did not disclose it to be a wagering contract. On its second appearance this court held that it was not error to instruct the jury that, in order to render an apparently valid contract for the sale of cotton void as a wagering contract, it must appear not only that the seller had at the time of entering into the transaction no intention of delivering the cotton, but also that the buyer then knew of the seller's intention in the premises. Outside of the general grounds of the motion for new trial, the exceptions of the plaintiff in error are to instructions to the effect that, if the seller at the time of the execution of the contract did not intend to deliver the actual cotton, and the buyer knew that in signing the contract he was only engaging in a speculative enterprise with no intention to deliver the cotton, but to settle by the difference in the contractual price and market price at date for delivery, and accepted the seller's contract under these circumstances, the contract would be a wagering one, and that the meaning placed on a contract by one of the parties, and known to be thus understood by the other party, shall be held to be the true meaning. These charges find approval in *Reeves v. Daniel*, 143 Ga. 569, 85 S. E. 756. We are asked to review that case, but on a consideration of same we adhere to the ruling there made.

[2] 2. The evidence is sufficient to uphold the verdict.

Judgment affirmed. All the Justices concur.

(146 Ga. 279)

HIGHTOWER v. SOUTHERN RY. CO.
(No. 178.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §203(1)—INJURY TO SERVANT—ASSUMPTION OF RISK.

The rule of law that a servant assumes the ordinary risks of his employment makes it his duty to exercise his own skill and diligence to protect himself, and applies alike whether the master be engaged in interstate or intrastate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543; Dec. Dig. §203(1).]

2. MASTER AND SERVANT §222(2)—INJURIES TO SERVANT—ORDERS.

"In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or of his master's representative, the servant must show that the order was a negligent one under the circumstances. If the order was negligent, and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received in complying with the order."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. §222(2).]

3. MASTER AND SERVANT §222(2)—INJURIES TO SERVANT—DUTY OF CARE.

Where a servant is an adult of ordinary intelligence, with knowledge equal, if not superior, to that of the master as to the ordinary risks of his employment, he is bound to exercise his own skill and diligence to protect himself, and cannot be relieved therefrom because the orders of the master, or his representative, were abrupt and peremptory, or because of fear of losing his employment, or because he did not have time to reflect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 649; Dec. Dig. §222(2).]

Atkinson, J., dissenting in part.

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Action by Alfred Hightower against the Southern Railway Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Hightower brought suit against the Southern Railway Company for damages from a personal injury received by him. The petition alleged, among other things, as follows: The plaintiff was employed by the defendant to assist in repairing its track, which was used in intrastate and interstate commerce. The suit is brought under the Employers' Liability Act of Congress (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). The plaintiff was engaged in repairing the track under the instructions of a track foreman. At the time of the injury he was engaged in replacing old ties with new ones. The new ties were very hard, and it was difficult to drive spikes in them. It was the custom of the defendant to furnish new spikes with which to fasten the rails to these new ties. On this occasion the defendant did not furnish new spikes, but ordered the plaintiff to use the old ones. New spikes are sharp, and can be driven into the ties without jumping out; but when the old spikes are used in the new ties, they are liable at times to rebound. On the occasion of the injury the plaintiff was ordered by the track foreman to drive the old spikes into the new tie. The plaintiff told the foreman that it was difficult to do this, that they ought to have new spikes, and that the old ones were liable to jump out and rebound. The track foreman directed him abruptly and peremptorily to use the old spikes, and to drive them at once. Being thus ordered to use the old spike, and knowing that if he refused to do so he would lose his job, and not having time to reflect upon the matter, he undertook to drive the old spike into the new tie, when it rebounded and struck his right leg about the knee, and shattered one of the bones. The court sustained a demurrer to the petition, and dismissed the action. The plaintiff excepted.

Robt. L. Berner, L. D. Moore, and W. A. McClellan, all of Macon, for plaintiff in error. Harris, Harris & Witman, of Macon, for defendant in error.

GILBERT, J. (after stating the facts as above). [1] 1. It is immaterial whether the defendant was engaged in interstate or intrastate commerce, as the rule of law which requires a servant to assume the ordinary risks of his employment, and makes it his legal duty to exercise his own skill and diligence to protect himself, applies in both cases. *Emanuel v. Georgia & Florida Ry. Co.*, 142 Ga. 543, 546, 83 S. E. 230; *Roberts on Injuries to Interstate Employees*, 193, 198. The doctrine of assumption of risks is wiped out if the injury is due to a violation of any federal statute enacted for the safety of employees. *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1504.

[2] 2. "In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or his master's representative, the servant must show that the order was a negligent one under the circumstances. If the order was negligent and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received in complying with the order." *Southern Ry. Co. v. Taylor*, 137 Ga. 704, 73 S. E. 1055; *Foster v. Walker Roofing Co.*, 139 Ga. 431, 77 S. E. 581; *Thomas v. Georgia Granite Co.*, 140 Ga. 459, 79 S. E. 130.

[3] Where a servant is an adult of ordinary intelligence, he cannot relieve himself of the duty imposed by law in regard to assumption of risks on the ground that he is obeying orders of the master, or of a representative of the master, or because failure to obey will result in loss of employment. 4 *Labatt's Master and Servant*, 4002; *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115, 52 Am. Rep. 733; *Seaboard Air-Line Ry. v. Horton*, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475. "Declining, he may lose employment; accepting, he assumes the risks attending the service, if he knows or has been properly warned of them. The servant is not under guardianship. He is a free man, at liberty to make such contracts as he will. That through stress of circumstances he consents to the orders of the master rather than be discharged from employment, does not impose liability upon the master because of such demand, if he has otherwise performed the duty which the law imposes upon him with respect to the servant." *Reed v. Stockmeyer*, 74 Fed. 186, 20 C. O. A. 381.

The petition leaves us exceptionally free from doubt as to the respective knowledge of the master and servant. It alleges that the representative of the master "knew, or should have known, that it [the spike] was liable sometimes to rebound and injure the person driving it." It also alleges that peti-

tioner told defendants' representative "that the old spikes were liable to jump out and rebound." Thus the plaintiff in express terms charges himself with actual knowledge of the danger. To relieve himself of the assumption of this risk he alleges that the track foreman "directed him abruptly and peremptorily to use the old spike, and drive it in at once, as they had to get the track ready immediately for the fast train No. 16 to pass over, * * * and that, being thus ordered abruptly to use the old spike, and knowing that if he refused to do so he would lose his job, and not having time to reflect," he undertook to perform the services, and that injury resulted. Thus, with knowledge equal, if not superior, to that of the defendant, he could not be relieved of his legal duty because the order was abrupt and peremptory, or because of a fear of losing his employment, or because he did not have time to reflect upon the matter. Precisely that thing happened which the plaintiff anticipated. In some respects the petition in the case of *Emanuel v. Georgia & Florida Ry. Co.*, 142 Ga. 543, 83 S. E. 230, supra, is similar to the petition in the present case. In the former case, however, the element of knowledge on the part of the servant was denied. In the decision of that case will be found an interesting discussion of the basis of the doctrine of assumption of risks by an employe, and of various cases in which the doctrine has been applied.

Judgment affirmed. All the Justices concur.

ATKINSON, J., concurs in the result, but not in all that is stated in the opinion.

(146 Ga. 272)

LYON v. PIGNATEL. (No. 172.)

(Supreme Court of Georgia. March Term, 1916.)

(Syllabus by the Court.)

WITNESSES \S 173 — COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.

In a suit by an executrix of a deceased payee on a note signed by two persons, where the plaintiff concedes the liability of one of them to be only that of a surety, and where the principal makes no defense, such principal is not incompetent to testify, on the trial of an issue formed by the surety, that he made an accord and satisfaction with the deceased payee. As the principal has filed no defense, and judgment against him is inevitable, and as he will not be affected by the discharge of the surety, his testimony in behalf of the surety is not in his own favor so as to disqualify him as a witness under the evidence act of 1889 (Civ. Code 1910, \S 5858).

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 708; Dec. Dig. \S 173.]

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action by C. G. Pignatel, as executrix of the estate of T. B. Sale, against D. M. Lyon.

There was a judgment for plaintiff, and defendant brings error. Reversed.

Clement E. Sutton, of Washington, Ga., for plaintiff in error. Wm. Wynne and W. A. Slaton, both of Washington, Ga., for defendant in error.

EVANS, P. J. T. B. Sale executed to T. Burwell Green his note for \$500. The note contained this entry on the back of it: "I guarantee one-half payment of within note. D. M. Lyon." The note was sued on by the executrix of the payee. The principal maker, Sale, made no defense. Lyon pleaded a discharge of liability because the payee had released Sale. On the trial it was stipulated that Lyon's liability on the note was only that of a surety. A verdict was directed against the principal maker for the full amount, and against the surety for one-half of the amount due on the note. The surety moved for a new trial, which was refused.

The surety offered to prove by the principal maker (Sale) that after the note became due, in consideration that the automobile for the purchase of which the note was given was to be used by the payee, the latter agreed to release the witness from the payment of the note, and that the witness had never told the surety anything concerning such agreement to release. The court repelled the testimony, on the ground that the witness was a party in interest and incompetent to testify in the suit brought on the note by the executrix of the deceased payee. The statute declares that, where a suit is instituted by the personal representative of a deceased person, the opposite party shall not be permitted to testify in his own favor against the deceased person as to transactions or communications with such deceased person. Civil Code 1910, § 5858(1). If Sale had filed a defense of accord and satisfaction of the note by delivery of the car to the deceased payee for use by him, Sale would have been incompetent to testify as to such defense. Is the statute applicable where he files no defense, and is offered as witness in behalf of his surety to establish his surety's defense which is dependent on the witness' exoneration from the debt? The statute prohibits the witness from testifying in his own favor. If his testimony be not in his own favor, but in favor of a co-defendant, he is not disqualified as a witness. This is illustrated by the case of Reed v. Baldwin, 102 Ga. 80, 29 S. E. 140. There the executors of a deceased payee sued a husband and wife on a note signed by them as joint makers. The wife pleaded that the debt was her husband's, and she signed as his surety. It was held that the husband was a competent witness in support of the plea of the wife, because his testimony was not in his own favor, in that he sought to discharge his wife from liability as a joint principal. The principal of this was applied in Hawes

v. Glover, 126 Ga. 305, 314, 55 S. E. 62. In the instant case Sale filed no defense. He is not offered as a witness in his own behalf. His testimony cannot and will not affect his liability to the plaintiff. The discharge of his surety is of no concern or interest to him. His testimony cannot be said to be in his own favor, because he is not affected by the result of the issue between the plaintiff and his codefendant. We do not think that the witness, whose liability is not disputed by plea and where judgment against him is inevitable, is disqualified to testify to a transaction with the plaintiff's testate which exonerated the surety, notwithstanding the same testimony would relieve the witness had he made defense on that ground.

Judgment reversed. All the Justices concur.

(146 Ga. 240)

RICHMOND HOSIERY MILLS v. HAYES.
(No. 149.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇐286(2) — INJURIES TO SERVANT—ACTIONS—EVIDENCE—JURY QUESTION.

The plaintiff's evidence was sufficient to withstand a motion for nonsuit, and the verdict is supported by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1006; Dec. Dig. ⇐286(2).]

2. APPEAL AND ERROR ⇐699(2)—TRIAL ⇐257—INSTRUCTIONS—REVIEW.

If a party desires a fuller instruction to the jury on the law as applied to any particular phase of the evidence, he should invite such instruction by a timely written request. A complaint of a failure to charge a principle of law in a particular form, even if such principle be pertinent, presents no question for decision, where neither is the charge brought up in the record nor is it otherwise made to appear that there was an omission to charge appropriately on the subject. He who alleges error must show it by the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2430; Dec. Dig. ⇐699(2); Trial, Cent. Dig. §§ 642-645; Dec. Dig. ⇐257.]

3. APPEAL AND ERROR ⇐730(2)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error on excerpts from a charge to the jury should specify the alleged error. Such excerpts as are criticized as not being adapted to the pleadings and evidence in this case are not open to such criticism.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3014, 3015; Dec. Dig. ⇐730(2).]

Error from Superior Court, Walker County; Moses Wright, Judge.

Action by James Hayes, by next friend, against the Richmond Hosiery Mills. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Watkins & Watkins, of Chattanooga, Tenn. and R. M. W. Glenn, of La Fayette, for plaintiff in error. W. H. Payne, of Chattanooga,

Tenn., and Rosser & Shaw, of La Fayette, for defendant in error.

EVANS, P. J. In his petition the plaintiff alleged the following: He was a boy of 15 years, had been reared on a farm, was without experience as to machinery, and was employed at the defendant's factory. His duties were to stir hosiery with a stick in dye-kettles, about which employment there was no danger. He was engaged in this work for about four days, when he was removed by defendant's superintendent and vice principal from this work to a machine known as a hydro extractor or whizzer, operated for drying hosiery in the course of its manufacture. This machine was composed of a metal receptacle upon vertical shafting that caused it to make about 300 revolutions per minute. He was entirely unfamiliar with the machinery and its operation, and the superintendent negligently failed to warn him of such danger, and, owing to his youth, inexperience, and lack of knowledge, he did not know or have equal means of knowing of the danger incident to the operation of the whizzer; he did not know how properly to load the whizzer, which required some degree of knowledge and skill, in that the hosiery should be packed therein carefully, evenly distributing the weight thereof around the sides of the receptacle, in order that it may not be so jostled as to cause the ends thereof to fly out. The defendant knew, or by the exercise of ordinary care should have known, of the danger, but failed to warn the plaintiff thereof and to instruct him as to the loading and the danger from the operation of the machinery. He was injured on the first day on which he began to work at the whizzer, and in the following manner: He filled the receptacle with wet hosiery, as he understood was proper from having casually seen the machine in operation while passing it during the four days preceding, and then started it to revolving, and after it had gained a high velocity the end of one of the stockings which had been placed therein flew out (the other end remaining fastened) and caught and wrapped his hand and wrist and pulled his hand against the shafting, breaking his arm in two or more places, lacerating the muscles, etc. He sued for damages, and obtained a verdict which the court refused to set aside on motion for new trial.

[1] 1. The evidence of the plaintiff sustained the allegations of his petition. It was adjudicated by this court that the petition stated a cause of action. 143 Ga. 131, 84 S. E. 541. Accordingly, there was no error in refusing to grant a nonsuit, or in refusing to vacate the verdict on the ground that it was without evidence to support it.

[2] 2. It is the duty of the judge, whether requested or not, to give to the jury appro-

priate instructions on the substantive issues made by the evidence as applicable to the pleadings. When no complaint is made of any dereliction in this respect, and the charge to the jury is not brought up in the record, this court will indulge the presumption that the jury were so instructed. *Omnia presumuntur rite et solemniter esse acta*. If a party desire a fuller instruction on the law as applied to any particular phase of the evidence, he should invite such instruction by a timely written request. A complaint of a failure to charge a principle of law in a particular form, even if such principle be pertinent, presents no question for decision, where the charge is not brought up in the record, and it is not otherwise made to appear that there was an omission to charge appropriately on the subject. He who alleges error must show it by the record.

[3] 3. Certain excerpts from the charge of the court are alleged to be error, but it is not pointed out in what respects the excerpts complained of are erroneous. The charges apparently state correct principles of law; and, in the absence of specific defects being indicated in the assignments of error, the giving of such charges is not cause for a new trial. Criticisms of other excerpts from the charge, as not being adapted to the pleadings in evidence, are not well founded.

Judgment affirmed. All the Justices concur.

(146 Ga. 274)

WALL et al. v. PITTMAN. (No. 173.)

(Supreme Court of Georgia. March Term, 1916.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS \S 537(8)—
ACTIONS—PETITION—SUFFICIENCY.

The court erred in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2545-2563; Dec. Dig. \S 537(8).]

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Action by C. A. Pittman, administrator de bonis non of the estate of Mrs. Mattie Lee Wall, against Arthur H. Wall and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

C. A. Pittman, as administrator de bonis non upon the estate of Mrs. Mattie Lee Wall, brought suit against Arthur H. Wall as principal, and the United States Fidelity & Guaranty Company as surety, on an administrator's bond, and alleged in substance as follows: Arthur H. Wall was appointed as administrator upon the estate of Mrs. Mattie Lee Wall, deceased, and executed bond as such in November, 1912. Application was made by Wall to sell certain lands belonging to the estate of the intestate, and leave was duly granted to sell the lands, which were

advertised for the first Tuesday in January, 1913. On the last-named date the lands, consisting of 154 acres, were duly exposed to sale by Wall as administrator, and were bid off by R. C. Thomas, he being the highest bidder, for \$39 per acre. Wall as administrator failed to collect the amount of the bid from Thomas, or to make any effort to collect it, or to offer the land for sale at the bidder's risk. A. F. White, a bidder at the sale, bid \$38 per acre for the lands, and he was and is perfectly solvent and able to have paid the sum bid for the land. Wall, administrator, obtained R. C. Thomas to bid at the sale for him, and this is why the bid was not complied with, and no effort made to have the amount of it paid. On the first Monday in September, 1913, an order was made by the court of ordinary, declaring the letters of administration issued to Wall revoked, which resulted in his removal as administrator upon the alleged grounds of his having committed waste, etc. On the last-named date the plaintiff was duly appointed and qualified as administrator de bonis non upon the estate of Mrs. Wall. On account of the defendant's failure to make the money from the sale of the land, or to resell it, the plaintiff obtained an order to sell it, and, after being duly advertised, it was sold on the first Tuesday in December, 1913, and brought only \$26 per acre. It was exposed for sale by the sheriff of the county as auctioneer for the plaintiff, before a large crowd, and everything was as favorable to the sale as it was possible to obtain. The estate the plaintiff represents as administrator suffered a loss and was damaged \$13 per acre on 154 acres, on account of the negligence of the defendant, or a total loss of \$2,002, and the further sum of \$23 costs (an itemized bill of which was set forth) paid the ordinary on the proceedings to remove the defendant as administrator, and other necessary expenses to sell the land, made necessary on account of the negligence of the defendant. On November 8, 1912, the defendant executed a bond to the ordinary of the county in the sum of \$7,500, for the faithful discharge of his duties as administrator in the terms of the law, with the United States Fidelity & Guaranty Company, of Baltimore, Md., as security. The intestate's estate has been damaged by the defendant, by his conduct above outlined, in the sum of \$2,025, for which amount the plaintiff prays judgment, with interest from the first Tuesday in January, 1913.

By an amendment the plaintiff alleged that Wall as former administrator entered into an agreement with R. C. Thomas, whereby Thomas was to bid on the land for Wall, and that there should not be any liability on Thomas in the event that the land should be knocked off to him, but that the liability was to be on Wall. At the time Wall had Thomas to bid on the land he was solvent, and has been so since; and Wall did not intend

to comply with the bid, unless he was able to sell the land at private sale for a profit. This conduct of Wall was without regard to the interest of the estate he represented, and was without any intention of complying with the bid that he had Thomas to make for him; and as administrator, through his unfaithfulness to his duty, he negligently allowed the lands to depreciate in value by his failure to sell as the law directs.

Both defendants filed general and special demurrers. The court overruled the general demurrers, and sustained one of the special demurrers as to costs in the court of ordinary. The defendants excepted to the overruling of the general demurrers.

O. M. Duke, of Flovilla, and Ryals & Anderson, of Macon, for plaintiffs in error. C. L. Redman, of Jackson, for defendant in error.

HILL, J. (after stating the facts as above).
1. Did the petition make a case against the defendants? We think not. The petition is too vague and indefinite as to set out a cause of action. If the present administrator is proceeding on the theory that the first sale was a valid one, and he is seeking to hold the purchaser responsible for his bid, the reply is that the first administrator could not be a purchaser at his own sale, and the allegations of the petition allege that he was such purchaser. It is not a case where the second administrator is seeking to sell the land with notice to the first purchaser that the land will be sold subject to his bid. But it is based upon the allegation that the act of the defendant Wall as a former administrator, in purchasing the land through Thomas, was without regard to the interest of the estate he represented, and that he did not comply with his bid, and was negligent in allowing "the said lands to depreciate in value by his failure to sell same as the law directs." If the plaintiff could recover at all under the petition, it is on the basis of the first being a valid sale. The allegations of the petition are not sufficient to show a valid sale, but on the contrary show a void sale, which has not been ratified by any one authorized to ratify. We do not think that the general allegations of the petition, as set out above, are sufficient to support an action against the first administrator or his sureties. These allegations negative the idea of a valid sale, and the plaintiff seeks to hold the former administrator liable on the allegation that he did purchase at his own sale and failed to comply with the bid, and in allowing the land to depreciate in value before the second sale. The allegations of the petition are not sufficient to authorize a recovery on the basis of a depreciation of the value of the land between the first and second sales, as loosely set out in the petition. It appears from the petition that after his appointment the present administrator received from the former

administrator possession of the land, procured a second order to sell, and did sell at a second public sale for a less price than was offered at the first sale. It cannot be said that this act on the part of the second administrator amounts to a ratification of a voidable sale, for the administrator could not thus ratify the voidable sale for the heirs at law, or recover on the basis set out in the petition.

Under the vague and indefinite allegations as they appear in the petition, we think the court erred in overruling the general demurrer.

Judgment reversed. All the Justices concur.

(146 Ga. 221)

HICKS v. STATE. (No. 138.)

(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. CRIMINAL LAW §1111(4)—APPEAL—PRESENTATION FOR REVIEW—OBJECTIONS TO EVIDENCE.

Where evidence was offered and counsel remarked, "If your honor please, I don't see what business they were in has got to do with the case," and the court replied, "I will let it go in," and counsel added, "We would like to get in the record that we object to it," and the court said, "It is overruled," and in the ground of the motion for new trial, relating to this evidence, the movant says that he insists that it was irrelevant, and that the objection to the evidence was in substance an objection to its relevancy and was so understood by the court and counsel and acted on by the court, but the judge certifies, that "these contentions were not passed upon by the court on the trial of the case," this court will not treat the statement of counsel that the evidence was objected to as irrelevant as being duly certified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2894; Dec. Dig. §1111(4).]

2. CRIMINAL LAW §388, 695(2, 4) — EVIDENCE OF EXPERIMENTS—OBJECTIONS.

Evidence of experiments out of court, if made under similar conditions and directly illustrating a material issue in the case, may be given. If made under changed conditions or in such circumstances that the experiments might be worthless or misleading, an objection to the testimony should specify these grounds of objection; and a mere general objection to the evidence, that it relates to an experiment not made in the presence of the accused, is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 854, 1634, 1636, 1638; Dec. Dig. §388, 695(2, 4).]

3. CRIMINAL LAW §922(5)—HARMLESS ERROR—INSTRUCTIONS.

Error is assigned upon the following charge of the court to the jury: "It is for you to determine from the testimony in the case whether any contradictory statements have been proven to have been made by such witness or witnesses; and whether such contradictory statements, if any have been established, of which you are the judges, are matters relevant to the testimony and to the evidence in the case." The criticism upon this charge is that "it was error to submit to the jury the question whether or not contradictory statements were relevant to the testimony and the case, this being a question for the court to decide, and not the jury." This charge is not an accurate statement of the law,

but in view of the entire charge and the evidence it is not cause for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2218; Dec. Dig. §922(5).]

4. CRIMINAL LAW §922(2)—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

The case was not one depending wholly upon circumstantial evidence, and it furnished no ground for a new trial that the court failed to charge the law touching such evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2210, 2213, 2216, 2217; Dec. Dig. §922(2).]

5. CRIMINAL LAW §774 — INSTRUCTIONS — DRUNKENNESS.

A charge that voluntary drunkenness is no excuse for crime, but that the jury can consider drunkenness, like any other fact, to illustrate intent and motive and otherwise shed light on the transaction, is not erroneous, where, as in the present case, it is authorized by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1829-1832; Dec. Dig. §774.]

6. CRIMINAL LAW §769—INSTRUCTIONS.

An exception to a correct charge because of failure to give in the same connection some other pertinent legal proposition is not a good assignment of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1803-1806; Dec. Dig. §769.]

7. HOMICIDE §340(4)—HARMLESS ERROR—INSTRUCTIONS—FORM OF VERDICT.

The failure of the court to charge the jury as to the form of their verdict in case they should find the defendant guilty of involuntary manslaughter is not cause for the grant of a new trial, inasmuch as the jury returned a verdict finding the defendant guilty of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 720; Dec. Dig. §340(4).]

8. CRIMINAL LAW §939(1), 942(1) — NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

The court did not err in refusing a new trial upon the grounds of the motion based upon alleged newly discovered evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318, 2321-2323, 2331; Dec. Dig. §939(1), 942(1).]

Error from Superior Court, Paulding County; A. L. Bartlett, Judge.

Sam Hicks was convicted of murder, and brings error. Affirmed.

Sam Hicks was tried under an indictment charging him with the offense of murder, it being alleged that he feloniously shot and killed Ed Fennell. Two witnesses testified that they saw the shooting; one of them was introduced by the state, and the other by the defendant. The witness introduced by the state was a nephew of the decedent, and was a boy about 13 years old. He testified that he was present when Ed Fennell was killed; that it was about 5 o'clock in the afternoon; that the defendant shot him with a pistol; that witness was about 50 yards away from them when the shot was fired; that the deceased, the accused, and George Prance were together and went to the edge of a field; that the deceased was going home, and the accused was going from his home; that when they got to the edge of

the field the witness heard a gun fire; that he heard the deceased call for him, and he asked what was wanting, but no reply was made. He then went and jumped on a stump, and just as he did so he saw the defendant shoot. The expression used by the witness was:

"I saw Sam [Hicks] throw the gun on Uncle Ed [Fennell] and shoot him down. I seen him fall, and I thought he was going to shoot again. That scared me and I ran towards the house, but I was looking back at him. After this, Sam Hicks ran back towards the branch, and then towards Uncle Ed, and then back, and then right up the hill towards his home. He ran as fast as he could."

The same witness gave other testimony locating himself at a period of time just before the first shot was fired and between the firing of the first shot and the second shot, and his position at the time of the firing of the fatal shot and a little while afterwards. The testimony of the other eyewitness to the homicide is, in substance, that the accused and the decedent were both drinking heavily; that the accused fired off his pistol once, and the decedent told him to "pop it again"; that Hicks then fired a second time, and the decedent said, "Pop it again." Hicks was drunk and apparently firing recklessly. Other testimony was introduced by the state and by the defendant. The jury returned a verdict of guilty, with a recommendation of mercy. The defendant made a motion for a new trial, which was overruled.

J. J. Northcutt, of Acworth, W. E. Spinks and A. J. Camp, both of Dallas, P. L. Bartlett, of Atlanta, and C. D. McGregor, of Dallas, for plaintiff in error. J. B. Hutcheson, Sol. Gen., of Douglasville, C. B. McGarity, of Dallas, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

BECK, J. (after stating the facts as above). The testimony of the state in this case authorized a verdict of guilty of murder. There was sufficient evidence to show that the defendant, while in a state of intoxication, deliberately shot and killed the decedent. There was some testimony to show that the two were not entirely friendly, though there was an abundance of testimony to show that they were perfectly friendly. The defendant's statement makes a case of accidental shooting. The witness Prance, who saw the killing, gave testimony which would have authorized the jury to find the defendant guilty of involuntary manslaughter.

[1] 1. To what is ruled in the first head-note we desire to add that while counsel insisted that the court understood his objection to the evidence referred to in this ground was based upon its irrelevancy, the objection was not by any means in proper form. For counsel to say, in the presence of the court, "I don't see what business they were in has got to do with the case," would, as a matter of course, be generally under-

stood between people engaged in conversation to mean that what had just been said by one of the parties was irrelevant; but when counsel desires a distinct ruling by the court, the court's attention should be directed to the question of the irrelevancy of the evidence objected to, by the distinct statement that it is objected to on the ground of irrelevancy. If counsel had stated to the court, addressing the court, "I object to the evidence on the ground that it is irrelevant," the attention of the court would have at once been arrested and directed to the question at issue. A trial judge has many things surrounding him to distract his attention in the progress of any trial, and especially in the progress of a trial for murder; and when counsel desires a ruling upon a question as to whether evidence should be admitted or repelled, he should secure the attention of the court, addressing himself to the bench and stating the grounds of objection to the evidence which he claims to be objectionable, and secure a ruling upon the motion which he has made or the objection which he has raised; and if he does not do this, but contents himself with remarking, relatively to the testimony that is being delivered by a witness, "I don't see what that has got to do with the case," such an objection will not avail him in this court, when the judge refuses to certify that the evidence was objected to on the ground of irrelevancy, but certifies that this contention was not passed upon.

[2] 2. Certain experiments were made by persons at and near the scene of the homicide, to test the opportunity of a witness, claiming to be an eyewitness to the homicide, for seeing and observing the act and conduct of the accused at the time of the shooting. This evidence was objected to on the ground that it related to an experiment between O'Neal, the witness testifying, and the boy introduced by the state, who testified as to the homicide, "as to the alleged places referred to and pointed out by the boy, when the defendant was not present, and that such evidence would not be admissible." This was not a good objection. Testimony may be received as to the results of experiments, where it is shown that the conditions are the same; and experiments may be made, of course, out of the presence of the defendant and out of the presence of the court, under proper conditions. The objection here raised by counsel was the broad objection based upon the fact that it was merely evidence of an experiment—not that the experiment was made under altogether different circumstances, where the conditions were not the same, nor that the experiment was as to some collateral matter. Consequently, there was no error in overruling the exception. *Taylor v. State*, 135 Ga. 622, 70 S. E. 237; 5 Enc. Ev. 473 et seq., and cases cited; 3 Jones on Evidence, § 410.

[3] 3. Error is assigned upon the following charge of the court:

"It is for you to determine from the testimony in the case whether any contradictory statements have been proven to have been made by such witness or witnesses; and whether such contradictory statements, if any have been established, of which you are the judges, are matters relevant to the testimony and to the evidence in the case."

The criticism upon this charge is:

"That it was error to submit to the jury the question whether or not contradictory statements were relevant to the testimony and the case, this being a question for the court to decide, and not the jury."

This charge was neither entirely accurate nor apposite. In section 1052 of the Penal Code it is provided that:

"A witness may be impeached by contradictory statements previously made by him as to matters relevant to his testimony and to the case."

This is a rule of evidence for the guidance of the court, and does not properly find a place in a charge instructing the jury as to the law of the case. The trial judge admits or repels testimony that is offered, according as it may appear competent or not competent. But we do not think that the error in this charge was of sufficient materiality to require the grant of a new trial.

[4] 4. "The case was not one depending wholly upon circumstantial evidence, and it furnished no ground for a new trial that the court failed to charge the law touching such evidence." *Clett v. State*, 132 Ga. 36, 63 S. E. 626.

[5] 5. A charge that voluntary drunkenness is no excuse for crime, but that the jury can consider drunkenness, like any other fact, to illustrate intent and motive and otherwise shed light on the transaction, is not erroneous, where, as in the present case, it is authorized by the evidence. *Park's Penal Code*, § 39, and cases cited.

[6] 6. Error is assigned upon the following charge of the court:

"If you find that the killing of Ed Fennell has been shown, was done by the defendant, Sam Hicks, on the occasion in question, without any intention to do so, but that it was done in the commission of an unlawful act which probably might produce such a consequence, in an unlawful manner, in that event you would be authorized to find the defendant guilty of involuntary manslaughter; but if such involuntary killing, if any has been shown, of which you are the judges, happened in the commission of an unlawful act by the defendant, Sam Hicks, which in its consequence naturally tended to destroy the life of Ed Fennell, and that Ed Fennell was killed by the defendant under such circumstances, then the offense would be murder."

This charge is criticised upon the ground that:

It was "erroneous in that the court failed and omitted to specify the grade of involuntary manslaughter referred to in said charge, of which the jury might find defendant guilty, and also failed to specify the penalty of such grade."

The charge itself was substantially a correct statement of the law, and was applicable to the case under the evidence. The inaccuracy in the charge could not be hurtful to the accused. And where a correct charge is given, it affords no ground of attack upon the charge itself that the court failed to give, in connection therewith, some other principle or proposition of law. *Cline v. Banking Co.*, 131 Ga. 611, 62 S. E. 984; *Seaboard Air Line Ry. v. Randolph*, 136 Ga. 505, 71 S. E. 887.

We might add, however, that there is no merit in the criticism. It was not error to fail to state the penalty, or to fail "to specify the grade of involuntary manslaughter referred to in said charge." *Jordan v. State*, 143 Ga. 499, 85 S. E. 327; *Tillman v. State*, 136 Ga. 59, 70 S. E. 876. What further specification of the grade was required, if the court correctly charged the law as to both grades of involuntary manslaughter committed in the commission of an unlawful act? And the criticism does not take exception to the failure of the court to charge upon involuntary manslaughter in the commission of a lawful act, which probably might produce such a consequence, in an unlawful manner.

[7] 7. The ruling made in the seventh headnote requires no elaboration.

[8] 8. The court did not err in refusing a new trial upon the grounds of the motion based upon alleged newly discovered evidence. As to a part of this evidence the court might well have found that the movant had not shown a proper degree of diligence; and as to the other evidence claimed to be newly discovered, it is merely impeaching.

The grounds of the motion not specifically referred to are without merit.

Judgment affirmed. All the Justices concur.

(146 Ga. 338)

TANNER v. WHITE et al. (No. 199.)

(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

SPECIFIC PERFORMANCE §106(1)—PARTIES—INTERVENTION—PETITION.

Where a daughter filed against her father a petition in which she alleged that the father, some years previously, had given to her a certain tract of land and had promised to execute to her a deed to it, but had failed and refused to do so, and that she had entered into possession of the land, had been in continuous possession of it up to the date of the filing of the suit, and had made valuable improvements thereon upon the faith of the gift, and she prayed specific performance by the father, and that title to the land be decreed in her, and where the father acknowledged service of the petition and process, waived further service, acknowledged that all of the allegations in the petition were true, and consented that a verdict and decree be taken at the appearance term of the court, the court should not have dismissed the petition of a third person who sought to intervene and be made a party defendant, alleging that he was

purchaser for value of the premises, without notice of the claims of the plaintiff in the suit for specific performance, denying the material allegations upon which the plaintiff based her claim for specific performance, and alleging further that upon the day upon which the suit was filed he had bought the land in question from the father of the plaintiff and paid the purchase money, without notice of the filing of the suit, and that the suit between the daughter and the father was collusive.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 342-345, 350, 351; Dec. Dig. § 106(1).]

Error from Superior Court, Jeff Davis County; J. P. Highsmith, Judge.

Action by Annie White against Elias Hinson and B. H. Tanner, intervenor. Judgment for plaintiff, and intervenor brings error. Reversed.

Mrs. Annie White filed her petition against her father, Elias Hinson, alleging that in July, 1910, the defendant gave to her a certain tract of land and promised to execute to her a fee-simple deed to the same; that she accepted the gift, took actual possession of the land, and held it continuously to the date of filing suit, and her possession was adverse to the claims of all persons whomsoever; that when the defendant made the gift he reserved the right to the timber upon the land, suitable for turpentine purposes, for a period of three years; that upon the faith of the gift and her father's promises to execute a deed she had made valuable improvements upon the land; and that the defendant refused to make a deed in compliance with his promise. She prayed for specific performance, and that title to the land be decreed in her. The defendant acknowledged service of the petition and process, admitted all the allegations of the petition to be true, and consented for the plaintiff to have a verdict and decree as prayed, at the appearance term of the court. B. H. Tanner filed his petition praying that he be made a party defendant. He denied the truth of the material allegations of the petition filed by Mrs. White, and alleged that he purchased the lot of land from Hinson on October 29, 1913, the same date upon which the original petition was filed and served upon Hinson. Tanner further alleged that he was a bona fide purchaser for value, and had been in possession of the property 17 months preceding the date of the filing of the suit. He denied that Mrs. White or any of her tenants had ever been in possession of the lot of land, so far as he knew, and averred that she was not in possession of the land at the time of his purchase. He further alleged that the purchase money had been paid by him before the suit was filed by Mrs. White, and that he had no knowledge, actual or constructive, of her claim of title. By amendment he alleged that the suit was filed before he bought the land and paid the purchase price, but that the filing of the suit and the purchase by him of the land were on the same day, and he had no knowledge of the filing of the suit. He

prayed that he be allowed to intervene and become a party defendant, that he be allowed to contest the claims of the plaintiff, and that the title to the land be decreed to be in him. The court, upon demurrer, dismissed the intervention of Tanner, and he excepted.

Bickerson, Kelley & Roberts and J. W. Quincey, all of Douglas, for plaintiff in error. W. W. Bennett, of Baxley, for defendants in error.

BECK, J. (after stating the facts as above). We are of the opinion that the court erred in sustaining the general demurrer to the petition of B. H. Tanner. If his allegations are true, the suit between Mrs. White and Hinson was collusive and designed to effect a fraudulent transfer of the property. Tanner was a purchaser who had paid a valuable consideration for the property. Mrs. White was a donee, and sought to have specific performance of her father's promise to give her the property. She was not entitled to a deed under a decree of specific performance as against one who was a purchaser for a valuable consideration, and who had bought without notice of the gift. It is true that if, as alleged in Tanner's petition, the suit between Mrs. White and Hinson was collusive, Tanner would not be barred by the doctrine of lis pendens from afterwards asserting his rights as against Mrs. White and Hinson; but there is no good reason for holding that he cannot now be made a party defendant and, as a party to this pending case, assert and have established his rights as purchaser. If Tanner is turned out of court and a decree for specific performance between Mrs. White and Hinson is rendered, it might constitute a cloud upon Tanner's title. Taking the allegations of the petition as true, he has caught both the wrongdoers facing each other in a court of equity. They have brought themselves there, and he is there asking that he be allowed to set up and establish his claims antagonistic to both; and the court should grant his prayer. The whole controversy will be settled in one case. In the case of *Allen v. Mitchell*, 143 Ga. 476, 85 S. E. 336, it is said:

"Our Code provides that 'all persons interested in the litigation should be parties to proceedings for equitable relief.' Civil Code, § 5417. Some exceptions to this rule are stated in the section referred to; but it is not necessary to consider them, as the parties here fall within none of the exceptions. In equity it is the general practice to permit strangers to a litigation, who claim and show an interest in such a matter, to intervene and assert and have established rights which would be affected by the decree in the case. 11 Enc. Pl. & Pr. 498 et seq. The broad rule laid down in the work last cited has probably been to a certain extent deduced from judicial construction of statutes in certain states in reference to the subject of intervention, and may be somewhat broader than the rule in this state; but under our Code provision quoted above, the rule here is not so narrow as to exclude parties showing a direct interest in the subject-matter of the suit, which is set up by the plaintiffs in error here. Generally a court

of equity will extend to one who is not a party to the bill the privilege of becoming a party, at his own instance, when from the case-made it appears that the ends of justice would be subserved by it. Phillips v. Wesson, 16 Ga. 187; Blaisdell v. Bohr, 68 Ga. 56."

What is there said is very closely in point under the facts of this case.

Judgment reversed. All the Justices concur.

(146 Ga. 344)

OSBORNE v. OSBORNE. (No. 201.)

(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

DIVORCE \Leftrightarrow 219—ALIMONY—TEMPORARY ALIMONY.

A judgment granting temporary alimony in stated monthly payments "until further order of the court" is not illegal because not limited to the termination of the suit, since the necessary construction and effect of such judgment is that the payments continue, under the supervisory power of the court to modify or revoke, until final judgment, when the payments cease altogether by operation of law.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 640, 735-737; Dec. Dig. \Leftrightarrow 219.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by O. F. Osborne against Ora Osborne. There was a judgment granting temporary alimony, and plaintiff brings error. Affirmed.

Arant & Trimble, of Atlanta, for plaintiff in error.

GILBERT, J. Ollie Osborne filed his petition for divorce against Ora Osborne. The defendant filed a plea and answer to the petition, and prayed "that she be granted temporary alimony pending said suit for divorce." The court passed an order granting temporary alimony "until the further order of this court." Ollie Osborne excepted to this order, on the ground that the court was "without authority to make this order." This is the only assignment of error.

In granting or refusing to grant temporary alimony the judge of the superior court is wisely permitted, under the law, to exercise a wide discretion. His order allowing temporary alimony "shall be subject to revision of the court at any time." Civil Code 1910, \S 2978. The authority of the court to modify or revoke an order granting temporary alimony is not even confined to a change of condition occurring subsequently to the granting of the order. Jennison v. Jennison, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441. The plaintiff in error insists that the court was without authority to pass the judgment awarding temporary alimony "until the further order of the court," without limiting the judgment to the pendency of the suit, citing Heilbron v. Heilbron, 158 Pa. 297, 27 Atl. 967, 38 Am. St. Rep. 845, and 1 Ruling Case Law, \S 89, p. 895, the last-named au-

thority being based alone upon the case of Heilbron v. Heilbron, supra. We have been unable to find any case in harmony with the one just cited. Under our law temporary alimony, pending an action for permanent alimony, does not cease with a verdict and judgment in the superior court, where the case is brought to the Supreme Court, but continues within the discretion of the court until the termination of litigation in all the courts. Holleman v. Holleman, 69 Ga. 678. When final judgment has been reached, temporary alimony ceases, and no judgment of the court could legally extend it beyond that point, no matter what language is employed in the order of judgment of the superior court.

In a judgment for temporary alimony, "whilst it is the better practice to specify the time for which the grant of supplies is decreed, it is no error not to do so, if the sum be not exorbitant or oppressive." Campbell v. Campbell, 67 Ga. 423 (3). It is not an unusual practice for judgments granting temporary alimony to be limited only by the words "until further order of the court"; and this is done for the very reason that the law itself fixes a time beyond which these judgments cannot be operative, to wit, final judgment in all the courts. Judgment for temporary alimony not being final, the application may be re-examined by the court at any time, either in term or in vacation, and modified in any direction, or revoked. If for slight causes of judicial discretion, or verbal niceties of expression in the judgment, this court should review and reverse the order of the trial court, the right to temporary alimony would be of little value, "and the very interregnum it is intended to cover would be frittered away in litigation over it." Carlton v. Carlton, 44 Ga. 219. It is also needless to give direction that the judgment be so modified that the payments directed thereby shall cease at the final judgment in the cause, since such is its necessary construction and legal effect.

Judgment affirmed. All the Justices concur.

(146 Ga. 288)

JONAS v. BLANCHARD. (No. 182.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

MASTER AND SERVANT \Leftrightarrow 286(1)—INJURIES TO SERVANT—ACTIONS.

There was no error in granting a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1001; Dec. Dig. \Leftrightarrow 286(1).]

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action by Robert Jonas against W. H. Blanchard. There was a judgment of nonsuit, and plaintiff brings error. Affirmed.

C. D. Maddox, of Atlanta, for plaintiff in error. Stiles Hopkins and Jas. J. Slaton, both of Atlanta, for defendant in error.

EVANS, P. J. The action was brought by a servant against the master, for damages alleged to have been sustained by the servant as the result of injuries caused by the master's negligence. A motion for nonsuit was granted, and the plaintiff excepted.

The plaintiff's evidence is confusing and contradictory. It may be gathered from it that he had been in the employment of the defendant about eight or nine months, working as a common laborer around the dwelling of the defendant; his duties requiring him to carry wood into the kitchen and to work about the kitchen. The defendant occupied a dwelling which was equipped with plumbing, and there was in the kitchen a metal tank large enough to hold 90 gallons of water, resting on a stool 18 or 20 inches high. In one part in his testimony the plaintiff said that the tank contained cold water all the time, but in another part he declared he thought the tank was empty all the time. The water pipe in the basement had burst, and the defendant and the plaintiff went down to cut off the water so as to stop the leak. The defendant cut off the water and went upstairs, instructing the plaintiff to come upstairs when he had finished with the work he was directed to do. In about five minutes the plaintiff ascended the stairs and went into the kitchen, where the defendant was standing by the tank near the stove. What occurred then was described by the plaintiff as follows:

"When I got up there in the kitchen, going from the basement, Mr. Blanchard [the defendant] had a pipe wrench and screw cutter in his hand. After I got up, Mr. Blanchard said he had disconnected the tank, to take it off from there; he thought I could hold it up; he said he disconnected, and he thought I could hold it until he could get around to me. In that conversation I am talking about, Mr. Blanchard told me when he disconnected, and it fell on me, he told me that he disconnected it, and he thought I could hold it until he came around, but I could not. I did not hold it. I could not hold it. I never did touch the tank at all. I suppose it was about seven feet from the door of the kitchen to the tank. When I got to the door of the kitchen, Mr. Blanchard was standing behind the tank. I could see his whole back. Yes, he had his back turned to me, and when I came in I could see his back and side. Yes, that is the time I saw the wrench in his hand. He had one hand on the tank. It looked like he was kinder propped against it; it looked like he was kinder propped against the tank. It seemed to me he was holding up the tank with his breast. * * * It seemed like he was holding the tank up with one hand leaning against the tank. When I came up, I went to where he was. I walked on to where he was. I went on to him. As to how far I was from him when I saw him first with that tank leaning on his breast, I suppose it was seven feet. As to whether the tank was leaning against him or was perfectly upright, it was perfectly upright. As to how it was leaning against him if it was perfectly upright, it seemed like he was kind of pressed

against it. Yes, he was between me and the tank. If he was between me and the tank. As to how I know the tank was kinder leaning against his breast, it seemed like he was kinder pressing the tank. He told me to get on the far side and catch the tank. As soon as I got around there, the tank fell. I suppose I was about a foot of the tank when it fell. I had got on the far side of the tank. He told me to catch it and hold it, but it fell before I could do anything with it. That was all he said."

The tank fell upon the plaintiff's foot, inflicting the injury complained of.

The plaintiff alleged in his petition that he did not know that the tank contained water, nor did he know that the defendant had disconnected the tank at its top from the plumbing; and that the defendant was negligent in failing to give him warning of these matters. His testimony is too confused and contradictory to establish the defendant's alleged acts of negligence. His testimony tends to show that he knew the condition of the tank, both with respect to its being filled with water and to its having been disconnected from the wall. With knowledge of these facts, he undertook to assist the master in protecting his house from the broken plumbing in the basement. He assumed the dangers incident to the task he undertook to perform; and, as he failed to show that the master was negligent, the nonsuit was proper.

Judgment affirmed. All the Justices concur, except HILL, J., disqualified.

(146 Ga. 253)

MILLTOWN LUMBER CO. v. BLITCH.
(No. 163.)

(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. JUDGMENT \S 17(9)—FORECLOSURE—SERVICE OF RULE NISI—VALIDITY OF JUDGMENT.

Where service of a rule nisi to foreclose a mortgage on realty was acknowledged by the mortgagors four days before the rule absolute was granted by the court, and the judgment absolute recited that the mortgagors named had "acknowledged service on this rule nisi," such defective service did not render the judgment absolutely void, but voidable.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 31; Dec. Dig. \S 17(9).]

2. JUDGMENT \S 497(2)—FORECLOSURE—COLLATERAL ATTACK.

Such judgment absolute cannot be collaterally attacked by one who claims the realty under a chain of titles from a common grantor who was a purchaser at the sheriff's sale.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 937; Dec. Dig. \S 497(2).]

3. DIRECTION OF VERDICT.

The court did not err in directing a verdict for the plaintiff.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by the Milltown Lumber Company against S. E. Blicht. Judgment for plaintiff, and defendant brings error. Affirmed.

E. K. Wilcox, of Valdosta, and Wilson & Bennett, of Waycross, for plaintiff in error. W. D. Bule and C. A. Christian, both of Nashville, for defendant in error.

HILL, J. Sarah E. Blitch brought an action of trespass against the Milltown Lumber Company, to recover damages for the cutting and removal of timber from 117 acres of lot of land No. 345 in the tenth district of Clinch county. The agreed value of the timber cut and removed was \$500. At the conclusion of the evidence the court directed a verdict for the plaintiff for that amount, and the defendant excepted. Both the plaintiff and the defendant claimed title to the timber in question from a common source. On the trial the plaintiff introduced, together with other evidence, a mortgage *fi. fa.* issued from the superior court of Clinch county, in favor of C. F. Brack against Angeline Brack and W. R. Brack, the entry of levy thereon showing that the *fi. fa.* was levied on the land involved in this case, that the land was sold by the sheriff of the county, and that it was purchased by J. B. S. Blitch, a predecessor in title of the plaintiff. The sheriff made a deed conveying the land. The defendant introduced a certified copy of the foreclosure proceedings in the above-stated case, including the petition, copy of mortgage, rule nisi, acknowledgment of service by the defendants, and rule absolute upon which the *fi. fa.* issued. It does not appear that the rule nisi was published once a month for four months, or that it was served on the mortgagors (who, according to the entry of the sheriff, were not to be found in Clinch county) or on their attorneys. But it does appear that the defendants signed the following acknowledgment of service:

"Tampa, Fla., October 14, 1899. I, Angeline Brack and W. R. Brack, acknowledge service on the within papers. [Signed] W. R. Brack and Angeline Brack."

It also appears that on October 19, 1899, four days after this acknowledgment of service was signed, the court granted a rule absolute foreclosing the mortgage. It is insisted by the plaintiff in error that the foreclosure proceedings were void, and that the plaintiff cannot recover in this case on a chain of titles based on such foreclosure. The controlling question, therefore, is whether the sale by the sheriff of Clinch county, under which the *fi. fa.* issued, was void, or voidable only. If it was void, it is conceded that the plaintiff cannot recover. Her right to recover is dependent on the validity of the judgment absolute. The judgment absolute, after stating that a rule nisi had been issued, recited that:

"Said Angeline and W. R. Brack acknowledged service on this rule nisi, and that they failed to pay said principal, interest, and costs in obedience to said rule," etc.

It thus appears upon the face of the judgment absolute that service was acknowledged by the defendants. This court held, in the case of *Hightower v. Williams*, 38 Ga. 598 (3), that:

"A purchaser at sheriff's sale, under a mortgage *fi. fa.*, will be protected when the rule absolute shows upon its face that the rule nisi was served upon the mortgagor according to law."

[1, 2] The judgment of foreclosure, as shown by the record, would be conclusive against the defendants (who, so far as the record discloses, did not contest the judgment of foreclosure), and upon a purchaser from them after the judgment absolute was rendered. See *Gunn v. Wades*, 62 Ga. 21. Of course, if there was no service at all, the judgment would be void, and it could be attacked collaterally by anybody; but if there is service, even though it be defective, the judgment absolute would be only voidable, and could not be attacked collaterally. See *Hobby v. Bunch*, 83 Ga. 1, 12, 10 S. E. 113, 20 Am. St. Rep. 301. The criticism on the service here is that it was not made a sufficient length of time before the signing of the judgment absolute. But, as already stated, that would render the judgment absolute only voidable, and not void. If voidable, the defendants in the mortgage *fi. fa.* might have had the judgment set aside, if they had made a timely motion for that purpose. But third parties cannot attack such judgment collaterally for a mere irregularity in the service of the rule nisi in the foreclosure proceedings.

[3] From what has been said, and a review of the evidence in the case, the court properly directed a verdict for the plaintiff.

Judgment affirmed. All the Justices concur.

(146 Ga. 250)

CITY OF JACKSON v. WILSON. (No. 161.)
(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES \S 165—RIPARIAN PROPRIETORS—RIGHTS OF.

Where an owner of land traversed by a creek sells a part of the land to a municipality, and incorporates in the deed a covenant that the municipality shall have the right to take water from the stream for the use of the municipality in the operation of its waterworks, and where the owner subsequently conveys to another the remainder of the tract, the municipality has no legal right to so construct a dam on its land as to cause backwater to fill up the channel of the creek and tributary ditches on the land of the upper proprietor, thereby rendering his land wet and unfit for cultivation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 213, 215; Dec. Dig. \S 165.]

2. WATERS AND WATER COURSES \S 171(1)—RIPARIAN PROPRIETORS—RIGHTS OF—"TRESPASS."

The owner of land is entitled to the free and exclusive enjoyment of all water courses not navigable flowing over his land; and the obstruction of such water course by a lower pro-

prietor so as to cause the water to overflow or injure the land of the upper owner, or any right appurtenant thereto, is a "trespass" upon his property. The charge to the jury was comprehensive of this principle of law.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 216, 217, 221, 222; Dec. Dig. § 171(1).

For other definitions, see *Words and Phrases*, First and Second Series, *Trespass*.]

3. DAMAGES § 62(3) — RIGHT OF ACTION — DUTY TO MINIMIZE.

"Whenever the right to enjoy one's property to its fullest extent is invaded, and injury arises therefrom, he may recover any damages sustained by reason of such invasion, nor is he bound to do anything to avoid the consequences thereof."

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 124–127; Dec. Dig. § 62(3).]

4. APPEAL AND ERROR § 302(3)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.

A ground of a motion for new trial must be complete in itself. Where complaint is made that the court refused to allow a witness to answer a certain question, and the motion does not disclose whether the question was asked on direct or cross examination, nor the nature of the expected answer, no question for decision is presented.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1747; Dec. Dig. § 302(3).]

5. MOTION FOR NEW TRIAL—DENIAL—ABUSE OF DISCRETION.

The evidence supports the verdict, and the court did not abuse his discretion in refusing a new trial.

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Action by W. W. Wilson against the City of Jackson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. T. Moore and H. M. Fletcher, both of Jackson, for plaintiff in error. C. L. Redman, of Jackson, for defendant in error.

EVANS, P. J. The city of Jackson owned a tract of land on which it erected a dam for the purpose of creating a reservoir for water to supply its inhabitants. The plaintiff owned adjacent land. He alleged that damages to him resulted from the erection of a dam which caused the ditches and drains on his land to become filled with sand and mud, thereby causing his land to become wet and unfit for cultivation. He recovered, and the defendant's motion for a new trial was overruled.

[1] 1. The plaintiff and the city purchased their respective tracts of land from a common owner; that of the city being anterior in point of time. The deed to the city contained this covenant:

"A further consideration being, and it is definitely understood by all parties, that party of the second part, the city of Jackson, is granted, bargained, and sold by party of the first part the right to take water for the use of the city of Jackson in the operation of its waterworks out of said Yellow creek at any point along said creek between the land described above

and the starting point in the aforesaid particularly described granted premises."

The covenant to take water from the creek did not authorize the city to so construct a dam as to back water on the plaintiff's land, or to cause the main channel of the creek over his land and the tributary ditches thereon to become filled with sand, the effect of which was to saturate the soil and render it wet and unfit for cultivation.

[2] 2. The owner of land is entitled to the free and exclusive enjoyment of all water courses not navigable flowing over his land; and the obstruction of a stream so as to impede its course or cause it to overflow or injure his land, or any right appurtenant thereto, is a trespass upon his property. Civil Code 1910, § 4475. The portions of the charge to the jury complained of in the first and second grounds of the motion for new trial were but an application of this principle, and were not erroneous for incompleteness in stating the principle.

[3] 3. The stream traverses the land of the plaintiff and the defendant, the land of the latter lying below that of the former. The plaintiff had the right to enjoy his property to the fullest extent; and when that right was invaded by the defendant and injury accrued to the plaintiff, he was entitled to his damages sustained by reason of such invasion, and was not bound to do anything to avoid the consequences thereof. *Athens Manufacturing Co. v. Rucker*, 80 Ga. 291, 4 S. E. 885. Accordingly it was not erroneous for the court to decline to allow the plaintiff, while testifying, to answer the question: "Couldn't you have cleaned out the ditches and got that much every year?"

[4] 4. Complaint is made that the court declined to allow certain witnesses to answer questions which had been propounded by the defendant's counsel. It does not appear from the motion for new trial whether the witnesses to whom the questions were put were offered by the plaintiff or the defendant. This court has frequently held that a ground of a motion for new trial must be complete in itself. If the witnesses were testifying for the defendant and the questions were put on direct examination, it was necessary, in order to make the assignment of error complete, that the court should be informed of the expected answers at the time; and, as it cannot be determined from the assignment of error in the motion for new trial whether the questions were put to the witness on direct or cross examination, no question is presented for decision.

[5] 5. The evidence was sufficient to sustain the verdict, and the court did not abuse his discretion in refusing a new trial.

Judgment affirmed. All the Justices concur.

(146 Ga. 267)

OWENS v. KEENEY et al. (No. 167.)

(Supreme Court of Georgia. Dec. 13, 1916.)

*(Syllabus by the Court.)***EXECUTION ~~§~~326 — DISTRIBUTION OF PROCEEDS—PRIORITIES.**

The grantor gave to three creditors security deeds differing in dates and amounts. Each of these creditors obtained judgment on his respective debt, and the land was sold under the *fi. fa.* based on the debt secured by the oldest deed, agreeably to the statute in such case made and provided. In a contest over the balance of the proceeds of the sale, after paying the *fi. fa.* under which the land was sold, it was not error to apply the money to the other judgments based on debts secured by the other deeds, in preference to a general judgment junior to the security deeds but older than the judgments on the debts secured by them.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 966-973; Dec. Dig. ~~§~~326.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Money rule by P. G. Keeney against C. W. Mangum, to which L. L. Owens, administrator, and others, were made parties. From the judgment, the administrator brings error. Affirmed.

Mayson & Johnson, of Atlanta, for plaintiff in error. Douglas & Douglas and Hewlett, Dennis & Whitman, all of Atlanta, for defendants in error.

HILL, J. This case arose upon issues presented in a money rule brought by P. G. Keeney v. C. W. Mangum, sheriff of Fulton county, and the answer of the sheriff, and is a contest between certain contract liens and a judgment lien. It appears from the record that Keeney obtained a general judgment in the city court of Atlanta, against Mrs. L. M. Bostick, on July 6, 1915, for the principal sum of \$700, with interest and costs, and that the same was established as a special lien on a certain described lot of land in the city of Atlanta. This judgment was based on a note dated May 26, 1914, and secured by warranty deed to the lot to secure a loan from Keeney to Bostick. The lot was sold under a judgment in favor of Irvine L. Elsemán against Mrs. L. M. Bostick, the judgment being dated July 6, 1915, and was based on a note dated August 23, 1909, for the principal sum of \$1,750, the note being secured by a deed of the same date covering the same parcel of land. The judgment was for \$1,978.70, including principal, interest, and attorney's fees. W. E. Treadwell & Co. obtained a general judgment in the city court of Atlanta against Mrs. Bostick July 6, 1915, which was also made a special lien on the same property, for the sum of \$1,776.50, covering principal, interest, and attorney's fees on a note dated May 28, 1914, which was secured by a warranty deed of the same date on the same property. L. L. Owens, administrator, on July 7, 1914, obtained a general judgment against Mrs. Bos-

tick for the principal sum of \$1,900, \$126.35 interest, and \$202.65 as attorney's fees, and costs. His suit was filed on July 13, 1914, and notice of intention to bring it was given June 4, 1914. He caused summons of garnishment to be issued and served on the sheriff after the sale of the land and the payment in full of the Elsemán *fi. fa.* The land brought at the Elsemán sale \$3,100, and there remained in the sheriff's hands, at the time of the hearing on the rule, the sum of \$1,016.34, and this sum was claimed by Keeney on account of his deed being the second loan deed, and the balance by Treadwell & Co. on their deed which was the third on the property. Owens, administrator, claimed the money in the hands of the sheriff by reason of the fact that he had the oldest judgment. The court ordered that Keeney be paid first, in full, the amount of his *fi. fa.*; that the residue be applied to the claim of W. E. Treadwell & Co.; and that Owens as administrator of the estate of B. B. Owens pay the costs of the case. To this judgment, Owens, administrator, excepted.

1. It is contended by Owens as administrator that the conveyance by Mrs. Bostick to Elsemán conveyed all the title that she had to the lot, and that the second and third loan deeds conveyed no title whatever, and that no interest in the land remained in Mrs. Bostick on which the special liens could be established. It is further argued that if Mrs. Bostick desired to secure Kenney, or Treadwell & Co., she could only do so by transferring the bond for title to reconvey to one or both of them; that the loan deed conveyed nothing because there was nothing to convey; that she should have transferred the "bond for title interest," because she ought to have had a bond for reconveyance, etc.; and, it not appearing that the bond for title was assigned to either Keeney or Treadwell & Co., they had nothing upon which to base their claim to the surplus remaining in the hands of the sheriff, and consequently the residue in his hands ought to be awarded to the Owens judgment. We do not think these contentions are sound. In the first place, it does not appear from the record that Mrs. Bostick had a bond for title. Be that as it may, whatever interest she had in the land was conveyed by her several deeds. Each deed subsequent to the first amounted to a conveyance of whatever equitable interest she had in the land, and was as effectual as a conveyance as a transfer of a bond for title would have been, and each deed according to its priority conveyed that interest, whatever it was, whether large or small, to the vendee therein. As long as Mrs. Bostick had an equity in the land, she could convey it by successive deeds. There is no contention that the loan deeds were not properly executed or recorded. Nor is there any insistence that, when the land was sold under

the Elseman *fi. fa.*, a deed of reconveyance was not made from Elseman to Mrs. Bostick for the purpose of levy and sale, or that the surplus money in the hands of the sheriff arising from such sale was not thus obtained. We think the court properly awarded the surplus money in the hands of the sheriff, first to the Keeney *fi. fa.*, and the residue to Treadwell & Co., instead of to the older judgment of Owens, administrator. See *O'Connor v. Georgia Railroad Bank*, 121 Ga. 88, 48 S. E. 716.

We think the court also properly awarded costs against Owens, administrator. He was cast in the suit, and the costs should not go against the prevailing parties.

Judgment affirmed. All the Justices concur.

(146 Ga. 216)

LAMB et al. v. TUCKER et al. (No. 136.)
(Supreme Court of Georgia. Nov. 18, 1916.)

(Syllabus by the Court.)

1. PROCESS \S 166 — AMENDMENT — CURE OF ERROR.

Where by statute a term of the superior court commences on the first Monday of a given month and may continue for two weeks, and a suit is instituted the requisite time before the term, and the petition contains a prayer that process issue, requiring the defendant to appear "at the next term," to answer, etc., and the clerk attaches to the petition a process which is regular in all respects, except that, by clerical error, it requires the appearance of the defendant at the court to be held on the second Monday in the month, and service is duly made on the defendant, who appears at the "next term" solely for the purpose of moving to dismiss the action for want of a valid process and files a motion to dismiss on that ground, and on the hearing of the motion at the second term after the appearance term the judge, on motion, allows the process to be amended by striking out "second Monday" and inserting in lieu thereof "first Monday," to which amendment no objection is interposed or exception taken, it is not erroneous to refuse to dismiss the case on the ground that the process is void as returnable to an impossible term. *Richmond & Danville R. Co. v. Benson*, 86 Ga. 203, 12 S. E. 357, 22 Am. St. Rep. 446; *Baker v. Thompson*, 75 Ga. 164.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. \S 250-255; Dec. Dig. \S 166.]

2. DEATH \S 49(1) — RIGHT OF ACTION — PLEADING.

Where by statute a prior right of action is given to beneficiaries other than the plaintiff, the petition must negative the existence of any person who has such primary statutory right to sue. *Tiffany on Death by Wrongful Act*, \S 182; 13 Cyc. 341; *Register v. Harrell*, 131 La. 983, 60 South. 638; *Chocktaw R. Co. v. Jackson (C. C.)* 182 Fed. 842. The Employers' Liability Act (Acts 1909, p. 160; Civ. Code 1910, \S 2781, 2782), giving a right of action against railroad common carriers for negligent homicide of their employes, gives a primary right of recovery to the widow or husband or child or children of the employe, and, if there be no person of either class, then to the parents of the employe. The right to sue is given primarily to the personal representative of the deceased, the recovery to be for the benefit of persons determinable in the above order; but, if there be no

personal representative, then the class of persons entitled to recover may sue in their individual names. *Williams v. W. & A. R. Co.*, 142 Ga. 696, 83 S. E. 525; *W. & A. R. Co. v. Smith*, 144 Ga. 737, 87 S. E. 1082. Where the parents assume to sue in their own names for the homicide of their minor son, and the petition negatives the existence of all the primary classes except "child or children" of the decedent, the petition is subject to an oral motion to dismiss in the nature of a general demurrer.

(a) The allegation that the deceased was 17 years of age, unmarried at the time of his death, and living with his parents as a member of their family, construed most strongly against the pleader (as the rule is in this state), did not negative the existence of children at the time of the homicide.

(b) In some states, where by statute pleadings are construed liberally in favor of the pleader, rulings have been made seemingly contrary to the one just stated. *Jackson v. Lincoln Min. Co.*, 106 Mo. App. 441, 80 S. W. 727; *Pries v. Ashland R. Co.*, 143 Wis. 606, 128 N. W. 281.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. \S 64-68, 69; Dec. Dig. \S 49(1).]

3. REFUSAL TO DISMISS.

Applying the foregoing, it was erroneous to refuse to dismiss the action on motion.

Error from Superior Court, Ben Hill County; *W. E. George, Judge.*

Action by Fannie Tucker and others against E. T. Lamb, receiver, and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Bolling Whitfield, of Brunswick, and Elkins & Koplin and J. B. Wall, all of Fitzgerald, for plaintiffs in error. Clayton Jay, of Fitzgerald, and F. G. Boatright, of Cordele, for defendants in error.

ATKINSON, J. On April 20, 1914, a petition was filed in an action against the receivers of a railroad company. To the petition was attached a process requiring the defendants to "appear at the superior court, to be holden for the county, * * * on the second Monday of October, next," etc. According to the statute (Acts 1906, p. 50), the October term of that court did not begin on the second Monday, but it was provided that the term should begin on the first Monday, and might continue for two weeks. The defendants appeared at the October term and filed a motion to dismiss the petition, on the ground that the process was made returnable to an impossible term of court, and therefore was void. The motion alleged that the defendants appeared solely for the purpose of making the motion to dismiss. No action was taken upon the motion, but at the next succeeding October term the court, on motion of the plaintiff, allowed the process to be so amended as to be returnable on the first Monday of October, 1914. At the same time the court allowed two amendments to the petition, having reference to the merits of the case. The defendants, so far as appears, interposed no objection to the allowance of any of the amendments. Afterward the case came on for trial at the October term, 1915,

and the defendants made an oral motion to dismiss it on the ground that the petition "did not set forth any cause or right of action against the defendants." Upon consideration, both motions to dismiss were overruled.

[1-3] In the bill of exceptions error is assigned only upon the overruling of the motions to dismiss. According to the allegations of the petition, the action was instituted by a mother for the homicide of her son, 17 years of age, who had been employed by the receivers of the railroad company, upon whom she was dependent, and who contributed to her support. At the time of the homicide, the boy was living at the home of his parents, and was unmarried. By one of the amendments his father was made a party plaintiff. In regard to the circumstances of the homicide and the negligence of the defendants, the petition set forth allegations in detail, which are not material to this report, in view of the rulings in the second division of the syllabus, *supra*.

Judgment reversed. All the Justices concur.

(146 Ga. 187)

JONES v. STATE. (No. 119.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. LARCENY \Leftrightarrow 88—PROSECUTION—MOTION IN ARREST.

A motion in arrest of judgment on a conviction of larceny from the house, upon an indictment drawn under Pen. Code 1910, § 175, is not sustainable on the ground that this Code section fails to prescribe a penalty.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 214; Dec. Dig. \Leftrightarrow 88.]

2. LARCENY \Leftrightarrow 38, 88—"LARCENY FROM THE HOUSE"—INDICTMENT.

"Larceny from the house," as defined in Pen. Code 1910, § 175, is punishable as prescribed in Pen. Code 1910, §§ 177, 178, and 179.

An indictment for larceny from the house as defined in Pen. Code 1910, § 176, must allege that it was privately committed, and the punishment for the offense denounced in that section is as is therein prescribed.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 98, 214; Dec. Dig. \Leftrightarrow 38, 88.

For other definitions, see Words and Phrases, First and Second Series, Larceny from the House.]

Certified Questions from Court of Appeals.

Charles Jones was convicted of larceny, and he brings error. On questions certified by Court of Appeals. Questions answered.

For subsequent decision in Court of Appeals, see 90 S. E. 981.

L. H. Covington, of Rome, for plaintiff in error. C. H. Porter, Sol., of Rome, for the State.

EVANS, P. J. [1] We have examined into the history and origin of the Code sections involved in the questions propounded by the Court of Appeals. We find that sections 175,

176, 177, and 179 of the Penal Code of 1910 are virtual reproductions of the Penal Code of 1833 (Acts of 1833, p. 161). In the Penal Code of 1833 larceny from the house is contained in a division confined to that subject. There is a substantial concordance of section 26 of the Penal Code of 1833 with section 175 of the Penal Code of 1910; of section 27 with section 176; of section 28 with section 177; of section 29 with section 178; and of section 30 with section 179. The punishment of larceny from the house was that of a felony under the Penal Code of 1833, but was reduced to that of a misdemeanor by the act of 1866 (Laws 1866, p. 233). Section 175 of the Penal Code of 1910 defines in general terms four classifications of the offense of larceny from the house: (1) Breaking into any house with intent to steal; (2) entering any house with intent to steal; (3) stealing from any house after having broken into the same; and (4) stealing from any house after having entered it. The punishment is provided in the following sections: 177 and 178 for the first and second classifications; and 179 for the last two classifications, where the house is one other than a dwelling house or its appurtenances. Heard v. State, 120 Ga. 848, 48 S. E. 311. Section 176 covers an offense where the entering was without intent to steal, but where, being in the house, a person did privately steal money, etc., and provides a punishment according to the value of the article stolen. Inasmuch as all thefts are usually committed in private, it would seem that the distinction was really one of small difference. Perhaps this conception influenced the General Assembly in 1872 (Acts of 1872, p. 10) to modify that section by confining the houses in which larceny is committed to houses "within the curtilage," so as to make the punishment apply to the case of a person who privately stole from a dwelling house, shop, warehouse, or any other building within the curtilage. This amendment limited the application of section 176 to a house which was the subject-matter of burglary. See Code of 1873, § 4414. But, however this may be, the General Assembly in 1877 (Acts of 1877, p. 22) struck the words "within the curtilage," and restored the section as it was in the Penal Code of 1833, § 27.

[2] It would thus seem that, in addition to the forms of larceny from the house, as defined in Penal Code 1910, § 175, which are punishable under Penal Code 1910, §§ 177, 178, and 179, the Legislature intended to define a separate and distinct form of larceny from the house as defined in section 176, and an indictment drawn under that section must describe the larceny as having been privately done. Kimbrough v. State, 101 Ga. 583, 29 S. E. 39.

Accordingly we answer the questions propounded by the Court of Appeals as stated in the headnotes to this opinion. All the Justices concur.

(146 Ga. 249)

WIMBURN et al. v. FISKE. (No. 159.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***NEW TRIAL** \S 70—**GROUND—VERDICT CON-
TRARY TO LAW AND EVIDENCE.**

Considering the charge of the court to the jury in its entirety, the errors in those portions excepted to are not of such character as to require the grant of a new trial; and, there being sufficient evidence to authorize the verdict, the judgment of the court below refusing a new trial is affirmed.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. \S 142, 143; Dec. Dig. \S 70.]

Error from Superior Court, Richmond County; H. O. Hammond, Judge.

Action between C. C. Wimburn and others and Carrie S. Fiske, administratrix. From the judgment C. C. Wimburn and others bring error. Affirmed.

Isaac S. Peebles, Jr., of Augusta, for plaintiffs in error. Geo. T. Jackson, of Augusta, for defendant in error.

BECK, J. Affirmed. All the Justices concur.

(146 Ga. 245)

**FRANCIS, Treasurer, v. PORTER, Tax Col-
lector.** (No. 155.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***MANDAMUS** \S 187(5)—**PRESENTATION FOR RE-
VIEW—TIME.**

By the Civil Code 1910, \S 5447, it is provided: "Upon refusal to grant the mandamus nisi, the petitioner may have his bill of exceptions to the Supreme Court, as in cases of the granting and refusing of injunctions; and either party dissatisfied with the judgment on the hearing of the answer to the mandamus nisi may likewise file his bill of exceptions." Section 6153 provides: "In all cases where an application for an injunction * * * is granted or refused; * * * granting or refusing application for * * * mandamus, or other extraordinary remedy, * * * the bill of exceptions shall be tendered and signed within twenty days from the rendition of the decision," etc.

Upon a petition for mandamus, presented to a judge of the superior court, the following order was passed: "At chambers. The foregoing petition considered, and mandamus nisi refused. This March 28, 1916." The bill of exceptions assigning error upon this order was presented on April 24, 1916. *Held*, that the writ of error must be dismissed as not having been presented within the time required by law. See, in this connection, *Holder v. Jelks*, 116 Ga. 134, 42 S. E. 400; *Sistrunk v. Mangum*, 138 Ga. 222, 75 S. E. 7.

[Ed. Note.—For other cases see *Mandamus*, Cent. Dig. \S 433; Dec. Dig. \S 187(5).]

Error from Superior Court, Bleckley County; E. D. Graham, Judge.

Mandamus by C. F. Francis, Treasurer, against W. D. Porter, Tax Collector. Judgment for defendant, and plaintiff brings error. Writ of error dismissed.

A. C. Adams, of Cochran, for plaintiff in error.

FISH, C. J. Writ of error dismissed. All the Justices concur.

(146 Ga. 228)

**C. E. NEWTON & BRO. et al. v. FRUIT DIS-
PATCH CO.** (No. 142.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***1. ASSIGNMENTS OF ERROR — ERRORS PRE-
SENTED.**

The assignments of error upon the ruling allowing the petition to be amended, and various rulings as to the admissibility of evidence, are not well taken and are not of such character as to require elaboration.

2. TRIAL \S 170—**DIRECTED VERDICT—RIGHT
TO.**

Under the uncontradicted evidence and all reasonable deductions therefrom, a verdict in favor of the plaintiff was demanded, and its direction was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 390-394; Dec. Dig. \S 170.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Fruit Dispatch Company against C. E. Newton & Brother and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiffs in error. John R. L. Smith and Grady C. Harris, both of Macon, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 284)

**JORDAN & PHILLIPS v. DIXIE CULVERT
& METAL CO.** (No. 180.)

(Supreme Court of Georgia. Dec. 14, 1916.)

*(Syllabus by the Court.)***1. CONTRACTS** \S 330(3) — **COMMISSIONS —
RIGHT TO RECOVER.**

If a vendor sells personal property and in the contract of sale promises the vendee, in consideration of the order for the goods, to allow commissions to a selling agent who is a friend of the vendee but who has not negotiated the sale, and if the vendor after the sale has been completed refuses to pay the commissions, the vendee suing for the use of the selling agent can maintain an action to recover the commissions. *Bell v. McGrady*, 32 Ga. 237; *Richmond & Danville Railroad Co. v. Bedell*, 88 Ga. 591, 15 S. E. 676; *Dallas v. Heard*, 32 Ga. 604. See, also, *Sheppard v. Bridges*, 137 Ga. 615, 74 S. E. 245.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. \S 1592-1594, 1596, 1602, 1603; Dec. Dig. \S 330(3).]

2. DEMURRER—SUSTAINING—PROPRIETY.

It was erroneous to sustain the general demurrer to the petition as amended, and to dismiss the case.

Evans, P. J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Jordan & Phillips, for use, etc., against the Dixie Culvert & Metal Company. There was a judgment for defendant, and plaintiff brings error. Reversed.

Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. Edgar A. Neely, of Atlanta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except EVANS, P. J., dissenting.

(146 Ga. 236)

COMMERCIAL BANK OF UNADILLA v. ATLAS INS. CO. (No. 188.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. INSURANCE ⇨629(1)—FIRE POLICIES—ACTION—PETITION.

In an action for a loss under a fire insurance policy the petition alleged that the defendant, in consideration of stated premiums, issued to the insured its policy of insurance against loss by fire, in stated amounts, upon described property, effective between specified dates; that on a certain day during the life of the policy a described loss was sustained; that thereafter all right to the amount of the loss was duly assigned in writing by the insured to the plaintiff; that at the time of the issuance of the policy the insured notified the insurer's agent who wrote the insurance that he held only a bond for title interest in the land, and that there was a certain mortgage on the personal property covered by the policy, and directed the agent "to write him a policy with these liens and the status of his title in view, and that the insured, "being a foreigner, can scarcely read or write English, and relied on the company's agent * * * to write up the policy according to the information, and he did not read or attempt to read said policy upon delivery"; also that the plaintiff furnished proper proof of loss within the time specified, and in every way complied with the terms of the policy; and that a copy of the material parts of the policy was attached to the petition as an exhibit. The paper so attached appeared to be in the form of a policy of fire insurance, except that while it referred to "the following conditions and stipulations printed on the back hereof," as being a part of the policy, none of such conditions were set out in the paper. *Held*, that it was erroneous to sustain a general demurrer to the petition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1575; Dec. Dig. ⇨629(1).]

2. APPEAL AND ERROR ⇨242(3)—REVIEW—QUESTIONS PRESENTED.

The judge did not rule upon any of the special grounds of demurrer, and no decision is made with respect to them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1419, 1420; Dec. Dig. ⇨242(3).]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by the Commercial Bank of Unadilla against the Atlas Insurance Company. There was a judgment sustaining a demurrer to the petition, and plaintiff brings error. Reversed.

Evins & Moore, of Atlanta, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 294)

NASHVILLE, C. & ST. L. RY. et al. v. WYETTE. (No. 187.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. RAILROADS ⇨381(6), 390 — INJURIES TO PERSONS ON TRACKS—NEGLIGENCE—CARE.

An action was brought by a widow against a railway company and one of its locomotive engineers for damages on account of the homicide of the plaintiff's husband. By the evidence submitted on the trial the following facts were established: The deceased was a man about 65 years old, and "hard of hearing." He and his family had resided for three or four years, "off and on," within about 12 or 15 feet from the defendant's right of way, and about "a half a quarter of a mile" from a trestle over which the railway track passed. The trestle was high and about 75 feet in length. The deceased had been walking across the trestle several times on each work day for some weeks prior to the time he was killed, and had been warned several times as to the danger in using the trestle as a footway. One morning about 8:30 o'clock, when going to his work and intending to walk over the trestle, he stopped when he reached it and looked and listened to ascertain whether a train was approaching from the direction of his home. He neither saw nor heard such a train. He then undertook to walk over the trestle, but before getting over a train overtook him and killed him. This train was a regular one, making several trips a day over the trestle, and was due to pass there in the morning at about 8 o'clock, but on this occasion it was about 30 minutes late. It was going downgrade. About 100 yards from the end of the trestle in the direction from which the train was approaching there was a curve of the track in a cut, which prevented those on the engine seeing a person on the trestle until the train emerged from the cut. The engineer driving the locomotive which killed the plaintiff's husband testified that he was on the lookout and saw the deceased as soon as he could have been seen by one driving the engine, and that as soon as the deceased was seen the engineer immediately put on the emergency brakes, sanded the track, and did all that could possibly be done to stop the train before it struck the deceased. The testimony of the fireman and the front brakeman corroborated the engineer's testimony. A witness for the plaintiff, who had formerly been an engineer, did not agree with the engineer driving the locomotive which struck the deceased as to the distance in which the train under all the circumstances could have been stopped, but he admitted that the distance would vary under certain circumstances, and that the engineer in charge of the locomotive would know better than any one else whether he stopped the train in as short distance as possible. *Held*: The plaintiff's husband failed to exercise ordinary diligence to avoid the collision which resulted in his death. Those in charge of the running of the defendant company's train did not fail to exercise ordinary care to prevent injury to the plaintiff's husband after his danger was apparent, or after it should have been apparent by the exercise of ordinary care. Even if the evidence authorized a finding that the trestle was used by the pub-

lic as a pathway, this furnished no excuse for the failure of the deceased to exercise that degree of care which the law requires of all persons in such situation and under like circumstances. *McIver v. Georgia Southern & Fla. Ry. Co.*, 108 Ga. 306, 33 S. E. 901; *Roach v. A. K. & N. Ry. Co.*, 119 Ga. 98, 45 S. E. 963; *Moore v. So. Ry. Co.*, 136 Ga. 872, 876, 72 S. E. 403; *Phillips v. E. T. Va. & Ga. Ry. Co.*, 87 Ga. 272, 13 S. E. 644; *Central of Ga. Ry. Co. v. Tapley*, 89 S. E. 841. Under the facts disclosed by the record and the law applicable thereto, no lawful recovery could be had by the plaintiff, and the court erred in not granting defendant a new trial on the general grounds that the verdict for the plaintiff was contrary to law and the evidence and without evidence to support it.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1291, 1324, 1325; Dec. Dig. ☞ 381(6), 390.]

2. APPEAL AND ERROR ☞ 1078(3)—REVIEW—WAIVER OF ERRORS.

The questions raised by the demurrer to the petition and the plea in abatement, not being argued in the brief of counsel for the plaintiff in error, will be considered as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4258; Dec. Dig. ☞ 1078(3).]

Error from Superior Court, Bartow County; A. W. Fite, Judge.

Action by Nancy Wyette, by next friend, against the Nashville, Chattanooga & St. Louis Railway and another. There was a judgment for plaintiff, and defendants bring error. Reversed.

Tye, Peeples & Jordan, of Atlanta, and Neel & Neel, of Cartersville, for plaintiffs in error. J. J. Copeland, of Dalton, Finley & Henson, of Cartersville, and M. C. Tarver, of Dalton, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(146 Ga. 244)

ALLEN v. CURRY et al. (No. 153.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS ☞ 382 — PROCEEDINGS TO SUPPRESS BIDDING—SALES—DAMAGES.

In an action by an administrator cum testamento annexo, the petition alleged the following in substance: A. and B. conspired to suppress bidding at a public sale of the testator's land, for the purpose of becoming the purchasers at a noncompetitive price; and in pursuance of the scheme A. pretended that he represented a third person who had purchased the interest of one of the legatees, falsely announced to prospective buyers, when the property was being cried off by the auctioneer, that his client would not confirm the sale unless the property should bring such a price that his fractional interest in the proceeds of the sale would be a stated amount (which was so great that the purchase price would have to exceed the value of the property), that the title to the land in whole or in fee could not be sold by petitioner without the concurrence of A.'s client, and that the purchaser at the sale must take subject to the notice thereby given. The sale proceeded; B. made a bid at less than the value of the property, and other persons were deterred from bidding, by the action of A. The property was knocked off to B.,

but before making a deed the plaintiff discovered the conspiracy and refused to carry out the sale. Thereupon an action was instituted by B. to compel specific performance, which was successfully resisted on the ground of the fraud of A. and B. Afterward the petitioner again advertised and sold the property at public sale at the highest bid obtainable, which was slightly less than the bid at which it was cried off on the first sale. The only measure of damages sought for recovery was the difference between the bid by B. at the first sale and the market value of the property at that time. *Held*, that upon the allegations of the petition, there was no right to recover the damages sought; and there was no error in dismissing the action.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1566; Dec. Dig. ☞ 382.]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Action by Albert Allen, administrator cum testamento annexo, against R. T. Curry and another. There was a judgment for defendants, and plaintiff brings error. Affirmed.

A. S. Thurman, of Monticello, for plaintiff in error. Greene F. Johnson and Doyle Campbell, both of Monticello, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 249)

COLQUITT v. GEORGIA RY. & POWER CO. (No. 157.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

PLEADING ☞ 64(2)—JOINER OF DISTINCT CAUSES OF ACTION.

This was an action for damages against a street car company. The petition contained but one count. A lump sum was claimed as damages (a) for refusal of a conductor of a car at a transfer point to allow the plaintiff to get on his car; (b) for refusal of the conductor of a second car to accept as fare transfer tickets that had been duly issued by the conductor of another car, and requiring payment of a cash fare; (c) for carrying plaintiff beyond his destination. *Held*, that the petition was subject to a special demurrer on the ground that there was an attempt to join several distinct causes of action in one count. *Seifert v. Sheppard*, 111 Ga. 814, 35 S. E. 673; *Gainesville & Dahlonga Electric Ry. Co. v. Austin*, 122 Ga. 823 (1), 50 S. E. 983; *Central of Ga. Ry. Co. v. Prior*, 142 Ga. 536(1), 83 S. E. 117; *Orr v. Cooledge*, 117 Ga. 205, 43 S. E. 527.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 134-137; Dec. Dig. ☞ 64(2).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Will Colquitt against the Georgia Railway & Power Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

E. R. Clarkson and Brown & Brown, all of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 242)

SMITH v. TURNER. (No. 150.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***MECHANICS' LIENS** \S 291(1), 304(1) — **FORECLOSURE—ACTIONS—NONSUIT.**

The petition of a materialman declared that he contracted with the defendant, the owner of certain realty, to furnish materials for improving it, and that the materials were used in making the improvement. Both a judgment in personam and a foreclosure of the plaintiff's lien were prayed. The answer denied that the defendant made any such contract with the plaintiff. On the trial it was shown that the plaintiff furnished the materials to a contractor with whom the defendant's husband had contracted for the construction of a building on the defendant's land. It appeared from the plaintiff's testimony that he made no contract with the owner of the land, and there was no evidence that the husband of the owner had any authority from her to contract with the materialman. It was shown by the uncontradicted testimony of the contractor, a resident of this state but not of the county where the action was brought, that no judgment had ever been rendered against him for such materials and that he had never been sued for the price of them. At the conclusion of the evidence in behalf of the plaintiff, the defendant moved for a nonsuit on the ground, among others, that no judgment had been rendered against the contractor for the materials he used in constructing the building on the defendant's land, and that the contractor was not a party defendant to the action being tried. *Held*, that the court did not err in granting the nonsuit on the ground stated, even if it should not have been granted on the other grounds of the motion. *Griffin v. Gainesville Iron Works*, 144 Ga. 840, 88 S. E. 201.

[*Ed. Note.*—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 509, 632; Dec. Dig. \S 291(1), 304(1).]

Error from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by Mrs. V. R. Smith against Leah Turner. There was judgment of nonsuit, and plaintiff brings error. Affirmed.

J. H. McLarty, of Douglasville, and J. S. James and J. R. Bedgood, both of Atlanta, for plaintiff in error. E. S. Griffith, of Buchanan, and J. R. Hutcheson, of Douglasville, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 278)

J. FURMAN EVANS CO. v. BRYSON. (No. 176.)

(Supreme Court of Georgia. Dec. 14, 1916.)

*(Syllabus by the Court.)***BILLS AND NOTES** \S 375—**ILLEGALITY—BONA FIDE PURCHASER—RECOVERY.**

An agent sold certain shares of stock without complying with the act of 1913 (Acts 1913, p. 117), taking a negotiable note therefor. The note was negotiated for value, before maturity, to an innocent purchaser who brought suit against the maker. The maker pleaded that the note, having been given in violation of the act, was, under the eighth section thereof, void, and that the plaintiff, notwithstanding he acquired a title to the note for value and before

maturity, could not recover. *Held*, that under the eighth section of the act such sale is voidable and not void, and the plea was not meritorious.

[*Ed. Note.*—For other cases, see *Bills and Notes*, Cent. Dig. §§ 971-981; Dec. Dig. \S 375.]

Error from Superior Court, Stewart County; Z. A. Littlejohn, Judge.

Action between the J. Furman Evans Company and J. H. Bryson. There was a judgment for the latter, and the former brings error. Reversed.

R. S. Wimberly, of Macon, and T. T. James, of Lumpkin, for plaintiff in error. G. Y. Harrell, of Lumpkin, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(146 Ga. 233)

BEALL v. PATTERSON et al. (No. 145.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***1. PLEADING** \S 340—**ESTABLISHMENT OF LOST PLEADINGS—EVIDENCE.**

Upon the loss of any original pleading or official paper, a copy may be established instantly on motion, and the court may suspend the trial for this purpose. Where a motion is made to establish a lost paper, and the opposite party files a written traverse denying the existence of the alleged lost original, it is error to refuse that party the right to offer competent evidence in support of his traverse.

[*Ed. Note.*—For other cases, see *Pleading*, Cent. Dig. §§ 667, 1026-1032; Dec. Dig. \S 340.]

2. LANDLORD AND TENANT \S 267(2) — **DISTRESS WARRANT—RENT NOTE.**

A distress warrant based upon a rent note payable to the order of the landlord, and indorsed by him in blank, may be sued out by the holder of the note in his own name, by virtue of the provisions of Civ. Code 1910, §§ 3345-3347.

[*Ed. Note.*—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1081; Dec. Dig. \S 267(2).]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action by L. E. Beall against John T. Patterson and another. Judgment for defendants, and plaintiff brings error. Reversed.

Geo. A. Coffee and A. L. Henson, both of Calhoun, for plaintiff in error. Starr & Paschall, of Calhoun, for defendants in error.

EVANS, P. J. [1] 1. L. E. Beall foreclosed a distress warrant against John T. Patterson and C. W. Patterson, which was levied upon the property of the defendants. The bill of exceptions recites that:

The "levy and proceedings were arrested by the defendants, who denied that they owed said sum or any part thereof. The distress warrant, together with the levy, etc., were filed in the clerk's office of the Gordon superior court and docketed as No. 35 to the November, 1914, term of said court."

When the case was called in its order the counter affidavit and replevy bond could not be found, and the defendants' counsel presented alleged substantial copies of them, and moved that the copies thus presented be established in lieu of the lost originals. The plaintiff tendered a traverse under oath, denying that any answer or counter affidavit or replevy bond had ever been filed by the defendants or either of them. The court allowed defendants' counsel to testify that the paper presented was a substantial copy of the originals which had been duly filed, but refused to permit the plaintiff to offer evidence to show that the papers had never been filed, "saying that, it appearing from the note sued on that the relation of landlord did not exist, it is unnecessary to hear any proof as to the alleged lost papers." Exception is taken to this ruling. The statute provides that upon the loss of any original pleading or office paper a copy may be established instantly on motion. Civil Code 1910, § 5312. The court may suspend the trial and allow a copy of the lost pleading to be established. *Freeman v. Coleman*, 88 Ga. 421 (4), 14 S. E. 551. If there is any contest over the existence of the alleged lost originals or a controversy whether the copies proposed to be established in lieu of the lost originals are substantial copies, it is the duty of the court to settle that issue of fact. The trial cannot proceed over objection without the presence of the necessary office papers or the established copies. *Morris v. Ogle*, 56 Ga. 592. It was error for the court to deny the plaintiff a right to be heard upon the issue made by his traverse. It is a fundamental principle in legal procedure that a judgment should never be rendered against a party who controverts the basal fact on what the judgment must rest, without giving him an opportunity to be heard.

[2] 2. After the court had passed the order establishing the proffered copy in lieu of the alleged lost originals, the defendants' counsel moved to dismiss the plaintiff's case, because the same was brought in the name of L. E. Beall, and it appeared that the rent note given the defendants was payable to the order of W. L. Beall, and by him was indorsed in blank without any special transfer of the lien for rent, and that such indorsement was not sufficient to transfer the lien for rent to L. E. Beall. The court announced that he would sustain the motion to dismiss; whereupon the plaintiff's counsel tendered an amendment so as to allow the suit to proceed in the name of David Johnson, administrator of the estate of W. L. Beall, for the use of L. E. Beall. The court disallowed the amendment and sustained the motion to dismiss. Prior to the act of 1899 (Laws 1899, p. 90) the transfer of a rent note payable to the order of the landlord, by simple indorsement, was ineffectual to assign the landlord's lien for

rent. *Lathrop v. Clewis*, 63 Ga. 282. But by the terms of that act as codified in Civil Code 1910, § 3345, all transfers and assignments of rent notes or mortgage notes, secured either by contract lien, or out of which a lien springs by operation of law, shall be sufficiently technical and valid where such transfer or assignment plainly seeks to pass the title to any of such papers in writing from one person to another. It is further provided, in sections 3346 and 3347, that upon all such transfers or assignments of any such rent note or mortgage note such transfer or assignment shall carry, together with the title thereof, to such transferee or assignee also the lien connected with same, without naming or specially transferring the lien, so that the effect of such transfer or assignment will be to completely and fully carry the lien as a necessary incident thereof, and that the person to whom the same may be transferred or assigned may, without more, have full power and authority to foreclose the same in his own name. In *Setze v. First National Bank of Pensacola*, 140 Ga. 603, 79 S. E. 540, these Code sections were construed. In that case a mortgage note was payable to the mortgagee or order, and was indorsed by the mortgagee in blank. The holder of the mortgage note foreclosed the mortgage in his own name; and it was held that:

"The simple indorsement of the name of the payee in a mortgage note payable to order, on the back thereof, gives the holder for value the right to foreclose the mortgage in his own name."

The act of 1899 is applicable alike to notes secured by contract lien and to notes from which a lien springs by operation of law. There is no doubt that a landlord who takes a note for his rent may foreclose a distress warrant; and if the note be payable to his order, under the construction placed on the Code section in the cited case, his assignee may foreclose a distress warrant in his own name. Inasmuch as the distress warrant could be prosecuted by the plaintiff in his own name, the amendment was unnecessary.

Judgment reversed. All the Justices concur.

(146 Ga. 315)

LUCAS v. STATE. (No. 196.)

(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

1. HOMICIDE — 163(2) — EVIDENCE — ADMISSIBILITY.

Evidence offered by the accused, to the effect that the police raided the home of the deceased and charged her with selling whisky, was irrelevant on the trial of the accused for murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 312-317; Dec. Dig. 163(2).]

2. WITNESSES — 77 — COMPETENCY — CHILDREN.

On objection to the competency of a child of ten years as a witness, based on her youth-

fulness, the answers given in response to questions propounded to the child by the judge were sufficient to authorize him to hold the witness competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195-200; Dec. Dig. ¶77.]

3. CRIMINAL LAW ¶531(3)—EVIDENCE—CONFESSIONS — ADMISSIBILITY — PRELIMINARY EVIDENCE.

Certain statements made by the accused to the arresting officers immediately after his arrest, in regard to the cause for shooting his wife, were objected to on the ground that they were not made freely and voluntarily, and that a proper foundation had not been laid for their introduction. *Held*, that the evidence submitted for the purpose of laying the foundation for introduction of the evidence was sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1215; Dec. Dig. ¶531(3).]

4. HOMICIDE ¶165 — EVIDENCE — ADMISSIBILITY.

The admission of the record in a divorce suit by the deceased against the accused was not, under the circumstances of the case, sufficient to require the grant of a new trial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 319; Dec. Dig. ¶165.]

5. CRIMINAL LAW ¶683(1)—EVIDENCE—ADMISSIBILITY.

On the trial of a man charged with the murder of his wife, the state introduced evidence tending to show that for some time the man and woman had lived in a certain house; that a few months prior to the homicide the man went to another house to live; and that while living in a state of separation the man returned at night to the house where the woman continued to live, and the two, being alone, engaged in a quarrel about money in her possession to which he made claim, during the course of which quarrel he shot and killed her. In his statement before the jury the accused said that he separated from the woman on account of his opposition to the sale of liquors in which she continuously engaged at the house; and that on the night of the homicide his motive in going to the house was to induce her to stop selling liquors and renew their marital relation, but upon arriving at the house he discovered her on the porch with another man in a compromising position, and being shocked at the sight, he shot at the man as they started to run, and struck the woman. *Held*, that it was competent, in rebuttal, for the state, in connection with testimony tending to show that the sale of liquors at the house by the woman before the separation was with the approval of the accused, to introduce testimony that on different occasions the accused also sold intoxicating liquors at the house.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615, 1617; Dec. Dig. ¶683(1).]

6. WITNESSES ¶406—CONTRADICTION—EVIDENCE—ADMISSIBILITY.

Certain evidence referred to in the sixth division of the opinion, when considered in connection with other testimony, was admissible for the purpose of contradicting the prisoner's statement.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1276-1279; Dec. Dig. ¶406.]

7. CRIMINAL LAW ¶723(1)—TRIAL—ARGUMENT OF PROSECUTOR.

The prosecuting attorney may, on a trial for murder, argue to the jury that they ought not to sentence the accused to imprisonment, because, if they should do so, there is a chance

of his being pardoned by the Governor at some future time.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. ¶723(1).]

8. CRIMINAL LAW ¶786(2)—TRIAL—STATEMENT BY ACCUSED.

The charge excepted to in the seventeenth ground of the motion for new trial, on the law relative to the prisoner's statement before the jury, was substantially in accord with Pen. Code 1910, § 1036.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1896, 1960, 1984; Dec. Dig. ¶786(2).]

9. CRIMINAL LAW ¶781(2) — TRIAL — INSTRUCTIONS.

The evidence authorized a charge on the law of confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1865; Dec. Dig. ¶781(2).]

10. CRIMINAL LAW ¶762(1) — TRIAL — INSTRUCTIONS.

The charge of the court set out in the tenth division of the opinion did not amount to an expression of opinion by the judge upon the facts relating to the issues involved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1750, 1758; Dec. Dig. ¶762(1).]

11. CRIMINAL LAW ¶789(17) — TRIAL — INSTRUCTIONS.

In this case the judge fully and correctly charged as to the prisoner's statement to the jury; and, having done so, it was not error, while charging upon the law of reasonable doubt, to refer to evidence or want of evidence as a basis for reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1921, 1960, 1967; Dec. Dig. ¶789(17).]

12. HOMICIDE ¶286(2) — TRIAL — INSTRUCTIONS.

In connection with a statement of the substance of Pen. Code 1910, § 62, defining implied malice, it was not erroneous to charge: "Wherever it is shown that one person kills another intentionally, whenever that appears and no considerable provocation appears in the case, then that case would be a case of murder and the law would imply malice."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 587-590; Dec. Dig. ¶286(2).]

13. HOMICIDE ¶302, 303 — INSTRUCTIONS — DEFENSE OF HABITATION OR PROPERTY.

The provisions of Pen. Code 1910, § 72, relating to the right to kill another to prevent a forcible attack and invasion of the property or habitation of the person killing, were not applicable to the facts of this case; but a new trial is not required because of the charge on this subject.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 634, 635; Dec. Dig. ¶302, 303.]

14. GROUNDS FOR NEW TRIAL—SUFFICIENCY.

Other special grounds of the motion for new trial, so far as approved by the trial judge, are without merit, and are not of such character as to require elaboration. The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Atkinson, J., dissenting in part.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

B. O. Lucas was convicted of murder, and he brings error. Affirmed.

Bunyan O. Lucas was indicted for the murder of his wife, Mrs. Ida Lucas, by shooting her with a pistol. It appeared from the evidence that they were living in a state of separation at the time of the homicide. The body of the deceased was found on the floor of her residence in the city of Macon, the head and shoulders being in her room and the other part of her body extending into the front hall near the front door. She was shot slightly above and to the rear of the left ear. The bullet glanced out, but broke the skull, causing it to press upon the brain, and she was dead when discovered. There was blood under the head as it lay on the floor, but not at any other place. There were burns under the ear and on the left hand and arm. The homicide occurred about 9 o'clock on Saturday night, and the accused was arrested at a small railroad station a little over four miles from Macon, about 2 o'clock Monday morning, where he was lying on a bench. On the trial a girl child of the deceased testified that about 9 o'clock on the night of the homicide she saw the accused at a drug store opposite a church five or six blocks away from the residence of the deceased, and conversed with him. In the course of the conversation, in response to questions asked by him, she stated that her mother was at home, and that her brother was there when she left. The girl had gone to church, and pending the services had left to go to the drug store to get a drink of water. After her conversation with the accused she went back to the church, and "started home about 20 minutes after that. I got home about 20 minutes after 9. When I got there, there were no men in the house—no one but mama; she was lying in the hall from here [indicating on her body] up on the hallway. I tried to get in the house, and I couldn't find the handle to the screen door. It was broke off." So far as necessary to an understanding of the decision of the case, other facts shown by the evidence will sufficiently appear in the opinion of the court. The defendant was convicted, without recommendation to mercy. A motion for new trial was overruled, and the defendant excepted.

Napier & Maynard and John R. Cooper, all of Macon, for plaintiff in error. Jno. P. Ross, Sol. Gen., of Macon, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

ATKINSON, J. [1,2] 1,2. The rulings announced in headnotes 1 and 2 do not require elaboration.

[3] 3. When the girl left the accused on Saturday night at the drug store, she returned to the church, and the accused went to the house of the deceased. When the girl returned home immediately after church service she discovered the body of her mother lying as indicated in the statement of facts. The deputy sheriff and the jailer of

the county, about 2 o'clock Sunday night following, found and arrested the accused at the M. & A. junction on the Central Railroad, a little more than four miles from the city. The deputy testified concerning the discovery of the accused, and his arrest and conversations with him, in effect as follows: Since the discovery of the homicide there had been a general search for the accused; and learning that he was at the railroad junction, the officers went to that place. They found him in a little waiting room, "lying down on a bench, side of the wall, on his elbow." The deputy further testified:

"I had a flashlight. I flashed my light. I had a gun in this hand, and when I flashed my light it looked like he was going to rise; and I says, 'Lay still; I don't want to hurt you;' and Tom [the jailer] remarked, 'What in the world did you do this for?' and I says, 'Take this pistol;' and Tom says, 'Give it to me;' and I says, 'No, you leave your hands right where they are.' Tom caught hold of both his wrists, and I says, 'Reach your hand in his pocket and give me his pistol;' and I told McCommons [the jailer] to hand me the pistol, and he asked us not to handcuff him, and I says it won't hurt you to be handcuffed to go to jail. We were talking going along to the automobile; we were walking along, and I asked him, I says, 'Mr. Lucas, you were separated from your wife?' and he says, 'Yes;' and I says, 'What were you doing over there?' and he says, 'I went to take a letter that came to my house from some piano firm, and when I got there she asked me what I wanted;' and he says, 'I told her, 'Here is a letter that came to my house, and I wish you would have your mail come to your house instead of mine;' and she says, 'You need not have brought it; I don't want you here anyway;' and finally I says, 'When did you shoot her?' and he says, 'When she turned to go into the house.' Mr. McCommons says, 'You lived with your wife about a year before you married her, didn't you?' and he says, 'Yes;' and they said some few words, and they were talking, and in a few minutes I says, 'If you had separated from her, you had no right over there;' and he says, 'Well, if you loved a woman like I loved her, you would do almost anything;' and he says, 'I cannot stand to see her going out automobiling with different men;' and I says, 'Were you drinking?' and he says 'No;' and I says 'You hadn't had a drink?' and he says, 'No, I don't drink;' and he says, since he had lost his job at the railroad he had not had right good sense, or hadn't been in his right mind, and I asked him which way he went after he left the house, and where he went. He asked some street; I know he said he went to the Georgia Southern Railroad out towards Sofkee and Wellston. He said, after he left the house, he went to the Georgia Southern and stayed there that night and next day and Sunday night. He came in town and went to the M. & A. junction; and I asked him if he met anybody at Proctor & Gamble's and talked to them; he said, 'No,' he hadn't seen a soul since he left the house until he was caught that night; and he said he hadn't had a mouthful to eat or a drink of water since Saturday night. He said after the shot was fired he left the house. He said she had been arrested for selling whisky, which caused him to lose his position at the railroad, and he had been worried so he hadn't been exactly right."

On cross-examination the witness testified:

When arrested "Lucas was in a reclining position, lying down in the waiting room; he had his eyes open. As far as I know, the first he knew of my presence was when I flashed light

on him and pointed the gun at him. I told him to lay still; I did not want to hurt him. The way that happened, he was lying down there, and I says, 'Don't want—I might have said 'kill you,' or 'I don't want to hurt you, or you hurt me'; I don't remember the exact words; and after we got him handcuffed I says, 'It won't hurt you to handcuff you; it may save you from getting hurt, or some of us.' To the best of my recollection, I told him that I did not want to hurt him. He got up in a reclining position while I had the shotgun pointed at him. He kept his hands in front, and I told McCommons to take the pistol. Mr. McCommons caught hold of his wrist, and the porter took the pistol from his pocket and gave it to me. He asked me not to handcuff him. I think Mr. McCommons said, 'What in the world did you want to do that for?' And I had the shotgun pointed at him at the time, and I put the gun on him at the same time I flashed the light. I didn't keep the gun on him after he was handcuffed. I asked him as we were walking along, I says, 'You are separated from your wife?' It was at the same time we were going along to the automobile, and he told me that he had lost his position with the Macon, Dublin & Savannah Railroad on account of his wife being charged with selling whisky, and he said he loved her, and he said he went there to take a letter from a piano house about a piano, and he says when she turned to walk off to go in the house, I believe is what he said, he shot her. I have been there to the house twice. The front door is the only way intended to go in the house from the front.

"By the Court: The gun was pointed at him before we put handcuffs on him. The conversation I had with him was after I handcuffed him. We were just walking along like two or three men would be to the automobile. We had not made any threats or held out any hope of reward to him to make the statements. After he was arrested and handcuffed we were all three talking; maybe Mr. McCommons would ask him a question, and maybe I would say something to him; we were just walking along talking. All that conversation I have testified to took place before we got into the automobile, and we talked some after we got in the car, and we talked some after we got to the jail; and I told him I was sorry for him, and I would do what I could for him. I don't know whether defendant gave any answer to Mr. McCommons' first question."

On redirect examination:

"He started to rise, and I says, 'Lay still,' I says, 'I don't want to hurt you, and I don't want you to hurt me.' I think that is what I said. When I flashed the light he started his hand to his right hip pocket, and I says, 'Don't move your hand, lay still, I don't want to have to hurt you.' I got the pistol out of his right-hand hip pocket. I made no statement to the defendant about the homicide while I had the gun pointed at him. I made no inquiry about it. As soon as Mr. McCommons handcuffed him I stopped pointing the gun at him; I was holding the flashlight and gun in the same hand. From the time I got the pistol I did not say anything to him about the homicide. He made no statement as to how it happened, at that time. It was after we had a talk coming to the car that I told him that I was sorry for him and would do what I could for him. It was after he told me about shooting the deceased."

The defendant objected to the admission of this testimony, on the ground that no foundation had been laid to admit an alleged confession, and that the statements of the defendant were made under fear and intimidation as well as by hope of reward. The objection was overruled, and one ground of

the motion for new trial complains of the admission of the evidence over such objection. In a different ground of the motion complaint is made of another ruling by the judge, whereby he admitted, over the same objection, testimony of specified questions propounded to the accused by the deputy, and answers to them, which did not embrace any other matter.

It is unnecessary to discuss the rulings here complained of, further than to call attention to the fact that it appears from the evidence of the deputy, relating to the statements made by the accused, that all of the statements were made after he had been arrested and had been told that the officers were taking him to jail, and that the expression of sympathy for the accused was made after the defendant had made his statement to the officers. The recital of the evidence shows that the judge did not err in holding that sufficient foundation had been laid for admitting testimony of the statements made by the accused. *Wilburn v. State*, 141 Ga. 510, 81 S. E. 444.

[4] 4. The ruling announced in the fourth headnote does not require elaboration.

[5] 5. Up to within a few months before the homicide the accused and the deceased had been living together in the house in which the homicide occurred. Certain evidence to the effect that the accused, on several occasions before the separation, had sold intoxicating liquors at the house in which he and his wife lived was admitted over objection that the accused had not put his character in issue, and that the testimony tended to show a crime other than that for which the defendant was being tried, and was irrelevant. No eyewitness to the killing was produced at the trial; but a witness, who testified that he was in an adjoining house, gave testimony as to an altercation between persons whom he recognized by their voices as the accused and deceased, and as to hearing the shot fired immediately after hearing the accused say:

"I have stood it as long as I am going to. I have talked until I won't talk a — bit more."

Other evidence was that several months before the homicide, a neighbor had, at the request of the deceased and the accused, received for safe-keeping certain money, which was later turned over to the deceased. After the money had been delivered to her the separation occurred, the accused going to another place to live. There was also evidence that shortly after the separation the accused went to the house of the deceased and sought permission to return, but was refused, whereupon the accused called her vile names and told her he "had to have half of the money by night, or get her — head." In his statement before the jury the accused said that while he was away at his work on the railroad, the deceased was summoned to court for selling whisky, and when he tele-

phoned her as usual on his return home, she said, "Hurry home; * * * some men left some whisky for a fishing party," and she had been summoned to court; also that later she had been indicted, and a few days afterward—

"I was held off of my job, and later discharged for something she had done and I knew nothing about. After I was discharged she told me she had been selling whisky, and I told her that was wrong and wouldn't do, * * * and she says, 'Since I have told you I am going to sell it right on.' * * * I got on my knees and begged her * * * to * * * quit it, and she wouldn't do it. * * * She told me * * * if I didn't want to see her sell it I would have to leave or could leave. * * * I decided to leave for a few days, to see if it wouldn't get her to stop; but it wouldn't. I asked her when I left if I could call back to see her sometimes, and she says I could; and every time I would go I would get on my knees and beg her to cut it out, and we could go back together and live happy and move away from Macon. She wouldn't do it, though."

In other portions of the statement the accused said, in effect, that on the day of the homicide he came to town to see about getting a job. He redeemed his pistol from a pawnshop, and went around town for several hours with some friends. He had received a letter from a company from which he had bought a piano, asking for payment, and after supper started to see the deceased about it, and "give her some money to send in payment, and have a talk with her." On the way he stopped in a drug store, where he met the girl child of the deceased by a former marriage, who, upon being asked, said that her mother was at home with the child's brother. The statement then proceeds:

"I went there expecting to find my wife at home and have a long talk with her, and get back together; and when I got there I found her and [another man] on the porch" in a compromising position. "This shocked me and caused me to go plumb crazy, and seeing them in this position they started to run in the house, and I fired to hit the man and not her, because I loved her too much to hurt her."

It was in rebuttal of the statement that the evidence which was admitted over objection was introduced. It appeared from the evidence of the witnesses whose testimony was objected to that the liquors which the accused sold consisted of whisky and beer, both of which were kept and sold in the house in which the accused and deceased lived before their separation.

From what has been stated it will be perceived that it was in question whether the accused separated from his wife on account of her engagement in the illegal sale of liquors, and was trying to get her to desist and resume marital relations with him when he discovered her in a compromising position with the man, and, in an effort to shoot the man to prevent a debauchery that was imminent, he shot his wife; or was his objection to the sale of liquors feigned, and, without any other man in the case, was not the real motive for going back to the house

and killing the deceased the refusal of the woman to divide the money? Under this view, the evidence as to the accused having kept and sold liquors in the house before the separation was relevant as tending to discredit the statement of the accused. Being relevant upon a material issue, the evidence is not inadmissible merely because it may tend to show the accused guilty of offenses other than the crime for which he is on trial, or because it may tend to impugn his character. *Frank v. State*, 141 Ga. 243, 80 S. E. 1016.

[6] 6. The ninth ground of the motion for new trial assigns error upon the admission in evidence of a letter from a certain company in Chicago, Ill., addressed to B. O. Lucas, 748 Boundary St., Macon, Ga., which had reference to payment due "on a piano account." The objection was that the letter was irrelevant and hearsay. In connection with the document a postman testified that on the morning of the homicide he delivered a similar letter to that at the house where the deceased was killed. The child of the deceased identified the letter as one which he had found on the bed in his room, in the house of the deceased, on the same night and shortly after the homicide. The evidence showed that the letter was addressed to the accused and had reference to a payment on the piano. In his statement before the jury the accused gave as one of his reasons for going to the house that night that he had received a letter from the company from which he had purchased the piano, demanding payment thereon, and that he was carrying it with him to give to his wife, with money to meet the payment. He made a similar statement to the arresting officer. It is to be inferred from his statement before the jury that the accused did not go into the house on the night of the homicide after reaching there. The fact that the letter, delivered in the morning by the postman at the house of the deceased and found that night after the homicide by the child of the deceased in one of the back rooms of the house, was of similar import to the letter which the accused stated he had received at another address, tended to contradict the statements of the accused and was admissible for that purpose.

[7] 7. Another ground of the motion for new trial complains of the refusal to grant a mistrial on the ground that the solicitor general, during the progress of his argument, before the jury, stated to them:

"Give him a life sentence and take your chances of his being pardoned by the Governor."

It was alleged that this remark was unauthorized and prejudicial to the accused, and that the court failed to rebuke the solicitor general or to instruct the jury with reference thereto. The ground of the motion contains a statement from the solicitor general, denying the use of the words excepted to and stating his version of what he said,

which, though in different language, embraced the substance of that to which the defense excepted. There was no merit in this ground of the motion for new trial. In this state—

"the punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge; in the latter it is." Penal Code, § 63.

In *Cohen v. State*, 116 Ga. 573, 42 S. E. 781, it was said:

"The jury in the trial of one who is charged with murder, if they find the accused guilty, are invested by law with the power of fixing the punishment, by recommendation to life imprisonment. Whether they will so recommend or not is a matter solely in their discretion, which is not limited or confined in any case. Accordingly, where the jury were instructed that they had such right, full and untrammelled, but in the same connection they were also instructed that the law allows such recommendation in cases where they think there are circumstances of mitigation, and in cases where the circumstances soften the crime, and where in their judgment they do not think the death penalty ought to be inflicted, a verdict of guilty without recommendation must be set aside, because it is possible that the jury may not have fully understood the extent of their power as defined by the law."

In *Hill v. State*, 72 Ga. 131, it was held:

"The Code leaves it in the discretion of the jury as to whether they will recommend imprisonment for life in the penitentiary of a person convicted of murder; they are not limited or circumscribed in any respect whatever; nor does the law prescribe any rule by which the jury may or ought to exercise this discretion. Therefore, a charge that the jury, in considering the question of recommending to mercy, should not be governed by their sympathies, but by their judgments, approved by the evidence in the case and the law applicable to it, was error."

In *Taylor v. State*, 105 Ga. 781, 31 S. E. 778, it was said:

"It is further complained that the court charged the jury as follows: 'If the jury are satisfied beyond a reasonable doubt of the guilt of the defendant of the offense of murder, and do not desire that he should suffer the death penalty, the form of your verdict would be, "We, the jury, find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life."' 'If the jury find that the evidence establishes beyond a reasonable doubt that the defendant is guilty of the offense of murder, and do not desire to reduce his punishment to imprisonment in the penitentiary for life, but do desire that he should suffer the death penalty, the form of your verdict would be, "We, the jury, find the defendant guilty."' And in charging further, in reference to a recommendation to life imprisonment, that 'It is not controlled by any rule of law or evidence; it is not controlled by anything except the wishes of the jury trying the case.' It was contended by the able counsel for the plaintiff in error that these clauses of the charge make the recommendation to imprisonment for life, or the refusal to so recommend, depend on the wishes of the jury, whereas such recommendation might be exercised by the jury in quality of mercy, or be controlled in deference to some line of public policy. It is undeniably true that if, in returning a verdict of guilty where the facts authorize a conviction for murder, the jury, be-

ing actuated by a wish or desire to show mercy to the accused, incorporate in their verdict a recommendation to life imprisonment, or do so or fail to do so from motives of public policy, this is but an exercise of the right with which they are invested. But this power to recommend, and thus fix the punishment, does not necessarily arise from regard to public policy or a wish to exercise mercy. These reasons may influence the jury, or other reasons may. The jury is not limited or circumscribed in any way. It is in their discretion whether they will or will not recommend, and the law prescribes no rule for the exercise of that discretion. Penal Code, § 63; *Hill v. State*, 72 Ga. 131; *Thomas v. State*, 89 Ga. 480 [15 S. E. 537]. It is possible that there may be better words to use in this connection than to say that the reduction of the punishment is to be governed by the wishes of the jury in that regard. For ourselves, we think little, if anything, can be added to the words of the statute without qualifying it. Yet, after all, as the whole matter—the recommendation as well as the refusal to recommend—is in the power and discretion of the jury, and, when exercised, no tribunal can review or call in question the exercise of that discretion, it is a matter which the wishes of the jury must determine; and we cannot hold it error to so charge."

It thus appears from the statute, and the decisions of this court applying it, that in all cases of conviction for murder, whether or not the jury would recommend a life imprisonment is within the discretion of the jury. They may do so with or without a reason, and they may decline to do so with or without a reason. They may do so as a matter of public policy, or out of mere sympathy for the prisoner, or they may decline to do so for reasons of public policy, or on account of absence of sympathy for the accused. The question of recommendation has nothing to do with the issue as to the guilt or innocence of the accused. The granting of it in cases of conviction is mere matter of grace that comes after guilt is established. In view of the broad discretion of the jury, it is not improper to allow counsel to refer to the possibility of the accused, at some future time, being pardoned by the Governor if he should be recommended to mercy by the jury. In *Ozburn v. State*, 87 Ga. 174, 182, 13 S. E. 249, it was said:

"Under our law, juries trying murder cases have the right to avert the death penalty by recommending life imprisonment, and it is therefore not improper for counsel to argue before them the question whether or not they should so recommend. It may not be proper for counsel to state that they should not recommend life imprisonment because the Governor of the state might pardon the defendant, and he would therefore be set free; but if such a statement is made, and the attention of the court is not called to it, and he is not asked to make any ruling thereon, it will afford no ground for a new trial."

But this was not a ruling that it would be cause for a new trial for the solicitor general to make such an argument before the jury. The actual ruling made in the case was:

"On the trial of a murder case, counsel for the state may comment before the jury upon the propriety or impropriety of their recommending imprisonment for life as a punishment."

In *McNeill v. State*, 102 Ala. 121, 15 South. 352, 48 Am. St. Rep. 17, it was held:

"The prosecuting attorney may, on a trial for murder, argue to the jury that they ought not to sentence the accused to imprisonment, because if they do so he may obtain a pardon afterward through the solicitation of his friends."

In the course of the opinion it was said:

"No fact was stated by him, but, to the contrary, all he said was but the expression of his opinion or anticipation as to what would be the result of committing the defendant to the penitentiary for life instead of inflicting the death penalty—an argument for the death penalty proceeding on considerations the reasonableness of which was as much open to the jury as to counsel, and nothing said was beyond the limitations put upon the remarks of counsel to the jury by repeated decisions of this court."

[8] 8. The ruling announced in the eighth headnote requires no elaboration.

[9] 9. In the nineteenth ground of the motion for new trial complaint is made of the following charge:

"Some evidence is offered here as to a confession claimed by the state to have been made by the defendant. These confessions have been admitted to be considered by you. I charge you, however, with reference to these alleged confessions, that, before you will consider them in the case, you must believe that they were made voluntarily without being induced by another by the slightest hope of benefit or the remotest fear of injury. If you do not believe that they were freely and voluntarily made as the law requires, you will not consider them in the case. If you think that they were freely and voluntarily made, and no compulsion was used, no inducement held out, or reward, no threats of punishment, or injury, that they were made without reference to anything of that sort, then you would be authorized to accept them and consider them in the case. The rule is that they must be received with great caution, and scanned with care. See if they were made, and see if they were freely and voluntarily made. The confession alone, uncorroborated by other evidence, will not justify a conviction."

The exceptions to the charge were: (a) The court assumed that confessions had been made by the accused, and the charge amounted to an expression of opinion to that effect. (b) No evidence of confession was introduced. (c) If the evidence showed a confession, the same evidence showed that it was not freely and voluntarily made. The objection last stated is disposed of, contrary to the contention of the plaintiff in error, by the ruling announced in the third division of this opinion, because the incriminatory statements there referred to were the same to which allusion is made in the above excerpt from the charge of the court as to confessions. The majority of the court are not in accord with the writer as to whether or not the statement made by the accused to the arresting officer amounted to a confession of guilt so as to authorize a charge on the law of confessions. The view of the majority on the subject follows: The evidence that on the night subsequent to the homicide the accused said to the arresting officer that he had been separated from his wife and went to the house where his wife lived, to take a letter from a piano house about a piano, and that

when his wife turned to go into the house he shot her, and that after the shot was fired he left the house, is sufficient to establish a confession of guilt by the accused of the murder of his wife by shooting her as charged in the indictment. Inasmuch as the law, in the absence of mitigating circumstances, declares a homicide to be felonious and done with malice, the confession by the accused that he did the act which produced the death of his wife is a confession that he killed her; and this proposition is established by the case of *Webb v. State*, 140 Ga. 779, 79 S. E. 1126. The majority of the court do not think there is any merit in this ground of the motion. The writer dissents from this view for the following reasons: The charge stated broadly that confessions were involved in the case. There is a distinction between confessions and incriminatory statements, which cannot be made plainer than to state that the former is a voluntary statement by a person charged with the commission of a crime, wherein he acknowledges himself to be guilty of the offense charged; whereas in the latter, only one or more facts entering into the criminal act is admitted. *Owens v. State*, 120 Ga. 296, 48 S. E. 21. In the case cited, after giving certain definitions which the court adopted, it was said by Evans, J.:

"These definitions of a confession imply an admission of every essential element necessary to establish the crime wherewith the defendant is charged. Unless the statement of the defendant is broad enough to comprehend every essential element necessary to make out the case against him, it cannot be said to be an admission of guilt."

In the same case it was also said that it was error to charge upon the subject of confessions where there is no evidence upon which to support the charge. See other cases to the same effect cited in *Weaver v. State*, 135 Ga. 317, 321, 69 S. E. 488. In the case of *Jones v. State*, 130 Ga. 274, 60 S. E. 840, a statement of the defendant charged with murder was held to be a confession—it appearing that in the statement there was an admission of an intentional killing by the deceased, accompanied with a statement of the reasons moving the accused to commit the homicide, and that the reasons given were not sufficient to furnish any legal excuse or mitigation. This latter ruling did not qualify or extend what has just been quoted from the opinion in *Owens v. State*, 120 Ga. 296, 48 S. E. 21. It was merely restating what was there said in other language, because, where the statement by the accused showed affirmatively all that it did in *Jones v. State*, supra, it stated every material fact which the law denounces as murder, with which the accused was charged. It was immaterial whether the accused made his confession in that form, or in some other form which amounted to complete acknowledgment of his guilt of the offense with which he was charged.

ed. In the case of *Webb v. State*, 140 Ga. 779, 79 S. E. 1126, it was held:

"Where, on the trial of one indicted for murder, the evidence on behalf of the state showed that the decedent was shot by the accused just outside of a house, and a witness testified that just after the shooting the accused had a pistol in his hand, that his wife and the witness, hearing shooting, were going out of the door of the house, and that the accused told them to get back out of the door, as they were liable to get shot, and that he had got one man [applying a vile epithet to him] 'falling on his knees now,' and did not know who it was, such evidence authorized a charge to the effect that all confessions of guilt should be received with great caution, and that a confession uncorroborated would not be sufficient to warrant a conviction"—citing *Jones v. State*, 130 Ga. 274, 60 S. E. 840.

The note does not fully state the case as appears from the original record in this court. All the evidence showed that deceased was shot in the neck as he was walking up the steps, and he sank to the ground, expiring immediately. The house was crowded and excitement prevailed, and some minutes afterwards the statements referred to as confessions were made by the accused while standing at the door at which the body of the deceased was lying. Under these circumstances it is possible that the language of the accused might be construed by the jury as meaning that he had intentionally killed the deceased without mitigating circumstances. If the ruling in this case is in conflict with *Owens v. State*, supra, which has been followed in other cases where all the justices concurred (*Graham v. State*, 125 Ga. 48, 53 S. E. 816; *Smith v. State*, 125 Ga. 290, 298, 54 S. E. 127), it must yield to the rulings in the older cases. There could be no murder without the victim of the shooting being killed; and to make a complete confession of murder, the statement of the accused should extend to that element of the offense as well as to any other element. If one material element might be omitted, another and another could be omitted, until the distinction between confessions and incriminatory statements would be extinguished. In the case now under consideration, it does not appear that at the time the accused made the incriminatory statements to the arresting officers he knew that the woman was dead. It appeared that immediately upon the shooting he fled, and it was about two days before the statements were made, several miles away from the place of the shooting. In propounding questions to him, the arresting officers did not state that she was dead, and in his answers which were relied upon as confessions he did not state that she was dead. The case differs in its facts from the case of *Webb v. State*, supra, and, under the circumstances, the statements attributed to the accused did not amount to confessions, and it was erroneous for the judge to charge the jury on the law of confessions.

[10] 10. The judge charged:

"The theory of the state is that the two, the defendant and Ida Lucas, were together, with

no one else in the house with them, and that he shot and killed her then and there. If that is the truth of the case, then the law presumes him to be guilty of murder until the contrary appears, or circumstances of alleviation, or excuse or justification. If that is the true theory of the way the killing occurred, and if no explanation appears showing any provocation given by her to him, and you so believe beyond a reasonable doubt, then you would be authorized and it would be your duty to find the defendant guilty. I charge you, in this connection, that to support the theory of the state as I have just outlined to you, that the evidence is circumstantial."

Error was assigned upon this charge, on the ground, among others, that it amounted to an expression of opinion by the judge that the theory of the state as to the circumstances connected with the homicide was supported by circumstantial evidence, thereby invading the province of the jury. Taking the charge in its entirety, the excerpt is not subject to the criticism made against it. The jury could not have otherwise understood the judge than that the state was relying upon circumstantial evidence to support its theory, and not that the state's theory of the circumstances under which the decedent lost her life was established by the circumstantial evidence offered by the state.

[11] 11. Several grounds of the motion for new trial complain of excerpts from the charge where the judge was instructing the jury on the subject of reasonable doubt. In so much of the charge as was set out in the excerpts the judge made no reference to the prisoner's statement, but in each instance referred to the "evidence," or the want of "evidence," as a basis for reasonable doubt. The exceptions to the charge were on the ground that it excluded consideration of the prisoner's statement by the jury in passing on the question of reasonable doubt. In other portions of the charge the judge properly instructed the jury in regard to the prisoner's statement; and when the charge is considered in its entirety, the excerpts upon which error was assigned were not of such character as would tend to exclude consideration of the prisoner's statement by the jury in passing upon the question. *Vaughn v. State*, 88 Ga. 731, 16 S. E. 64(4); *Frye v. State*, 141 Ga. 789, 82 S. E. 135(3).

[12] 12. Error was assigned upon the charge:

"Wherever it is shown one person kills another intentionally, whenever that appears and no considerable provocation appears in the case, then that case would be a case of murder and the law would imply malice."

The criticism upon this excerpt from the charge was that it did not correctly state the law, and that the court should have added "that all the circumstances of the killing show a malignant and abandoned heart." It was alleged that the effect of the charge was to tell the jury that if the accused had killed the deceased, having no considerable provocation for the killing, but having some provocation, then he would be guilty of mur-

der. The defendant could have killed the deceased with no considerable provocation, but having some provocation, would have been guilty of manslaughter, provided the provocation was such as to produce violent and sudden heat of passion, supposed to be irresistible. The excerpt from the charge upon which error was assigned is a part of a paragraph, the whole of which is as follows:

"The charge in this case is murder. Murder is the unlawful killing of a human being in the peace of the state, by a person of sound memory and discretion, with malice aforethought, either express or implied. Express malice is the deliberate intention unlawfully to take away the life of a fellow creature, manifested by circumstances capable of proof. Wherever one person makes up his mind unlawfully to kill another with any degree of deliberation, and executes that intention, why then that is a case of murder with express malice. But the law implies malice in every case of an unlawful killing where no considerable provocation occurs, and all the circumstances of the killing show a malignant and abandoned heart. Wherever it is shown one person kills another intentionally, wherever that appears, and no considerable provocation appears in the case, why then that case would be a case of murder and the law [would] imply malice."

Penal Code, § 62, provides:

"Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

It thus appears that the excerpt from the charge upon which error was assigned was given in connection with a statement of this provision of the Penal Code defining implied malice. When considered in connection with the other portions of the charge, the portion excepted to was not erroneous.

[13] 13. Error was assigned upon the charge:

"If, after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading the property or habitation of another."

It is argued that this charge was inapplicable to the facts proved in the case, and was confusing to the jury, that there was no contention by the accused that any attack and invasion had been made upon his property or habitation, but that he contended that he shot at the man who had debauched, or was about to debauch, his wife, and inadvertently shot his wife, and that the shooting was for the purpose of preventing the debauching. The charge complained of was a statement of a principle expressed in the language of Pen. Code, § 72. In former divisions of this opinion the facts of the case have been sufficiently stated to illustrate that the principle charged by the court was inapplicable to the case, but the error under the facts of the case is not such as to require the grant of a new trial.

[14] 14. The ruling announced in the fourteenth headnote does not require elaboration.

Judgment affirmed. All the Justices concur, except

ATKINSON, J. (dissenting). The rulings announced in headnotes numbered 9 and 10 do not have the concurrence of the writer of the opinion. Under his view there should be a reversal of the judgment, based on the assignments of error dealt with in the corresponding divisions of the opinion.

On Rehearing.

ATKINSON, J. The grounds of the motion for rehearing are without merit. With reference to the ground that the case had been orally argued in the Supreme Court before Mr. Justice Gilbert had qualified as a justice of this court, this statement is made: The case was orally argued during the incumbency of Mr. Justice Lumpkin, and he having died subsequently to the argument, Mr. Justice Gilbert was appointed as his successor. After qualification of the appointee, the court promulgated an order directing this case and others to be reargued on briefs to be filed by counsel; it being stipulated in the order that upon failure of counsel to file additional briefs, cases covered by the order would be considered as submitted on briefs already filed. After the date upon which cases were to be reargued this case was considered and decided.

(146 Ga. 277)

FLYNT v. TRIBBLE et al. (No. 174.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 302(3)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error in a motion for new trial that the court failed and refused to rule out all of the documentary evidence offered by the plaintiff in *fi. fa.*, relating to bills of sale and mortgage, as being immaterial and irrelevant, is not complete, in that a reference to the brief of evidence is necessary; and is also too indefinite to present any question for adjudication.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1747; Dec. Dig. \S 302(3).]

2. VERDICT—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to uphold the verdict.

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Action between J. C. Flynt and C. E. and G. W. Tribble. There was a judgment for the latter, and the former brings error. Affirmed.

A. M. Zellner, of Forsyth, for plaintiff in error. J. M. Fletcher, of Forsyth, for defendants in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(146 Ga. 229)

KITCHENS v. POOL. (No. 143.)

(Supreme Court of Georgia. Dec. 12, 1916.)

*(Syllabus by the Court.)***1. EXECUTORS AND ADMINISTRATORS §221(3)
—ACTIONS AGAINST—EVIDENCE.**

Where a suit was upon a quantum meruit for board, and for care and attention, it was erroneous to permit a witness, over objection, to testify that he, as ordinary, would not have approved a bill in a named amount for such board and services.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865, 1866, 1871; Dec. Dig. §221(3).]

**2. EXECUTORS AND ADMINISTRATORS §221(3)
—ACTION FOR SERVICES—EVIDENCE.**

It was also erroneous in such a case to permit a witness, over objection, to testify that, as executrix, she had paid to the wife of the plaintiff a legacy in a named amount.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 902, 1865, 1866, 1871; Dec. Dig. §221(3).]

**3. EXECUTORS AND ADMINISTRATORS §451(3)
—IMPLIED CONTRACT—INSTRUCTIONS.**

It was error for the trial court in this case to charge the jury, in substance, that before the plaintiff could recover it must be shown, not only that the services were rendered with an expectation that the same were to be paid for by the deceased, but that such expectation was made known to her.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1880; Dec. Dig. §451(3).]

4. APPEAL AND ERROR §1033(5)—INSTRUCTIONS—IMPLIED CONTRACTS.

It was not error for the trial court to charge that if "in this case Mr. Kitchens rendered to Mrs. Pate in her lifetime the services that he now sues for," etc., he would be entitled to recover. This was not a charge of which the plaintiff could complain.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4066; Dec. Dig. §1033(5).]

**5. WITNESSES §140(9)—DECEASED PERSONS
—INCOMPETENCY—"INTEREST."**

Ordinarily, in a suit instituted or defended by a husband for or against a deceased person, it is competent for the wife to testify in regard to transactions between the husband and the deceased. Mere personal interest, such as that entertained by a near relative, does not disqualify a witness. But, if it should appear from the evidence that the wife has a legal or pecuniary "interest" in the result of the suit, or that she is acting as agent of her husband, she would be an incompetent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 608; Dec. Dig. §140(9).]

For other definitions, see Words and Phrases, First and Second Series, Interest.]

Error from Superior Court, Warren County; B. F. Walker, Judge.

W. F. Kitchens brought suit against Mrs. Fannie Pool, executrix of the estate of Mrs. M. C. Pate, upon a quantum meruit for board, and for care and attention rendered to the deceased. The defendant admitted that Mrs. Pate, the deceased, lived at the home of the plaintiff, but denied that she boarded with him, or that she was indebted to him in any amount whatever. The evidence showed that the deceased was an aunt by

marriage of the wife of the plaintiff. There was also evidence that the deceased had rented a room at the home of the plaintiff, and had paid therefor. The jury found for the defendant. The plaintiff moved for a new trial, which was refused, and he excepted. Reversed.

E. T. Shurley, of Warrenton, for plaintiff in error. M. L. Felts, of Warrenton, for defendant in error.

GILBERT, J. (after stating the facts as above). The case, as presented by the record, discloses two theories only, one presented by the plaintiff, and one by the defendant. The theory of the plaintiff's case was a suit upon a quantum meruit alone, in which there was no reference to an express contract. The theory presented by the defendant was that there was an express contract between the plaintiff and the deceased for the rent of a room, and that it was understood between the parties that such services and attention as the deceased received from the plaintiff and his family were given upon the distinct understanding that they were not to be paid for by the deceased. There was no middle ground. The jury necessarily were compelled to accept the one or the other theory. Inasmuch as the plaintiff did not undertake to recover anything on an express contract for rent of the room, it also necessarily follows that if the plaintiff prevailed, the recovery must be based upon an implied contract for the value of the services alleged by the plaintiff upon a quantum meruit.

[1, 2] 1, 2. It is complained that the court erred in allowing a witness for the defendant to testify, over objection of counsel for the plaintiff, as follows:

"As ordinary of Warren county, I would not have approved a bill of \$300 in this case; neither would I have approved a bill of \$100 in this case."

This testimony was irrelevant, and it was error, over objection, to admit it. It was also error for the trial court, over timely objection, to permit a witness for the defendant to testify that:

"As executrix of this will I have paid to Mrs. Bernice Kitchens [wife of the plaintiff] one hundred dollars, which was her legacy under the will."

[3] 3. Generally, where one receives services from another, the law implies a promise to pay therefor. In order to recover upon such an implied promise it would only be necessary to show that the services were rendered to the party sued, and that the latter accepted the same. Jackson v. Buice, 132 Ga. 53, 63 S. E. 823. As stated in the case of Hudson v. Hudson, 90 Ga. 581(1), 16 S. E. 349:

"Where, however, the parties sustain towards each other the relation of parent and child, and the services performed are in the nature of care and attention bestowed by a son upon an old and infirm father, no such presumption arises by operation of law."

In order, therefore, to recover where a near relationship exists between the parties, it must affirmatively appear, either that the services were rendered under an express contract that the same were to be paid for, or that the circumstances were such as to plainly indicate that it was the intention of both parties that compensation was to be made, and also to negative the idea that the services were performed merely because of natural love and affection arising out of such relation. In the Hudson Case the alleged contract was between father and son. In the present case, under the facts disclosed in the record, no relationship existed between the plaintiff and the deceased, the wife of the plaintiff being merely related by marriage to Mrs. Pate, the deceased. Marriage will relate the husband by affinity to the wife's blood relations, but not to her relations by affinity. The law cannot be more expressively nor impressively stated than by Chief Justice Bleckley in *Central Railroad Co. v. Roberts*, 91 Ga. 513, 517, 18 S. E. 315, which will bear repeating until it obtains the familiarity of a nursery rhyme:

"The groom and bride each comes within
The circle of the other's kin;
But kin and kin are still no more
Related than they were before."

Accordingly, it was erroneous to give an instruction to the jury that, before the plaintiff could recover, it must be shown by a preponderance of the evidence, not only that the services were rendered with an expectation that the same were to be paid for by Mrs. Pate, but that such expectation was made known to her. This rule of law only applies between near relations.

[4] 4. The ruling stated in the fourth head-note requires no elaboration.

[5] 5. Ordinarily the wife is not an incompetent witness in a suit instituted or defended by her husband for or against another, deceased at the time of the trial, in regard to transactions and statements between the husband and the deceased. *Belcher v. Craine*, 135 Ga. 73, 68 S. E. 839; *Hall v. Hilley*, 139 Ga. 13, 76 S. E. 566. The statute, Civil Code 1910, § 5858, which provides that in suits instituted or defended by the personal representative of a deceased person the opposite party shall not be admitted to testify in his own favor against the deceased person, and which makes a person interested in the result of a suit also incompetent to testify in such a case, is to be strictly construed, and by express terms of the statute no other exceptions are allowed than those therein stated. Civil Code, § 5859. The interest referred to in section 5858 is a legal or pecuniary interest in the result of the suit. Mere personal interest, such as that entertained by a near relative of the party, does not disqualify the witness. *Blount v. Beall*, 95 Ga. 182(2), 188, 22 S. E. 52; *Dean v. Dean*, 13 Ga. App. 798, 80 S. E. 25. If it should appear,

however, from the evidence, that the wife is an interested party otherwise than just stated, or that she is acting as agent of her husband, she would be an incompetent witness. Whether evidence is admissible in cases like this is often attended with the greatest difficulty; for while the rule of law in regard to admissibility is precisely fixed, its proper application is not so simple.

"No precise and universal test of the relevancy of testimony is furnished by law. The question must be determined in each case according to the facts of that particular case, and in accordance with the teachings of reason and judicial experience." *Alexander v. State*, 7 Ga. App. 89, 66 S. E. 275; *Lee v. State*, 8 Ga. App. 414, 69 S. E. 310.

The will of Mrs. Pate contained a bequest of \$100 to the wife of the plaintiff. But, inasmuch as this bequest was without condition or qualification, an instruction to the jury, to the effect that they might consider the will as to the amount of the estate, and also as to whether any indebtedness to Mr. Kitchens existed as claimed, and the amount of the indebtedness, was inappropriate.

Judgment reversed. All the Justices concur.

(146 Ga. 235)

STANDARD COOPERAGE CO. v. O'NEILL. (No. 147.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

1. PAYMENT \S 53—NOTE GIVEN FOR ACCOUNT.

Where a promissory note is given in settlement of an open account, without an express agreement that the note shall extinguish the pre-existing debt, it is a condition precedent to a final judgment upon the account that the note be surrendered to the maker, or accounted for by showing that it is not in any event enforceable against him.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 141; Dec. Dig. \S 53.]

2. PAYMENT \S 76(4)—SUBMISSION OF ISSUES—SETTLEMENT BY NOTE.

Since it was the legal right of the defendant to have the condition precedent above stated complied with, if the account had been closed by note, the court committed error in not submitting to the jury the disputed issue of fact as to whether or not the account or any portion thereof had been closed by note.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 245; Dec. Dig. \S 76(4).]

Error from Superior Court, Chattooga County; Moses Wright, Judge.

Action by J. H. O'Neill, trustee in bankruptcy of the Standard Supply & Hardware Company, against the Standard Cooperage Company. Judgment for plaintiff, and defendant brings error. Reversed.

J. H. O'Neill, trustee in bankruptcy of the Standard Supply & Hardware Company, brought suit on an open account against the Standard Cooperage Company. A verdict was directed for the full amount of the account in favor of the plaintiff. The defendant excepted.

Ficklen, the manager of the plaintiff company, testified that the account was correct, and that all proper credits had been allowed, and that the account sued for was the balance due. He swore that he saw Scoggins in Rome and discussed on several occasions the account, and that:

"Scoggins said he knew he owed it, and just admitted the account in that way. He admitted this balance of account sued on. * * * He did not question the account. * * * That is the only account he owed our concern. He admitted he owed the rendered account."

Ficklen also denied that any of the account sued on had been closed by note.

Scoggins, the secretary and treasurer of the defendant company, testified as follows: He also swore that he gave a note to close the August account. "This account is correct." He denied that he had admitted the amount was due, and that he had ever talked with Ficklen as sworn to by him. Scoggins also said: "I kept a memorandum of the account that I made with that company, and it tallied with the account that is presented here and sued on." He also testified as follows: "That last entry there, closed by note, is in my handwriting. It was made the last day of August."

Treadaway, for the defendant, testified that Ficklen told him "he had just closed the account by note. He said he discounted it at the State Bank; just said he discounted a note, didn't say what note."

Wesley Shropshire, of Summerville, and Maddox & Doyal, of Rome, for plaintiff in error. Jno. D. & E. S. Taylor, of Summerville, for defendant in error.

GILBERT, J. (after stating the facts as above). There was no denial that the defendant bought and received, at the price stated, each and every item of the account sued on. The only defense was that the account had been closed by note, and that the note was discounted at a named bank. There was no demurrer to the answer. Scoggins, a witness for the defense, swore that only a portion of the account was closed by note, while the witness Treadaway swore that the manager of the creditor company admitted that "he had just closed the account by note; * * * discounted it at the State Bank." No such note was produced at the trial, nor was its whereabouts accounted for in any way except by the evidence of Treadaway, as above stated.

[1, 2] Did the evidence raise an issue of fact which the court should have submitted to the jury? We think it did. The general rule is that bank checks and promissory notes are not payment of a pre-existing indebtedness until themselves paid. Civil Code 1910, § 4314. Where there is an express agreement that such check or note shall operate as an extinguishment of the original de-

mand, this agreement will prevail, independently of whether the note or check is ever paid. In a given case, whether there was such an express agreement depends upon the intention of the parties. Norton v. Paragon Oil Can Co., 98 Ga. 470 (1), 25 S. E. 501, citing a number of authorities. In the absence of such express agreement to the contrary, the general rule applies. It is not contended in the instant case that there was any express agreement that the note was to extinguish the account. Hence the making of the note could not amount to payment. Without more, it would seem that the defendant had succeeded in raising an issue which only amounted to shadow, without substance, in which event the direction of the verdict would have been legally authorized. Sanders Mfg. Co. v. Dollar Savings Bank, 110 Ga. 559, 35 S. E. 777. However, in the case of Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312, it was decided that where a promissory note was given in settlement of an account, without an express agreement that the note should extinguish the pre-existing debt, "as a condition precedent to final judgment" upon the account the note must be surrendered to the maker, or accounted for by showing that it is not in any event enforceable against him. In Glenn v. Smith, 2 Gill & J. (Md.) 493, 20 Am. Dec. 452, a leading case, fully argued, it was held that:

"The acceptance by a creditor from his debtor of his promissory note, for an antecedent simple contract debt, does not extinguish the original debt (both being of equal degree in the eye of the law), if it remains in the hands of the creditor unpaid, and he can produce it to be canceled, or show it to be lost. But [he] will not be suffered to recover on the original cause of action, unless he can show the note to have been lost, or produces it at the trial, to be canceled."

As already stated, the plaintiff insisted that no such note was given, in extinguishment of the account, as claimed by the defendant. If such be the truth of the case, necessarily there was no note to be produced or accounted for. If, on the other hand, such a note was made and delivered to the creditor company, the condition precedent must have been complied with before judgment in its favor could legally be awarded. In directing the verdict complained of, the jury was not allowed to pass upon this substantial right of the defendant, and to say whether or not the account or any portion thereof had been closed by note, in order to force the plaintiff to bring the same into court for surrender and cancellation, without which it would be possible for some transferee of the note to force payment of the same notwithstanding a previous recovery on the open account.

Therefore the judgment must be reversed. All the Justices concur.

(146 Ga. 226)

DUNN et al. v. CAMPBELL, Ordinary. (No. 139.)

(Supreme Court of Georgia. Nov. 23, 1916.)

*(Syllabus by the Court.)***MANDAMUS** \S 14(1) — **PROCEEDINGS** — **WRIT ABSOLUTE**.

The ordinary of Murray county applied to the judge of the superior court for a writ of mandamus to compel the commissioners of roads and revenues of that county and their clerk to turn over to the applicant the records, books, vouchers, etc., in their hands as such commissioners. It was alleged in the petition that the board of commissioners of roads and revenues had been abolished by an act of the Legislature approved August 4, 1916 (Acts 1916, p. 475), and ratified by the people of Murray county at an election held in pursuance of the act on September 12, 1916; and that by the terms of this act the ordinary of the county became entitled to the custody and control of the books, etc., belonging in the office of the board so abolished. The judge of the circuit issued a mandamus nisi against the respondents, returnable before him in vacation, requiring the plaintiffs to show cause why the books, etc., in their hands should not be turned over to the applicant as prayed for. At the interlocutory hearing the respondents appeared by counsel and made defense by demurrer and verified answer. The answer made an issue of fact as to the material allegations of the petition, especially as to the demand, and counsel for respondents moved that the court return the case for trial before a jury, and refused to submit the alleged issues of fact to the judge. The court stated that he would hear evidence, and did, after which he made the mandamus absolute. *Held*, that under the answer of the respondents denying that any demand had been made upon them for the books, etc., and the pleadings and evidence upon the hearing before the judge showing that this was a disputed question of fact, and not showing conclusively that demand was unnecessary, the judge was without authority, in vacation, to grant a mandamus absolute. *Ficklen v. Mayor, etc., of Washington*, 141 Ga. 440, 81 S. E. 123.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 44; Dec. Dig. \S 14(1).]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Proceedings by J. M. Campbell, Ordinary, against D. R. Dunn and others. From a judgment of mandamus absolute, respondents bring error. Reversed.

D. W. Blair, of Marietta, and Jesse M. Sellers, of Chatsworth, for plaintiffs in error. W. W. Sampler, of Spring Place, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(146 Ga. 227)

DUNN et al. v. CAMPBELL, Ordinary. (No. 140.)

(Supreme Court of Georgia. Nov. 23, 1916.)

*(Syllabus by the Court.)***APPEAL AND ERROR** \S 1180(2)—**CONSTRUCTIVE CONTEMPT**—**EFFECT OF REVERSAL**.

Upon failure of the respondents to obey the judgment of mandamus dealt with in the case of *Dunn et al. v. Campbell*, Ordinary, 91 S. E. 84, this day decided, two of the respondents in

an ancillary proceeding were adjudged in contempt of court. The judgment granting the mandamus absolute having been reversed, it is directed on the return of the remittitur in that case that the judgment in this case adjudging the respondents to be in contempt be vacated. *Ficklen v. Mayor and Council of Washington*, 141 Ga. 441, 81 S. E. 123.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4627-4629, 4658, 4639; Dec. Dig. \S 1180(2).]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Ancillary contempt proceedings between D. R. Dunn and others and J. M. Campbell, Ordinary. The former were adjudged in contempt, and they bring error. Affirmed, with directions.

D. W. Blair, of Marietta, for plaintiffs in error. W. W. Sampler, of Spring Place, for defendant in error.

HILL, J. Judgment affirmed, with direction. All the Justices concur.

(146 Ga. 238)

THOMPSON v. CITIZENS' BANK. (No. 135.)

(Supreme Court of Georgia. Dec. 14, 1916.)

*(Syllabus by the Court.)***1. BANKS AND BANKING** \S 43—**BILLS AND NOTES** \S 489(1)—**ACTIONS—DEFENSES—NATURE OF DEFENSE**.

The plaintiff, a bank, sued the defendant on a note payable to its order. The defendant pleaded that, the bank having sustained a loss amounting to its entire capital stock, it was agreed by the stockholders that they would severally give their notes to the bank in an amount equal to the par value of their respective holdings of stock, to pay the shortage, and if any amount was recovered from the persons responsible for the shortage it was to be ratably applied to the notes given by the stockholders to cover the shortage; that the defendant gave the note in suit in pursuance of the agreement; and that a certain amount had been collected, which, if ratably applied according to the agreement, together with a certain amount he had paid, would reduce the amount due on the note to a small sum, which he offered to pay. *Held*: (1) That under this plea the only issues were the existence of the agreement, and the amount the defendant was entitled to credit; (2) that the defendant was only entitled to participate in the net collections from the persons responsible for the shortage. See *Thompson v. Citizens' Bank*, 144 Ga. 10, 85 S. E. 1002.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. \S 61; Dec. Dig. \S 43; *Bills and Notes*, Cent. Dig. \S 1587; Dec. Dig. \S 489(1).]

2. CHARGES—SUFFICIENCY.

These issues were fairly submitted by the charge to the jury; and, though some of the excerpts from the charge may have been slightly inaccurate, yet such inaccuracies were not of such a nature as to be harmful to the defendant.

3. VERDICT—EVIDENCE.

The evidence authorized the verdict.

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action by the Citizens' Bank against Ar-

thur Thompson. There was a judgment for plaintiff, and defendant brings error. Affirmed.

See, also, 144 Ga. 10, 85 S. E. 1002.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Smith & Kirkland, of Swainsboro, for defendant in error.

EVANS, P. J. Judgment affirmed. All the Justices concur.

(146 Ga. 182)

JOHNSTON v. BRENAU COLLEGE CONSERVATORY. (No. 118.)

(Supreme Court of Georgia. Nov. 17, 1916.)

(Syllabus by the Court.)

1. COURTS ⇨190(1)—CITY COURT—CERTIORARI—SCOPE.

Certiorari is an available remedy to review a judgment rendered in the municipal court of Atlanta without making an oral motion for a new trial before the judge trying the case, or without first taking an appeal to the appellate division of that court from the judgment of the trial judge refusing an oral motion for a new trial.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇨190(1).]

2. COURTS ⇨190(3½)—CERTIORARI—MUNICIPAL COURT.

Where issues of fact are involved in the trial of a case in the municipal court of Atlanta, and the court passes upon such issues without the intervention of a jury, the right of certiorari can be exercised without moving for a new trial in that court.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇨190(3½).]

3. COURTS ⇨190(4)—MUNICIPAL COURTS—CERTIORARI—TIME FOR APPLICATION.

A judgment of the appellate division of the municipal court of Atlanta can be reviewed by certiorari applied for within 30 days from the rendition of such judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⇨190(4).]

4. CERTIORARI ⇨2—COURTS ⇨190(1)—REMEDY—STATUTE—CONSTITUTION.

There is nothing in the amendment to the Constitution ratified October 7, 1912 (Acts 1912, p. 30) which abrogates the right of certiorari. Nor is there such necessary conflict between the constitutional provision conferring the right of certiorari and the amendment to the Constitution just mentioned as abrogates and repeals the right of certiorari.

(a) The method of review in the municipal court of Atlanta provided by the act of 1913 establishing that court (Acts 1913, p. 145) does not exclude the right of certiorari.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 2; Dec. Dig. ⇨2; Courts, Dec. Dig. ⇨190(1); Appeal and Error, Cent. Dig. § 103.]

5. COURTS ⇨190(1, 8), 217—CERTIFIED QUESTIONS—DETERMINATION—CERTIORARI—REMEDY—SCOPE OF.

The first part of question 5 cannot be answered, because no provision of the Constitution is specified with respect to which the constitutionality of the portion of the act of 1913 set forth in the question is challenged.

(a) The finding of the trial judge in the municipal court of Atlanta on the facts, or the verdict of a jury therein, can be reviewed by certiorari.

(b) Where a party obtains a writ of certiorari

directed to the trial judge in the municipal court of Atlanta, he can have reviewed the question of whether the finding is contrary to law; but if, instead of suing out the writ of certiorari, he takes an appeal to the appellate division, he cannot have such finding reviewed by certiorari.

(c) Subdivision B of section 42 of the act of 1913 (Acts 1913, p. 168) denies to a petitioner in certiorari, or a plaintiff in error seeking a review in the Court of Appeals, the right to urge the question of sufficiency of the evidence as a ground for reversal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. ⇨190(1, 8), 217; Appeal and Error, Cent. Dig. §§ 103, 3379½, 3381.]

6. COURTS ⇨217—JURISDICTION—CERTIFIED QUESTIONS.

Under the ruling in the case of Lynch v. Southern Express Co., 90 S. E. 527, decided October 20, 1916, this court will not answer the sixth question propounded by the Court of Appeals.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. ⇨217.]

Certified Questions from Court of Appeals.

Action between Mrs. W. H. J. Johnston and the Brenau College Conservatory. An application to the superior court for certiorari to review the decision of the municipal court of Atlanta being denied, the former brings error. On questions certified by the Court of Appeals.

For subsequent opinion in Court of Appeals, see 90 S. E. 972.

M. Herzberg and D. K. Johnston, both of Atlanta, for plaintiff in error. W. I. Hobbs and J. G. Collins, both of Gainesville, for defendant in error.

HILL, J. The Court of Appeals has asked the Supreme Court for instruction on the following questions involved in this case:

[1] 1. "In the municipal court of Atlanta, established by the act of 1913 (Acts 1913, pp. 145 to 177, inclusive), where no jury is demanded and the trial judge passes upon issues of both law and fact involved in the trial of a case by him and renders judgment, is certiorari available to review such judgment without making an oral motion for a new trial before the judge trying the case, or without first taking an appeal to the appellate division of that court from the judgment of the trial judge in refusing an oral motion for a new trial?"

Article 6, § 4, par. 5, of the Constitution of this state (Civil Code, § 6514) declares that the superior courts of this state "shall have power to correct errors in inferior jurisdictions, by writ of certiorari, which shall only issue on the sanction of the judge; and said courts and the judges thereof shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs that may be necessary for carrying their powers fully into effect, and shall have such other powers as are or may be conferred on them by law." And see Civil Code, §§ 5180, 5183. It will thus be seen that the Consti-

tution confers the right of certiorari on the superior courts. And by reference to the act of 1912 (Acts 1912, p. 30), being an act submitting to the people for ratification an amendment to article 6, § 7, of the Constitution, so as to provide that the Legislature might abolish justice courts and the office of justice of the peace and notaries public ex officio justices of the peace in certain cities and establish in lieu thereof such court, or courts, or system of courts, as the General Assembly might deem necessary, to provide for the jurisdiction of such courts, and for rules of procedure therein, and for the correction of errors in and by such courts, by the superior, or Supreme Court, or Court of Appeals, it will be seen that the right of certiorari conferred on the superior courts was not taken from them by this act, which was subsequently ratified by the people on October 7, 1916.

Nor did the act of 1913 (Acts 1913, pp. 145 to 177, inclusive) establishing the municipal court of Atlanta in lieu of justice courts in that city take away the power of superior courts to hear and determine cases brought to these courts by writ of certiorari. Parties desiring to correct errors in the municipal court of Atlanta, in addition to the remedies conferred by the act of 1913 supra, still have the right of certiorari to the superior court. This question therefore must be answered in the affirmative.

[2] 2. "Where issues of fact are involved in the trial of a case in the municipal court of Atlanta, and the court passes upon them without the intervention of a jury, can the right to certiorari be exercised without moving for a new trial in that court, or can it only be used as a means of reviewing the judgment of the trial judge in refusing a motion for a new trial, or the judgment of the appellate division of that court in denying such a motion, either where the amount involved exceeds \$50, or where the amount involved is less than \$50? See *Young v. Broyles*, 16 Ga. App. 356, 85 S. E. 366; *Atlantic Coast Line Railroad Co. v. Lane & Autry*, 9 Ga. App. 524, 71 S. E. 918; *Central of Georgia Railway Co. v. Willingham*, 8 Ga. App. 817, 819, 70 S. E. 199; *Schuites v. Campos*, 5 Ga. App. 277, 63 S. E. 23; *Macon, Dublin & Savannah Railroad Co. v. Wright*, 122 Ga. 654, 50 S. E. 466; *Toole v. Edmondson*, 104 Ga. 784, 31 S. E. 25. *Western & Atlantic Railroad v. Dyar*, 70 Ga. 723."

For the reasons given in answering question 1 propounded by the Court of Appeals, this question must also be answered in the affirmative. Neither in the Constitution, nor the amendment thereto, nor in the act of 1913 supra is there any limitation on the right of certiorari as it existed prior to the constitutional amendment of October 7, 1916.

[3] 3. "After the expiration of 30 days from the judgment of the trial judge in the municipal court of Atlanta, rendered with-

out the intervention of a jury, where issues of fact are involved, or where only issues of law are involved, can the judgment of the appellate division of that court approving or reversing the judgment or rulings of such trial judge be reviewed by certiorari applied for within 30 days from the rendition of the last-mentioned judgment by the appellate division, or is such judgment subject to review only by bill of exceptions to the Court of Appeals of Georgia?"

This question is answered in the affirmative. The judgment of the appellate division of the municipal court of Atlanta can be reviewed by certiorari applied for within 30 days from the rendition of such judgment.

[4] 4. "Is article 6, § 4, par. 5, of the Constitution (Civil Code, § 8514), allowing the correction of errors in inferior judicatories by writ of certiorari, abrogated or repealed pro tanto by the amendment to the Constitution ratified October 7, 1912 (Acts 1912, pp. 30, 33), relating to the abolition of justice's courts in certain cities and the establishment by legislative enactment of other courts in lieu thereof, and is such repeal effected by the provision contained in that amendment to the Constitution empowering the Legislature to provide rules and procedure in such courts as to new trials, and as to the correction of errors in and by such courts, and the subsequent enactment by the Legislature of the law establishing the municipal court of Atlanta (Acts of 1913, p. 145 et seq.), with the provisions for the correction of errors in the municipal court by the appellate division of that court, and by direct bill of exceptions to the Court of Appeals of Georgia, and by failure of the act to provide for the correction of errors from the municipal court by certiorari to the superior court?"

"(a) Is the method of review in the municipal court of Atlanta, provided by the act of 1913 supra the exclusive method, and did the adoption of the amendment to the Constitution supra repeal all provisions of the Constitution in conflict therewith, and thus exclude the exercise of the right of certiorari to the superior court, as a means of reviewing the judgments of a trial judge in the municipal court in rendering judgment without the intervention of a jury, or in refusing a parol motion for a new trial made before him either for the purpose of setting aside the judgment rendered by him, without the intervention of a jury, or to set aside the verdict of a jury in a trial over which he presided, or for the purpose of reviewing the judgment of the appellate division of that court in refusing to grant a new trial on appeal to such division? See *McWilliams v. Smith*, 142 Ga. 209, 82 S. E. 569, and *Young v. Broyles*, supra."

For the reasons already given in the preceding divisions of this opinion, this question must be answered in the negative. There is nothing in the amendment to the Constitu-

tion ratified October 7, 1912 (Acts 1912, p. 30), which abrogates the right of certiorari. Nor is there such necessary conflict between the Constitution conferring the right of certiorari and the amendment to the Constitution so ratified as to abrogate and repeal the right of certiorari.

(a) Question numbered 4 (a) must also be answered in the negative. The method of review in the municipal court of Atlanta provided by the act of 1913 supra did not exclude the right of certiorari. The case of *McWilliams v. Smith*, 142 Ga. 209, 82 S. E. 569, merely decided the constitutionality of the act so far as conferring the right to carry cases to the Court of Appeals.

[5] 5. "Is the following provision of the act of 1913 (Acts 1913, pp. 145 to 177, inclusive) constitutional: 'Should the judge decline to grant said motion for a new trial, he shall pass an order to that effect, and an appeal shall lie therefrom to the appellate division of said court upon any ground of new trial which would be a ground for new trial in the superior courts, except upon the ground: (1) that the verdict found or the judgment rendered is contrary to the evidence and the principles of equity; and (2) that said verdict or judgment is decidedly and strongly against the weight of the evidence, which excepted grounds for new trial shall not be otherwise urged than in an oral motion made at the time of the finding of the verdict or the rendition of a judgment by the court, as hereinbefore provided, and as to which excepted grounds the order denying such motion for a new trial shall be conclusive, and such ground shall not be urged upon appeal from such order, nor by writ of error'?"

"(a) If this act is good and valid, can the finding of the trial judge on the facts or the verdict of a jury thereon be reviewed by certiorari, or will such finding or verdict be conclusive as to the facts in issue?"

"(b) Is the plaintiff in error or the petitioner in certiorari (if the right of certiorari from the municipal court was not destroyed by the amendment under which it was established) prevented by the provisions of the said act from urging in his petition for certiorari or his bill of exceptions, as a ground for a reversal of the judgment of the lower court or the setting aside of a verdict therein.

the fact that such verdict or judgment was contrary to law because not supported by the evidence?"

"(c) Does subdivision B of section 42 of the said act (Acts 1913, p. 168) lawfully deny an appeal to the appellate division of the municipal court upon the ground that the verdict or judgment rendered was contrary to evidence and the principles of equity, or that the verdict and judgment was decidedly and strongly against the weight of the evidence, or deny to a petitioner in certiorari or a plaintiff in error seeking a review in the Court of Appeals the right to urge the sufficiency of the evidence as a ground for reversal?"

The first part of question 5 cannot be answered, because no provision of the Constitution is specified with respect to which the constitutionality of that portion of the act set forth in the question is challenged.

(a) We think the finding of the trial judge on the facts or the verdict of a jury thereon can be reviewed by certiorari.

(b) If the plaintiff in certiorari sues out the writ to the decision made by the trial judge, he can have the question as to whether the finding is contrary to evidence and contrary to law passed upon; but, if instead of suing out the writ of certiorari then, he takes an appeal to the appellate division, inasmuch as the act eliminates these two general questions on such appeal, he cannot have them reviewed by certiorari taken from a decision made by such division.

(c) Subdivision B of section 42 of the act of 1913 (Acts 1913, p. 168) does deny to a petitioner in certiorari or a plaintiff in error seeking a review in the Court of Appeals the right to urge the sufficiency of the evidence as a ground of reversal. We do not understand by the question "does it lawfully deny" that right that the constitutionality of the act is brought in question.

[6] 6. "Did the judge of the superior court properly refuse to sanction the application for the writ of certiorari in this case, for the reasons stated by him or for any other reason?"

Under the ruling in the case of *Lynch v. Southern Express Co.*, 90 S. E. 527, decided October 17, 1916, this court will not answer the sixth question. All the Justices concur.

(146 Ga. 314)

KIRKLAND v. FERRIS et al. (No. 195.)
(Supreme Court of Georgia. Dec. 18, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 78(1), 100(1) — **DECISIONS APPEALABLE — INTERLOCUTORY ORDERS.**

Where a petition for injunction was presented to the judge of a circuit other than that which included the county in which the action was brought, on the ground that the judge of the latter circuit was disqualified, and the judge to whom it was presented took jurisdiction and granted a temporary restraining order and a rule calling upon the defendants to show cause, at a stated time and place in his circuit, why an interlocutory injunction should not be granted, and at such time and place he granted an order reciting that it appeared to him that the judge of the circuit wherein the case was pending was not disqualified, and for that reason the matter as to whether an interlocutory injunction should be granted was referred to the judge of the circuit wherein the case was pending to be heard at a stated time in the county where the case was brought, a direct bill of exceptions to this court did not lie, where the only error assigned was upon the grant of the last-named order; it not being a final judgment in the case, nor the grant or refusal of an interlocutory injunction. It follows that the motion to dismiss the writ of error must be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 426, 470, 472, 670-674; Dec. Dig. \S 78(1), 100(1).]

Error from Superior Court, Floyd County;
A. W. Flite, Judge.

Action between E. E. Kirkland and T. H. Ferris and others. There was an order denying relief sought and the former brings error. Writ dismissed.

M. B. Eubanks, of Rome, for plaintiff in error. Barry Wright and Denny & Wright, all of Rome, for defendants in error.

PER CURIAM. Writ of error dismissed. All the Justices concur.

(146 Ga. 282)

CARTER v. HARALSON. (No. 170.)
(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 477 — **ACTIONS — PLEADING—SUFFICIENCY.**

In an action upon a negotiable promissory note payable to the order of a corporation, a plea that the note was given for certain stock in the corporation, and that the defendant was induced to buy the stock by false statements as to the solvency of the corporation and the value of the stock, made by a named person who was not alleged to be the agent of the corporation making sale of the stock, was insufficient. The case differs on its facts from *Bank of Lavonia v. Bush*, 140 Ga. 594, 79 S. E. 459.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1524, 1525, 1558; Dec. Dig. \S 477.]

2. BILLS AND NOTES \S 315 — **INDORSEMENT—DEFENSE.**

When a suit is instituted by an alleged transferee of a negotiable promissory note against the maker, the defendant can inquire into the title of the plaintiff when "necessary

for the protection of the defendant, or to let in the defense which he seeks to make." Civ. Code 1910, \S 4290.

(a) Payment of a negotiable promissory note to a supposed transferee holding it by virtue of a forged indorsement will not protect the maker against payment to the true owner, and consequently the maker of such a note when sued by an alleged transferee may avail himself of the defense that the alleged transfer by the payee was not genuine. *Bruce v. Neal Bank*, 134 Ga. 364, 67 S. E. 819.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 751, 753, 756-759, 764, 766-769, 864; Dec. Dig. \S 315.]

3. BILLS AND NOTES \S 480 — **ACTIONS—ANSWER—CONSTRUCTION.**

This was an action by Haralson as transferee against the maker and indorser of the note. It was alleged in paragraph 2 of the petition: "That said defendants are indebted to your petitioner as owner and holder before maturity of the note hereinafter described, * * * executed by said defendant L. Carter, * * * payable to the order of said Southern Guarantee & Investment Company, and indorsed by said Southern Guarantee & Investment Company by C. M. Hitch, secretary and treasurer; said note being now held and owned by your petitioner as aforesaid." The separate answer of the maker stated: "Defendant denies the second paragraph of plaintiff's petition."

Held:

(a) Construed in connection with the allegations of fact made in paragraph 2 of the petition, this answer was, in substance, a denial, among other things, of the genuineness of the alleged transfer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1526-1529; Dec. Dig. \S 480.]

4. PLEADING \S 362(4) — **MOTIONS—STRIKING OUT PORTION.**

Allegations in the eighth and ninth paragraphs of the answer to the effect that the existence of certain facts "at the date of the transfer" were sufficient to put the plaintiff on notice, etc., and that "the transfer of said note" was fraudulently made and without authority, etc., are not to be construed as so qualifying the denial of the factum of transfer contained in paragraph 2 of the answer as to authorize the striking of that part of the plea. Civ. Code 1910, \S 5649; *Wade v. Watson*, 129 Ga. 614, 59 S. E. 204.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1153; Dec. Dig. \S 362(4).]

5. BILLS AND NOTES \S 476(1) — **PLEADING — NUDUM PACTUM.**

The plea alleging that the note was given for certain stock in the corporation, and there being no attack on the validity of the stock or denial that it was received by the maker of the note, allegations that the stock was worthless would not amount to an allegation that the note was nudum pactum. *Bank of Lavonia v. Bush*, 140 Ga. 594, 79 S. E. 459; 7 Cyc. 694, 695; *Nash v. Lull*, 102 Mass. 60, 3 Am. Rep. 435; *Kernodle v. Hunt*, 4 Blackf. (Ind.) 57.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1519; Dec. Dig. \S 476(1).]

6. PLEADING \S 362(4) — **DISMISSAL OF PLEA.**

The plea being sufficient to raise an issue as to the genuineness of the transfer available to the defendant to protect himself against the consequences of payment upon a spurious transfer, it was erroneous to dismiss the plea in its entirety.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1153; Dec. Dig. \S 362(4).]

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

Action by W. L. Haralson against L. Carter. Judgment for plaintiff, and defendant brings error. Reversed.

Wilson & Bennett, of Waycross, and Jas. W. Poppell, of Jesup, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, and D. M. Clark and J. H. Thomas, both of Jesup, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 249)

AARON v. ANDERSON. (No. 158.)

(Supreme Court of Georgia. Dec. 12, 1916.)

(Syllabus by the Court.)

TRIAL §170—DIRECTION OF VERDICT—EVIDENCE.

There were no material errors committed on the trial in the rulings upon the admissibility of evidence. Under the evidence submitted, no other verdict than the one directed by the court, which was for the plaintiff, could properly have been rendered. The court did not err, accordingly, in directing the jury to find in his favor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 390-394; Dec. Dig. §170.]

Error from Superior Court, Toombs County; R. N. Hardeman, Judge.

Action by C. N. Anderson against I. E. Aaron. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

G. W. Lankford and Cowart & Brown, all of Lyons, and Hines & Jordan, of Atlanta, for plaintiff in error. J. J. Williams, of Lyons, and W. S. Dillon, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 256)

REALTY TRUST CO. et al. v. SMITH & SWINNEY. (No. 165.)

(Supreme Court of Georgia. Dec. 18, 1916.)

(Syllabus by the Court.)

INSTRUCTIONS.

The assignments of error on alleged misinstructions to the jury, when considered in connection with the entire charge given, show no cause for the grant of a new trial. There was evidence to authorize the verdict. The refusal of a new trial was not error.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between the Realty Trust Company and others and Smith & Swinney. There was a judgment for the latter, and the former bring error. Affirmed.

McDaniel & Black, of Atlanta, for plaintiffs in error. Hill & Wright, of Atlanta, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 305)

McPHAUL v. CURRY et al. (No. 192.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. PARTNERSHIP §22 — AGREEMENTS — CREATION.

In January, 1906, J. G. McPhaul, owner and operator of a plant for the manufacture of naval stores, entered into an agreement to sell a three-fourths interest therein to W. R. Curry, C. S. Sealy, and D. A. Brown, McPhaul retaining the other fourth; the business to be continued under the management and control of the purchasers under the firm name of McPhaul, Brown & Co. The agreement was reduced to writing and signed by all parties except Sealy, and he, with the other purchasers, took possession under it. The agreement contained the following stipulations: "But the property herein bargained for by the said parties of the second part is a three-fourths interest in the above-described property, and the said J. G. McPhaul agrees to sell and convey to the said parties of the second part said three-fourths interest in and to said property for and in consideration of the sum of twelve thousand dollars, payable out of the net profits of said three-fourths interest in said property; the said McPhaul distinctly reserving a one-fourth interest in and to said property and the net profits on said one-fourth interest. The sum of six thousand dollars, or one-half of the said twelve thousand dollars, is due and payable, with interest on same at 8 per cent. per annum from this date, to said McPhaul by said parties of the second part on January 1, 1908, and the balance of six thousand dollars to be paid, with 8 per cent. interest from date, to said McPhaul on or before January 1, 1909, the said parties of the second part to have the active management and control of said property and to operate the same during the years 1907 and 1908, for and in the interests of the said parties of the first and second part and for the purpose of this agreement, and no party herein connected with said contract shall receive any salary or stipend from the proceeds of said business over and above the net profits on his individual one-fourth interest in the profits of said business. It is further agreed that the net profits on the one-fourth interest of the said McPhaul shall at reasonable and seasonable times [be] subject to his demand, and the profits on the three-fourths interest of parties of the second part shall be due and payable first to the purchase price of the same as herein specified; but all the proceeds and profits of the entire property shall first discharge the obligations and charges made and contracted in the operation of said business for said two years 1907 and 1908. No title of the said three-fourths interest shall pass to said parties of the second part until the terms of this contract and the payments herein set forth shall have been made. The said parties of the second part, together with the party of the first part, shall be equally, that is, according to their interests in said property, bound for discharge of all obligations and demands made necessary by the operation of said property for said years 1907 and 1908; but said parties of the second part shall be bound for the purchase price of said three-fourths interest in said property, un-

less said property shall produce, over and above expenses on the said three-fourths interest in said two years, sufficient to pay said purchase price of same, and they shall acquire no interest whatever in said property unless said purchase price is duly paid as herein contemplated." In 1908 it was ascertained that the business was losing money; and by consent of all parties McPhaul assumed and discharged certain debts of the firm to general creditors, and received from the firm all its assets, which were of less value than the amount agreed to be paid for the three-fourths interest in the business, but exceeded the amount of the firm debts discharged by McPhaul. On March 20, 1912, McPhaul instituted an action against W. R. Curry, C. S. Sealy, and D. A. Brown for an accounting and contribution, alleging these defendants were liable to contribute ratably for the difference between the value of the assets returned to him and the value of the property turned over by him, and also for the amount of the firm debts paid by him. Certain of these debts were paid on March 23, 1908. *Held*:

The written agreement showed the creation of a partnership; and, though it was not signed by Sealy, he was nevertheless bound by its terms, having accepted possession under it and engaged in the partnership enterprise as a member of the firm. *Louisville & Nashville R. Co. v. Nelson*, 145 Ga. 594, 89 S. E. 693(1).

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 1, 7, 8; Dec. Dig. ¶22.]

2. PARTNERSHIP ¶32 — AGREEMENTS — CONTRIBUTION.

By the terms of the contract, properly construed, the defendants were never to pay for their interests in the property sold, except from net profits, but all of the partners were bound for partnership debts. Although on account of the failure to make net profits the defendants would not be bound for the agreed purchase price, that would not save them from liability to contribute to pay partnership debts.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 34; Dec. Dig. ¶32.]

3. LIMITATION OF ACTIONS ¶28(1) — ACCOUNTING—FOUR-YEAR STATUTE.

The right of action for contribution, relatively to the difference in value between the property delivered by the plaintiff and that returned to him more than four years before commencement of the suit, and certain moneys advanced more than four years before the suit, was barred by the statute of limitations. But the right of action for contribution to reimburse the plaintiff for payment of firm debts which were paid by him less than four years before the institution of the suit was not barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 134, 142; Dec. Dig. ¶28(1).]

4. PLEADING ¶218(4) — DEMURRER — DISMISSAL.

It was erroneous to dismiss the action on demurrer.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ¶218(4).]

Evans, P. J., dissenting.

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action by J. G. McPhaul against W. R. Curry and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

Pope & Bennet, of Albany, for plaintiff in error. Smith & Miller, of Edison, and M. C. Edwards, of Dawson, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except EVANS, P. J., dissenting.

(146 Ga. 264)

ROSSMAN v. GEORGIA RY. & POWER CO. et al. (No. 171.)

(Supreme Court of Georgia. Dec. 13, 1916.)

(Syllabus by the Court.)

1. CARRIERS ¶355 — CARRIAGE OF PASSENGERS—RIGHT TO SEAT.

As a general rule, a carrier operating an interurban electric line is under a legal duty to furnish a passenger on its cars with a seat. If one boards such a car with the intention to become a passenger, and refuses to pay his fare because from the crowded condition of the car he is unable to procure a seat, he cannot insist on riding free while standing. If he is unwilling to accept transportation unless provided with a seat, he must abandon the car if the carrier gives him a reasonable opportunity to leave it in safety. If, after a refusal to pay the fare because not provided with a seat, and after he has been afforded a reasonable opportunity to leave the car in safety, he refuses to leave the car, the conductor may eject him and use necessary force to accomplish his expulsion.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1416-1422; Dec. Dig. ¶355.]

2. CARRIERS ¶365(2), 380(1)—CARRIAGE OF PASSENGERS—EJECTION—FORCE.

In accomplishing such ejection the carrier cannot use more force than is necessary; and if in an action against the carrier the plaintiff ejected complains that he was "bruised" by the ejection, he must allege that the force used was unnecessary, or state the facts from which such an inference may be drawn.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1451, 1464-1466, 1469; Dec. Dig. ¶365(2), 380(1).]

3. CARRIERS ¶363, 380(1)—CARRIAGE OF PASSENGERS—EJECTION.

An interurban electric carrier cannot lawfully eject a person refusing to pay fare on account of not being provided with a seat, at an improper place or at a place where his ejection will be attended with peril or danger. An allegation that the place where the ejection occurred was "many hundred feet from a regular stopping place" does not charge that the ejection was at an improper place, or with unnecessary force.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1445, 1446, 1464-1466, 1469; Dec. Dig. ¶363, 380(1).]

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action by W. H. Rossman against the Georgia Railway & Power Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Nalley & Scott, of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendants in error.

EVANS, P. J. In substance the plaintiff alleged the following: The defendant operates

an interurban railway line between Atlanta and Stone Mountain. Plaintiff with 75 or 80 other persons at Stone Mountain were awaiting the arrival of the cars from Atlanta, so that they could board them on their return trip. When the cars reached Stone Mountain, the trailer car, which had been customarily operated over the defendant's line, was detached, leaving only one car to be operated on the return trip. The plaintiff, with the other passengers, boarded this car, the plaintiff intending to ride as a passenger to the city of Atlanta. He was unable to obtain a seat, and refused, after the car had gone some distance, to pay the usual and customary fare demanded of him by the conductor. Upon his refusal to pay the fare the car was stopped, and the plaintiff was ejected at a point not at a regular stopping place, in the presence of his friends and many strangers, and on this account he was "greatly humiliated in mind, body, and spirit"; he was "bruised and injured about his arms and body, caused by the manner and method in which he was ejected from the car." The circumstances attending his ejection from the car were not made to appear in the petition. His complaint is that the defendant was negligent, in that it failed to furnish him with reasonably safe and comfortable transportation from Stone Mountain to Atlanta, failed to furnish him with a seat and with a car in which he could have been seated, and ejected him from the car on which he was riding at a place not established as a regular stop for passengers to get on or off the defendant's cars, and in the manner of his ejection. His petition was dismissed on general demurrer, and he excepted.

[1] If the passenger had provided himself with a ticket, the conductor could not have required him to surrender it until he had furnished him with a seat. But while a passenger may decline to surrender his ticket until he is furnished with a seat, he cannot insist on riding free while standing. He cannot avail himself of the benefit of the transportation offered him under his contract, and at the same time withhold from the carrier his ticket, which is the evidence of his having paid his fare. If a passenger with a ticket desires to repudiate his contract because of the carrier's failure to comply with a part of his obligation, he must do so in toto. He cannot appropriate its benefits and at the same time get rid of its burden. *Southern Railway Co. v. Nappler*, 138 Ga. 31, 74 S. E. 778; 2 *Hutchinson on Carriers*, § 1113. The principle of this rule also applies to intending passengers of interurban cars who board the car with the intention of paying the fare on the car. The plaintiff

does not make it appear that the car had left Stone Mountain before he discovered that he could not get a seat. If he made such discovery after he got on the car, but before it was in motion, and, with full opportunity to leave it, nevertheless he remained on it, he will be deemed to have elected to take the accommodations furnished him; he could not refuse to pay fare and gratuitously complete his journey. If one who boards the car of an interurban electric company is unwilling to accept transportation unless furnished with a seat, he must abandon the car, and the carrier is bound to afford him a reasonable opportunity to leave it in safety. If, after such refusal to pay fare because not provided with a seat, and after he has been afforded a reasonable opportunity to leave the car in safety, he refuses to leave the car, the conductor may eject him, and use necessary force to accomplish his expulsion.

[2, 3] Though a carrier may have the right to eject a passenger who refuses to pay fare, unnecessary force must not be used. The plaintiff alleged that he was "bruised and injured about his arms and body, caused by the manner and method in which he was ejected from the car." The only "manner and method" of ejection alleged is that the conductor stopped the car at a place many hundred feet away from a regular stop, and "after it was stopped petitioner was ejected therefrom." There is no allegation from which it can be deduced that unnecessary force was used. The plaintiff admits that he refused to pay fare, and that the car was stopped so as to give him an opportunity to leave it. No complaint is made that he was not given time to leave the car. It was a part of his case to show excessive force was used; he does not allege it. If the bruises on the arms and body were the result of his resistance of the conductor's effort to eject him, and the force used was not excessive, the carrier is not liable for such injuries. He complains that he was put off "many hundred feet from a regular stopping place," but no complaint is made that the place was an improper one to alight from the car in safety. We do not understand the law to be that one who boards an interurban electric car to be transported as a passenger, and who refuses to pay his fare because not given a seat, has the right to demand that he be carried to the next regular stopping place. When he refuses to accept the carrier's accommodation and the carrier gives him an opportunity to leave the car at a proper place in safety, he must leave the car; otherwise he may be lawfully ejected.

Judgment affirmed. All the Justices concur.

(120 Va. 55)

CHESAPEAKE & O. RY. CO. v. MERIWETHER et al.

(Supreme Court of Appeals of Virginia. Nov. 16, 1916. Rehearing Denied Jan. 16, 1917.)

1. WATERS AND WATER COURSES §54—FRESHETS—OBSTRUCTION OF FLOW—LIABILITY.

A railroad which, to protect its line, constructs a high embankment, several feet from the shore line at low-water mark, and narrowed the channel of a stream, is not liable therefor to a riparian owner whose land is damaged by the flood of an unusual and extraordinary freshet.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 209; Dec. Dig. §54.]

2. WATERS AND WATER COURSES §54—FRESHETS—OBSTRUCTION OF FLOW—LIABILITY.

A railroad is within its rights on changing the location of its track from one part of its right of way to another to escape the danger incident to a "14 per cent. curve," and in constructing its embankment sufficiently high to protect its roadbed and other property from injury by accidental and extraordinary floods.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 209; Dec. Dig. §54.]

Sims, J., dissenting.

Error to Circuit Court, Amherst County.

Action by one Meriwether and others against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Harrison & Long, of Lynchburg, for plaintiff in error. Aubrey Strode, of Amherst, and Wm. Beasley, of Lynchburg, for defendants in error.

WHITTLE, J. In the trial court the positions of the parties were reversed; defendants in error were plaintiffs, and the plaintiff in error defendant. The case in outline is as follows:

The alleged cause of action is that the defendant, by changing the location of its roadbed and track and building an embankment or fill along its right of way on James river in Bedford county, unlawfully narrowed the channel and lessened the space for the flow of the stream in high water and changed its natural course, and thereby, during a freshet in the spring of 1913, flooded plaintiffs' farm on the opposite side of the river in Amherst county and its island in the river and inflicted the injuries of which they complain. The case was tried upon that theory, and resulted in a verdict for the plaintiffs for \$1,400, upon which the judgment under review was rendered.

Prior to the year 1910, the defendant's track at the point in question was located at the foot of a bluff on a sharp curve, to avoid which, during that year, the railway company relocated its track nearer the bank of the river for the distance of 1,750 feet, in part upon the embankment of the towpath

of the old James River & Kanawha Canal Company, to whose property rights the defendant succeeded. This old towpath was 12 feet above low-water mark, and the new embankment was raised to the height of 25 feet from the same level.

Admittedly, the change of location and increased elevation of the embankment exerted no influence whatever upon the flow of the river at ordinary stage, since the base of the latter was 10 feet distant from low-water mark and the intervening space was traversed by a wagon road. The low grounds on plaintiffs' farm were only 6 or 7 feet above low-water mark.

The evidence, we think, indisputably places the freshet of 1913 in the class of "accidental or extraordinary floods," such as from the observation and experience of men of ordinary prudence, familiar with the river, would not reasonably be expected to occur. In the memory of the oldest residents in that vicinity there had only been two other freshets that approximated the flood of 1913 in magnitude, namely, the "great freshets" of 1870 and 1877; and all of them were characterized as "extraordinarily high freshets," the highest that had ever been seen in the river. The records of the water power department of the railway company also showed that the height of the water at Clifton Forge in the 1913 flood was 28.4 feet, and that it was 25 feet at the point of defendant's embankment, and 24.6 feet at Lynchburg, eight miles further east. These facts in the opinion of the engineer at the head of the water department showed "a tremendous accumulation of water at Clifton Forge, which caused that phenomenal rise above what had been there before, and in consequence of which the water came down in a great volume at high speed between those two points, much more so than, had been at previous freshets." It was also in evidence that the freshet of 1913 rose faster, came quicker from the mountains, rose more rapidly, was swifter in flow and quicker in fall than was the case with its two great predecessors.

[1] In these circumstances, confining our decision to such injury as was inflicted upon plaintiffs' land by reason of the construction of the embankment in its effect, if any there was, on the flood of 1913, we are of opinion that it imposed no liability on the defendant.

The case of *Cubbins v. Mississippi River Commission*, decided by the United States Supreme Court at October term, 1915, 241 U. S. 351, 36 Sup. Ct. 671, 60 L. Ed. 1041, is decisive of the questions here involved. Mr. Chief Justice White, delivering the opinion of the court in that case (after stating the general rule, that "the free flow of water in rivers was secured from undue interruption, and the respective riparian proprietors, in consequence of their right to enjoy the

same, were protected from undue interference or burden created by obstructions to the flow by deflection in its course, or any other act limiting the right to enjoy the flow, or causing additional burdens by changing it," observes:

"But while this was universally true, a limitation to the rule was also universally recognized by which individuals, in case of accidental or extraordinary floods, were entitled to erect such works as would protect them from the consequences of the flood by restraining the same, and that no other riparian owner was entitled to complain of such action upon the ground of injury inflicted thereby, because all, as the result of the accidental and extraordinary condition, were entitled to the enjoyment of the common right to construct works for their own protection."

The learned Chief Justice maintains these principles by reason and authority, showing that the general rule and its limitation were recognized by the Roman Law, the Code Napoleon, the law of Scotland and England, and also of this country. Although, in this country, he remarks:

"It is true to say that much contrariety and confusion exist in the adjudged cases as to when it is applicable, some cases extending the rule so far as to virtually render the limitation inoperative, others extending the limitation to such a degree as really to cause it to abrogate the rule itself. But into these differences and contrarieties it is not at all necessary to enter, since there is no decided case, whatever may be the difference as to the application of the limitation, holding that it does not exist, and when in fact the very statement of the general rule requires it to be determined whether that rule as correctly stated would include situations which the limitation, if recognized, would exclude."

[2] The evidence, as we view it, plainly brings this case within the influence and protection of the limitation to the general rule. The railway company was within its rights in changing the location of its track from one part of its right of way to another to escape the danger incident to a "14 per cent. curve," and in constructing its embankment sufficiently high to protect its roadbed and other property from injury by accidental and extraordinary floods.

It follows from what we have said that the judgment of the court below is erroneous and must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

SIMS, J. (dissenting). I cannot concur in the view that the decision of the United States Supreme Court in the case of *Cubbins v. Mississippi River Commission*, cited in the majority opinion of this court, is applicable to and controls the decision of the case before us.

The former case was a suit by the owner of a piece of land on the east bank of the Mississippi river, adjacent to Memphis, Tenn., on behalf of himself and of others owning similar land in the same locality, against the Mississippi River Commission, created by act of Congress, and 15 local state levee

boards, operating on the river between Cape Girardeau, Mo., and the mouth of the river at the Gulf of Mexico, 3 of these boards being organized under the laws of Missouri, 4 under the laws of Arkansas, 1 under that of Tennessee, 1 under the law of Mississippi, and 6 under the law of Louisiana.

The following further statement of this case is taken from the opinion of the court:

"It was alleged that in flood seasons, when the water in the Mississippi river rose above its natural low-water banks, such water would flow out and over the vast basins in which the alluvial valley between Cape Girardeau and the Gulf formed itself, and would then, either by percolation gradually flow back into the river, or be carried over and through the basins by the streams flowing through them into the Gulf of Mexico, where such streams emptied. It was further alleged that the land of the complainant, when the river in the flood periods was thus permitted to discharge its waters, was so situated that it was beyond the reach of overflow from the river. It was then alleged that in 1883 the Mississippi River Commission, acting under the authority of Congress, had devised a plan known as the 'Bads Plan,' by which it was contemplated that on both banks of the river, except at certain places, which were stated, a line of embankment or levees would be built which, in times of high water or flood, would hold the water relatively within the lines of the low-water banks, thus improving navigation by causing the water to deepen the bed, and saving the country behind the levees from inundation. It was averred that, to further this plan, the various state levee boards, which were made defendants, were organized, and that all of them, within the scope of their power and the limits of their financial ability, had aided in carrying on this work, and that, as the result of their work and of the levees built by the Mississippi River Commission, it had come to pass that from Cairo to the Gulf, a distance of about 1,050 miles, on both sides of the river, except at points which were stated, there was a continuous line of levee, restraining the water from flowing out into the basins, as above stated, and which, in many instances, cut off the outlets connecting the streams which drained the basins and ultimately carried off the water to the Gulf. It was charged that this line of levees as a whole had been virtually adopted by the Mississippi River Commission, which body had assumed control of the whole subject, and that such body and all the state agencies co-operating were engaged in strengthening, elevating, reviewing, repairing, and increasing the lines of levee so as to more effectually accomplish the purpose in view.

"It was charged 'that the effect of the closing by the defendants of the natural outlets along the said river, and the confining of the flood waters between the levee system as a whole, is to obstruct the natural high-water flow of the water of said river in and along its natural bed for its entire length, thereby raising the level of the water to such an extent that said flood waters, within the last five years, have attained a sufficient height to flow over complainant's land, and when there is not a high-water stage in said river, the waters of said river accumulate, flow over and remain standing upon and over said lands of complainant to a depth of from 4 to 8 feet, so that complainant is now being interrupted in the profitable use, occupation, and enjoyment of his said land.' And it was further alleged that 'said land is being covered with superinduced additions of sand, silt, and gravel, now from 6 inches to 3 feet in depth; the houses and fences thereon are being washed away, rendering the said land and the houses thereon unfit for occupancy, driving away the tenants, doing irreparable harm and injury to

said land, impairing its usefulness, causing the practical destruction thereof, and destroying its market value.'

"It was averred that to obstruct the river as alleged was a violation of the legal rights of the complainant, since he was entitled to the natural flow of the river within its natural high or low water bed, free from interference by the acts of the defendants. Averring that no proceedings had been taken to expropriate the land, and that no offer to pay for the same had been made, and that the acts complained of constituted a taking without compensation, in violation of due process of law under the Constitution of the United States, and that there was no adequate remedy at law, the prayer was for an injunction against the Mississippi River Commission and all its officers, employés, agents, and contractors, wherever found, and against all the local levee boards and their officers, employés, agents, and contractors, perpetually prohibiting them from further building any levees, from enlarging, strengthening, repairing, or doing any act to maintain the levees already built, and for general relief.

"The bill was amended by alleging that the overflow of complainant's land, as averred, instead of having happened within five years, had occurred within one year, and the original prayer was added to by asking that if it was found that the injunction prayed could not be granted, the case be transferred from the equity to the law side, and be converted into a law action to recover from the Yazoo-Mississippi Delta levee board, the local Mississippi board which alone of the defendants had been served, the sum of \$500,000 as the value of the plantation alleged to have been wrongfully taken.

"A motion by that corporation was made to dismiss the bill on the ground that it stated no basis for relief, and in any event it alleged no ground for equitable jurisdiction, since at best, upon the theory that a cause of action was stated there was plainly an adequate remedy at law. On the hearing the motion to dismiss was joined in by the Mississippi River Commission, and the case is here as the result of the action of the court below in dismissing the bill for want of equity."

As expressly stated by the learned and eminent judge in his opinion in such case, the subject was considered, "looking at it in a twofold aspect: First, with reference to the rights and obligations of the landowners and the power of the state to deal with the subject; and, second, with reference to the power of the United States to erect levees to confine the water for the purpose of improving navigation, as superimposed on the right of the landowners or that of the state authorities to construct such levees, if such right obtains, and if not, as independently existing in virtue of the dominant power to improve navigation vested in Congress under the Constitution."

I can but feel that what is said in such a case in reference to a situation where there was statutory provision on the subject, national and state, comprehending an immense plan of beneficial improvement, adequate to compel the general erection of levee works sufficient therefor, is not applicable or of controlling force where there has been no legislation on the subject—no general or legislative policy on the subject, existing or declared—and where the inevitable result of allowing one proprietor to erect such works on his land to protect his property from the

result of accidental or extraordinary floods would be to compel another riparian owner to erect similar works on his land as a necessary means of defense. This would result in spasmodic individual action here and there, and in great hardship and injustice before any co-ordinate and efficient system on the subject could be evolved.

It will be observed that the case of *Cubbins v. Mississippi River Commission* applies a different rule as applicable to the question of liability of one riparian owner to another for erecting a levee or embankment by the former on his own land to protect it from the overflow of the river, from that which has heretofore obtained in Virginia, and a great number of other states. This rule, as laid down in the case of *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25, 6 L. R. A. (N. S.) 252, 8 Ann. Cas. 773, as stated in its syllabus, is as follows:

"A lower riparian owner has no right to pen back or obstruct the flow of a water course so as to flood the lands of the upper owners. * * * Due care should be taken not to obstruct the natural flow, including such rises as are usual and ordinary and reasonably to be anticipated at certain seasons of the year. But a lower proprietor is not bound to take precautions against extraordinary freshets which human sagacity cannot foresee nor human experience foretell. * * *"

This rule, in each case of asserted liability against a riparian landowner for his action in building a levee or embankment for the purpose aforesaid, where injury would be occasioned another riparian landowner only in the event of an extraordinary flood, which flood in fact occurred, reduces the inquiry to this: Could the flood which occurred and which occasioned the injury complained of have been foreseen or anticipated by the exercise of ordinary foresight? If the fact be that by the exercise of such foresight the defendant could have foreseen or anticipated that such a flood would occur, he is liable for the injury done by the flood resulting from such levee or embankment being erected—otherwise not; whereas, the rule of the United States Supreme Court case cited and above referred to is precisely the opposite, namely, in effect: That if the fact be that the defendant does foresee and anticipate that such a flood will occur, he may build the levee or embankment to protect his own property, and he is not liable for the injury done by the flood resulting from such levee or embankment being erected.

The latter rule had its origin in the civil law, and has not been adopted in any of the states except in Louisiana, where the civil law is in force, so far as I have been able to find. I do not understand that it is meant to say, in the extract from the United States Supreme Court case contained in the quotation therefrom in the majority opinion above, that the civil law rule above referred to has been adopted generally in this country. This is made manifest by reference to the various state cases cited in such opinion as containing

"the limitation" referred to. These cases are the following: *Burwell v. Hobson*, 12 Grat. (53 Va.) 322, 65 Am. Dec. 247; *Cairo, V. & C. R. Co. v. Brevoort (C. C.)* 62 Fed. 129, 25 L. R. A. 527; *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429; *O'Connell v. East Tennessee, V. & G. R. Co.*, 87 Ga. 246, 13 S. E. 489, 13 L. R. A. 394, 27 Am. St. Rep. 246; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Shelbyville & B. Turnp. Co. v. Green*, 99 Ind. 205; *Mailhot v. Pugh*, 30 La. Ann. 1359. An examination of all of these cases shows that in no one of them, except in the Louisiana case of *Mailhot v. Pugh*, 30 La. Ann. 1359, was the civil law rule under consideration adopted or applied. Among the cases cited on this subject in such United States Supreme Court opinion is *Burwell v. Hobson*, 12 Grat. (53 Va.) 322, 65 Am. Dec. 247. The nature of that case will appear from its syllabus, which is as follows:

"H., owning lands on both sides of a creek which frequently overflowed its banks, built a dike along the south side of it, to protect his low grounds on that side of the creek; and this caused the creek to overflow the land on the north side still more. At his death his lands were divided by commissioners, who allotted to one of his children the land on the south side of the creek, and to another, W., the land on the north side; and in their report they made no allusion to the dike. The son receiving the land on the south side of the creek, afterwards sold it to B.; and then W., owning the land on the north side, commenced to build a dike on that side, to protect his lands, which would have the effect to destroy the dike built by H., and overflow the low grounds on the south side. B. then filed a bill to enjoin the building of the dike on the north side. *Held*:

"1. B. is entitled to have his dike as it was when H. died, and to have his lands protected thereby; and W. has no right to build a dike on his side of the creek, which would destroy the dike of B. and overflow his low grounds.

"2. Equity will interfere to prevent the building of the dike; and will compel W. to abate so much of his dike already built as would injure the dike and low grounds of B."

Moncure, J., in delivering the opinion of this court in that case, said in part:

"The maxim, '*Sic utere tuo ut alienum non lædas*,' emphatically applies to the case of a riparian proprietor, and is the true legal as well as moral measure of his rights. He has no right to divert the stream, or any part of it, from its accustomed course, to the injury of other persons. This is a plain proposition, laid down by all the writers on the subject of water rights, and was not denied by the counsel for the appellee.

"But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods, by erecting a dike or other obstruction on his own land, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, nor in any adjudged case, so far as I have seen. The utmost extent to which the authorities seem to go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change of the natural state of the stream, and to prevent its old course from being altered. *Angell on*

Water Courses, § 333. But he has no right, for his greater convenience and benefit, to build anything which, in times of ordinary flood, will throw the water on the grounds of another proprietor, so as to overflow and injure them. *Id.* § 334. If, in the case of such an obstruction, it appears that the injury therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, he is liable for the damage. *Id.* § 349. That the supposed distinction does not exist was expressly decided by the Court of King's Bench in *Rex v. Trafford*, 20 Eng. C. L. R. 498. *Tenterden, C. J.*, in delivering the judgment of the court in that case, said, 'Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons, to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders cannot be justified. No case was cited, or has been found, that will support such a distinction.' *Id.* 502. The judgment in that case was reversed in the Exchequer Chamber. *Trafford v. Rex*, 21 Eng. C. L. R. 272. But that court agreed in the principle laid down by the Court of King's Bench, though it did not discover, upon the special verdict, a finding of sufficient facts to warrant its application to the case.

"It is often the mutual interest of adjacent riparian proprietors to agree to erect works on their respective lands to protect them against floods, and keep the water at all times in its natural channel. That interest is generally sufficient to bring them to such an agreement. But in the absence of agreement, express or implied, or of any statutory provision on the subject, the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public, and will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense. Each has the exclusive right to judge and act for himself on this subject, taking care not to injure the property of the other."

The last paragraph of this quotation is especially pertinent to the question under consideration, namely, whether the civil-law rule, applied in the United States Supreme Court case above cited, is properly applicable in this state, when there is an "absence * * * of any statutory provision on the subject," and when "the law affords no means of compelling the erection of such works, however beneficial they might be to the proprietors or the public," and where I think the law, as it still is, "will not allow one proprietor, by erecting such works on his land, to compel another to erect similar works on his as a necessary means of defense."

It would seem that where a limitation is referred to in the opinion of the United States Supreme Court case above mentioned, where it is said, "In this country it is also certain * * * that the limitation is recognized," it is meant merely to say that there is in all countries "a limitation" in some form, placed upon the liability of individuals for erecting "such works as would protect them from the consequences of the flood by restraining the same." It was not

meant to say, because that would have been contrary to the fact, that in all countries, including our states, the civil-law rule above referred to applied. This statement does not controvert the fact, which is the fact, that in most of our states "the limitation" upon such liability is fixed by the rule in Virginia above adverted to.

It may be noted in passing that Indiana puts into effect "a limitation" such as above referred to by considering the flood waters of rivers extending beyond their ordinary channel as surface waters, and applying the common-law rule with respect to surface waters thereto, namely, that each landowner affected thereby may fight such waters as a "common enemy," and hence deduces the result that in that state a riparian owner may erect an embankment on his own land to ward off the flood waters both of ordinary and extraordinary floods from overflowing his lands (see Indiana cases cited in *Cubbins v. Mississippi River Commission*, supra), which is not the rule in Virginia, nor is it the rule of the civil law applied in the *Cubbins Case*.

Again, I do not think the case before this court is one where the erection of the embankment by the defendant was in furtherance of any purpose to fight a "common enemy," such as the sea or extraordinary floods, by restraining them within their banks, which is contemplated by the civil-law rule above referred to, and to those entertaining which purpose alone such civil-law rule extended its protection against individual liability for damages. The purpose of the defendant in the case before us was undoubtedly "not to keep the water within the bed of the river for the purpose of preventing destruction to the valley lying beyond its bed and banks," which was the purpose the civil-law rule was intended to conserve (see *Cubbins v. Mississippi River Commission*, supra, at page 676), but it constructed its embankment for its individual benefit alone, without any idea of public benefit. As is said in the case of *Pappenheim v. Metropolitan*, etc., Co., 128 N. Y. 436, 29 N. E. 518, 13 L.

R. A. 401, 26 Am. St. Rep. 486, in reference to a defendant claiming immunity under a Georgia statute, authorizing a general system of levees on unnavigable streams (having a like public beneficial purpose to that of the civil-law rule adverted to above), it "constructed an embankment on which to lay its track without regard to any consequences of benefit or injury to the contiguous country."

For the reasons given above, I do not think that the case of *Cubbins v. Mississippi River Commission*, supra, is applicable to and should control the decision of the case before us. And since its application to such a case makes such a radical and far-reaching change in the law of Virginia on the subject, I feel constrained to note my dissent from the majority opinion, although I am of opinion that the assignment of error relied on by counsel for defendant with respect to instruction No. 7, given by the court below, is well taken, and that the case should be reversed on that ground, if not upon others.

Instruction No. 7 was as follows:

"If the jury believe from the evidence that the embankment on the new location of the track opposite the lands of the plaintiffs narrowed the natural channel of the waters of the river at normal stages, and at such flood stages as are defined in others of these instructions, and that by reason of such embankment damage accrued to the lands of the plaintiffs, then as a matter of law the defendant was guilty of negligence as contemplated by these instructions, and the defendant is liable in damages for the loss so caused to the plaintiffs."

This instruction concluded with a direction of a verdict for the plaintiffs in effect. Flood stages of ordinary as well as extraordinary floods are defined in others of the instructions. This instruction, therefore, in effect directed a verdict for plaintiffs, although the jury found from the evidence that damage accrued to the lands of the plaintiffs only from an extraordinary flood of a character which would not have been foreseen or anticipated by the exercise of ordinary and reasonable foresight on the part of defendant.

As this is a minority opinion, it is unnecessary for it to discuss any other assignments of error.

(106 S. C. 245)

HOLDER v. MELVIN et al. (No. 9572.)

(Supreme Court of South Carolina. Jan. 6, 1917.)

1. TRUSTS — 134 — DEEDS — CONSTRUCTION — RULE.

The legal interest of the trustee in an estate given to him in trust is measured, not by words of inheritance in the deed or will, but by the object and extent of the trust upon which the estate is given, whether it be greater or less than the estate given trustee in the instrument.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. — 134.]

2. TRUSTS — 135 — TRUST DEED — CONSTRUCTION.

Where a deed conveyed an estate in trust to the wife of the grantor for life, with remainder over in fee to the children, the trust was active until the death of the life tenant, but passive as to the remainder to the children, as no active duty rested upon the trustee in connection with the remainder.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 178; Dec. Dig. — 135.]

3. TRUSTS — 131 — TRUST DEED — CONSTRUCTION.

Although the estate conveyed to the children could not become a vested interest in possession until the death of the life tenant, when the life tenant died the statute executed the use in the children.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 175, 175½; Dec. Dig. — 131.]

4. TRUSTS — 140(3) — TRUST DEED — CONSTRUCTION.

Where a trust deed conveyed land in fee for the use of the grantor's wife and children during the life of the wife, and at her death to go to her children, the use of the word "fee" and the absence of any restrictive words in granting the estate to the children showed an intention on the part of the grantors to dispose of the land in fee, and a child of the life tenant in esse when the deed was executed, but who predeceased his mother, took a vested interest in the land, which upon his death descended to his only child and the only grandchild of the life tenant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 187; Dec. Dig. — 140(3).]

Appeal from Common Pleas Circuit Court of Lexington County; J. W. De Vose, Judge.

Action by J. H. Holder against Willie W. Melvin and others. Decree for the defendants, and plaintiff appeals. Reversed and remanded.

J. Wm. Thurmond, of Edgefield, for appellant. Sheppard Bros., B. E. Nicholson, and S. M. Smith, all of Edgefield, for respondents.

GARY, C. J. This is an action for specific performance, and involves the construction of a deed dated the 4th of May, 1871, the provisions of which are as follows:

"Know all men by these presents that I William H. Mays, * * * for and in consideration of the sum of five dollars, to me in hand paid by James M. Holder, * * * (the receipt whereof is hereby acknowledged), hath granted, bargained, sold, released, and conveyed * * * unto the said James M. Holder, in trust, for his wife Sarah F. W. Holder and her children, all that tract or parcel of land * * * to have and to hold all the above described premises in fee, as trustee for his wife

* * * and her children, the said James M. Holder to use, control, and cultivate the said premises, for the use of his wife and her children, during the life time of his said wife * * * and at her death to go to her children."

Then follows the clause of warranty against himself, his heirs and assigns, unto the said James M. Holder, trustee, and against all other persons. The plaintiff (who is the only grandchild of Mrs. Sarah F. W. Holder, his father, Oscar Holder, her only child, having predeceased her) claims that he owns the said land in fee. His honor the circuit judge ruled that the plaintiff had no interest whatever in the land; that the land reverted to the estate of the grantor. The plaintiff appealed from the decree of his honor the circuit judge.

The rule for the construction of trust deeds, is thus stated in *McMichael v. McMichael*, 51 S. C. 555, 29 S. E. 408:

"The technical rules of the common law make it essential to the creation of an estate in fee simple in a natural person by deed, that there be in the deed an express limitation to such person and his 'heirs.' * * * An exception to this rule is recognized in this state, in the case of trust deeds, where the purposes of the trust require that the trustee, or cestui que trust, shall take an estate of inheritance, in which case the word 'heirs' is not essential to create such an estate. A court of equity, in its jurisdiction over trusts, not being bound by the technical rules of the common law, will seek the intention of the grantor from the whole instrument; and if it contains other words than 'heirs,' indicating an intention to convey a fee simple, may so declare the intent in order to effectuate the trust."

This language is quoted with approval in *McMillan v. Hughes*, 88 S. C. 296, 70 S. E. 804.

[1] Stated in another form, the rule which has been adopted in this state is thus expressed in section 312 of *Perry on Trusts*:

"The extent or quality of the estate taken by the trustee is determined, not by the circumstances that words of inheritance in the trustee are or are not used in the deed or will, but by the intent of the parties. And the intent of the parties is determined by the scope and extent of the trust. Therefore the legal interest of the trustee in an estate given to him in trust is measured, not by words of inheritance or otherwise, but by the object and extent of the trust, upon which the estate is given. On this principle, two rules of construction have been adopted by courts: First, wherever a trust is created, a legal estate, sufficient for the purposes of the trust, shall, if possible, be implied in the trustee, whatever may be the limitation in the instrument, whether to him and his heirs or not. And second, although a legal estate may be limited to a trustee to the fullest extent, as to him and his heirs, yet it shall not be carried further than the complete execution of the trust necessarily requires."

In *Sullivan v. Moore*, 84 S. C. 426, 65 S. E. 108, 66 S. E. 561, the court, in discussing the proposition that the deed, with the word "heirs" being omitted, conveyed only a life estate, and that upon the death of the life tenant there was a reversion, used this language:

"This is the rule of the common law from which the courts cannot escape, though its operation nearly always results in the injustice of defeating the intention of the parties. The rule serves generally as a snare to those unlearned in technical law, and it would be difficult to suggest any reason for its continued existence; but it has been so long established in this state that the courts cannot now overrule the cases laying it down without imperiling vested rights."

Such being the effect in the application of the common-law rule, the courts, in the exercise of their chancery powers, are inclined to follow the equitable rule, whenever it is doubtful whether the word under construction is a word of inheritance. Accordingly, in *Duncan v. Clarke*, 90 S. E. 180, where the construction of a trust deed was involved, it was held that the word "issue" was used in the sense of "children," so as to give effect to the purposes of the trust, although "issue" is a word of limitation, unless the language of the deed indicates that it was intended as a word of purchase. *Williams v. Gause*, 83 S. C. 265, 65 S. E. 241.

Before proceeding to construe the deed herein, it may be well to determine the following questions: Can the statute execute the use, when the deed contains an active trust? Is the provision in the deed that the land was to go to the children, after the death of their mother, to be determined by the common-law or equitable rule? In *Hunt v. Nolen*, 46 S. C. 356, 24 S. E. 310, lands were conveyed by deed to a trustee, for the use of Mrs. Cynthia Dupreest, during her natural life, and after her death to the use of her husband, if he survived, during his natural life, and at his death to be equally divided among the children of Cynthia Dupreest. Then, after stating the life estates substantially as above, these words were added:

"Then to go absolutely to the children of the said Cynthia Dupreest absolutely, share and share alike."

In deciding that case, his honor the circuit judge used this language:

"Another essential difference between the case at bar and those cited by counsel for defendants is that the estate conveyed to the children, and now owned by Dr. Cleveland, was not equitable, but a legal estate. If they take all under the deed, they take a legal title to the land as purchasers. There was no trust as to them. The trust expired with the [death of the] surviving parent. Dr. Cleveland's title is just the same as it would be if H. H. Thomson, instead of making the trust deed had conveyed the premises directly to Julia Dupreest and the other children, naming them."

The Supreme Court, however, did not adopt this construction of the deed. There was a petition for a rehearing in that case, on the ground that the court had overlooked the following essential difference between the facts of that case and those in *Fuller v. Missroon*, 35 S. C. 314, which ground was, in substance, the same as that upon which his honor the circuit judge relied:

"There the trust continued, while here it died with the life estate; that in the case of *Fuller*

v. Missroon, the estate given to the remaindermen was in the inception an equitable estate, while here the estate given to the remaindermen was not at any moment an equitable one; that they took by purchase a legal estate; and that the trust had no relation to them. They, therefore, contend that the liberal rules which courts of equity exercise, to ascertain and carry out the intention of the grantor, cannot be overlooked in this case, and that there are no words of inheritance in the deed sufficient to pass the title in fee to the land."

In disposing of that ground for a rehearing, this court said (46 S. C. 551, 24 S. E. 544):

"The grantor intended that the deed should convey the entire estate, and the words used in connection with the children of Mrs. Dupreest show his intention that they should have all the remainder of the estate, after the falling in of the preceding life estate of Mrs. Dupreest and her husband. No other construction would carry out the purpose of the trust."

The petition for a rehearing was therefore dismissed. In section 300 of *Perry on Trusts*, it is said:

"The statute may execute the use in regard to one party, and not as to another in the same deed; for example, where land is conveyed to A. in trust for B. for life, contingent remainder to C., the statute may execute the life estate in B. and still leave the fee in A. for the preservation of the remainder."

The rule is thus stated in section 320 of the same work:

"Where an estate is given to trustees and their heirs, in trust to pay the income to A., during her life, and at her decease to hold the same for the use of her children or her heirs, or for the use of other persons named, the trust ceases upon the death of A., for the reason that it no longer remains an active trust; the statute of uses immediately executes the use in those who are limited to take it, after the death of A., not because the court has abridged their estate to the extent of the trust, but because, having the fee or legal estate, the statute of uses has executed it in the cestui que trust."

In *Young v. McNeill*, 78 S. C. 143, 59 S. E. 986, the court says:

"There is no doubt as to the principle that when estates are conveyed to trustees for the benefit of parties taking different interests, the statute may execute the use in one and not in the other" (citing *Howard v. Henderson*, 18 S. C. 184).

See, also, *Duncan v. Clarke*, 90 S. E. 180.

[2] A trust is active, as to any estate conveyed to a cestui que trust, whenever it imposes upon the trustee some duty, with reference to the estate of the particular beneficiary, and as to all others it is passive. The principle is thus expressed in *Holmes v. Pickett*, 51 S. C. 271, 29 S. E. 82:

"It is well settled that the true test as to whether the statute of uses applies is to inquire whether the trustee has some duty to perform, for the proper performance of which it is necessary that the legal estate shall be in him. If so, the use is not executed; but, if not, then the statute does apply, and the use is executed."

[3] In the case now under consideration, the trust was active until the death of the life tenant, but passive as to the remainder to the children, as no active duty rested upon the trustee, in connection with that estate.

The estate conveyed to the children could not become a vested interest in possession until the death of the life tenant, but when the life tenant died, there was no longer any obstacle, to prevent the statute from executing the use in the children.

Having disposed of these two questions, we proceed to determine whether the deed contains language from which it must be inferred that it was the intention of the grantor that the children should take in fee. The language of the habendum, that the trustee should hold the lands "in fee," clearly shows the intention of the grantor to clothe him with the fee. The deed recites that the consideration was \$5, and that the receipt thereof was acknowledged. In *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714, the court used this language:

"The use of \$5 paid by trustee to grantor is in support of this view. While, it is true, the only evidence of this payment is in the recital of the deed itself, yet the only person who could gainsay it would be a creditor of the grantor; it would certainly bind his heir so as to prevent a reverter. A very slight circumstance in the way of consideration, even if it be 'a peppercorn' our own courts declare, will be sufficient evidence of intention to carry the whole estate."

The rule is thus stated in *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370:

"It is true that the deed was partly made in consideration of the love the grantor had 'for George W. Foster and his family'; but this love is well shown in providing for the family of George W. Foster, and the valuable consideration was from the one to whom the fee was granted. From such words it is impossible to imply any estate, use, occupancy, or trust, in conflict with the grant of the whole estate in fee, with all its incidents to another."

Again the court says after discussing the cases of *Bratton v. Massey*, 15 S. C. 277, and *Fuller v. Missroon*, 35 S. C. 328, 14 S. E. 714:

"It is settled by the two cases cited above that where a trust deed is based upon a valuable consideration, however small, this fact may be taken as evidence of the intention of the grantor, to convey the whole estate, and it will usually be held to prevent a resulting trust in the grantor or his heirs. In this case the deed was made in consideration of \$50, paid by the trustee. It is evident, therefore, that the grantor meant to convey the whole estate, without resulting trust to the grantor or his heirs. The grant of the fee to the trustee with no possibility of reverter discloses the intent that the whole estate conveyed should go to the beneficiaries, the object of his love and bounty. If this was not the grantor's intent, what was his intent? The alternative is that the fee would remain in the trustee, and appellants could scarcely complain that the trustee, who is plaintiff, is willing to partition the estate among them."

In *Hunt v. Nolen*, 46 S. C. 551, 24 S. E. 543, the court said:

"The consideration of \$500 paid for the land by Mrs. Cynthia Dupreest, also shows that the grantor did not intend that any part of said property should revert to his estate."

[4] There are numerous other decisions to the same effect, but we do not deem it necessary to cite them, as the foregoing fully sustain the proposition that the consideration re-

cited in the deed, and the words "in fee" show an intention on the part of the grantor to dispose of the land in fee, and that there should not be a reverter. Such being the case, the purposes of the trust cannot be carried out, unless the children take the absolute estate in remainder.

There is another reason tending to show the grantor intended that the children should take an absolute estate. When the grantor desired to convey to the mother a mere life estate, he used apt words of restriction, but when he provided that the land should go to the children, he did not use any restrictive words. If it had been his intention to confer upon the children a mere life estate, it would have been most natural for him to have added the words "for life" after the words "to go to her children."

The conclusions we have reached on all the questions involved are fully sustained by the authorities in this state and elsewhere, among which may be mentioned *Bratton v. Massey*, 15 S. C. 277; *Fuller v. Missroon*, 35 S. C. 314, 14 S. E. 714; *Hunt v. Nolen*, 46 S. C. 551, 24 S. E. 310; *Id.*, 46 S. C. 551, 24 S. E. 543; *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370. In *Hunt v. Nolen* there were no specific words in the deed, indicating an intention on the part of the grantor to convey the fee to the trustee; nor were there any words sufficient to pass the fee to the children, in a common-law deed. The sole word upon which it was held that the grantor intended that the trustee should hold the land in fee, for the purposes of the trust, and that it should pass to the remaindermen upon the death of the life tenant, was the word "absolutely," which prescribed the manner in which the children were intended to take. It was nevertheless held that the children took a fee. The case of *Foster v. Glover*, 46 S. C. 522, 24 S. E. 370, resembles the one under consideration more than any of the others. The deed in that case contained the following provision:

"To have and to hold the premises above mentioned unto the said William H. Foster, * * * his heirs and assigns forever, * * * in trust for the sole and separate use of Mrs. Sarah A. Foster and her children."

The deed contained the usual clause of warranty. It will thus be seen that the fee was conveyed to the trustee for the use of Sarah A. Foster, but that there were no specific words, indicating an intention on the part of the grantor that Sarah A. Foster and her children were to take a fee in the land, yet the court held such was the case.

We do not deem it necessary to cite authorities to sustain the proposition that the child of Mrs. Sarah F. W. Holder, who was in esse when the deed was executed, but who predeceased his mother, took a vested interest in the land which upon his death descended to the plaintiff, who is the only grandchild of Mrs. Sarah F. W. Holder.

Judgment reversed, and case remanded to

the circuit court for such further proceedings as may be necessary, to carry into effect the conclusions herein announced.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(146 Ga. 300)

BYRD v. THOMPSON. (No. 191.)
(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. MASTER AND SERVANT \S 196—INJURIES TO SERVANT—"FELLOW SERVANTS"—"SAME BUSINESS."

A laborer employed to assist in placing joists on the walls of a brick building recently constructed by brick masons to the second story is a fellow servant with such masons about the same business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 375-378, 486-488; Dec. Dig. \S 196.]

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant; Same Business.]

2. MASTER AND SERVANT \S 173—INJURIES TO SERVANT—LIABILITY.

Where, while he was engaged in placing one end of a joist on the wall, a loose brick therein turned under the laborer's foot, causing him to fall and be injured, the master is not liable on account of the negligence of the mason in not properly placing and securing the brick in the wall (it not appearing that the master knew of the incompetence of the brick mason when he was employed), or because the master failed to warn the laborer of such defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 343-346; Dec. Dig. \S 173.]

3. MASTER AND SERVANT \S 206—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 550; Dec. Dig. \S 206.]

4. MASTER AND SERVANT \S 107(4)—INJURIES TO SERVANT—SAFE PLACE OF WORK.

"The general rule of law declaring the duty of a master in regard to furnishing a servant a safe place to work is usually applied to a permanent place, or one which is quasi permanent." "The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition and at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 254, 255; Dec. Dig. \S 107(4).]

5. MASTER AND SERVANT \S 285(5)—INJURIES TO SERVANT—DIRECTED VERDICT.

Under the evidence the court properly directed a verdict for the defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 1016; Dec. Dig. \S 285(5).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Brad Byrd against J. B. Thompson. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Brad Byrd brought suit against J. B. Thompson to recover damages on account of personal injuries received while working for Thompson as a laborer on a building which Thompson was erecting. After the evidence was in, the court directed a verdict for the defendant.

The petition alleged in substance as follows: Thompson, as owner and builder, was engaged in erecting a building in the city of Atlanta, and Byrd was instructed by Thompson to assist another workman in putting in "sleepers" in the building on the second story. The sleepers extended across the building, and the ends thereof rested on the outer walls of the building. Byrd was a "lather" by trade, and he had been employed to do the lathing work on the building, which was not then ready for the lathing. He was not experienced as a carpenter or in putting in sleepers, and the defendant knew at the time that he was a lather. In obedience to the instruction of his employer, the plaintiff, being at one end of the sleeper on the outer wall where it was to be set, put his foot on the wall (there being no place for him to put it, and it being necessary in the line of his duty to do so), and the bricks of the wall slipped and threw him from the second story down 15 or 20 feet to the bottom of the building, and he was injured by the fall. He had no notice or warning that the bricks had not been put securely in the wall and were loose, and that it was dangerous to step thereon. The defendant negligently failed to give the plaintiff warning that the bricks in the wall were loose and not securely fastened and laid in cement or other substance to hold them in position, and negligently failed to provide for him a safe place to perform the work required of him. The plaintiff had no part in building the wall, and was wholly without fault, etc. The defendant denied the material allegations of the petition. On the conclusion of the evidence the court directed a verdict for the defendant. A motion for new trial was overruled, and the plaintiff excepted.

C. D. Maddox, of Atlanta, for plaintiff in error. J. L. Anderson, of Atlanta, for defendant in error.

HILL, J. (after stating the facts as above). [1] The motion for new trial complains that the court directed a verdict for the defendant instead of submitting the case to the jury. The main question in the case is whether, under the pleadings and evidence, the fellow-servant doctrine applies. Section 3129 of the Civil Code provides:

"Except in the case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business."

The question therefore arises, Were Byrd and the bricklayers "about the same business," and were they fellow servants at the time of the injury? The bricklayers were not engaged in erection of the wall at the exact time the injury occurred. The evidence tends to show a suspension of the work on the wall, which had been completed to the second story. But, in the view we take of the case, it does not matter whether or not the bricklayers were actually engaged in laying the brick at the time the accident occurred.

[2.] They and the plaintiff were fellow servants engaged in the same business of building the house; and unless the master was negligent in the selection of the other servant, or the master had knowledge (and the servant had not) of the defects in the wall and failed to disclose them to the plaintiff, he would not be liable for the injury. There is no evidence to show that the master was negligent in these respects. "A servant assumes the ordinary risks of his employment, and is bound to exercise his own skill and diligence to protect himself." Civil Code, § 3131.

The plaintiff testified, among other things:

"I went there to go to lathing. I went to helping put up these timbers. The lathing was not ready, and he hired me to work in the building until the lathing was ready. * * * That was a brick wall—supposed to be fixed all right. It was just built there and cemented up and mortar put on; brick laid in cement with mortar, like any other brick wall. * * * That brick looked like a part of the wall. I suppose I did not notice any break at all, any more than just a straight wall. I didn't notice any brick sticking out at all; supposed [to] be straight, so far as I saw. I wasn't paying attention to anything like that nohow. I was paying attention to my work. I wasn't thinking about no loose brick. I didn't have no thought of it until it slipped out from under my foot. * * * Mr. Thompson did not tell me before I got the fall that the brick was loose; he never told me anything about it; nobody told me the brick was loose. * * * I have been accustomed to climbing upon houses that were not finished. I helped to build a good many of them. I had worked on brick walls before, many a time. I had laid joists down this way before. I understood pretty well how to do that. * * * I don't remember exactly how thick this wall was. It had been there, I suppose, maybe a week or more. They were building on it when I first went up there. * * * I saw them working on this wall when I was trading about this work. I don't know exactly how long it was completed when I went there, but I know it was not long. The mortar will set and get hard in less time than a week or ten days, if there is nothing on the outside of the brick. * * * I didn't pay any particular attention to this wall at all. I took it for granted that it was all right. I didn't notice if there was any loose brick. I thought it was all right, and went on and did this work."

This evidence does not show that the plaintiff exercised the proper diligence to protect himself. Nor does the evidence in the record show that the master knew or ought to have known of the incompetency of the bricklayers who laid the brick in the wall, or the danger

in the wall. It is insisted that the fellow-servant doctrine does not apply here, for the reason that plaintiff was not injured by the negligence of a fellow servant, the person who built the wall having gone away at the time of the injury, and that his work was prior to the employment of the plaintiff. We will consider this contention.

In *Keith v. Walker Iron & Coal Co.*, 81 Ga. 49, 7 S. E. 166, 12 Am. St. Rep. 296, it was held:

"A corporation building a structure composed in part of brickwork and in part of woodwork is not responsible for the fall of the masonry upon the carpenter whereby he was killed, if due care was exercised in selecting the mason, and if there was no reason why he should not be fully trusted as an expert in his business, though his work proved defective, and the carpenter thereby lost his life; the two workmen being coemployees of a common master and co-operating in their respective departments of labor to a common end, to wit, the erection and completion of the contemplated structure."

See, also, *Georgia Coal & Iron Co. v. Bradford*, 131 Ga. 289, 62 S. E. 193, 127 Am. St. Rep. 228.

In 4 *Labatt's Master & Servant* (2d Ed.) § 1423, p. 4092, appear the following notes and citations of cases in support of them:

"A painter upon a new house, who uses a scaffold erected by carpenters in building the house, is a fellow servant of the carpenters. *Hoar v. Merritt* (1886) 62 Mich. 386, 29 N. W. 15 (carpenters here not independent contractors; all employed in a common pursuit in carrying out a common enterprise). A servant in charge of a derrick and a servant posted on a building are fellow servants. *Fox v. Sandford* (1856) 4 Sneed (Tenn.) 36, 67 Am. Dec. 587 (plaintiff struck by timbers hoisted by the derrick, and thrown to the ground)." "Pole setters are fellow servants of a lineman injured by the fall of a pole which they negligently set. *Mullin v. Genesee County Electric Light, Power & Gas Co.* (1911) 202 N. Y. 275, 95 N. E. 689. One placed in charge of an apparatus for raising and moving stone out of a quarry is a fellow servant with a quarry man in the quarry. *Chapman v. Reynolds* (1896) 77 Fed. 274, 23 C. C. A. 166, 33 U. S. App. 686. A carpenter engaged in inclosing an elevator shaft within a frame is a co-servant of an employé who is operating the elevator. *Mann v. O'Sullivan* (1899) 126 Cal. 61, 58 Pac. 375, 77 Am. St. Rep. 149. The elevator man in a department store is fellow servant of an employé in a dressmaking department. *Carnahan v. Robert Simpson Co.* (1901) 32 Ont. Rep. 328. The operator of an elevator in a building in the process of construction is the fellow servant of a workman on the building. *Ingram v. Fosburgh* (1902) 73 App. Div. 129, 76 N. Y. Supp. 344. A servant working inside a brewery is a co-servant of one whose duty it is to unload barrels outside from the barges which bring them to the brewery. *Charles v. Taylor* (1878) L. R. 3 C. P. Div. 492, 38 L. T. N. S. 773, 27 Week. Rep. 32 (the latter servant had gone into the brewery and was injured by the former, who was shifting a barrel)."

[6] From the foregoing authorities as applied to the evidence in this case, we conclude that the plaintiff who was assisting in putting down the joists and the bricklayers who built the wall were fellow servants within the meaning of the law. And nothing appearing in the record showing that the mas-

ter knew or ought to have known that the bricklayers were incompetent, or that he had knowledge of the defects in the wall and failed to disclose them to the plaintiff before he was injured, and it appearing from the evidence of the plaintiff that he was "not paying attention to anything like" the wall, the court did not err in directing a verdict for the defendant.

[4] It was alleged in the petition that the master failed to provide a safe place for the plaintiff to perform the work required of him, and it is argued that it was the duty of the master to furnish the servant (the plaintiff) with a reasonably safe place to work.

"The general rule of law declaring the duty of a master in regard to furnishing a servant a safe place to work is usually applied to a permanent place, or one which is quasi permanent." *Holland v. Durham Coal, etc., Co.*, 181 Ga. 715, 63 S. E. 290.

"The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends on the due performance of that work by them and their fellow servants." *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440.

The plaintiff was a man of full age, with some experience in the character of work in which he was engaged at the time of the injury; and if the wall was insecure at that time, the injury was due either to the risk incident to the unfinished state of the work on the building, or to some negligence on the part of the bricklayers who were fellow servants, all of whom were in the employment of the same master and engaged in the same common purpose of constructing the building. In neither of which events can the servant recover.

Judgment affirmed. All the Justices concur.

(146 Ga. 284)

LUDEM v. ENTERPRISE LUMBER CO.
et al. (No. 181.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** — 342 — **CORPORATIONS** — 306, 312(4) — **CONSIDERATION** — **LIABILITY OF AGENT.**

A promissory note without consideration, executed in the name of a corporation by one of its officers, and payable to such officer individually, is void as against the corporation.

(a) A holder of such note takes it with notice.

(b) While a promissory note without consideration executed in the name of a corporation by one of its officers, and payable individually to such officer, is void as against the corporation, in contemplation of law such act is the individual undertaking of the officer, and as such he is bound.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830-841; Dec. Dig. 342; Corporations, Cent. Dig. §§ 1382, 1457, 1458; Dec. Dig. 306, 312(4).]

2. **PRINCIPAL AND SURETY** — 105(1) — **DISCHARGE OF SURETY** — **STAY OF EXECUTION.**

Stay of an execution, to relieve a surety, must be for a valuable consideration, and for a definite period of time. The stay of execution relied on in this case recites no consideration, and is for no definite period of time; and there can be no release of the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 196, 201, 203-210; Dec. Dig. 105(1).]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by W. H. Luden against the Enterprise Lumber Company and A. B. Steele. There was judgment for defendants, and plaintiff brings error. Affirmed as to the Enterprise Lumber Company, and reversed as to defendant Steele.

W. H. Luden brought suit against the Enterprise Lumber Company, as principal, and A. B. Steele, as indorser, alleging that the defendants were indebted to him in the sum of \$2,500 on a promissory note for that amount, which note recited that it was payable to A. B. Steele, and was signed, "Enterprise Lumber Company, by A. B. Steele, Pres.," and that "petitioner is the holder and owner for value received before maturity, and without notice." Before verdict the plaintiff struck the words, "for value received before maturity, and without notice." The defendants denied indebtedness, and for further answer alleged that the note was given without consideration; that it was executed and indorsed as a matter of accommodation, without consideration either to the lumber company or to Steele; that the plaintiff took the note after maturity; that the note was executed and delivered by the defendants to George M. Britton, without consideration to either of the defendants, but solely for the purpose of accommodation and to allow Britton to use the note as a guaranty or security for his indebtedness; that Luden was not a bona fide holder for value; and that Luden, knowing that Britton was only a surety and had pledged the note as surety only for the original indebtedness to him of the G. M. Britton Company, and after having obtained a judgment against the G. M. Britton Company and caused execution to issue thereon, deliberately stayed said execution for the purpose of indulging the Britton Company, and by reason of said stay of execution the defendants were released from their obligations.

The evidence showed that the note was signed, "Enterprise Lumber Company, by A. B. Steele, Pres.," and was payable to A. B. Steele. Steele indorsed the note in blank and mailed it to Britton, having knowledge that G. M. Britton was president of the Britton Company, and would use the note for the benefit of the Britton Company. The Britton Company owed Luden, and G. M. Britton indorsed the note and transferred it

to Luden as security for a past indebtedness. The Britton Company failed, and the note remained unpaid. There was evidence to show that Luden received the note before maturity. Steele testified, among other things, as follows:

"Mr. Britton was a personal friend of mine for many years, and had done me many kindnesses; when he needed money he would send some notes to me, and I would send him our notes in exchange."

The court directed a verdict for the defendants. The plaintiff's motion for a new trial was overruled, and he excepted.

Anderson, Slate & D'Orr, of Atlanta, for plaintiff in error. Candler, Thomson & Hirsch, of Atlanta, for defendants in error.

GILBERT, J. (after stating the facts as above). [1] 1. One of the reasons assigned by the defendants why the note was not enforceable against them was that it was wholly without consideration. The plaintiff, on the other hand, insisted that the note was not without consideration, because the defendants had received in return therefor a similar note from the G. M. Britton Company. Civil Code 1910, § 4291, declares:

"Any circumstances which would place a prudent man upon his guard, in purchasing negotiable paper, shall be sufficient to constitute notice to a purchaser of such paper before it is due." *Fidelity Trust Co. v. Mays*, 142 Ga. 821, 828, 83 S. E. 961.

The note sued upon was executed by the president of the corporation, and on its face was made payable to this president individually. It remains, therefore, to be seen whether Luden was an innocent holder, in view of the Code section just quoted.

In *Capital City Brick Co. v. Jackson*, 2 Ga. App. 771, 59 S. E. 92, the principle is convincingly and clearly stated:

"A negotiable promissory note made in the name of the corporation by its president, in which he is named as payee, is prima facie void as to such corporation. The burden is upon the holder of such note to show that it is in fact the contract of the corporation."

It would serve no useful purpose to repeat all of the argument and the citation of authorities in the case just referred to. It will be seen by a careful examination that, whenever a promissory note is signed by an officer of a corporation, and is made payable to himself individually, and is by this same officer negotiated, the holder is held to have notice. The opinion in the cited case declares:

"As far as we have been able to find, there has been no contrary opinion in a case involving a similar state of facts; but both courts and standard text-writers are in accord on the subject. * * * The law must be as herein contended; else corporations would be at the mercy of dishonest officials, and positions of corporate trust would be prostituted to private gain, and corporate property be exhausted in payment of personal debts. A bona fide holder of a promissory note executed by an officer in the name of the corporation and payable to the officer execut-

ing it, as an individual, in legal contemplation cannot exist. The person and the subject are in positive contradiction."

And in *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S. E. 316, it is declared:

"Authority to borrow money is among the most dangerous powers which a principal can confer upon an agent. Whoever lends to one claiming the right to make or indorse negotiable paper in the name of another does so in the face of all the danger signals of business. He need not lend or discount until assured beyond doubt that the principal has in fact appointed an agent who by the stroke of a pen may wipe out his present fortune and bind his future earnings. The very nature of the act is a warning; and if the lender parts with his money, he does so at his own peril."

The plaintiff received the note sued upon, with the danger signal on its face. There is nothing in the evidence to show that the Enterprise Lumber Company ever received any consideration whatever. One who receives such a note with its danger signal on its face, warning him of the burden he must carry before enforcing payment, is in no position to invoke the principle of estoppel against the corporation, where it does not appear that the corporation received any consideration therefor.

The exchange by Steele and Britton of notes of their respective companies was purely a personal and individual act; the note of each corporation being signed by its president, and made payable to its president individually. Irrespective of the use actually made of the notes, the fact remains that the danger signal was obvious to all who paid due regard to ordinary business precautions. The rule of law expressed above is essential to corporate integrity, to protect it against just such use of its credit. *Cook on Corp.* (7th Ed.) § 774; *Kenyon Realty Co. v. National Deposit Bank*, 140 Ky. 133, 130 S. W. 965, 31 L. R. A. (N. S.) 169.

None of the reasons above stated apply in behalf of Steele. The note is void as to the corporation, but not as to Steele. As an individual, for motives of personal favor Steele had the right to lend his credit to Britton; and the indorsement and delivery of the note payable to him will bind him to the extent only of the amount due by the Britton Company to Luden. *Angell & Ames on Corporations*, § 303; *Daniel on Negotiable Inst.* § 306, and note; *Aven v. Beckom*, 11 Ga. 1, 6; *Rawlings v. Robson*, 70 Ga. 595(1); *Candler v. De Give*, 133 Ga. 496, 66 S. E. 244; *Frankland v. Johnson*, 147 Ill. 520, 35 N. E. 480, 37 Am. St. Rep. 234.

[2] 2. Stay of the execution, to relieve a surety, must be for a valuable consideration, and for a definite period of time. 8 O. J. 930; *Bunn v. Commercial Bank*, 98 Ga. 647, 26 S. E. 63; *Woolfolk v. Plant*, 46 Ga. 422; *Ver Nooy v. Pitner*, 17 Ga. App. 229(3), 86 S. E. 456. The stay in this case recites no consideration and no definite period of time; a levy may legally be effected at any time;

hence there can be no release of the surety.

Judgment affirmed as to the Enterprise Lumber Company, and reversed as to Steele. All the Justices concur.

(146 Ga. 310)

ALACULSEY LUMBER CO. v. FLEMISTER
et al. (No. 194.)

(Supreme Court of Georgia. Dec. 18, 1916.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §237(2)—REVERSIBLE ERROR—WHAT CONSTITUTES.

Where certain evidence is admitted by the court on the statement of counsel offering it that he will subsequently prove certain facts rendering the evidence admissible (which is not done), the admission of such testimony will not require a reversal, where no motion is made later to rule it out, or the timely attention of the court called thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §237(2); Trial, Cent. Dig. §236.]

2. EJECTMENT §90(1) — DISTRIBUTION BY FREEHOLDERS—RETURN—ADMISSIBILITY.

Where freeholders made a return to the ordinary, dividing property in kind between the heirs and distributees of a decedent, and the recitals in the return are sufficient to indicate that an application was made to the ordinary for a division of the estate in kind, and that it was in the process of being administered, there is a presumption that a proper application was made to the ordinary to have a division of the property made in kind; and on the trial of an ejectment suit wherein one of the heirs is a plaintiff, involving the title to a lot of land awarded to her by the freeholders making the return, it is not error to admit in evidence a certified copy of the return dividing the property in kind.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §267; Dec. Dig. §90(1).]

3. EVIDENCE §273(4) — ADMISSIBILITY — EJECTMENT.

Where on the trial of such suit there was evidence tending to show that one of the defendant's predecessors in title claimed title to the land in controversy, it was not error to permit the plaintiff to testify that during the years that such predecessor claimed title he was acting as her agent and made to her disclaimers title in himself.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§1115, 1116; Dec. Dig. §273(4).]

4. EJECTMENT §89—EVIDENCE—ADMISSIBILITY.

On the trial of an ejectment suit it is competent for the plaintiff to testify as to the identity of her title papers and connect them with the land in controversy.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§249-253; Dec. Dig. §89.]

5. APPEAL AND ERROR §1051(1)—REVIEW—HARMLESS ERROR.

Regardless of whether the evidence objected to in ground 11 of the motion for new trial was admissible, its admission will not require a reversal of the judgment, for the reason that, independently of the evidence referred to, the court properly directed a verdict under evidence which was clearly admissible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§4161, 4162, 4165, 4166; Dec. Dig. §1051(1).]

6. EVIDENCE §183(15) — SECONDARY EVIDENCE—ADMISSIBILITY.

It was not error to exclude from evidence a certified copy of a deed, where it was not shown whether any inquiry was made of the heirs or administrator of the grantor as to the loss of the original deed, in order to lay the foundation for the introduction of the secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§635-637; Dec. Dig. §183(15).]

7. EJECTMENT §109 — ACTIONS — DIRECTED VERDICT.

Under the evidence the court properly directed a verdict for the plaintiff.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §312; Dec. Dig. §109.]

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action by I. C. Flemister and husband against the Alaculsey Lumber Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

C. N. King, of Chatsworth, and W. E. Mann and W. C. Martin, both of Dalton, for plaintiff in error. Hendricks, Mills & Hendricks, of Nashville, and J. J. Bates, of Chatsworth, for defendants in error.

HILL, J. The defendants in error brought suit in the court below against the plaintiff in error for the recovery of lot of land No. 171 in the twenty-seventh district and second section of Murray county, and for damages for cutting and removing timber from said lot. After the evidence was all in, the court directed a verdict for the defendants in error against the plaintiff in error for the land sued for, and submitted to the jury the question of the value of the timber cut, and they returned a verdict for the defendants in error. A motion for a new trial was overruled, and the plaintiff in error excepted.

[1] 1. Error is assigned because the court admitted in evidence a deed purporting to be from L. N. Callaway to A. W. Callaway (the latter being the plaintiff's father, who died intestate), the objection being that the deed was not recorded, that there was no proof of its execution, nor was there any proof of possession thereunder, as required by law in order to admit the same in evidence as an ancient document. The court admitted the deed provisionally, saying that:

"Under the statement of Mr. Hendricks [plaintiff's attorney] that he proposes to prove those facts, I will let it go in for the present."

There was no motion made later to rule out this evidence; and under former rulings of this court the above ground of exception will not require a reversal.

[2] 2. Objection was made to the admission in evidence of what purported to be a division in kind of the estate of A. W. Callaway, the plaintiff's father, the objection being that there was nothing to show that there was any application for partition of the estate, except what purported to be a return; that the paper offered appeared to

be simply a voluntary act on the part of the parties; that, if the partition was based upon an agreement, such agreement ought to be offered in evidence, and any transcript from the ordinary's office showing an agreement was not admissible; that, if there was any division as claimed, it must be under some agreement of the parties; that, it being admitted that there was no administration, the only way to divide the property was to sell it or divide it in kind in the manner pointed out by law, etc. It was not error to admit the return of the freeholders appointed by the ordinary for the purpose of making distribution of the estate of A. W. Callaway, deceased, among the distributees. If there was administration pending on the estate of A. W. Callaway at the time the ordinary ordered a division in kind, he had jurisdiction to so order. Civil Code, § 4057. The recital in the return of the freeholders, "It appearing from the return of the administration [administrator?] that Mrs. K. M. Weldeman [one of the heirs] has heretofore received the sum of," etc., showed that the return was made during the pendency of administration, and there is a presumption from the recitals in the return that a proper application was made to the ordinary in order to have a division of the property made in kind. See *Caverly v. Stovall*, 134 Ga. 677(4), 68 S. E. 442. While the ground of the motion being dealt with discloses that the attorney for the movant, in making his objection to the return, stated that it was admitted that there was no administration, this statement—urged as a reason why the evidence should be rejected—is not to be taken as true. The approval by the trial judge of the grounds of the motion is merely a certificate to the fact that such statement was made by counsel, and not that it was in fact true. An examination of the record does not show that, either in the pleadings or the evidence, any such admission was made by the plaintiff; on the contrary, the testimony of the plaintiff herself would seem to indicate the contrary, as she says the land in dispute was allotted to her as her share in the division of her father's estate, which statement is appropriate to denominate a share received in the course of administration of the estate. The ruling on the admission of the evidence having been in favor of the opposite party, there is, of course, no estoppel against her because of a failure to deny the statement that it was admitted that there was no administration on the estate.

[3] 3. Objection was made to the admission of certain testimony of the plaintiff with reference to her title deeds, and as to what Ezzard, the agent of the plaintiff and alleged predecessor in title of the defendant, had said to the plaintiff as to a disclaimer of title by him. The evidence tended to show that Willis Clarey, administrator of Joseph L.

Robinson, conveyed the lot in controversy to Thomas W. Ezzard in 1877, and that Ezzard made a deed to F. W. Crandall and others conveying the lot in dispute on November 20, 1900. All the evidence objected to related to what Ezzard said to Mrs. Flemister, the plaintiff. E. J. Flemister, the husband of the plaintiff, testified that he and his wife turned over all the papers to Ezzard, and that Ezzard paid taxes on the land and had the title put in his own name; but the plaintiff testified that Ezzard was her agent. We think the evidence testified to was competent. The title to the land was claimed by Ezzard during the years he made the disclaimer to the plaintiff.

[4] 4. Error is assigned because the court permitted a question to be propounded by counsel for the plaintiff, and the plaintiff to answer it, as follows:

"Q. Describe the title papers to lot 171, Twenty-Seventh district and Second section, under which you hold and claim title, and where are they? A. Original grant for the state of Georgia to L. N. Callaway, 1st day of June, 1832, and recorded in Book C, Cherokee L. C. R. L. p. 270. Said grant is dated May 20, 1846. Deed from L. N. Callaway to A. W. Callaway, dated January 7, 1847, to lot described in sixth direct interrogatory. In the division of my father's estate the lot sued for and described in direct interrogatory No. 6 was allotted to me, and title to same has been in me ever since. These papers are now before me, but I am sending the original grant and deed from L. N. Callaway to A. W. Callaway to my attorneys, Hendricks and Hendricks."

We think this evidence was admissible, and that the plaintiff could thus identify her title papers and connect them with the land in dispute.

[5] 5. On the trial of the case the court permitted counsel for the plaintiff to prove by C. N. King, a witness for the defendant, the following on cross-examination:

"I recollect the prosecution and conviction of Thomas W. Ezzard for the forgery of a deed from Mrs. Laura Dick, J. R. Bryant, and Mrs. Alma Dick Johnson, heirs of Thomas F. Dick, which conviction was had in Fulton superior court and conviction obtained on April 23, 1910. I was not an attorney in that case. I did testify as a witness in the case against Ezzard, and not only him but two or three others in the bill."

The objection urged against this testimony was, that Ezzard not being a witness in the case, and no attack being made on any paper that he executed, the evidence was irrelevant to the issue on trial. As we are holding that the verdict was properly directed, the admission of this testimony will not cause a reversal, regardless of its irrelevancy.

[6] 6. Error is assigned because the court excluded a certified copy of a deed purporting to have been executed in Baldwin county on June 10, 1846, from L. N. Callaway to Joseph L. Robinson, conveying the lot of land in dispute; the deed being recorded in the clerk's office on November 26, 1900. It was insisted that the admission of this deed would have

shown the title out of the plaintiff's chain of title into the defendant, Alaculsey Lumber Company. Under the preliminary evidence advanced, the court did not err in excluding this certified copy. There was no proof that any inquiry was made of the heirs or administrator of Robinson as to the loss of the original deed. No proper foundation having been laid for the secondary evidence, it was properly excluded. Civil Code 1910, § 4212.

[7] 7. Under the evidence the court did not err in directing a verdict for the plaintiff. None of the other assignments of error show cause for a reversal.

Judgment affirmed. All the Justices concur.

(146 Ga. 267)

COLUMBIAN NAT. LIFE INS. CO. v. MULKEY. (No. 55.)

(Supreme Court of Georgia. Oct. 21, 1916.)

(Syllabus by the Court.)

1. COURTS — 217 — GEORGIA — QUESTIONS BY COURT OF APPEALS.

Where the Court of Appeals certifies to the Supreme Court a question of law necessary for the decision of the case by that court, and the record accompanying the certified question shows that the Court of Appeals had jurisdiction of the case at the time it ordered the certification of the question, this court will not refuse to answer the question certified.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. — 217.]

2. INSURANCE — 615 — ACTIONS — DEFENSES.

In an action on an insurance policy, the defense that the contract of insurance is void because obtained by fraud practiced on the insurer by the insured may be pleaded without repaying or offering to repay the premiums or any part thereof received by the insurer on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. — 615.]

Certified Questions from Court of Appeals.

Action by Janie Mulkey against the Columbian National Life Insurance Company. There was a judgment for plaintiff, and defendant brings error. On question certified by Court of Appeals. Question answered.

The Court of Appeals desires instructions from the Supreme Court upon the following questions involved in this case:

"1. Where it is sought to interpose the defense that the contract of insurance was void because it was obtained by fraud, are the provisions of section 4305 of the Civil Code applicable in the same manner as to other contracts? And can the defense that the policy of insurance was obtained by fraud be presented where it appears that there was no restoration of such thing of value as was received by the company in exchange for the policy, nor any effort to restore, prior to that included in the defendant's answer?

"2. Can a plea that a contract of insurance was obtained by fraud be presented without any previous effort to restore the status quo, though there be included in the plea an offer to return? Is it necessary to make such an offer at any time, as a prerequisite to asserting the invalidity of the policy on account of fraud?"

Colquitt & Conyers, of Atlanta, for plaintiff in error. Horton Bros. and Anderson & Rountree, all of Atlanta, for defendant in error.

FISH, C. J. [1] 1. The first headnote needs no elaboration.

[2] 2. Both questions propounded to this court by the Court of Appeals may be briefly stated as follows:

"In an action on an insurance policy, can the defendant plead, without repayment of the premiums, that the policy is void because obtained by fraud practiced by the insured on the insurer?"

Thus stated, we have no difficulty in answering the question in the affirmative. It does not appear from the questions propounded what was the nature of the fraud which induced the insurance company to issue the policy; nor is there anything in the questions to indicate that the policy sued on contained any stipulation to the effect that the policy should be void if procured by fraud on the part of the insured. The question may, however, be satisfactorily answered when considered in connection with certain provisions contained in the Civil Code of this state, which are as follows:

Section 2479: "Every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which the nature, or extent, or character of the risk is changed will void the policy."

Section 2480: "Any verbal or written representations of facts by the assured to induce the acceptance of the risk, if material, must be true, or the policy is void. If, however, the party has no knowledge, but states on the representation of others, bona fide, and so informs the insurer, the falsity of the information does not void the policy."

Section 2481: "A failure to state a material fact, if not done fraudulently, does not void; but the willful concealment of such a fact, which would enhance the risk, will void the policy."

Section 2483: "Willful misrepresentation by the assured, or his agent, as to the interest of the assured, or as to other insurance, or as to any other material inquiry made, will void the policy."

The declarations in the sections just quoted clearly establish the rule that the insurer retains the premium in all cases of actual fraud on the part of the insured or his agent in procuring the policy. (In *Beasley v. Phoenix Insurance Co.*, 140 Ga. 126, 78 S. E. 722, the action was upon a fire insurance policy which contained stipulations to the following effect: Concurrent insurance was permitted on the stock of goods upon which the policy was issued, to the amount of \$1,000; but no additional insurance for a larger amount should be taken on the goods by the insured, except by the consent of the insurance company, acquired by compliance with certain requirements. The defendant company, among other things, pleaded that, contrary to express stipulations in the policy sued on, the insured had pro-

cured additional concurrent insurance on the stock of goods, for a larger amount than \$1,000, and that this had been done without the knowledge or consent of the defendant. On the trial it appeared that such additional insurance had been taken on the stock of goods, and to an amount greater than \$1,000, without the knowledge or consent of the defendant, but that the agent of the defendant, who was instrumental in having the policy issued, had knowledge, ten days before the stock of goods was destroyed by fire, that such additional insurance had been placed on the stock of goods. It was held that under such facts the defendant company was not estopped from urging the defense set up, to the effect that the stipulations of the policy as to additional insurance had been violated; and that it was not necessary for the defendant to return the unearned portion of the premiums on the policy before it could rely upon such defense. Section 2489 of the Civil Code was cited, which provides that:

"A second insurance on the same property, unless by consent of the insurer, voids the policy."

While the Beasley Case does not present the exact question propounded by the Court of Appeals, it does decide that in a suit on a policy of insurance, which is void, it is not necessary, as a condition precedent to setting up its invalidity, that a tender of the premiums received is necessary.

The general doctrine laid down by textbook writers is that an unintentional breach of warranty on the part of the insured does not authorize a retention of the amount paid as assessments or as premiums, if no risk has been run by the insurer; but actual fraud in the inception of the contract on the part of the insured forfeits his claim to a return of assessments or premiums, notwithstanding the fact that no risk has ever attached. 2 Cooley's Briefs on Insurance, 1037, 1048; Niblack, Acc. Ins. & Ben. Soc. § 282; Vance, Ins. §§ 85, 86; 2 Joyce, Ins. §§ 1398, 1406; Cook, Life Ins. 193; 1 May, Ins. (3d Ed.) § 4; 1 Wood, Ins. (2d Ed.) § 109; Angell, Fire & Life Ins. (2d Ed.) § 404; 2 Phillips, Ins. (5th Ed.) § 1841; 2 Marshall, Ins. 652; 1 Parsons, Marine Ins. 560; 2 Clement, Fire Ins. 538. In line with the general rule above stated is *Taylor v. Grand Lodge*, 96 Minn. 441, 105 N. W. 408, 3 L. R. A. (N. S.) 114. In that case Elliott, J., delivered a very able and exhaustive opinion on the subject, and seemingly cited and discussed all decisions previously rendered by the courts in the United States, as well as the English decisions. The learned annotator in 3 L. R. A. (N. S.), supra, referring to the *Taylor* Case, says:

"The effect of the fraud of an applicant for membership in a benefit insurance order or society on the obligation of the society to return what has been paid as assessments or dues before it can claim the contract unenforceable has been given such thorough treatment by the court in *Taylor v. Grand Lodge*, A. O. U. W., that little is left to be said, and a search has

discovered no cases bearing on that subject which the court has not discussed in the opinion."

Among the cases cited and discussed in the *Taylor* Case is the well-considered case of *Blaeser v. Milwaukee Mechanics' Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747, wherein it was held that in all cases of actual fraud on the part of the insured, committed either by himself or his agent, the insurer shall retain the premium. In the opinion *Cole*, J., said:

"There is another portion of the charge excepted to, which we deem it proper and necessary to notice, which is where the court instructed the jury that although there might be misrepresentations in the application, yet the company could not avail itself of them in an action upon the policy, without first tendering back to the insured the amount of premium paid. The learned circuit judge held upon this point that the rule in regard to the rescission of contracts for fraud was applicable; that when a party seeks to avoid a contract on that ground, he must put the other party to the contract back to the condition in which he stood prior to the transaction. This is undoubtedly a well-settled rule in regard to the rescission of contracts; but we think it has no application to the case before us, and for this reason: By the condition of the policy itself, any fraudulent misrepresentations of a fact material to the risk avoids the contract. It is not necessary that the company refund the premium in order to avail itself of this stipulation in the policy. The representations in the application constitute the basis upon which the risk is taken, and the policy declares that if there is any misrepresentation or concealment the insurance shall be void and of no effect. The company enters into the contract relying upon the truth of the representations; and if it has been misled or deceived upon matters material to the risk, it may well say that no contract was ever made; that there was no concurrence of assent upon the same facts."

In *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, Wells, J., said:

"Representations to insurers, before or at the time of making a contract, are a presentation of the elements upon which to estimate the risk proposed to be assumed. They are the basis of the contract; its foundation, on the faith of which it is entered into. If wrongfully presented, in any respect material to the risk, the policy that may be issued thereupon will not take effect. To enforce it would be to apply the insurance to a risk that was never presented."

These remarks are sufficient to show that the position of the defendant in attempting to defeat the action on the ground that fraudulent representations were made in the application is essentially different from that held by a party who seeks to rescind a contract on the ground of fraud. In *Thompson v. Travelers' Ins. Co.*, 11 N. D. 274, 91 N. W. 75, the suit was upon a life insurance policy, and one of the questions for decision was whether the defendant was bound to return the premiums in order to maintain the defense set up. The court said:

"The case is not parallel as to its facts with one where the premium was paid by an insured upon a policy which the insurer is endeavoring to cancel through an action in a court of equity. In such a case, a return, or an offer to return, everything of value received under the policy must be made at or before the commencement

of the action. * * * In this case the defendant is not seeking any affirmative relief. It seeks to establish that there never existed a policy of insurance in favor of the deceased in defendant's company, by reason of the fact that it was delivered under circumstances that by its own terms provided that it should not come into effect."

In Taylor's Case, hereinbefore referred to, it was said:

"The claim that a party who has by false and fraudulent representations secured membership in an order of this character has an absolute right to the return of the money which he has paid into its treasury upon the discovery of his fraud, to say the most, rests upon a very meager foundation of merit. Such a rule is an invitation to fraud. If all moneys thus voluntarily paid can be recovered or must be returned by the insurer as a condition precedent to pleading the fraud as a defense, a party who contemplates obtaining insurance by false representations may well feel that he is taking no chances of loss, but is entering upon a transaction in which he stands to gain large returns without any possibility of endangering his investment. If the fraud is never discovered, the beneficiary under the policy which will be issued to him will receive the full benefit of the contract. If it by chance is discovered, his estate will receive back all that has been paid by the guilty party, and the trouble and expense attending upon the transaction will be thrown upon the innocent party. As the beneficiary certificate upon which this action is brought was obtained by fraud, the lodge was not required to return what it had received for assessments as a condition of availing itself of the right to elect to treat the contract as void ab initio. The widow of the party who had obtained membership by fraudulent representations has no just claim to the money, and certainly it was not due to the party named as beneficiary in the certificate"—citing *Thompson v. Travelers' Ins. Co.*, supra.

See 15 notes to Am. Rep. 1041, where a number of cases are collated on page 1042, wherein is cited *Blaeser v. Milwaukee Mech. Mut. Ins. Co.*, supra, from which we have quoted. Of course we do not mean to hold that an insurance company might not be estopped from setting up fraud practiced upon it in the procurement of the policy, if it should appear that after the discovery of such fraud the company did not promptly move to have the contract of insurance rescinded, but treated it as valid and binding and continued to receive the premiums thereon.

(146 Ga. 297)

MURPHY v. GEORGIA RY. & POWER CO.
(No. 190.)

(Supreme Court of Georgia. Dec. 14, 1916.)

(Syllabus by the Court.)

1. STREET RAILROADS — 112(2) — TRIAL — 296(7) — CROSSING ACCIDENTS — INSTRUCTIONS — CURE — BURDEN OF PROOF.

In an action against an electric railroad company for an injury caused by the running of its car, it is not incumbent on the plaintiff to prove the allegations of negligence of the defendant by a preponderance of evidence. But where giving to the jury an instruction that it is so incumbent on the plaintiff, the court followed with a further instruction that if the injury resulted from the running of the cars under any of the circumstances alleged in the pe-

tition as negligence, a presumption against the company would arise, and the burden would be upon it to show that its agent exercised all ordinary and reasonable care, a new trial is not required.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 227, 228; Dec. Dig. — 112(2); Trial, Cent. Dig. § 710; Dec. Dig. — 296(7).]

2. JUDGMENT — 250 — NEGLIGENCE — AVERMENTS.

In an action for damages for an injury alleged to have been caused by the defendant's negligence, a plaintiff cannot recover on a ground of negligence not alleged in the petition.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 436; Dec. Dig. — 250.]

3. STREET RAILROADS — 101, 112(2) — CROSSING ACCIDENTS — LIABILITY.

"When a personal injury has been shown to have been done by the locomotives, or cars, or other machinery of a railroad company, or by any person in its employment or service, the presumption is against the company, but it may defeat a recovery by establishing either of the following defenses: That its agents have exercised all ordinary and reasonable care and diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could have avoided the injury to himself, although caused by the defendant's negligence."

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 227, 228; Dec. Dig. — 101, 112(2).]

4. STREET RAILROADS — 118(3) — CROSSING ACCIDENTS — INSTRUCTIONS.

The charge of the court on the subject of alleged negligence by failure of the defendant company to give warning of the approach of the car, by the sounding of a gong, was not erroneous under the pleadings and evidence.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 261; Dec. Dig. — 118(3).]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by L. E. Murphy against the Georgia Railway & Power Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Westmoreland & Westmoreland and Mark Bolding, all of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

EVANS, P. J. The plaintiff's husband was killed in a collision of an automobile, which he was driving, with a street car. The automobile and the street car were coming from opposite directions, and the collision occurred near a curve in the highway. The highway was double tracked for street car operation, from the direction the automobile was coming to a point around the curve, estimated by the witnesses to be from 225 to 300 feet distant from the curve, from which point the double track, by means of a switch, became a single track. The collision occurred on the highway at a point estimated to be from 175 to 200 feet from the point where the double track merged into the single track. The speed at which the automobile was driven at the time of the collision was variously

estimated from 12 to 40 miles an hour. The street car, according to the servants in charge, and passengers, was standing still or barely moving, having been stopped or slowed down to avoid an impending collision. The plaintiff's witnesses estimated that the street car was going from 20 to 25 miles per hour when the collision occurred. The jury returned a verdict for the defendant. The plaintiff's motion for new trial was denied.

[1] 1. The jury were instructed that upon the filing of the defendant's answer, denying the essential allegations of the petition, the burden of proof was upon the plaintiff to establish every material allegation in her petition by a preponderance of the evidence. The court further charged:

"If the plaintiff shows by a preponderance of the evidence that her husband was injured, that is to say, that he was injured and died from the effects of the injuries or was killed by the running of the car of the defendant under any of the circumstances alleged in the petition as negligence, then a presumption against the company would arise, and the burden would be upon the defendant to show that its agents exercised all ordinary and reasonable diligence."

The first part of this charge is criticized because it required the plaintiff to prove the allegations of negligence; whereas, upon proof that her husband was injured by the running of the cars of the defendant, a presumption arose, by virtue of the statute (Civ. Code 1910, § 2780), that the injury was due to the company's negligence as alleged in the petition. It is not incumbent upon the plaintiff, in a case where the injury complained of is caused by the running of the defendant's cars, to prove the allegation of negligence of the defendant by a preponderance of the evidence. *Killian v. Georgia Railroad Co.*, 97 Ga. 727(3), 25 S. E. 384; Civ. Code 1910, § 2780. But the excerpt from the instruction complained of must be taken in connection with the other instruction; and when the whole instruction on the subject is considered, the instruction will not require a new trial. *Freeman v. Collins Park, etc., Railroad Co.*, 117 Ga. 78, 43 S. E. 410.

[2] 2. The superior court is a court of record, and the case is made by the pleadings. Accordingly, it was not erroneous for the court to instruct the jury, in substance, that the plaintiff could not recover upon a ground of negligence not alleged in the petition. *Central of Georgia Railroad Co. v. Weathers*, 120 Ga. 475, 478, 47 S. E. 956.

[3] 3. There was no error in charging, under the facts of this case, that:

"When personal injury is shown to have been done by the cars of a railroad company, the presumption is against the company, but it may defeat a recovery by establishing, by a preponderance of the evidence, either of the following defenses: That its agents have exercised all ordinary care and reasonable care and diligence to avoid the injury; that the damage was caused by the negligence of the person injured; that he consented to it; or that the person injured, by the use of ordinary care, could

have avoided the injury to himself, although caused by the defendant's negligence." *Savannah, Florida & Western Ry. v. Stewart*, 71 Ga. 427(3).

[4] 4. Complaint is made of this charge:

"If the driver of the automobile, that is to say, in this case conceded to have been the plaintiff's husband, saw the car coming when it was 100 feet or more away, then the failure to sound a gong, even if there was such failure, would not authorize a recovery on that alleged ground of negligence."

The alleged error is: that by this charge the court took away from the jury the question as to whether it would be negligent for the railroad company to run its cars at a rate of speed shown by the plaintiff's evidence without sounding a gong when the car was 100 feet or more away. A ground of negligence alleged by the plaintiff was that the defendant failed to ring the bell, or give warning, as the car approached the curve to the plaintiff's husband or others who were on or emerging from the curve. The complaint is that the plaintiff's husband was not given warning of the approach of the car. The ringing of the gong was one means of giving the warning. If the plaintiff's husband saw the car, he had the notice which the ringing of the gong would give. Accordingly, this charge was not erroneous, under the pleadings and the evidence. The verdict is supported by the evidence, and no error requiring a new trial is made to appear.

Judgment affirmed. All the Justices concur.

(146 Ga. 346)

THOMAS v. STATE. (No. 202.)

(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW \S 762(3)—INSTRUCTIONS—OPINION OF COURT.

In a prosecution for seduction, where the defense was that the prosecutrix was not virtuous, an instruction that it was not a lawful defense for accused to blacken or blackball the character of his victim by proving loose declarations or immodest conduct on her part, was erroneous because containing an intimation that the facts sought to be proved constituted no lawful defense, but only an attempt to discredit the prosecutrix.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731, 1758, 1769; Dec. Dig. \S 762(3).]

2. COURTS \S 217—APPELLATE COURT—CERTIFIED QUESTIONS.

Where, after conviction, writ of error was sued out of the Court of Appeals, the question whether an erroneous instruction was prejudicial is for the determination of that court, and of the Supreme Court on certified questions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 536-538; Dec. Dig. \S 217.]

3. CRIMINAL LAW \S 823(4)—INSTRUCTIONS—STATUTE.

In a prosecution for seduction by persuasion and promises of marriage, it was not reversible error for the court to give the jury the full definition of the crime, as contained in Pen. Code 1910, § 378, including the accomplishment, not only by persuasion and promises of

marriage, but by other false and fraudulent means, without instructing the jury as to what would constitute other false and fraudulent means, where the jury were charged elsewhere that defendant was being tried for having accomplished the seduction by persuasion and promises of marriage.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1994, 3158; Dec. Dig. § 823(4).]

Beck and Hill, JJ., dissenting.

Certified Questions from Court of Appeals.

H. G. Thomas was convicted of crime, and he brings error. On questions certified by Court of Appeals. Questions answered.

Jos. H. Hall, of Macon, Davis & Sturgis, of Dublin, O. A. Weddington, of Cochran, I. N. Eubanks and Jas. A. Thomas, both of Dublin, and W. R. Brown, of Atlanta, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, and J. S. Adams, of Dublin, for the State.

PER CURIAM. The Court of Appeals desires instructions upon the following questions:

"1. In the trial of a case of seduction, was the following charge to the jury error because it tended to discredit in the minds of the jury the defense interposed by the prisoner, that the woman he was charged with seducing was not a virtuous female, or because it contained an intimation by the court that the facts sought to be proved by the defendant constituted no lawful defense, but amounted only to an effort on his part to 'blacken and blackball the character of his alleged victim?' Or was this language of the court calculated to raise in the minds of the jury such a prejudice against the defendant and his defense as to require the setting aside of the verdict of guilty: 'The proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize the jury to infer actual guilt of the illicit act; but it is not a lawful defense for the accused to blacken or blackball the character of his alleged victim by proving loose declarations or showing imprudent or immodest conduct on the part of the woman he is accused of seducing?'"

[1, 2] The Court of Appeals is instructed that the excerpt from the charge quoted in the above question is erroneous for the reasons stated; but whether the error was cured, or the evidence was such as to avoid the necessity of a new trial, depends upon an entire review of the case, which can be done only by the Court of Appeals.

BECK and HILL, JJ., dissenting from the answer of the majority of the court to the first question asked by the Court of Appeals: The first question in this case really comprises three questions: The first is, Was the charge of the court referred to error because it tended to discredit in the minds of

the jury the defense interposed by the prisoner that the woman he was charged with seducing was not a virtuous female? Second, Was the charge erroneous because it contained an intimation by the court that the facts sought to be proved by the defendant constituted no legal defense, but amounted only to an effort on his part to blacken "and blackball" the character of his alleged victim? Third, Was the language of the court calculated to raise in the minds of the jury such a prejudice against the defendant and his defense as to require the setting aside of the verdict of guilty? In our opinion the first question should be answered in the negative. The other two questions cannot be answered without entering upon a consideration of the evidence, which this court cannot do.

"2. Where the indictment charged the defendant with the commission of the crime of seduction by 'persuasion and promises of marriage' only, was it reversible error for the court to give to the jury the full definition of the crime of seduction as contained in Pen. Code, § 378, including the accomplishment of that crime, not only by 'persuasion and promises of marriage,' but also by 'other false and fraudulent means,' without at least instructing the jury as to what would constitute the other false and fraudulent means by which the crime would be accomplished? See, in this connection, Langston v. State, 109 Ga. 153, 35 S. E. 166, 779, where it is held that an indictment charging the commission of this crime by false and fraudulent means is demurrable for failure to set forth by what means the seduction was accomplished."

[3] It was not reversible error to give this charge, assuming that the court somewhere in the general charge pointed out to the jury that they were trying the defendant upon the charge of having accomplished the seduction by persuasion and promises of marriage. This exact question is dealt with in Jones v. State, 90 Ga. 616, 16 S. E. 380.

3. In answer to the third question propounded by the Court of Appeals, it was not reversible error, on the trial of one under an indictment charging him with the commission of the crime of seduction by "persuasion and promises of marriage only," for the court to give the jury the full definition of the crime of seduction as contained in Pen. Code, § 378, including the accomplishment of that crime, not only by "persuasion and promises of marriage," but also by "other false and fraudulent means," where the court subsequently instructed the jury, without specially retracting or explaining anything contained in the above instruction, in effect that the state relied for conviction upon proof of persuasion and promises of marriage. All the Justices concur, except, BECK and HILL, JJ., dissenting.

(146 Ga. 228)

FORD v. E. TRIS NAPIER CO. (No. 141.)
(Supreme Court of Georgia. Dec. 1, 1916.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 65—AMOUNT IN CONTROVERSY—MUNICIPAL COURT.

That part of the act creating the municipal court of Macon (Acts 1913, p. 262, \S 26(c)), which provides in substance that in all cases tried in that court in which the principal sum claimed, or the value of the property in controversy, does not exceed \$100, "an appeal shall lie by writ of error to the superior court of Bibb county," and that the judgment of the latter court "shall be final, and shall not be subject to review by an appellate court," is not invalid for the reason that it is opposed to article 6, \S 2, par. 9, of the Constitution of this state (Civ. Code 1910, \S 6506), which provides that "the Court of Appeals shall have jurisdiction for the trial and correction of errors in law and equity from the superior courts in all cases in which such jurisdiction is not conferred by this Constitution on the Supreme Court, and from the city courts of Atlanta and Savannah, and such other like courts as have been or may be hereafter established in other cities." *Wester v. Redding*, 90 S. E. 1023, decided October 20, 1916.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 315-323; Dec. Dig. \S 65.]

Certified Question from Court of Appeals.

Action between J. W. Ford and the E. Tris Napier Company. There was a judgment for the latter, and the former brings error. On question certified by Court of Appeals. Question answered.

See, also, 90 S. E. 1024.

W. A. McClellan and J. C. Estes, both of Macon, for plaintiff in error. Ryals & Anderson, of Macon, for defendant in error.

PER CURIAM. Question certified to Court of Appeals answered. All the Justices concur, except BECK, J., absent.

(146 Ga. 348)

SHIPPEN BROS. LUMBER CO. v. FLEMISTER. (No. 205.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

TAXATION \S 734(1)—EXECUTION FOR TAXES—WILD LANDS.

Where wild lands have been returned for taxation in the county within which they are situated, the tax collector is without jurisdiction to issue execution for taxes thereon as unreturned wild land, and to cause such lands to be sold; and, if he does so, the execution is invalid, and the proceedings thereunder are void. The purchaser at such a sale gets no title, and ergo can convey none.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1408, 1470, 1471; Dec. Dig. \S 734(1).]

Error from Superior Court, Gilmer County; H. L. Patterson, Judge.

Action by Mrs. Ida C. Flemister against the Shippen Bros. Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. H. Burtz, of Ellijay, and Robt. C. & Philip H. Alston, of Atlanta, for plaintiff in error. G. N. Bynum and Clark Ray, both of Atlanta, for defendant in error.

GILBERT, J. Shippen Bros. Lumber Company, plaintiff in error, bought land lot 27 in Gilmer county from one who purchased it at a tax sale. The sale was by virtue of an execution issued by the tax collector of Gilmer county. The execution recited all jurisdictional facts required by law in such proceedings applicable to wild lands. Civil Code 1910, \S 1070. Mrs. Ida C. Flemister brought suit for this land, and on the trial showed title by grant from the state to A. W. Callaway, her father, and to herself by inheritance. She had never seen the land, and had no personal knowledge of its boundaries. She introduced a certified official map, which indicated that the land was divided by the county line between Fannin and Gilmer counties. She also showed that E. J. Flemister, as her agent, returned the land for taxes in Fannin county. She also tendered in evidence a certified copy of the wild land digest of Gilmer county for the year 1884, from the comptroller general's office, showing that James H. Smith returned the land in question for taxes in Gilmer county. To this copy the defendant objected, upon the grounds that the return did not show any right or authority on the part of Smith to make it; that there was no evidence to show that Smith had any title to the property, or was authorized by anybody who did have title to make the return; and that for these reasons the return, being void, was equivalent to no return. The court overruled the objection, and error was assigned. The defendant offered to prove by M. S. Clayton that no part of the land was within Fannin county. On objection the court rejected this evidence, and error was assigned. The court directed a verdict for the plaintiff for the premises in dispute, and entered up judgment accordingly. The defendant excepted. The court stated his reason for directing a verdict, the kernel of which is:

"I will direct a verdict for the plaintiff in this case, irrespective of where the line is. Smith returned it in Gilmer county. That made it so the tax collector could not sell it as wild land."

It will be seen that the whole case must be governed by the solution of the single question whether a return of the land for taxes by Smith was sufficient to invalidate the tax execution. If the question be answered in the affirmative, it is immaterial whether Clayton was allowed to testify that the land was wholly within Gilmer county; also it would necessarily follow that the evidence of a return by Smith was not only admissible, but vitally material; also in such case the direction of a verdict was a logical and inevitable result. On the other hand, if the question be answered in the negative, it was

harmful error to admit the evidence of Smith's return of the land for taxes, and without it the issue belonged to the jury, and not to the court, for determination, and the direction of a verdict was unauthorized. Thus the statement of the judge goes to the root of the issue.

The summary seizure and sale of the land of a citizen is a harsh remedy. It has behind it no adjudication of rights. It depends merely upon statute; and if the procedure varies from the statute, the foundation crumbles. The doctrine of caveat emptor applies with great force, and the purchaser is bound to take notice of all irregularities which have taken place in the proceedings under which he claims. *Southern Pine Co. v. Kirkland*, 112 Ga. 216, 218, 37 S. E. 362. In the case just cited Mr. Justice Little has stated in a clear and conclusive manner the rule applicable to such tax sales. It is true that the discussion in that case was applied primarily to the failure of the officer to recite the necessary jurisdictional facts in the execution. The same principle would apply, however, to the establishment of jurisdictional facts as to their recital. When contested, it is not sufficient to merely recite all the necessary facts. The truth of the recitals must also be made to appear. "The title to be acquired under statutes authorizing the sale of land for taxes must be regarded as stricti juris, and whoever sets up a tax title must show that all the requirements of the law have been complied with." *Leonard v. Pilkinton*, 99 Ga. 740, 27 S. E. 753, 754, quoting *Black on Tax titles*. It would be inconceivable that the lawmaking power intended only to require strictness as to allegations and unconcern as to proof. The statute provides:

"Any wild lands *not given in for taxes* in the county in which they may be shall be subject to double tax, as other property, and it shall be the duty of the tax collector, when taxes are not paid in the time provided by law, to issue executions against said wild land," etc. Civil Code 1910, § 1070.

Under the proof the land was returned for taxes by Smith. The record does not disclose whether he had any interest in the land, or any authority to return it; and it is argued for the plaintiff in error that a return is only valid when made by the owner, or by some one with his authority, citing several decisions of this court which employ language apparently to that effect. The language of these decisions applied to the particular facts in each case, and was not intended to hold that a tax return was invalid because there was nothing to show the interest or authority of the person making the return. "Primarily the state is interested only in receiving the taxes, and is indifferent as to who pays them." *Powell on Actions for Land*, § 238. Since the state is indifferent as to who pays the taxes, surely it cannot be concerned with the matter of who makes the returns.

The jurisdictional facts having been chal-

lenged by proof of a return by Smith, the burden was on the lumber company to show that the return was not sufficient in law. Having failed to do so, the tax execution was properly held to be invalid. This lot of land, 160 acres, was taxed at \$1.08, and sold for \$3.30, which fully demonstrates the necessity for the strict construction of the statute, which has been the uniform practice of all courts and law writers.

Judgment affirmed. All the Justices concur.

(146 Ga. 363)

LOTT v. DENTON. (No. 215.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. INTERLOCUTORY INJUNCTION.

Under the evidence and the pleadings, the court did not err in granting the interlocutory injunction.

(Additional Syllabus by Editorial Staff.)

2. LOGS AND LOGGING — § 3(11) — LEASE — CONSTRUCTION.

Under a lease stipulating that the lessees could enter upon and use the land to box timber thereon for turpentine purposes, and could commence using the timber at any time they might desire to do so, and continue to work same for three years, "beginning, with reference to each portion of the timber, for the time only that the boxing and working of each portion is commenced," it was essential that the lessee, in order to enjoy the rights conferred, enter upon the land and commence the working thereof within a reasonable time.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 9; Dec. Dig. § 3(11).]

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Injunction by Mrs. N. E. Denton, against Mrs. M. O. Lott, as administratrix of Warren Lott, deceased. Interlocutory injunction granted, and defendant brings error. Affirmed.

Lankford & Moore, of Douglas, for plaintiff in error. L. E. Heath and Dickerson & Kelley, all of Douglas, for defendant in error.

BECK, J. Mrs. N. E. Denton filed her petition against Mrs. M. O. Lott, as administratrix of Warren Lott, deceased, seeking an injunction to prevent the defendant from entering upon certain lands and cutting and boxing the timber thereon for turpentine. The defendant resisted the application for an injunction, contending that, under the terms of a certain lease of which her intestate was the transferee, she had the right to enter upon the lands and cut and box the timber. The court granted an interlocutory injunction, and the defendant excepted.

[1] As ruled in the headnote, the court did not err in granting the interlocutory injunction. In the lease referred to it was stipulated that the lessees, their heirs and assigns, should have the right to enter upon and use

the lands in controversy for the purpose of boxing the timber thereon for turpentine purposes during the continuance of the lease; and it was stipulated that the lessees or their assigns could commence boxing or using the timber for turpentine purposes, or any portion thereof, at any time they might desire to do so, and that they should have the right to continue to work the timber for the purposes specified, and every portion thereof, for the term of three years, "beginning, with reference to each portion of the timber, for the time only that the boxing and working of each portion is commenced; it being the intention of the parties that this lease shall continue until all of the timber, and each and every part thereof, has been boxed, worked, and otherwise used for turpentine purposes for the full period of three years."

[2] We are of the opinion that this lease should be construed to require the lessees or grantees, in order to enjoy the rights conferred, to enter upon the lands and commence the working thereof within a reasonable time. It is true that the lease provides in terms that the lessees may enter upon the work when they desire; but we think the law will write into such a lease that this shall be within a reasonable time. In the lease which is construed in the decision in the case of Goette v. Lane, 111 Ga. 400, 36 S. E. 758, the words "at any time in reason" were expressed in the instrument itself; but we do not think that such a lease as that in the case referred to, or in the present case, though it is not expressly provided therein that the work shall commence at any time in reason, could be construed to mean, in the absence of those terms, that the lessees might enter upon the work of boxing the timber for turpentine purposes at any time not "in reason"; and so far as relates to the time at which the lessees should begin to exercise the privileges conferred, the lease is the same, whether it has in it, or omits, the expression "at any time in reason." The title to the timber involved in this lease was not conveyed, but the lease grants a license to use the timber for the purposes stipulated. Johnson v. Truitt, 122 Ga. 327, 50 S. E. 135. In the case of North Georgia Co. v. Bebee, 128 Ga. 563, 57 S. E. 873, this court was dealing, in the opinion delivered by Presiding Justice Evans, with an instrument which was a deed of conveyance, and under which an estate in fee to the trees passed; and the ruling there made, that the estate in the trees was not terminated and forfeited by the failure of the grantee to remove the trees within a reasonable time, is not applicable to the present case.

Upon application of the ruling which we have made to the facts in the case, the court did not err in granting the injunction.

Judgment affirmed. All the Justices concur.

(146 Ga. 362)

BUTTS v. DEEN REALTY & IMPROVEMENT CO. (No. 214.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. ADVERSE POSSESSION §84—COLOR OF TITLE—CONVEYANCE BY SQUATTER.

"A mere squatter on a lot of land, without color of title or claim of right, cannot defeat the title of the true owner by conveying the land to other purchasers who have full knowledge of the nature and character of the title when they purchase it, although they may have been in possession of it for seven years under such title." *Compton v. Newton*, 129 Ga. 619, 59 S. E. 270. There was evidence which would have authorized the jury to apply to this case the principle just announced; and the charge as complained of in the fourth and fifth grounds of the amended motion for new trial was such as to confuse the jury in applying the principle.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 488-500; Dec. Dig. § 84.]

2. INSTRUCTIONS.

Certain requests to charge, as embodied in other grounds of the motion for new trial, were not themselves accurate and adjusted to the facts, and it was not erroneous to refuse them.

3. GROUNDS FOR NEW TRIAL.

As the judgment will be reversed on account of the error in the charge dealt with in the first headnote, it is unnecessary to rule upon the general grounds of the motion for new trial.

Error from Superior Court, Ware County; J. I. Summerall, Judge.

Action between J. C. Butts, guardian, and the Deen Realty & Improvement Company. From the judgment, the guardian brings error. Reversed.

J. L. Sweat, of Waycross, for plaintiff in error. Wilson & Bennett and Parker & Walker, all of Waycross, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 369)

WILSON v. GROOVER. (No. 221.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. JUDGMENT §252(1) — CONFORMITY TO PRAYER—MONEY JUDGMENT.

In an action for injunction against cutting timber and for damages to the timber, the petition alleged ground for injunction, and damage in a stated amount. The prayers were that the defendant be restrained and permanently enjoined, and "that process issue, requiring the defendant to be and appear at the next term of * * * court to be held in and for said county on the fourth Monday in October, then and there to answer your petitioner's complaint," and "that your petitioner have such other and further relief as the nature of the case and the principles of law, justice and equity demand." *Held*, the portion of the prayer first quoted, when considered in connection with the allegations of the petition, was sufficient upon which to base a money verdict. *Fitzpatrick v. Paulding*, 131 Ga. 693, 63 S. E. 213; *Worthy v. Farmers' Life-Confederation*, 139 Ga.

81(1), 76 S. E. 856. The case differs in its facts from *Schmitt v. Schneider*, 109 Ga. 628, 35 S. E. 145, and cases cited.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 441, 442; Dec. Dig. ¶252(1).]

2. VERDICT—EVIDENCE—SUFFICIENCY.

The evidence was sufficient to authorize the verdict. The grounds of amendment to the motion for new trial are covered by the ruling last stated.

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Action between J. A. Wilson and J. B. Groover. There was a judgment for the latter, and the former brings error. Affirmed.

J. J. E. Anderson, of Statesboro, and Hines & Jordan, of Atlanta, for plaintiff in error. Hunter & Jones, of Statesboro, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 371)

DURDEN v. DURDEN. (No. 223.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. TRIAL ¶39—RECEPTION OF EVIDENCE—AFFIDAVITS.

The court did not abuse its discretion in refusing to admit in evidence an affidavit offered by the attorney for one of the parties, which had not been served upon the opposite party in accordance with the order of the court relating to the exchange of affidavits.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 92-98; Dec. Dig. ¶30.]

2. TEMPORARY ALIMONY.

Under the evidence in the case, it does not appear that the court abused its discretion in the allowance of temporary alimony.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by Millie Durden against L. B. Durden. Judgment for plaintiff, and defendant brings error. Affirmed.

Don. H. Clark, of Savannah, for plaintiff in error. Saml. R. Dighton, of Savannah, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 369)

McALEER v. GLOVER. (No. 222.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. DEEDS ¶114(2)—DESCRIPTION—CONSTRUCTION.

A deed to the northern half of a designated lot of land, rectangular in shape, includes all of the lot north of a line equidistant from the north and south lines of the lot. Such description is definite and without latent ambiguity.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 318; Dec. Dig. ¶114(2).]

2. BOUNDARIES ¶48(3)—ESTOPPEL BY ACQUIESCENCE—LIMITATION PERIOD.

Acquiescence by conduct for a period of time less than seven years will not suffice to establish

a dividing line between adjoining landowners by virtue of Civil Code 1910, § 3821.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 236, 237; Dec. Dig. ¶48(3).]

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Action by A. M. Glover against H. J. McAleer. Judgment for plaintiff, and defendant brings error. Affirmed.

O'Byrne, Hartridge & Wright, of Savannah, for plaintiff in error. Wilson & Rogers, of Savannah, for defendant in error.

EVANS, P. J. The action was by Augustus M. Glover against Henry J. McAleer, to recover a small area of land located in the city of Savannah, having an eastern frontage of 6 feet and 9 inches on Abercorn street and a rectangular depth of 35 feet and 3 inches westwardly. It appeared on the trial that John McAleer was the owner in fee of lot No. 4, Reppard ward, at the northwest corner of Thirty-Second street and Abercorn street, which was rectangular in shape. In his will John McAleer devised the northern half of this lot to his wife, Rose McAleer, for life, with remainder to Henry J. McAleer in fee; and the southern half of the same lot was devised to Henry J. McAleer. Henry J. McAleer, on July 6, 1908, conveyed by deed to Rose McAleer his remainder interest in the northern half of the lot, and on January 17, 1913, Rose McAleer conveyed to the plaintiff the northern half of the lot. It appeared that the lot was traversed by a fence a few feet from a line which would equally divide the lot into northern and southern sections. It was the contention of the plaintiff that his deed from the defendant included the northern half of the lot, the limits of which extended 6 feet and 9 inches south of the fence, and embraced the premises in controversy. The defendant's contention was that the fence was the dividing line, and that the locus of the suit was not covered by the deed of the plaintiff. A verdict was returned for the plaintiff.

[1] 1. In the will of John McAleer the testator divided the tract into two parts, the northern half of which he devised to his widow for life, with remainder to Henry McAleer, and the southern half he devised in fee to Henry McAleer. The conveyance by Henry McAleer of his remainder interest in the northern half to Rose McAleer vested the complete title of the northern half of the lot in Rose McAleer, the plaintiff's grantor. The deed from Rose McAleer to the plaintiff, as well as the deed from the defendant to her, described the property conveyed as being the northern half of lot No. 4, Reppard ward, at the northwest corner of Thirty-Second street and Abercorn street. Land intended to be conveyed may be designated by the name and number of a lot, including fractional parts thereof. The de-

scription in this deed includes all of the lot north of a line equidistant from the north and south lines of the lot; it is definite and without latent ambiguity.

[2] 2. It appeared from the testimony that the plaintiff became a tenant of Mrs. Rose McAleer on April 1, 1908, at which time there was a fence across the lot, which fence remained during the term of his tenancy; that as a tenant he never had the use of any property save that shown on the plat introduced in evidence; and that Mr. Pead, a tenant of Mr. McAleer, was in possession of the other portion of the lot during this time. It is argued that this evidence is sufficient to show such acquiescence by conduct on the part of Glover as to establish the fence as a dividing line between the northern half and the southern half of the lot. An unascertained or disputed boundary line between coterminal proprietors may be established by acquiescence for seven years by acts or declarations of the owners of adjoining land. Civil Code 1910, § 3821. *Osteen v. Wynn*, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212. But the doctrine of establishing a dividing line by acquiescence by conduct can have no application to the facts of this case, inasmuch as the plaintiff's possession, both as tenant and as owner of the northern half of the lot, was for a period considerably less than seven years.

Judgment affirmed. All the Justices concur.

(146 Ga. 373)

HAWK v. WESTERN & A. R. CO.
WESTERN & A. R. CO. v. HAWK.
(No. 225.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR **§ 1218—REHEARING—**
VACATION OF JUDGMENTS.

It having been discovered by this court, after the judgments in the above-stated cases, dated December 12, 1916, had been rendered and duly entered upon the minutes of court, and after the remittiturs therein had been duly transmitted to the trial court, but before the same were filed in the trial court, that the judgments were inadvertently rendered, this court upon its own motion recalled the remittiturs, and they were returned to this court without having been filed in the trial court. It is now ordered that the judgments rendered in the cases as above mentioned be vacated and set aside. See *Maddox v. Bramlett*, 84 Ga. 89, 11 S. E. 129.

a. This case differs from *Seaboard Air-Line Railway v. Jones*, 119 Ga. 907, 47 S. E. 320, in which the court declined to entertain a motion for a rehearing where the judgment was not rendered by inadvertence and the remittitur had been filed in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4719; Dec. Dig. **§ 1218.**]

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action between T. D. Hawk and the Western & Atlantic Railroad Company. From the judgment, both parties brought error.

Judgments rendered by the Supreme Court vacated.

W. C. Martin and M. C. Tarver, both of Dalton, for plaintiff in error. Tye, Peebles & Jordan, of Atlanta, and Maddox, McCamy & Shumate, of Dalton, for defendant in error.

PER CURIAM. All the Justices concur. except FISH, C. J., absent on account of sickness.

(146 Ga. 367)

CURLEW et al. v. JONES. (No. 220.)
(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. MARRIAGE **§ 54—INVALID MARRIAGE—**
RIGHTS OF WIFE.

Where a woman having a living husband married another man, the second marriage was void. Upon the decease of this man no title to his property passed to her; and a deed by her purporting to convey the property of the decedent was without effect, and her grantee took no title under the instrument as against the heirs of the decedent.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 93-103, 105, 106, 109; Dec. Dig. **§ 54.**]

2. BASTARDS **§ 104—RIGHT OF DESCENT—**
MOTHER.

The decedent referred to being a bastard, his brother and sister by the same mother, who were also bastards, inherited his property. Civ. Code 1910, § 3029.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 251, 257-262; Dec. Dig. **§ 104.**]

3. VERDICT—PROPRIETY.

Applying these principles to the facts of the case, a verdict in favor of the plaintiffs for the premises in dispute was demanded.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Ejectment by Major Curlew and another against Maria Jones. There was a judgment for the latter, and the former bring error. Reversed on condition.

Major Curlew and Jane Moore brought ejectment against Maria Jones. Plaintiffs and defendant claimed title through one Jack Curlew. Jack, Charlie, Major, and Jane (the last two named being plaintiffs in this case) were sister and brothers of the same mother. Jack Curlew, from whom plaintiffs seek to derive title by inheritance, intermarried in 1901 with Kate Fambro, or Kate Campbell. Kate Fambro (or Campbell) in 1891 was married to Grant Campbell. She and Grant Campbell separated. There was no evidence of divorce or of any proceeding for divorce, and Grant Campbell testified that there never was a divorce. After the separation of Grant Campbell and Kate Campbell, the latter was formally married to Jack Curlew. Afterward Jack Curlew died, and an administrator of his estate was appointed. The administrator filed a petition in the court of ordinary, reciting that Kate Curlew, the wife of Jack Curlew, had paid off all the debts of the estate, that he had advertised as re-

quired by law, and no other debts had been presented, that he had found Kate Curlew in possession of the land through her accredited agents, that the money for the expense of the administration had been paid by Kate Curlew, and he prayed, first, that the petition be treated as a final return, and that he as administrator be directed to execute and deliver to Kate Curlew an administrator's deed to the lands belonging to the estate of Jack Curlew, deceased, which includes the land sued for, and that letters of dismission be granted to him. Upon this petition citation was issued and published, and, no objection having been filed, the prayers of the petition were granted, and it was ordered that the administrator execute to Kate Curlew quitclaim deeds to the property, reciting this judgment as authority therefor, and that letters of dismission issue to petitioner. The administrator executed his deed to Kate Curlew under the provisions of the foregoing judgment, and she afterwards executed her deed to the defendant. The court directed a verdict in favor of the plaintiffs for an undivided two-thirds interest in the premises sued for, and submitted to the jury the amount of the mesne profits, which the jury found to be \$55. The defendant moved for a new trial, which was granted.

Williford & Lambert, of Madison, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiffs in error. Holbrook & Corbett, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). [1] The uncontradicted evidence in the case shows that Kate Curlew, or Kate Campbell, at the time the ceremony of marriage was performed between herself and Jack Curlew was a married woman, having a living husband, Grant Campbell. That being true, her marriage to Jack Curlew was void, and the ceremony of marriage did not make her his wife. Upon his death she inherited nothing from him and took no title to his real estate, and her deed to the defendant in this case conveyed no title as against the plaintiffs, who were the brother and sister of Jack Curlew by the same mother.

[2] Jack Curlew left besides the plaintiffs another brother, who was also a bastard brother by the same mother. Consequently the plaintiffs inherited two-thirds of the land belonging to the decedent; and the court properly directed a verdict awarding a two-thirds interest in the land to these plaintiffs, as no circumstances of estoppel were shown which prevented their contesting the validity of the claims of the defendant derived through Kate Curlew, or Campbell.

It is unnecessary to decide whether the verdict for the amount of mesne profits awarded by the jury was demanded under the evidence; for the plaintiffs offered to write off the amount of mesne profits. Con-

sequently the judgment of the court below setting aside the verdict in favor of the plaintiffs and granting a new trial is reversed upon condition that the plaintiffs write off from the verdict the amount of mesne profits recovered, within 20 days after the remittitur from this court is made the judgment of the court below. If the plaintiffs fail to comply with this condition, the judgment granting a new trial will stand affirmed.

Judgment reversed upon condition. All the Justices concur.

(146 Ga. 364)

PATTERSON et al. v. MOORE. (No. 216.)
(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

USURY. ~~§~~95—ACTIONS—EQUITY—MAXIM.

Although under Civ. Code 1910, § 3444, it is a misdemeanor to reserve or charge interest greater than 5 per cent. per month on loans secured by an assignment of salary or wages, nevertheless a borrower cannot maintain an action in equity for the surrender and cancellation of a usurious salary assignment, and for injunction against the lender "filing" it with the borrower's employer (whose custom is to discharge employes who assign their salaries), without payment or tender of the actual money received, with lawful interest. Whoever would have equity must do equity.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 198-202; Dec. Dig. ~~§~~95.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between B. G. Moore and J. A. Patterson and others. There was a judgment for the former, and the latter bring error. Reversed.

C. D. Maddox, of Atlanta, for plaintiffs in error.

EVANS, P. J. The plaintiff brought an equitable action against the defendants, alleging in substance: The defendants are money lenders, and claim that the plaintiff is in debt to them in the sum of \$18, to secure which they required the plaintiff, on April 15, 1915, to sign in blank, in defendants' favor, what purported to be an assignment of his wages. At that time the plaintiff was working on a monthly salary, payable on the 15th day of the month, and at the time plaintiff executed to defendants an assignment of his wages there was due to him a half month's salary. The defendants knew this, and also had knowledge of a custom followed by his employer of discharging employes who, having made an assignment of wages, should have the same "filed against their time." The defendants, on April 15, 1915, gave the plaintiff \$15, and required him to execute to them a salary assignment for \$18, as security, which was taken in the form of an absolute sale, with the intent and purpose to cover usury, and it was the understanding and agreement at the time that the

plaintiff was to draw his wages as the same became due and pay the defendants the full amount of the salary assignment, viz., \$18. It was further understood and agreed that the "assignment was in no event to be turned in against the wages of petitioner and same required at the hands of petitioner's employers, except when petitioner should refuse or threaten to refuse payment of said usury, which in the present instance amounted to twenty (20) per centum per month." The defendants have often informed plaintiff that unless he accounted on the due date of the loan for the amount of the assignment, they would file notice of their assignment with his employer, and have threatened plaintiff with sending in a notice to his employer, and have kept him in constant fear of losing his position with his employer; and the suit is brought to protect the plaintiff "from the threatened, imminent, and irreparable injury." The assignment is illegal and void. The prayer is for injunction against "filing said assignment against wages or salary earned by petitioner," and that the defendants be compelled to surrender the assignment, and that the same be canceled. The court overruled the defendants' demurrers, and they excepted.

The petition is projected on the theory that inasmuch as the statute (Civ. Code 1910, § 3444 et seq.) denounces as a misdemeanor the reservation or charge of interest greater than 5 per cent. per month on loans of money, whether by way of purchase of salary or wages or other security, the plaintiff is entitled in equity to a cancellation of the illegal contract, and an injunction against its threatened use by the defendants in a way likely to cause a loss of employment. It is true that equity opens its door for the relief of the oppressed, and will not deny relief against usury on the ground that the parties are in pari delicto; the necessitous borrower in usurious loans not being regarded as in pari delicto, but as in vinculis to the lender. But there is another equitable principle that whoever would have equity must do equity. The plaintiff asks for the surrender and cancellation of his salary assignment given to secure the money he borrowed from the defendants. The salary assignment is void because of the usury. It may be entirely worthless to the creditor; but the plaintiff in a court of conscience cannot demand that his creditor deliver up the security he gave to get his creditor's money, however worthless it may be, without offering to do reciprocal equity, viz., tender back the actual money which he received as the quid pro quo of his worthless security. *Campbell v. Murray*, 62 Ga. 86. The circumstances that the salary assignment evidence a criminal act does not affect the case. In the wisdom of the Legislature, the taking of usury by money lenders on the security of salary

assignments in excess of a certain rate of interest was made a crime. The defendants may be prosecuted and punished for the crime. But there is nothing in the statute that the remedial rules of equity should be changed to meet the case of the borrower who promises to pay excessive interest, so as to give him any different remedy to the ordinary borrower in relief against usury. The creditors have not "filed" their salary assignment with the plaintiff's employer, and may never do so. All that is charged against them is that they are holding the assignment as a leach to compel performance, and the plaintiff prays to have a surrender and cancellation of the paper to prevent this. Let him tender the debt purged of the usury; and if he so desires, he may also institute a prosecution against the usurer.

Judgment reversed. All the Justices concur.

(146 Ga. 367)

KING v. MOORE. (No. 217.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

RECOVERY OF USURY.

This case is controlled by the case of *Patterson v. Moore*, 91 S. E. 116, this day decided.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between A. R. King and B. G. Moore. There was a judgment for the latter, and the former brings error. Reversed.

C. D. Maddox, of Atlanta, for plaintiff in error. Philip Weltner and Elliott Cheatham, both of Atlanta, for defendant in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(146 Ga. 353)

MORGAN v. GODBEE. (No. 208.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. BOUNDARIES — §22 — DESCRIPTION — CONSTRUCTION.

Where, in the description in a deed, the land is bounded on one side by the right of way of a railroad company, the true boundary line between the land conveyed and the right of way of the railroad company must be taken as the boundary line, and not the line as it was understood to exist at the time of the execution of the deed, if there is a variance between such two lines.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 134; Dec. Dig. §22.]

2. COVENANTS — §100(1) — BREACH OF WARRANTY — DESCRIPTION.

Where one purchases a tract of land, and the boundaries are pointed out to him by the vendor and a warranty deed is executed, intended to convey the land as pointed out, but in fact describing only a part of the land, the purchaser cannot, as for a breach of warranty contained in the deed, recover damages from the

grantor, on the ground that the omitted land belonged to another.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 139-146, 149, 150, 152, 153, 155; Dec. Dig. § 100(1).]

3. FRAUD § 41—ACTION FOR FRAUD—PLEADING.

The petition was lacking in necessary averments to be good as an action for fraud and deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.]

Error, from Superior Court, Douglas County; A. L. Bartlett, Judge.

Action by W. L. Morgan, administrator, against W. A. Godbee. Judgment for defendant and plaintiff brings error. Affirmed.

J. S. James, of Atlanta, for plaintiff in error.

EVANS, P. J. The plaintiff's petition was dismissed on demurrer. He alleged that the defendant had damaged him in the sum of \$500, "on account of a breach of warranty as hereinafter stated," for that he purchased from the defendant a certain tract of land, and the defendant, on February 21, 1898, executed to him a deed containing a covenant of warranty, wherein the property was described as follows:

"All that tract or parcel of land lying and being on the north side of the Atlanta & West Point Railroad, being part of the western half of lot of land No. 107 in the ninth district of originally Fayette, but now Campbell county, commencing at the rock corner on right of way near Miles Smith's house, running north $15\frac{1}{2}$ rods to the original line of said lot; then west 52 rods; thence south $46\frac{1}{2}$ rods to the right of way of said railroad; thence east along said right of way 62 rods—containing $10\frac{1}{2}$ acres of land more or less."

A part of the land which he purchased was not owned by the defendant, but was the right of way of the Atlanta & West Point Railroad Company, and the title to that portion of it was not in the defendant at the time he sold the land to the plaintiff. At the time of the execution of the deed the defendant claimed that he owned the land extending to within 50 feet of the center of the track, and pointed out and conveyed to him the land as being adjacent to the right of way of the Atlanta & West Point Railroad Company, including in his conveyance a strip of land 50 feet wide and 52 rods long, which belonged to the Atlanta & West Point Railroad Company, which was the most valuable part of the property. The right of way of the Atlanta & West Point Railroad Company sold by the defendant to the plaintiff contained about $2\frac{1}{2}$ acres of the value of \$187.50, but the land which the plaintiff obtained and entered into possession of was about 8.35 acres. He has erected valuable improvements on the land which he purchased on the faith of his title to the whole, and he sues for "special damage that has accrued, besides the breach of warranty before stated."

The defendant filed a demurrer to the petition. The plaintiff amended by alleging that the defendant pointed out the land plaintiff was purchasing as containing 10.7 acres adjoining the right of way of the Atlanta & West Point Railroad, which right of way extended 50 feet from the middle of the track; that this line was pointed out as the south line by the defendant, who claimed title to within 50 feet of the center of the line of the railroad, and represented that he was selling to the plaintiff the land on the north side of the center line of the railroad up to within 50 feet thereof; that the true line of the right of way of the Atlanta & West Point Railroad extended 100 feet from the center of the track, and the defendant did not own that part of the right of way on the north side of the railroad beyond 50 feet of the center of the railroad track; that the railroad company has paramount title, and within a short time before the filing of suit the plaintiff undertook to take possession of the land, but was prevented from doing so by the Atlanta & West Point Railroad Company. He relied implicitly on the representation of the defendant that he owned, as part of the land defendant sold to him, the strip of 50 feet by 62 rods above described, and did not know that it was a part of the right of way of the railroad company. He has never been able to get possession of that portion of the land which lies between a line drawn 50 feet and 100 feet from the center of the railroad track, because it is owned by and is in the possession of the Atlanta & West Point Railroad Company. The defendant renewed his demurrer to the amended petition, and the demurrer was sustained.

[1, 2] 1, 2. The petition is not good as a suit to recover damages for a breach of a covenant of warranty of title, for the reason that the land, paramount title to which is alleged to be in the Atlanta & West Point Railroad Company, is not embraced in the description in the deed. The particular description of the deed calls for the right of way of the Atlanta & West Point Railroad Company as the boundary line where the property conveyed touches the right of way of the railroad company. Although the starting point is stated to be a rock corner on the right of way near Miles Smith's house, it is not alleged that this rock corner was located within 100 feet from the center of the right of way. Even though the beginning corner should not have been upon the boundary of the right of way, the description in the deed does not undertake to fix the boundary line at 50 feet from center of the track. On the contrary, the calls of the deed are for the right of way and along the right of way of the railroad company, thus fixing the right of way, wherever it may be, as the boundary line between the property described in the

deed and the right of way of the company. Where one purchases a tract of land and boundaries are pointed out to him by the seller, and a warranty deed is executed, intended to convey the land so pointed out, but in fact describing only a part of the land, the purchaser cannot recover from the seller damages for a breach of warranty contained in the deed, on the ground that some of the land contracted to be purchased was omitted from the description in the deed. *Littleton v. Green*, 130 Ga. 693, 61 S. E. 593. This is so for the reason that covenants of title do not apply to land not included in the conveyance. *White v. Stewart*, 131 Ga. 460, 62 S. E. 590, 15 Ann. Cas. 1198. Where a deed describes the land as bounded on one side by the land of a third person, the true boundary line between the land conveyed and the land of such person must be taken as the boundary line, and not the line as it was understood to exist at the time of the execution of the deed, if there is a variance between such two lines. *Hall v. Davis*, 122 Ga. 252, 52 N. E. 106; 2 Devlin on Deeds, § 1034.

[3] 3. Nor is the petition good as an action founded on fraud and deceit. It is not alleged that the defendant knowingly sold or attempted to sell to the plaintiff land to which he had no title. Nor are there any other allegations sufficient to make out a cause of action for deceit and misrepresentation.

Judgment affirmed. All the Justices concur.

(146 Ga. 347)

KIRKLAND et al. v. KIRKLAND et al.
(No. 203.)

(Supreme Court of Georgia. Dec. 19, 1916.)

(Syllabus by the Court.)

1. JUDGES \S 46, 53 — DISQUALIFICATION — INTEREST.

The maker of a promissory note procured certain persons to become sureties thereon by indorsement, and, for the purpose of securing them against loss on their indorsement, executed to them a mortgage on certain land. The mortgage contained a power of sale, which authorized the mortgagees to sell "all of said property or a sufficiency thereof to reimburse them as such accommodation indorsers of said note in the full amount of their liability and payment in the premises, together with the expense of the proceedings, including fees of attorney to the amount of 10 per cent. if their claim be placed in the hands of an attorney for collection, after advertising," etc. The note and mortgage were afterwards placed in the hands of an attorney for collection, under special employment whereby the attorney was to be paid a fee by the plaintiffs, which was not in any sense conditioned upon the collection of the attorney's fees specified in the mortgage. The property was advertised for sale under the power expressed in the mortgage. The attorney for the mortgagees was related within the prohibited degree to the judge of the circuit in which the sale was being advertised. A suit was brought by alleged creditors to enjoin the sale. *Held*, that the attorney had no such interest in the suit as disqualified the judge from

presiding in the injunction suit. Civ. Code 1910, § 4642. See *Young v. Harris*, 91 S. E. 37, this day decided.

(a) The judge voluntarily recused himself on the ground that his relative was the attorney advertising the property for sale, and caused the case to be referred to another judge, and after the attorney had made a motion to revoke the order referring the case to the other judge on the ground that the sale of the property was not to involve the payment of attorney's fees, the motion to revoke was granted by both of the judges. This did not affect the qualification or jurisdiction of the first judge finally to preside in the case.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 213, 234; Dec. Dig. \S 46, 55.]

2. JUDGES \S 47(1) — DISQUALIFICATION — WHAT CONSTITUTES.

Nor was the trial judge disqualified by reason of the facts that several years before the execution of the mortgage he had been a member of the law firm which represented the grantee in a security deed executed by the maker of the note, and that the firm had issued a certificate approving the title of the grantor, without referring to the claim of the plaintiffs in the equity suit alleged to have been in existence; the money raised by the last transaction upon notes indorsed by the mortgagee in the mortgage first above mentioned having been applied in part to the satisfaction of the security executed at the time when the certificate was issued by the firm of which the judge was a member. Civ. Code 1910, § 4642.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 223; Dec. Dig. \S 47(1).]

3. MORTGAGES \S 337—SALES—POWER OF.

The power of sale expressed in the mortgage referred to in the first note was not extinguished by a general judgment obtained by the plaintiffs against the maker of the note in a suit in the city court. See *Dykes v. McVay*, 67 Ga. 502; *Montgomery v. Fouché*, 125 Ga. 43(2), 53 S. E. 787; *Hughes v. Mt. Vernon Bank*, 4 Ga. App. 23, 60 S. E. 809; *Mitchell v. Castlen*, 5 Ga. App. 134, 62 S. E. 731; 27 Cyc. 1164.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1025; Dec. Dig. \S 337.]

4. CONFLICTING EVIDENCE — DENIAL OF INJUNCTION.

Under conflicting evidence there was no abuse of discretion in refusing an injunction.

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action between L. C. Kirkland and others and E. E. Kirkland, and others. There was a judgment for the latter, and the former bring error. Affirmed.

M. B. Eubanks, of Rome, for plaintiffs in error. Barry Wright and Denny & Wright, all of Rome, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 372)

CAIN v. RAGSDALE. (No. 218.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS \S 31, 33—ACTIONS—RIGHT TO MAINTAIN—VENUE.

A. instituted an equitable action to cancel a deed he had executed to B., alleging that the consideration received by A. for the land described in the deed was certain land, a stock of

goods and a mercantile business, and certain money; that plaintiff did not know the value of the land and stock of goods and mercantile business, and defendant knew that she did not know such value, but with intent to defraud her he told her the property was worth stated amounts which he knew to be greatly in excess of the values of the respective properties, and thereby induced her to exchange her property for that of defendant and to execute the deed she sought to have canceled; that she had sold the stock of goods for a stated sum; that defendant had incumbered to a third person the property he received from plaintiff, to an amount exceeding the amount realized for the stock of goods and the money theretofore received by plaintiff from defendant and the part of the consideration of the land which was paid in money; and that plaintiff was willing to return all the other property and to do what equity would require of her. The venue was laid in the county of the residence of B. An amendment was allowed alleging that prior to the institution of the suit B. had conveyed the property to C., who resided in a different county; that C. had conveyed to D., a nonresident of the state; that these two latter conveyances were without consideration, and the respective grantees took with notice of the facts charged against B. in the original petition; and that the conveyances to C. and D. were made in order to put the property beyond the reach of A. There was a prayer that C. and D. be made parties defendant, and that the deeds to them be canceled. B. demurred to the petition, and after the amendment B., C., and D. filed a demurrer on general and special grounds; one ground making the point that, inasmuch as it appeared from the allegations of the petition that the property had been conveyed by B. before the suit was filed and was outstanding in C. and D., neither of whom resided in the county, the court was without jurisdiction. The judge sustained the general demurrer and dismissed the petition. The bill of exceptions assigns error on this judgment. *Held* that, though the venue of the suit was properly laid in the county of the residence of B., it was not erroneous to dismiss the petition on general demurrer.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 48; Dec. Dig. 31, 33.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Ollie Cain against C. B. Ragsdale. There was a judgment for the latter, and the former brings error. Affirmed.

W. H. Terrell, of Atlanta, for plaintiff in error. Gober & Jackson and W. I. Heyward, all of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 362)

KELLY v. KELLY. (No. 213.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

DIVORCE 286, 312—ALIMONY—CUSTODY OF CHILDREN—REVIEW.

This case involved the allowance of temporary alimony and the right to the custody of the children of the plaintiff and the defendant. The evidence was conflicting, and it cannot be held

that there was such an abuse of discretion on the part of the trial judge in the allowance of temporary alimony, and in awarding the custody of the two youngest children to the plaintiff, as to require a reversal of the judgment of the trial court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 769, 770, 806; Dec. Dig. 286, 312.]

Error from Superior Court, Montgomery County; E. D. Graham, Judge.

Action by N. C. Kelly against W. H. Kelly, Judgment for plaintiff, and defendant brings error. Affirmed.

A. C. Saffold, of Alamo, and M. B. Calhoun, of Mt. Vernon, for plaintiff in error.

BEOK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 356)

REESE et al. v. BLOODWORTH. (No. 209.)
(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. USURY 45—WHAT CONSTITUTES—INVALIDITY OF NOTE.

The reserving of interest in advance at the highest legal rate on a loan, whether it be a short or long term loan, is usurious; and a deed to land, given to secure a promissory note for the loan, is void on account of usury. Loganville Banking Co. v. Forrester, 143 Ga. 302, 84 S. E. 961.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 98; Dec. Dig. 45.]

2. USURY 18—WHAT CONSTITUTES—AGREEMENTS.

If money is loaned for the purpose of enabling a borrower to buy a certain shop, upon an agreement that for the use of the money the lender shall receive from the borrower one-half of the specified rents from the property, which amounts to more than the highest legal rate of interest per annum, the transaction will be usurious. Baggett v. Trulock, 77 Ga. 369, 3 S. E. 162; Floyd v. Kicklighter, 139 Ga. 139, 76 S. E. 1011.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 31-34, 36-38, 40; Dec. Dig. 18.]

3. INTERLOCUTORY INJUNCTION—RIGHT TO.

By the admissions in the plea and the uncontradicted testimony of the defendant, both the security deeds involved in this case were infected with usury and were void. Without passing upon the power of the trustee to incumber the property, it was erroneous to refuse an interlocutory injunction.

Error from Superior Court, Jones County; J. B. Park, Judge.

Action between W. T. Bloodworth and Henry Reese and others. There was a judgment for the latter, and the former brings error. Reversed.

J. B. Jackson, of Gray, and A. L. Jackson and L. D. Moore, both of Macon, for plaintiff in error. E. T. Dumas and F. Holmes Johnson, both of Gray, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 353)

MASON et al. v. DUNN, Com'r, et al.
(No. 207.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. COUNTIES \S 61.—COMMISSIONERS OF REVENUE—STATUTES—VALIDITY.

The act of the General Assembly approved February 21, 1873 (Acts 1873, p. 282), entitled "An act entitled an act to establish a board of commissioners of revenues, roads, bridges, and paupers for the county of Murray," is not unconstitutional for any of the reasons assigned. *Churchill v. Walker*, 68 Ga. 681, 686; *Speir v. Morgan*, 80 Ga. 581, 5 S. E. 786; *Plumb v. Christie*, 103 Ga. 700, 30 S. E. 759, 42 L. R. A. 181.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 86; Dec. Dig. \S 61.]

2. COUNTIES \S 113(3)—COUNTY COMMISSIONERS—AUTHORITY OF.

The above-cited act confers authority on the county commissioners to contract for the erection of a courthouse, jail, and other public buildings. *Dunn v. O'Neill*, 144 Ga. 823, 826, 88 S. E. 190.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. \S 174, 177; Dec. Dig. \S 113(3).]

3. REFUSAL OF INJUNCTION—PROPRIETY.

The judge of the superior court did not err in refusing the injunction prayed for.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Action between A. J. Mason and others and D. R. Dunn, Commissioner, and others. There was a judgment for the latter, and the former bring error. Affirmed.

E. H. Beck, of Eton, for plaintiffs in error. D. W. Blair, of Marietta, and J. M. Sellers, of Chatsworth, for defendants in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 351)

LEDFOORD v. ALLEN. (No. 206.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 977(4)—DISCRETIONARY RULING—GRANTING NEW TRIAL.

We cannot say that a verdict for the defendant was demanded by the evidence in this case; and it being the first grant of a new trial, the discretion of the trial judge in granting a new trial will not be controlled.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 3863; Dec. Dig. \S 977(4).]

Error from Superior Court, Gilmer County; H. L. Patterson, Judge.

Action by M. A. Allen against Frank Ledford. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred Morris, of Marietta, and A. N. Edwards, of Ellijay, for plaintiff in error. Thos. A. Brown, of Blue Ridge, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 361)

BROWN v. BERRIEN COUNTY BANK.
(No. 211.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. INJUNCTION \S 135—INTERLOCUTORY JUDGMENT—EVIDENCE—DISCRETION.

On conflicting evidence, there was no abuse of discretion in refusing an interlocutory injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 304; Dec. Dig. \S 135.]

2. ADMISSION OF EVIDENCE.

No assignment of error based on the admission of evidence requires a new trial.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by W. P. Brown against the Berrien County Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. W. R. Smith and W. D. Bule, both of Nashville, and E. K. Wilcox, of Valdosta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(120 Va. 352)

MAGRUDER et al. v. VIRGINIA-CAROLINA CHEMICAL CO. et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

LIMITATION OF ACTIONS \S 55(6)—PERMANENT NUISANCE.

As for a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, like the poisoning of the waters of a stream with the acid-impregnated washings from the operation of iron mines, but one action, in which all damages past and prospective must be recovered, can be maintained, it must be brought within the period of limitations from the accrual of the cause of action.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. \S 304; Dec. Dig. \S 55(6).]

Appeal from Circuit Court, Louisa County.

Suit by H. E. Magruder and others against the Virginia Carolina Chemical Company and others. From an adverse decree, plaintiffs appeal. Affirmed.

E. H. De Jarnette, Jr., of Orange, for appellants. Coke & Pickrell, of Richmond, Gordon & Gordon, of Louisa, Jas. R. Caton, of Alexandria, and W. Worth Smith, Jr., of Louisa, for appellees.

WHITTLE, J. This appeal is from a decree of the circuit court of Louisa county denying a permanent injunction and dismissing appellants' bill, the material allegations of which are as follows:

That plaintiffs are the owners of 808 acres of land lying on North Anna river, in Spotsylvania county, below the point where Contrary creek flows into that stream; that 250 acres of the main tract are low grounds ad-

joining the river and subject to overflow in time of freshets; that defendants and their predecessors in title have been owners and operators of certain iron and pyrites mines (located at different points on Contrary creek several miles above its junction with North Anna river) continuously since the year 1885; that, in the operation of these mines by the respective owners, the water pumped from the shafts, as well as the water used in washing the ores in the ore-washing or concentration plants is impregnated by the ore with sulphuric acid and other injurious substances, and flows into Contrary creek, and thence into and down North Anna river to plaintiffs' farm; that the waters of the river are so poisoned by the washings from the mines as to be rendered completely worthless for all domestic and agricultural purposes, and are fatal to fish; that the trees and other vegetation upon plaintiffs' low grounds are thereby killed, and the productivity and value of the land itself is seriously impaired, if not destroyed; that the alleged injuries of which they complain constitute a permanent nuisance; and the bill prays that defendants be perpetually enjoined from polluting the waters of the streams by the washing of ore and pumping polluted and poisonous waters from their mines and pits into the same, and that damages may be awarded plaintiffs for injuries already inflicted upon them.

Defendants filed demurrers and answered the bill, and also interposed the defense of the statute of limitations.

The trial court was of opinion that the cause of action was barred by the five-year limitation, and decreed accordingly. From the correctness of that conclusion there can be no escape under the following decisions of this court: *Va. Hot Springs Co. v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465, 10 Ann. Cas. 179; *Southern Ry. Co. v. McMenamin*, 113 Va. 121, 73 S. E. 980; *McKinney v. Trustees, Emory & Henry College*, 117 Va. 763, 86 S. E. 115; *Worley v. Mathieson Alkali Works*, 89 S. E. 880. These cases declare the firmly established rule of law in this jurisdiction to be that, where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and that the right of recovery will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued.

The undisputed facts of this case bring it completely within the influence of the principle stated, and, in essentials, the case is undistinguishable from that of *Worley v. Mathieson Alkali Works*, supra. The causes of action in both cases are the same, namely, the alleged injury to property rights of plain-

tiffs, and the destruction of fish, etc., from the pollution of the waters of nonnavigable streams caused by discharging noxious refuse matter therein from the defendants' works. In both cases the grounds of complaint are permanent, "the consequences of which, in the normal course of things, will continue indefinitely; * * * that the plant when first constructed was intended to be permanent; and has been so treated and used ever since; and that as long as it is operated, so long will the nuisance complained of be constant, continuous, and injurious to the plaintiff."

Upon these considerations, the ruling of the trial court in sustaining the plea of the statute of limitations and dismissing the bill was plainly right.

But, independently of the question of the bar of the statute, it is by no means clear that plaintiffs, upon the merits, have shown themselves entitled to injunctive relief and to a decree for damages. We shall not undertake to review the evidence, covering many pages of the record. It is sufficient to say that there is serious conflict in the testimony of the nonexpert witnesses as to the real cause of the conditions complained of. Moreover, the farm is located 10 or 12 miles down stream from the mines, and analyses by two experienced chemists of water taken from the stream at that point showed that it was normal, and not injurious to the soil, or trees and other vegetation, or to fish. A third analysis of the water was made by another chemist employed by a person having a common interest with appellants, yet he was not examined as a witness, nor was his analysis put in evidence. It also appeared that appellants suffered more than 20 years to elapse after the opening and operation of the mines before they sought redress from the courts for the supposed violation of their rights. In these circumstances, a chancellor well might hesitate to grant a perpetual injunction and decree damages against these extensive mining industries, which are shown to be of great public utility.

The decree of the circuit court is affirmed. Affirmed.

SIMS, J., absent.

(120 Va. 324)

HOLLAND et al. v. VAUGHAN et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. REFORMATION OF INSTRUMENTS \Leftrightarrow 45(5)—PROCEEDINGS—WEIGHT OF EVIDENCE—RELEVATION.

In action to reform a deed to insert mention of a tract of 10 acres, the facts that the deed purported to convey 75 acres more or less, and without this tract would contain about 61 acres, that upon conveyance the plaintiffs assumed control over the tract and paid taxes on it, and defendant stopped paying taxes thereon, and that the agent and attorney of defendant thought

the tract was intended to be conveyed, held to entitle plaintiffs to relief.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 162; Dec. Dig. ¶ 45(5).]

2. REFORMATION OF INSTRUMENTS ¶ 45(5)—PROOF REQUIRED.

If it be clearly shown by satisfactory proof that by mistake of the draftsman a writing does not truly set forth the agreement of the parties, equity will correct the mistake to conform the instrument to the real agreement of the parties, but such evidence, although it may be parol, must be clear and convincing.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 162; Dec. Dig. ¶ 45(5).]

Appeal from Circuit Court of City of Portsmouth.

Suit by E. E. Holland and others against E. M. Vaughan and another. From a decree for defendants, the complainants appeal. Reversed, with directions.

J. N. Sebrell, Jr., of Norfolk, and R. H. Rawles, of Suffolk, for appellants. Jas. H. Corbitt, of Suffolk, for appellees.

PRENTIS, J. The appellees, E. M. Vaughan and T. E. Vaughan, her husband, by deed dated the 2d day of June, 1903, conveyed certain lands to Charles Keller. The appellants, E. E. Holland, to whom the property had been since conveyed, and Charles Keller and Amanda Keller, his predecessors in title, filed their bill on the 9th day of February, 1912, alleging that by mutual mistake of the parties that deed contains an imperfect description of the property intended to be conveyed thereby, and praying that it be so reformed as properly to express its true intent, purpose, and meaning.

The deed described the property as:

"Containing seventy-five acres, more or less, and bounded and described as follows, to wit: Situated near Kilby station, in Nansemond county, Virginia, and bounded on the west by the Norfolk & Western Railroad, on the south by the said railroad and the land of E. E. Holland, on the east by the lands of E. E. Holland and others, and on the north by the Seaboard Railroad, it being the same land conveyed to E. M. Norfleet (now E. M. Vaughan) by her husband, E. A. Norfleet, and deed duly recorded in the clerk's office of Nansemond county, and also by deed executed by E. E. Holland and wife and recorded in the clerk's office of Nansemond county court, in D. B. No. 34, page 162, and also a part of the old Bottiger place conveyed to E. M. Norfleet by D. F. Parker by deed duly recorded in the clerk's office of Nansemond county court in D. B. No. 50, page 667."

The error alleged is that in the recital of the sources of title of the grantors the draftsman of the deed inadvertently omitted to refer to deed from Vallie Harrison and Lydia Harrison, his wife, dated and recorded the 24th day of September, 1892, which conveyed 10 acres of land, and which will be hereinafter referred to as the Vallie Harrison tract.

The question then to be determined is

whether the deed from E. M. Vaughan and T. E. Vaughan, her husband, to Charles Keller, dated the 2d day of June, 1903, should be reformed, so as clearly to include this Vallie Harrison tract.

After the conveyance to Charles Keller in 1903, he took possession of the Vallie Harrison tract, along with the three other parcels of land specifically referred to, the four tracts being contiguous, and he, and those claiming under him, have held possession of the entire property ever since that time.

When E. E. Holland, in 1911, determined to buy the land from Amanda Keller, he discovered that the original deed from Vaughan and husband to Charles Keller failed to refer to the deed from Vallie Harrison and wife as one of the sources of title. He thereupon asked Mrs. Vaughan and her husband to correct the alleged mistake in the original deed from them to Keller by uniting in Keller's deed to him. They declined to accede to his request, and this litigation is the result.

[1] The following facts, tending to establish the mutual mistake complained of, appear: The land referred to was in 1903, at the time of the conveyance, charged upon the land books for taxation to Ella M. Norfleet (who is now the appellee Ella M. Vaughan) in four separate parcels, aggregating 71½ acres, one of these parcels being the Vallie Harrison tract of 10 acres. The four tracts were contiguous, and without the Vallie Harrison tract the area of the other three tracts is only 60 acres, though the deed purports to convey 75 acres, more or less. Immediately after the conveyance to Keller in 1903, he claimed the Vallie Harrison tract of land, and he and his successors have since then collected rent for it, have fenced and improved it, and ever since that time have paid taxes on it. It was transferred on the land books by the commissioner of the revenue to Keller in 1904, and has not been charged to Mrs. Vaughan since 1903, and she has paid no taxes thereon since that year.

The circumstances attending the sale were that Mrs. Vaughan had removed from the land after the death of her first husband, a Mr. Norfleet, and went to live with her brother 2 or 3 miles away. She married her present husband, Mr. Vaughan, and moved to the city of Portsmouth in November, 1902, before the execution of their deed to Keller in June, 1903, and has lived in Portsmouth ever since. She placed her property in the hands of Mr. S. M. Everett, an attorney at law of Suffolk, for sale. He offered it for sale at public auction on the 30th day of May, 1903, but failed to secure a satisfactory bid. A few days later, by telephone, she received through her attorney, Mr. Everett, an offer of the sum of \$2,000 from Mr. Keller, which she accepted.

Mr. and Mrs. Vaughan testified that they did not intend to include the Vallie Harrison tract, but the testimony of her agents, the auctioneer, Mr. Hosler, and her attorney, Mr. Everett, is to the effect that no reservation of any part of her land was mentioned to them, and the attorney, Everett, testifies that he thought that he was authorized to sell all of Mrs. Vaughan's land at or near Kilby station, and that he intended to draw the deed so as to include all of her property there.

The jurisdiction of a court of equity to reform written instruments is so well settled that we do not deem it necessary to sustain the doctrine by the citation of authorities.

[2] The syllabus in the case of *Beach v. Bellwood*, 104 Va. 170, 51 S. E. 184, states the rule thus:

"While parol evidence will not be received to vary, alter, or contradict the terms of a valid written instrument, still, if it be clearly shown by proof which is entirely satisfactory that, by mistake of the draftsman, a writing does not truly set forth the agreement of the parties as previously entered into by them, equity will correct the mistake, so as to make the instrument conform to the real agreement of the parties. Such mistake may be shown by parol, but the evidence of it must be clear and convincing, and such as to leave no fair and reasonable doubt upon the mind that the writing does not correctly embody the intention of the parties."

Applying that rule to this case, our conclusion is that the mutual mistake is sufficiently proved. The deed under consideration itself states that the land conveyed is bounded on the north by the Seaboard Railroad. There is a narrow strip of uninclosed land, 5 feet in width and about 900 feet in length, belonging to H. B. Phillips, which constituted the entire northern boundary of the Vallie Harrison tract, which lies between it and the right of way of the Seaboard Air Line Railway, and it appears that the draftsman of the deed did not then know that this narrow strip of land was the true northern boundary of the property. To the casual observer, however, it appeared that the right of way of the railway company was the northern boundary of the Vallie Harrison tract. It is difficult to understand why this boundary was given, if the deed was not intended to include the tract in controversy, because the only other place where any of the property conveyed touches the right of way of the Seaboard Railroad is in the extreme northwestern corner of the property, where another parcel, not the Vallie Harrison tract, does touch the right of way, say for a distance of about 200 feet.

No rule for the construction of written instruments is better settled than that which attaches great weight to the construction put upon the instrument by the parties themselves, and the evidence is conclusive that from June 2, 1903, the date of her deed, until Mrs. Vaughan was requested by Mr. Holland to correct the alleged mistake by uniting in

the deed from Keller and wife to him in February, 1911, she made no claim whatever to the Vallie Harrison tract. That Keller construed her deed as conveying the land involved is abundantly proven by his having taken and held undisputed possession of it during all that period.

Upon the whole case, we have no doubt that there was a mutual mistake, participated in by both parties, and that the appellants are entitled to the relief which they pray for. The decree will therefore be reversed, and the lower court will be directed to grant the prayer of the bill.

Reversed.

(119 Va. 763)

BOARD OF SUP'RS OF TAZEWELL COUNTY v. NORFOLK & W. RY. CO.

(Supreme Court of Appeals of Virginia. Sept. 11, 1916. Rehearing Denied Nov. 23, 1916.)

1. HIGHWAYS — 21 — ESTABLISHMENT — WIDTH — STATUTES.

Neither Act March 8, 1847 (Acts 1846-47, c. 100), providing that the road therein directed to be constructed should nowhere exceed a grade of four degrees and should not be more than 22 feet wide or less than 12 feet wide, nor Act Jan. 17, 1848 (Acts 1847-48, c. 143), Act March 7, 1849 (Acts 1848-49, c. 144), Act March 2, 1853 (Acts 1852-53, c. 86), directing the construction and completion of the first link in a turnpike, nor Act Jan. 30, 1850 (Acts 1849-50, c. 92), and Act Feb. 16, 1853 (Act 1852-53, c. 93), directing the construction and completion of the second link in such turnpike, of themselves established or located the turnpike or public road contemplated thereby, or fixed the width thereof, but merely controlled the wide discretion of the board of public works under Code 1849, c. 70, §§ 1, 2, when it came to take the land for the location of and the construction of the road.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 37; Dec. Dig. — 21.]

2. EVIDENCE — 54 — PRESUMPTION — LOST RECORD.

The court will not presume the existence of facts merely because records have been lost or destroyed; as such loss or destruction gives rise to no presumption.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 74; Dec. Dig. — 54.]

3. EVIDENCE — 178(3) — LOSS OF RECORDS — SECONDARY EVIDENCE.

The loss or destruction of records has the effect merely of changing the mode of proof of such records by the admission of secondary evidence in the place of an exemplification of the records.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 583; Dec. Dig. — 178(3); *Records*, Cent. Dig. § 33.]

4. HIGHWAYS — 68 — ESTABLISHMENT — ACCEPTANCE.

Exhibits showing that a road was a public road in 1858 merely show the acceptance of the road by the county authorities as a public road, but do not show its establishment as a public road under and in pursuance of legislative acts.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 226-233; Dec. Dig. — 68.]

5. HIGHWAYS — 21 — ESTABLISHMENT — WIDTH — STATUTES.

Code 1904, § 944a(2), relating to the appointment of viewers to examine roads, etc., to

be made by the board of supervisors of any county, and to the width and grade of such roads, continuing the law of Rev. Code 1819, c. 236, § 7, etc., through the intervening Codes, did not itself have the effect of establishing public roads, or any public road 30 feet in width.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 37; Dec. Dig. ¶21.]

6. HIGHWAYS ¶21 — ESTABLISHMENT — ACCEPTANCE—STATUTES.

Act March 8, 1847 (Acts 1846-47, c. 100), and other acts directing the construction and completion of the first and second links of a turnpike, or road, did not establish the road as a public road; as, where it was not the result of condemnation, acceptance did not supply its place so as to give title to a right of way in being but one element in obtaining title, dedication being the accompanying element.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 37; Dec. Dig. ¶21.]

7. HIGHWAYS ¶1 — ESTABLISHMENT — PRESCRIPTION.

When dedication is implied from the long and continuous use of a road by the public for the prescriptive period of 20 years, and there has been an acceptance by competent authority, title to a right of way for a public road may be obtained by prescription.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 1, 2; Dec. Dig. ¶1.]

8. HIGHWAYS ¶14 — ESTABLISHMENT — PRESCRIPTION—WIDTH.

The width of a public road acquired or established by prescription was limited to, and was the width of such road as was in use by the public at the time defendant railway company made changes in its location.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 21; Dec. Dig. ¶14.]

9. RAILROADS ¶94(5)—CHANGE OF HIGHWAY—CONSENT OF COUNTY COURT—STATUTE.

Under Acts 1874-75, c. 63, substantially carried into Code 1887, § 1094, in effect when defendant railroad altered the location of a public road, providing that any county road may be altered by any railway whenever it shall have made an "equally convenient roadway in lieu thereof," a railway changing the location of a county road was not required to obtain the consent or approval of the county court, and was only required to make an equally convenient road in lieu thereof.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 270; Dec. Dig. ¶94(5).]

10. RAILROADS ¶94(6)—CHANGE OF HIGHWAY—BURDEN OF PROOF—PROVISION FOR EQUALLY GOOD HIGHWAY.

A railway company having acted ex parte under Acts 1874-75, c. 63, substantially carried into Code 1887, § 1094, in altering the location of a public road had the burden of showing that it had performed its statutory duty of making "an equally convenient roadway in lieu thereof."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. ¶94(6).]

11. RAILROADS ¶94(6) — CHANGE OF HIGHWAY—DUTY OF RAILWAY—SUIT—PLEADING.

In a suit by the board of supervisors of a county involving the defendant railway's change in the location of a public road and charging its failure to comply with its statutory duty therein with respect to a crossing, where the bill alleged that a post office was the terminus of the road at the place of the crossing, and the answer alleged that the change in location began at a certain point, and that the present road was on the old location from a point to the post office or terminus, the fact was in issue whether the defendant had performed its statutory duty with re-

spect to the original road all the way to the post office.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. ¶94(6).]

12. RAILROADS ¶95(5) — PUBLIC ROAD — CROSSING—DUTY OF RAILROAD.

Under Acts 1874-75, c. 63 (Code 1887, § 1094), and Acts 1883-84, c. 422, § 1 (Code 1887, § 1095), permitting a railroad to cross any road if its crossing will not impair its safety, and requiring it as far as practicable to pass at surface grade or above or beneath any existing structure so as to admit safe travel, it was the duty of a railroad to construct the public road and its approaches on both sides of a crossing of the same width as the old public roadway, and to leave as easy a grade as could have been obtained by grading such road to the top of the railway at such crossing on either side.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 278; Dec. Dig. ¶95(5).]

13. RAILROADS ¶95(8) — HIGHWAY CROSSINGS — COMPLIANCE WITH STATUTE — EVIDENCE.

Evidence in such suit held to show that the defendant railway had not complied with such statutory duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 281-283; Dec. Dig. ¶95(8).]

14. JUDGMENT ¶559—RES JUDICATA—CIVIL OR CRIMINAL PROCEEDING.

In a suit by the board of supervisors of a county charging that defendant railroad had not complied with its statutory duty with respect to its change in the location of a public road, and its crossing of such road, a verdict in favor of the defendant railways in a prior criminal proceeding against it by the commonwealth for unlawfully obstructing the same road did not estop the board from prosecuting the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1077, 1078; Dec. Dig. ¶559.]

15. RAILROADS ¶94(6) — PUBLIC ROAD — CHANGE IN LOCATION — COMPLIANCE WITH STATUTE—JURISDICTION.

Where a railway company acted under a statute permitting it to change the location of a public road, if it made an equally convenient road, and to cross such road, and assumed to comply with its statutory duties, the court, although no contractual relation existed between the county and the railway, had jurisdiction to enforce the performance of such duty.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 272, 273; Dec. Dig. ¶94(6).]

16. ADVERSE POSSESSION ¶8(2) — PROPERTY SUBJECT—HIGHWAYS.

Public highways belong to the state, and the statute of limitations does not run against the state nor bar the rights of the public therein.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 44-50; Dec. Dig. ¶8(2); Highways, Cent. Dig. § 280.]

17. EQUITY ¶85—LACHES—PARTIES SUBJECT—STATE.

Public highways belong to the state, and the doctrine of or defense of laches cannot be set up in a suit in equity by the board of county supervisors involving the rights in a public road.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 221; Dec. Dig. ¶85.]

Appeal from Circuit Court, Tazewell County.

Suit in equity by the Board of Supervisors of Tazewell County against the Norfolk & Western Railway Company. From a decree dismissing the bill and from a decree

refusing leave to file a bill of review, the Board of Supervisors appeals. Reversed in part, and affirmed in part, and case remanded.

H. Claude Pobst, J. W. Harman, and J. N. Harman, all of Tazewell, for appellant. Graham & Hawthorne, of Tazewell, for appellee.

SIMS, J. This is a suit in equity, on appeal from the circuit court of Tazewell county, involving change by the defendant in the court below. appellee here, the Norfolk & Western Railway Company (the change, in fact, being made by the Norfolk & Western Railroad Company, a former corporation, to the rights and duties of which the *Railway* company succeeded, and hence its liability is the same in this civil suit as if it had been the original actor in the case, and it may be treated as if it were such original actor) of the location of a public road between Doran and Raven, or of portions of it, and a crossing of such public road at Raven by such railway company, the bill alleging that the defendant failed to comply with its statutory duty and obligations in these matters, and is guilty of maintaining a public nuisance, the prayer of the bill being that the defendant be compelled to comply with its duty and obligations or else restore to Tazewell county the old road, and that it be enjoined and restrained from further use and occupation of said public road, to thereby abate such nuisance, and for general relief.

The cause was heard upon the bill, exhibits therewith, the answer of the defendant, depositions in behalf of the plaintiffs and defendant, together with a number of photographs and several blueprints, and the court below, by its decree of September 9, 1913, dismissed the plaintiffs' bill.

On February 16, 1916, the plaintiffs moved the court below for leave to file a bill of review, setting forth and exhibiting with such bill what was claimed to be after-discovered evidence, consisting of certain orders of the county court of Tazewell county entered in 1857 and 1858, some of which, in effect, evidenced that the county authorities took charge of and undertook to keep in repair the said road from Doran to Raven, which the plaintiffs claim was a part of the second link of the Richlands and Kentucky turnpike, presently more particularly referred to. There were also filed with the bill of review certain other orders of the said county court entered during the years 1850, 1851, and 1852 in reference to certain persons appearing before said court and making suggestions and claims for damages done to their lands by the construction of the road connecting the Richlands and Kentucky line road with the Tazewell courthouse and Fancy Gap turnpike; some of such orders showing allowance of such damages by the court and certifying same for payment.

The court below, by its decree entered February 22, 1916, refused to permit such bill to be filed, and dismissed said motion of the board of supervisors to be allowed to file the same.

From these two decrees the appellants have appealed.

Upon the issues made in the cause and evidence in the court below arise the following points for the consideration of this court on appeal, namely:

(1) What was the width of the public road between Doran and Raven at the time the railway company made changes in its location?

(2) What was the authority given by statute to the railway company to make such change of location as it made of the road between Doran and Raven, and with respect to the crossing at Raven?

(3) Whether the railway company at the time of such change of location made an equally convenient road as the old road taken by it, including width of right of way, location, drainage, grade, etc.

(4) Whether the railway company complied with its statutory duty as to the crossing at Raven.

(5) Whether a verdict in favor of the same defendant in a prior criminal case of the commonwealth against it for unlawfully obstructing the same road estops the board of supervisors from prosecuting this suit.

(6) Whether lack of contractual relations and lapse of time and laches bar the plaintiffs in this suit for specific performance.

We will consider these points in the order stated.

1. As to what was the width of the public road between Doran and Raven at the time the railway company made changes in its location.

The board of supervisors rely on act of March 8, 1847 (Acts 1846-47, p. 89); act of January 17, 1848 (Acts 1847-48, p. 178); act of March 7, 1849 (Acts 1848-49, p. 90); act of March 2, 1853 (Acts 1852-53, p. 72), which, in effect, directed the construction and completion of the first link in a turnpike beginning at "the Richlands" and extending in a northwesterly direction to the Kentucky line; and on act of January 30, 1850 (Acts 1849-50, p. 63), and act of February 16, 1853 (Acts 1852-53, p. 77), which, in effect, directed the construction and completion of the second link in said turnpike beginning at "the Richlands" and extending in an easterly direction to Tazewell courthouse and there connecting with the Fancy Gap road.

The board of supervisors claim that "Raven" is the same place as "the Richlands," and that the road from Doran to Raven, as located when the railway company made the changes of location of which complaint is made, was a part of the second link in the turnpike aforesaid mentioned in said act of assembly of Virginia, namely, was that part

of it beginning at "the Richlands" and extending in an easterly direction towards Tazewell courthouse. The railway company denies this, claiming that the Richlands and Kentucky turnpike referred to in said act of March 8, 1847, was built and its terminus in "the Richlands" was located at the mouth or near the mouth of coal creek, and "ran from there northwestward across the dividing ridge, that is, the mountain which divides the waters of Clinch river, or Tennessee waters, from the Louisa Fork river, or the waters of the Ohio river; that the terminus of this road in Richlands lies west of the terminus of the road in controversy."

[1] In the view this court takes of the effect of the acts above referred to, it is unnecessary to inquire which contention is correct. We are of opinion that the acts in question did not of themselves establish or locate the turnpikes or public roads contemplated thereby, nor did they fix the width of such roads. These acts directed these roads or links in the same road to be constructed as a state road. As the law then stood:

"1. When any act shall pass, directing any work of internal improvement to be made on State account, the board of public works shall cause the same to be constructed * * * as may seem to them proper. * * *

"4. The board may exercise the same powers, and in like manner, that a company incorporated for a work of internal improvement may exercise under the fourth, fifth * * * sections of the fifty-sixth chapter. * * *

Code 1849, §§ 1 and 4, pp. 348, 349.

The act of March 8, 1847, provided that the road therein directed to be constructed "shall nowhere exceed a grade of four degrees, nor shall be more than twenty-two feet wide, nor less than twelve feet, exclusive of side ditches"; but the effect of this was not to fix or establish these widths, or any of them, as the width of the road, or right of way for the road, but merely controlled the wide discretion of the board of public works under sections 1 and 2, Code 1849, *supra*, when it came to take the land for the location of and to construct the road.

[2, 3] Preliminary to the work of construction, the right of way must be acquired. As the law then stood the following was the mode provided by statute by which the right of way was to be acquired, the road located, and its width fixed:

"Of the land to be taken for such work, the board shall cause a plat to be returned to the clerk's office of the court of each county wherein any of the * * * land lies, and there admitted to record, and the said land shall ipso facto be vested in the state." Code 1849, § 5, c. 70, p. 349.

There were provisions of law that after the plat was so recorded the landowners whose land was taken might, within a prescribed time, claim damages by petition to the county or circuit court.

It appears in this case that a search of the records of Tazewell county fails to show the

existence at any time of any such plat admitted to record in such county covering the road in controversy, or any part of it; and there is no proof in this case of the loss or destruction of any such record so as to admit secondary proof of its one time existence, and there is no evidence tendered attempting to introduce such proof.

The court will not presume the existence of facts merely because records have been lost or destroyed. Such loss or destruction gives rise to no presumption, and has the effect merely of changing the mode of proof of such records, admitting secondary evidence in the place of an exemplification of the record. *Gaines v. Merryman*, 95 Va. 665, 29 S. E. 738.

We are clearly of opinion, therefore, that there is no evidence in this cause that any title was vested in the state, or that it acquired the right of way of any width to construct the road in controversy by any statutory proceedings.

Similarly as to the county of Tazewell. There existed at the time this road is claimed to have been established as a public road certain provisions of statute contained in chapter 52 of the Code of 1849 for the establishment of public roads by proceedings in the county court by which the right of way therefor could be condemned. It is not claimed by the plaintiffs that any such proceedings were taken with respect to the road in controversy or any part of it.

[4] It is insisted, however, on the part of the plaintiffs that, as the exhibits with the bill of review sought to be filed show the road in question was in 1858 a public road, it must have been established under and in pursuance of the acts of the Legislature relied on. This appears to us to be a non sequitur. Under the well-settled rule in Virginia, the acts of the county authorities shown by such exhibits evidence merely an acceptance of the road as a public road. They do not establish it as such.

As was said by Keith, P., in *Gaines v. Merryman*, 95 Va. on page 664, 29 S. E. 738:

"There is evidence that the county of Henrico was divided by the county court into road districts; and there is evidence that that order, as applied to the district in which this road is situated, must have had reference to this road, or been wholly without any subject upon which it could operate, but that is wholly insufficient to create it a public road. If, instead of such an indirect recognition of it as a public road as could be inferred from this order, the county court had in express terms declared the road in controversy to be a public road, it would not of itself have made it a public road."

[5] The statutes relied on by plaintiffs (section 944a[2], Pollard's Code 1904; section 22, c. 52, Code 1873; section 5, c. 52, Code 1860; section 5, c. 52, p. 267, Code 1849; section 7, c. 236, p. 235, Code 1819) and what is said in *Terry v. McClung*, 104 Va. at page 602, 52 S. E. 355, in regard to the 30 feet in width requirement as to all public roads, cannot be construed to give those statutes

themselves the effect of establishing public roads or any public road 30 feet in width.

As said by Kelth, P., in *Gaines v. Merryman*, supra, 95 Va. 665, 29 S. E. 738, referring to acts of the General Assembly passed in the fourth year of the reign of Queen Anne and October 31, 1751:

"The first declares that 'where the same is not already done, public roads shall be laid out by the surveyors of the highways, in their several precincts, in such places as shall be most convenient for passing to and from the city of Williamsburg, the courthouse of every county, the parish churches, and such public mills and ferries as now are, or hereafter shall be, erected, and from one county to another, and that the highways already laid out, together with such as shall hereafter be laid out, by virtue of this act, shall, at all times hereafter, be kept well cleared from woods and bushes, and the roots well grubbed up, at least thirty feet broad.' The act of 1751 is almost identical with that quoted. It does not establish [public] roads, and such was not its purpose. * * *

"It would be a dangerous decision for it to declare, as we are urged to do by the appellees, that the effect of these statutes was to establish as public highways all roads that can be shown to have been in use at the date of their passage. * * *

[6] Similarly we are of opinion that the acts relied on by counsel for appellant do not establish the road in question as a public road.

The record in the case at bar showing that the road in controversy was not the result of condemnation, acceptance does not supply its place so as to give title to a right of way. Acceptance is merely one element in obtaining title to a right of way for a public road. Dedication is the accompanying element.

As said by Riely, J., in *Buntin v. Danville*, 93 Va. on page 204, 24 S. E. 830:

"The principle of dedication by the act of the owner of land," said Judge Staples in *Harris' Case*, 20 Gratt. 833, 'is now almost universally recognized as a part of the common law in this country.' Dedication is an appropriation of land by its owner for the public use. It may be express or implied. It may be implied from long use by the public of the land claimed to have been dedicated. Dedication is not required to be made by a deed or other writing, but may be effectually * * * done by verbal declarations. The intent is its vital principle, and the dedication may be made in every conceivable way that such intention may be manifested. It must, however, be manifested by some unequivocal act, and is not effectual and binding until accepted. When the intention of the owner to make the dedication has been unequivocally manifested, and there has been acceptance by competent authority, or such long use by the public as to render its reclamation unjust and improper, the dedication is complete"—citing *City of Richmond v. A. Y. Stokes & Co.*, 31 Gratt. (72 Va.) 713; *Talbott v. R. & D. R. Co.*, 31 Gratt. 685; *Harris' Case*, supra; *Kelly's Case*, 8 Gratt. 632; *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400; *Harding v. Jasper*, 14 Cal. 642; *Morgan v. Railroad Co.*, 96 U. S. 716, 24 L. Ed. 743; *Devaston v. Payne*, 2 Smith's Lead. Cas. 213; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554, and note thereto; 2 Greenleaf on Ev. § 662; and *Wash. on Easements*, 180 and 184.

[7] When the dedication is implied from the long and continuous use by the public for

the prescriptive period of 20 years, and there has been acceptance by competent authority, title to a right of way for a public road may be obtained by prescription. *Com'th v. Kelly*, 8 Gratt. (49 Va.) 632.

Such is the case at bar, as shown by the proof, and as, indeed, is admitted by counsel for defendant in their brief.

[8] What, then, was the width of the right of way of the road in controversy acquired by prescription by such user before the removal of any part of it by the railway company?

In *Columbia v. Robinson*, 180 U. S. 92, 21 Sup. Ct. 283, 45 L. Ed. 440, the Supreme Court said:

"Relying for right of way on use, the right could not extend beyond the use; or, as it has been expressed, 'if the right to the way depends solely upon user, then the width of the way and the extent of the servitude is measured by the character of the user. The easement cannot be broader than the user.'"

To the same effect are the following authorities: *Board of Sup. Prince William Co. v. Manuel*, 118 Va. 716, 88 S. E. 54, 11 Va. App. 512; *Arndt v. Thomas*, 93 Minn. 1, 100 N. W. 378, 106 Am. St. Rep. 418, 2 Ann. Cas. 972; *Schelmer v. Price*, 65 Mich. 638, 32 N. W. 873; *Anderson v. Huntington*, 40 Ind. App. 130, 81 N. E. 223; *Davis v. Bonaparte*, 137 Iowa, 196, 114 N. W. 896.

Counsel for the board of supervisors contend that:

Even though this court should "not presume that the proceedings in opening this road under and in pursuance of said acts of the Legislature were regular, and hold that the right acquired was only a prescriptive right, nevertheless the authorities are to the effect that the width of the road would not be limited to the actual user, but would extend the entire width of the highway that was attempted and intended to be established, to wit, the highway described in said acts."

The only authority cited to sustain this position is 37 Cyc. p. 41, as follows:

"(II) *Effect of Defective Proceedings to Establish Highway*.—Another qualification of the general statement that the width of a prescriptive highway is measured by the actual user exists where a highway is acquired by prescription under color of defective proceedings to establish the same. In this event the width of the highway is ordinarily the width of the highway so attempted and intended to be established, although the user does not extend over that entire width."

There is no evidence in the case at bar of any proceedings to locate or establish the right of way for the road under the statutes relied on, or any other proceedings; so it is not a case of "defective proceedings," referred to in the authority cited, which might have had the effect of color of title and give constructive possession to the extent of the bounds of such color of title. We do not consider, therefore, that the authority last quoted is in conflict with the well-established rule on this subject.

Our conclusion, therefore, is that the width of the public road in question at the time the railway company made changes in its location was confined to and was the width

of such road as was in use by the public at that time, including the side ditches and slopes, in addition to the roadbed or traveled portion of the roadway, which, it appears from the evidence, was the same as it had existed for the prescriptive period.

[9] 2. What was the authority given by statute to the railway company—

(a) To make such change of location as it made of the road between Doran and Raven, and

(b) With respect to the crossing at Raven? The defendant made the alterations in the location of the road in controversy it did make, and the crossing by the railroad of the public road at Raven in 1888 and 1889.

(a) The statute law in force in Virginia at that time with respect to such change in location of a public road is contained in Acts 1874-75, p. 47, subsequently, in substance, in section 1094 of the Code of 1887, and in so far as same affects public roads is as follows:

"* * * But any county road * * * may be altered by any such company, for the purpose aforesaid, whenever it shall have made an equally convenient road or water way in lieu thereof."

(b) The statute law then in force with respect to crossings of a public road by a railroad is substantially contained in the same Acts of 1874-75, p. 47, and in section 1094 of Code 1887, and substantially in Acts 1883-84, p. 528, § 1, and in section 1095, Code of 1887, as follows:

"If any railroad * * * deem it necessary in the construction of its works to cross any * * * county road, it may do so: Provided such crossing does not impair the safety, or impede or endanger the operations of the road. * * * Code 1887, § 1094.

"Every railroad hereafter constructed across a county road * * * shall, as far as practicable, pass at surface grade, or pass beneath or above any existing structure at a sufficient depression or elevation, as the case may be, with easy grades, so as to admit of safe and speedy travel over each." Code 1887, § 1095.

(a) Now in regard to said alteration of the location of the road in controversy.

Counsel for the plaintiff contend that the defendant had no authority to act ex parte under said statute, ignoring the courts and road authorities, and cite chapter 43 of Code 1887 as vesting in the county courts exclusive jurisdiction of county roads, *Watts v. So. Bell Tel., etc., Co.*, 100 Va. 45, 40 S. E. 107, as so holding, and *Norfolk & Western Ry. Co. v. Supervisors of Carroll Co.*, 110 Va. 95, 65 S. E. 531, 3 Va. App. 537, as a case in which the Norfolk & Western Railway Company filed its petition in the county court of Carroll county asking leave to make such alterations.

In this connection the following should be borne in mind: The same statute above cited contained in Acts 1874-75, p. 47, which provides that "any county road * * * may be [so] altered whenever [such company] shall have made an equally convenient road," does not allow a railroad to alter the loca-

tion of a state road by ex parte action, but requires the agreement of the board of public works upon the terms and manner of the alteration. Similarly the same statute, in section 1094 of Code 1887, contains practically the same prohibition of ex parte action of a railroad company by requiring, in case of alteration of the location of a "turnpike," the agreement of the company or court owning or having charge of the work to be affected by the change; that is to say, this statute, as it stood in 1888, did not allow a railroad company in case of alteration of a state road (until May 1, 1888, when the Code went into effect) or a turnpike (after May 1, 1888) to act ex parte and ignore the road authorities, but placed no such limitation upon such action in case of a county road. It was not until the re-enactment of said section 1094 as section 3 of Acts 1902-04, p. 968 (Pollard's Code 1904, p. 655), that such limitation was imposed as to county roads, such act then providing:

"But any county road * * * may be altered by any such company for the purposes aforesaid whenever it shall have made an equally convenient road * * * in lieu thereof; *the said company having first obtained the consent of the board of supervisors of the county to the alteration of any road or highway*"—the words in italics being then first added to the statute.

The question under consideration was not involved in the cases of *Watts v. So. Bell Tel., etc., Co.*, supra, and *N. & W. Ry. Co. v. Supervisors of Carroll Co.*, supra. The former was a personal injury case, and in the latter case the railroad company went voluntarily into court, and it did not involve the consideration by the court of the power given by said statute (Acts 1874-75, p. 47, or section 1094, Code of 1887) to a railroad company to act ex parte in the matter of altering a county road thereunder.

As to chapter 43 of Code of 1887: Sections 945 and 947 provide for action by the county courts on their own motion, and upon application of others for alteration of location of roads, etc.

The language of section 947, c. 43, Code 1887, is, "When any person applies to the court," etc., and "whenever without such application it sees cause for so doing," etc., contemplating only action by such courts without application of any one or on voluntary application. There is nothing in the chapter showing any legislative intention to forbid any action by railway companies under section 1094 contained in the same Code, except upon condition that they should make prior application to the court.

We are therefore of opinion that, as the statute law stood when the alteration in location of the road in controversy was made (such road being then a county road), the railway company was not required to obtain the consent or approval of the county court to such alteration, and that the only limitation upon this right of the railway company,

as the law then stood, was the requirement of the statute that it should make "an equally convenient road * * * in lieu thereof." Whether this was done in the case at bar is a question of fact which we think was properly before the court below for determination.

[10] We will therefore now consider the question of fact:

3. Whether the railway company, at the time of such change of location, made an equally convenient road as the old road taken by it, including width of right of way, location, drainage, grade, etc.

In this connection it should be noted that counsel for plaintiff, in their brief, contend that, in considering the question of fact as to whether the railway company has performed its statutory duty "to make an equally convenient road," that duty must be regarded as a continuing one, and cite the case of *City of Charlottesville v. Southern Railway Co.*, 97 Va. 428, 34 S. E. 98, in support of that position. That was the case of a railway crossing a public road, and the bridge and approaching embankments of the railway company were narrower than the original width of the street "as established by law before such encroachment."

If in the case at bar it should appear that the railway company did not make an equally broad roadway, where it altered the road in controversy, as the right of way existing at the time of such alteration, acquired by prescription as above referred to, but a roadway narrower than such right of way belonging to the state or county at such time, the duty to make such equally broad roadway is a continuing one, and such duty is not performed until such equally broad roadway has been made. To that extent the case cited is an authority applicable and binding in the case at bar. In the case at bar, however, this principle resolves itself into the inquiry of fact whether the roadway which the railway company provided in lieu of the public road taken was at any place less convenient—that is to say, narrower—than the right of way of the old road acquired by prescription, as aforesaid, or was not of as good location, drainage, grade, etc.

On this question of fact the effect of the decree of the court below was to hold that the new road provided by the railway company was "equally convenient" as the old road; i. e., was no narrower in width of right of way, was of as good location, drainage, grade, etc.

In this connection will be considered also the position of the plaintiff that, the defendant having acted ex parte under the statute, the burden of proof is upon it to show that it has performed its duty under that statute. We consider this position well taken, and that such burden does rest upon the defendant.

So considering, we find that the evidence in the record is voluminous and to some extent conflicting upon this question of fact. But the preponderance of evidence is, in our opinion, very greatly in favor of the holding of the court below, so far as those portions of the old road are concerned the location of which was altered. Such being our conclusion on this point, we do not feel that any good purpose would be served by prolonging this opinion with a discussion of the testimony introduced pro and con on this question of fact. It is sufficient to say that affirmative testimony was introduced by the defendant which was sufficiently definite and convincing in its character to sustain the burden of proof resting upon the defendant.

With respect to the crossing at Raven, however, our conclusion is different. Upon the inquiry:

[11-13] 4. Whether the railway company complied with its statutory duty as to the crossing at Raven

—We find no evidence in the record introduced by the defendant.

The only controverted question as to this crossing in the record is as to whether complaint of it is made in the bill. In exceptions entered in the taking of the depositions, counsel for the railway company take the position that no such complaint is made in the bill, and that the Richlands and Kentucky line turnpike began right at or about this crossing, and included the crossing, so that such crossing is not on or a part of the public road as to which complaint is made in the bill. The bill, however, alleges Raven "post office" as the terminus at Raven of the road from Doran to Raven, about the interference with which by the railway company complaint is made.

In the answer of the defendant railway company, after describing what it alleges were the changes made in location of the public road "beginning at the point called Doran post office," for 4,300 feet along such road towards Raven, it alleges that from the end of such 4,300 feet "the present road is on the exact old location from there to what they term the Raven post office, at or about Coal creek, the terminus of the road in question."

Hence by both bill and answer the fact is put in issue whether the defendant railway company has performed its statutory duties with respect to said original road all the way from Doran to Raven post office.

The uncontradicted evidence in the case is that the crossing in question is on or a part of the public road between Doran and Raven post office, being some 150 feet east of Raven post office on such roadway. Whether the railway company complied with its statutory duty with respect to this crossing was therefore clearly put in issue by the bill and answer in this case.

The uncontradicted evidence of the plaintiff on this issue of fact is that the original roadway at the crossing in question was practically on a level. Counsel for plaintiff in their petition expressly rely upon this issue. Counsel for the defendant in their brief make no mention of this issue, and do not insist upon their objection noted in the taking of the depositions above referred to, nor does it appear that such objection was called to the attention of or passed upon by the court below. Counsel for plaintiff in their reply brief again insist and rely upon this issue.

The evidence of the plaintiff on this issue of fact is that the original roadway in controversy at the crossing in question was practically on a level, as above stated, before the construction of the railroad; that the railway company made a fill across this roadway where it crossed it west of Coal creek, the fill being, according to some of plaintiff's witnesses who made no measurements, but approximated in his statements, 5 or 6 feet in height, causing a grade in the road, as the railway company constructed and left it, of possibly 15 per cent. for a distance of about 10 feet on each side of the railroad. The testimony of another witness for plaintiff, as to such fill and grade of the road caused thereby, who made actual measurements, was that the grade of the road on the south side of the crossing is 25 per cent. for the first 25 feet; that, measuring from the center of the track for 8 feet, the road is the same elevation as the track; that 25 feet from the center of the track it is 4½ feet lower than the top of the rail of the track; that 75 feet distant it is 7½ feet lower; that 100 feet distant it is 8½ feet lower, and then on the north side of the track the grade of the road is 15 per cent. for the first 80 feet from the center of the track, being 4½ feet lower; that at 50 feet the road is 3½ feet lower; and that at 70 feet it is 7½ feet lower than the top of the rail of the railroad track.

Section 1095 of the Code of 1887, enacted March 13, 1884 (Acts 1883-84, p. 528), is above quoted; also the provisions of Acts 1874-75, p. 47, as to railway crossings of public roads.

The rule laid down in *Charlottesville v. Southern Ry. Co.*, supra, as to the construction of the last-named statute on this subject, is as follows:

"To construe the statute literally would defeat the very object which the Legislature had in view in passing it; for, in the very nature of things, it is impossible to construct a railroad across a highway without to some extent impairing its safety or impeding or endangering the passage or transportation of persons or property. * * * The statute must therefore receive a reasonable construction, such a one as would enable the railroad company to exercise the power conferred; but it must at the same time be so construed as not to deprive the public of their rights in the highway to any greater extent than is necessarily implied from the power granted. The true meaning of the

statute is, we think, that a railroad * * * may construct its road across a public highway, but it must do so with as little injury to the highway as is practically possible. It must so restore the highway that its use by the public will not be materially, or at least unnecessarily, interfered with, and so as not to render it less safe and convenient for the passage or transportation of persons or property along the same, except so far as diminished safety and convenience are inseparable from its use by the railroad"—citing 2 Wood's Railway Law, 977, 978; 3 Elliott on Railroads, § 1105; Pierce on Railroads, 245; 2 Shearman & Redfield on Neg. § 445; State v. St. Paul, etc., Ry. Co., 35 Minn. 131, 28 N. W. 8, 59 Am. Rep. 313; Railroad v. Coms., 31 Ohio St. 339; Roberts v. O. & N. Railroad, 35 Wis. 679; Jones v. Erie, etc., R., 169 Pa. 333, 32 Atl. 535, 47 Am. St. Rep. 916; Evansville, etc., R. Co. v. Carver, 113 Ind. 51, 14 N. E. 738.

The statute enacted in 1884, above quoted, expressly provides that:

Such railroad crossing of a public road there-after constructed "shall, as far as practicable, pass at surface grade, or pass * * * above any existing structure at a sufficient * * * elevation, * * * with easy grades, so as to admit of safe and speedy travel over each."

We are of opinion that it was the statutory duty of the defendant railway company to construct the public road in its approaches on both sides of said crossing of the same width as the old public roadway in use by the public in 1888 or 1889, when the railway company constructed said crossing, and of as easy grade as can be obtained by grading such road from Coal creek to the top of the railway at such crossing as the latter is approached from the direction of Doran, and of as easy grade as can be obtained from the top of such railway crossing at such public road to Raven post office; that the defendant railway company has not complied with such statutory duty; and that the decree of the court below was erroneous in not so holding.

It is claimed by counsel for the defendant company, however, that no relief can be granted the plaintiffs because of the two remaining positions on which it relies, which we will now consider:

[14] 5. Whether a verdict in favor of the same defendant in a prior criminal case of the commonwealth against it for unlawfully obstructing the same road estops the board of supervisors of Tazewell county from prosecuting this suit.

The facts bearing on this question may be briefly summarized as follows: Upon complaint and information under oath of one Jackson Shelton, a warrant was issued by a justice of the peace of Tazewell county against the Norfolk & Western Railway Company, charging that the latter had unlawfully obstructed the public road leading from Doran post office to Raven post office by unlawfully keeping and maintaining railroad ties, steel rails and railroad tracks, fences, cuts and fills, and by unlawfully throwing and dumping dirt and stone on said public road; and there was another count in such warrant

charging the same things as done knowingly, willfully, and without lawful authority. On the calling of this case before said justice of the peace, the Norfolk & Western Railway Company, by counsel, and the attorney for the commonwealth, appeared, the latter introduced evidence, the former declined to introduce any evidence, and the justice entered an order finding the defendant "guilty of the offense charged in the warrant," and fined it \$5 and costs, and the following thereafter appears in such order:

"* * * And, it being suggested by the attorneys for both parties that it is desired to make a test case out of this, the defendant therefore prayed an appeal from said judgment to the circuit court of Tazewell county may be allowed, which appeal is allowed," etc.

Thereafter this case was docketed in said circuit court, prosecuted by the attorney for the commonwealth, resulting in a verdict of a jury of not guilty, on December 12, 1913, which was all prior to the institution of the suit at bar.

Counsel for the defendant plead the said acquittal as in bar of this civil suit. On this question counsel for the plaintiff take the position that not only are the parties different, but that the issues are widely different, as well as the burden of proof, and they rely upon the following authorities:

In the case of *Stone v. United States*, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127, *Stone* was sued for the value of certain timber cut and removed by him from public lands. *Stone* had previously been indicted by the United States for unlawfully cutting and removing this same timber, in which he was acquitted by the jury, and he set up as a bar to the civil suit his previous acquittal in the criminal case, which involved the same question, and was between the same parties, but the court held that an acquittal of the defendant under the indictment was not a defense to an action against him by the United States for the conversion of the timber. The court in its opinion, at page 188 of 167 U. S., at page 782 of 17 Sup. Ct. (42 L. Ed. 127), states as follows:

"In the present case the action against *Stone* is purely civil. It depends entirely upon the ownership of certain personal property. The rule established in *Coffey's Case* [116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684] can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property. In the criminal case the government sought to punish a criminal offense, while in the civil case it only seeks, in its capacity as owner of property illegally converted, to recover its value. In the criminal case his acquittal may have been due to the fact that the government failed to show beyond a reasonable doubt the existence of some fact essential to establish the offense charged; while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the government to a verdict. Not only was a greater degree of proof requisite * * * to sustain a civil action, but an essential fact had to be proved in the crim-

inal case which was not necessary to be proved in the present suit."

See, also, the case of *United States v. Schneider* (C. C.) 35 Fed. 107.

The authorities are collected in 2 *Black on Judgments* (2d Ed.) § 529, from which we make partial quotation as follows:

"Sec. 529. *Criminal Sentences Not Evidence in Civil Issues.*—Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them respectively are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relative fact."

In the case at bar the suit is not only civil in form, but the relief to which the plaintiffs are entitled is, in the view this court takes of the matter, civil, and not penal or criminal, in character. The gravamen of the suit at bar is that the defendant has not performed the duties required of it by statute, and specific performance thereof is prayed for, and is the relief to which the plaintiffs are entitled in so far as they prove their case.

Counsel for the defendant rely upon the case of *Coffey v. U. S.*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684, as establishing a different rule. It is sufficient to say of that case here that it is clearly distinguished in the case of *Stone v. United States*, supra, and, in our opinion, has no application to the case at bar.

The other cases cited by counsel for the defendant on this point are *Commonwealth v. G. W. Croushore*, 145 Pa. 157, 22 Atl. 807; *Chas. F. Durant v. David A. Williamson*, 7 N. J. Eq. 547; *Davidson v. Isham*, 9 N. J. Eq. 186; and *Bierer v. Hurst*, 162 Pa. 1, 29 Atl. 98.

The case of *Commonwealth v. Croushore* expressly holds an acquittal of the same defendant upon an indictment for maintaining a nuisance in obstructing a public highway is not a bar to a suit for an injunction on bill filed by the commonwealth on the relation of the Attorney General, but merely a circumstance which will be considered by a chancellor in exercising his discretion to refuse the injunction.

The other cases cited were civil cases between the same parties in which the doctrine of *res adjudicata* was properly invoked, and have no application to the case at bar.

Further, in the case at bar the Norfolk & Western Railroad Company constructed the obstructions of the public road complained of, and not the defendant, the Norfolk & Western Railway Company, prosecuted in the criminal proceeding in question.

We are therefore of opinion that the plea of *res adjudicata* of the defendant is not sustained, and that the plaintiffs are not estopped by the verdict in favor of the de-

defendant in the criminal proceeding referred to from maintaining this suit.

We come now to the remaining point and inquiry:

[15] 6. Whether lack of contractual relations and lapse of time and laches bar the plaintiffs in this case.

Defendant contends that no contractual relations existed between the plaintiff and defendant whereby a court could venture to attempt to specifically enforce the doing by the defendant of more than it has already done, and that more than a generation has passed since the alleged changes, and, in substance, that the plaintiffs have been guilty of laches, and are thereby barred from maintaining this suit.

While it is true no such contractual relations existed, the legal duty on the part of the railway company existed, imposed by statute, to "make an equally convenient road." The railway company having acted under such statute and assumed such legal duty, the court has jurisdiction to enforce the performance of that duty. It was expressly held by this court in the case of *N. & W. Ry. Co. v. Board of Supervisors of Carroll Co.*, supra, that the proceedings in the county court which had been had in that case—

"did not take the matter from under the operation of this statute. When the railroad company made its proposition to build an equally convenient road, * * * it did no more than the law required it to do before it could take for its purposes the public road. And when the court, in its order accepting the proposition, set forth all the plans and specifications to be observed in building the new road, it was merely prescribing what would be regarded by it as a compliance with the statutory requirement to build an equally convenient road.

"A promise to perform a legal duty does not make it any the less a duty, nor does it transform the legal duty into a mere personal obligation.

"In the case of *City of Oshkosh v. Railway Co.*, 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175, citing with approval *Jamestown v. Railway Co.*, 69 Wis. 648, 34 N. W. 725, it is said: 'In that case this court sustained a bill brought by the town to compel the railway company to restore a public highway, which it had practically destroyed in constructing its road, to its former condition of usefulness to public travel. The jurisdiction of the court was rested upon the ground that a court of equity would compel a railroad corporation to perform the plain statutory duty of restoring the highway which it had invaded to its former state of usefulness, as a condition to using it for the purposes of its roadbed. This duty is imposed by statute by plain and positive language, and a railroad corporation has no warrant in law to invade a highway with its track without complying with the law which grants the privilege to do so. It is contumacious and wrongful conduct for the officers of a railroad corporation to occupy a public highway with its track, practically destroying the street for purposes of public travel, and then defy or disregard all law and all authority invoked to compel them to repair the wrong which they have done the public. The courts would be impotent indeed if they could not correct such flagrant invasions of public right.'"

N. & W. Ry. Co. v. Supervisors of Carroll Co., supra, 110 Va. at pages 102, 103, 65 S. E. at page 584.

[16, 17] The plea of lapse of time and laches is equally untenable. As held in the case last-cited, and as stated in its syllabus:

"*Highways—Public Rights—Statute of Limitations—Laches.*—Public highways belong to the state, and the statute of limitations does not run against the rights of the public therein, nor does the doctrine of laches apply. As against the government, laches cannot be set up as a defense in equity any more than the bar of the statute can at law. Time does not run against the state, nor bar the rights of the public."

Upon the whole case, therefore, we are of opinion to reverse the decree of September 9, 1915, complained of, in so far as it did not hold, as it should have done, that the defendant railway company should construct the public road in its approaches on both sides of said railway crossing at Raven of the same width as the old public roadway in use by the public in 1888 or 1889, when the Norfolk & Western Railroad Company constructed that crossing, and of as easy grade as can be obtained by grading such road from Coal creek to the top of the railway at such crossing as the latter is approached from the direction of Doran, and of as easy grade as can be obtained from the top of such railway crossing as the public road leaves the same going west to Raven post office; to confirm the decrees complained of in all other respects, with costs, however, to the plaintiffs as the parties substantially prevailing in this court; and to remand the cause to the circuit court of Tazewell county to be therein proceeded with in accordance with the views on the subject of said crossing at Raven expressed in this opinion.

Reversed in part.

(120 Va. 379)

NORFOLK COUNTY WATER CO. v. ETHERIDGE.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. JUDGMENT \Leftrightarrow 598—SPLITTING CAUSES OF ACTION—INJURIES FROM DAM—"PERMANENT STRUCTURE."

A dam, built for reservoir purposes across a natural water course, which caused the water course or swamp to fill with water to such an extent that the natural drainage of plaintiff's land was interfered with, and the water from the artificial lake was backed upon it, was such a permanent structure that the injuries to the land flowing from it were not of a recurrent and intermittent character, but permanent in their nature, so that plaintiff must recover the permanent damage to his land, past and future, in a single action, and could not recover for damage to crops put out since his cause of action accrued, which would be included in the single judgment for permanent damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1113; Dec. Dig. \Leftrightarrow 598.

For other definitions, see Words and Phrases, First and Second Series, Permanent Structure.]

2. WATERS AND WATER COURSES \S 178(2)—
DAMAGE TO LAND FROM DAM—MEASURE.

In plaintiff's action, the measure of damage would be the difference in the market value of the land with and without the dam, to be computed as of the time immediately before the dam was built and immediately after it was finished and filled with water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. \S 255; Dec. Dig. \S 178(2); *Damages*, Cent. Dig. \S 276½, 282.]

Error to Circuit Court, Princess Anne County.

Action by W. T. Etheridge against the Norfolk County Water Company. To review a judgment for plaintiff, defendant brings error. Judgment reversed, verdict set aside, and case remanded for new trial in accordance with the opinion.

Pender & Way, of Norfolk, for plaintiff in error. R. W. Tomlin and Wm. G. Maupin, both of Norfolk, for defendant in error.

HARRISON, P. The plaintiff, W. T. Etheridge, brought this action to recover damages alleged to have been suffered in consequence of the defendant water company having built a dam which caused his lands to be permanently injured, and for the destruction of crops on such lands for the years 1912, 1913, and 1915. The case was conducted by the plaintiff in the lower court upon the theory that the injury was intermittent and recurrent, and that only such damages were recoverable as had been suffered prior to the institution of the suit. The instructions given by the court sustained this theory, and a verdict was rendered against the defendant company for \$3,500 damage to the land, and for \$1,000 damage to the crops for the three years mentioned. To this judgment the present writ of error was awarded.

The contention of the defendant company is that the dam complained of is a permanent structure, and that the injury to the land is, as alleged, permanent in its character, and that there can be but a single action therefor, in which the entire damage suffered both past and future, must be recovered; that there can be no separate recovery for crops put out after the completion of the dam; and that to allow such a recovery would inflict upon the defendant the payment of damages twice for the one injury.

The law applicable to this case has been so repeatedly announced by this court, in recent decisions, that it is unnecessary to do more than cite the latest decision, where it is said:

"Undoubtedly repeated actions may, as a general rule, be brought to recover for nuisances as long as the nuisance continues; but where there is a permanent nuisance, the consequences of which, in the normal course of things, will continue indefinitely, there can be but a single action therefor, and the entire damage suffered, both past and future, must be recovered in that action, and the right to recover will be barred unless it is brought within the prescribed number of years from the time the cause of action accrued." *Worley v. Mathieson Alkali Works*, 89 S. E. 880.

It appears from the record that the defendant company, for the purpose of supplying the public with water, built an enormous dam and reservoir across a natural water course known as "Gum Swamp." The lake of water thus impounded covers some 450 acres of land belonging to the defendant; the entire structure being on its premises. This structure caused the Gum Swamp to be filled with water to such an extent that the natural drainage to the plaintiff's land was interfered with, and the water from the artificial lake or reservoir backed upon the plaintiff's farm, thereby causing the injuries complained of.

There can be no question that this is a permanent structure, and we think that the evidence warrants the conclusion that the injuries to the land flowing from it are not of a recurrent and intermittent character, but are permanent in their nature, and in the normal course of things will continue indefinitely. The evidence shows that whether the water is above the spillway and overflowing or not, the ditches keep full, thereby backing the water upon the land, and further that the water is always under plaintiff's land, thereby making it sour, cloddy, and unproductive. It is true that the water sometimes gets low in dry weather and the overflow ceases temporarily, but the menace of an overflow and destruction of crops is always present as shown by the repeated damage to crops.

[1] It is clear that if, as held, the dam in this case constitutes a permanent structure and from its nature must continue permanently to injure the land affected thereby, there can be but one recovery for such injury, which would include all the damage sustained, both past and future. It is conceded that the damage to the crop of 1912, which was put out during the construction of the dam and before its injurious effect was known, can be recovered in this action. There can, however, be no recovery for damage to crops put out since the plaintiff's cause of action accrued. Such future damages are included in the single judgment for permanent damages, and the plaintiff cannot be twice subjected to the payment thereof.

[2] In conclusion, we are of opinion that under the law and the facts of this case, the permanent damage to the land of the plaintiff, both past and future, must be recovered in this action, the measure of such damage being the difference in the market value of the land with and without the dam, to be computed as of the time immediately before the dam was built and immediately after it was finished and filled with water; that there can be no recovery for damage to the crops of 1913 and 1915, which were put out after the plaintiff's cause of action arose; and that the plaintiff can recover any damage shown to have been suffered by reason of injury to the crop of 1912.

Without considering the instructions objected to in detail, it is sufficient to say that they are based upon an erroneous view of the law applicable to this case, and were therefore highly prejudicial to the defendant company.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial in accordance with the views expressed in this opinion.

Reversed.

(120 Va. 297)

DEAL'S ADM'R v. MERCHANTS' & MECHANICS' SAVINGS BANK et al.

(Supreme Court of Appeals of Virginia. Jan. 16, 1917.)

BANKS AND BANKING — 301(5) — RELATION BETWEEN BANK AND DEPOSITOR — JOINT ACCOUNTS.

Where decedent deposited money in bank to the joint account of herself and sister, the deposits created the relation of debtor and creditor between the bank and depositors, and upon decedent's death, the balance of such fund belonged to the sister.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1174; Dec. Dig. ¶ 301(5).]

Appeal from Circuit Court of City of Norfolk.

Suit by Deal's administrator against the Merchants' & Mechanics' Savings Bank and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank L. Crocker and Winston Parrish, both of Portsmouth, for appellant. N. T. Green and Baker & Eggleston, all of Norfolk, for appellees.

HARRISON, P. This suit was brought by the administrator of Martha S. Deal claiming a certain deposit, on savings account, in the Merchants' & Mechanics' Savings Bank of Norfolk. The claim was contested by Ellen C. Holland, and the circuit court entered a decree in favor of the contestant, from which this appeal has been taken by the complainant.

The controversy arises out of the following facts: In January, 1912, Martha S. Deal, sent for a friend and requested him to deposit her money in bank, saying that she did not expect to live long, and that she wanted the money to go to her sister, Ellen C. Holland, when she died. The friend told her that he could deposit the money in her name so that it would go to her sister at her death, and that it should be put on the bank book that way. In pursuance of this understanding, the money, \$1,800, was deposited in the Merchants' & Mechanics' Savings Bank on savings account to the credit of "Martha S. Deal or Ellen C. Holland." At the time the deposit was made the receiving teller of the bank explained that the deposit was a joint account, and that either of the parties named

could draw the money at any time, but that it was necessary to bring the passbook to the bank. In December, 1913, less than a year after the deposit was made, Mrs. Deal died, having then drawn upon the account four times, the amount drawn aggregating \$300. After Mrs. Deal's death, Mrs. Holland drew \$200, which was used for paying her sister's funeral expenses, etc. The balance of the original deposit, with accrued interest, is the subject of this litigation. After Mrs. Deal's death the bank book was produced from the possession of Mrs. Holland, taken to the bank for her, and the deposit changed, by the bank, to Mrs. Holland's name alone; the bank thereby recognizing its understanding with the decedent and Mrs. Holland at the time the deposit was made. That this joint deposit was made with the understanding that the balance thereof, not checked out during the joint lives of the two depositors, was to become the property of the survivor satisfactorily appears.

We are of opinion that, under the facts of this case, the effect of the deposit by Mrs. Deal to the joint credit of herself and her sister was to create a contract relation between the bank and the two joint depositors, under which the amount to the credit of the account became the property of Ellen C. Holland as the survivor of decedent and herself.

The relation between a bank and a depositor is that of debtor and creditor. The deposit creates an ordinary debt, not a privilege or right of a fiduciary character. It is a loan with the superadded obligation that the money is to be paid when demanded by check. *Wood v. Am. Nat. Bk.*, 100 Va. 306, 40 S. E. 931; *Pendleton v. Commonwealth*, 110 Va. 229, 65 S. E. 536; *Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380.

Therefore, when the deposit in this case was made by Mrs. Deal for the joint benefit of herself and Mrs. Holland, in legal effect a loan was made by decedent and Mrs. Holland to the bank, and the bank was the debtor to them, and they creditors of the bank, to the amount of such deposit. It was a pure contractual relation, and no question of gift or trust arises in determining the rights of the parties under such a contract.

In *Chippendale v. North Adams Savings Bank* (1916) 222 Mass. 499, 111 N. E. 371, the question here involved arose, and the court, in disposing of the case, said:

"The new deposit in the Hoosac Savings Bank by its terms was a deposit to be paid during the lives of Williams and of Mrs. Worthington or either of them as they should call for the deposit or a part of it, and the balance (not withdrawn during their joint lives) was to be paid to the survivor of them. Such a contract between a depositor or depositors and the savings bank is a valid contract. If Mr. Williams had gone to the savings bank with a sum of money he could have made such a contract with the savings bank. What took place was the equivalent of that by reason of a novation with respect to the account theretofore on de-

posit in Williams' name alone. The case therefore which we have to decide is not a case of an attempted gift of property but is a case where Williams the depositor through a novation had made a new contract with the savings bank by virtue of which either he or Mrs. Worthington could draw such sums as either in their discretion chose during their joint lives, and the balance was to be withdrawn by and so was to belong to the survivor. In such a case there is no gift of the balance upon the death of Williams. Mrs. Worthington (when she survived Williams) became the owner of the balance undrawn by virtue of the contract of deposit, and not by virtue of a gift which took effect on Williams' death."

In *Blick v. Cockins* (1916) 252 Pa. 53, 97 Atl. 125, it is held that:

"A deposit in a bank account in the joint names of husband and wife, 'subject to the order of either or survivor,' whether made by each of them or entirely by the wife, amounts to a gift to both jointly with right of survivorship, and on her death the deposit becomes his sole property."

As the decree complained of must be affirmed for the reasons already given, it is unnecessary to consider other grounds urged in its support.

Affirmed.

(120 Va. 290)

DAVIS v. CITY OF NEWPORT NEWS.*

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. MUNICIPAL CORPORATIONS ⚡375—PAVEMENT GUARANTY—DEFENSE.

It was no defense to an action by a city against a contractor on a paving guaranty that the defects developed from sinking of the street from operation of street cars, where the contractor's bid was on a different basis for streets occupied by street car tracks and streets not so occupied.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ⚡375.]

2. MUNICIPAL CORPORATIONS ⚡375—PAVEMENT GUARANTY—ACTION—INSTRUCTIONS.

In city's action on pavement guaranty it was proper to refuse instruction that plaintiff's case depended on showing some default of defendant under his contract, and if defects were due to causes over which he had no control defendant would not be liable, where there was no evidence as to causes over which defendant had no control other than matters fully covered by other instructions, since such a charge would invite the jury to indulge in mere conjecture.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. ⚡375.]

Error to Circuit Court of City of Newport News.

Action by City of Newport News against J. W. Davis. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Winston Read, of Newport News, for plaintiff in error. J. A. Massie, of Newport News, for defendant in error.

HARRISON, P. In December, 1908, the plaintiff in error, J. W. Davis, entered into a written contract with the city of Newport News for paving certain streets and avenues, upon some of which there were no

street car tracks, and upon others cars were operated. Specifications, form of contract, and printed instructions were furnished the bidders in advance, and they were required to acquaint themselves with the condition of the streets to be paved, and separate bids were asked for the work to be done on streets where car tracks were laid and on those where there were no such tracks. Attention was further called to the fact that the bids would be for paving the street exclusive of the space between the street car tracks and for a distance of two feet on each side thereof, which excluded portion of the street was to be paved by the street railway company at the same time and with the same materials as the other portion of the street, and that each bid should be made at a rate which would include the cost of keeping the whole work to be done under the contract in proper repair for a period of ten years. The sections of the specifications pertinent to this inquiry are as follows:

"52. The contractor shall guarantee the entire work done under this agreement for a period of ten years dating from the date of the last monthly estimate. The bonds furnished for the faithful performance of this contract will include the guaranteeing of the work as fully as any other stipulation. At the end of the guaranty period, the contractor, upon notice from city engineer, shall clean up the entire work done under these specifications so that the surface can be closely observed, said cleaning to be done by and at the expense of the contractor.

"53. The contractor for the work herein specified and in consideration of the prices bid and to be received therefor, guarantees that the workmanship and materials furnished under these specifications and used in said pavement, are in all respects first class and of such kind and quality that for a period of ten years from and after the completion and final acceptance thereof by the said city, the said pavement shall require no repairs, the necessity for which shall be occasioned by defects in said workmanship or material.

"If, however, during the said period, in the opinion of the council of the city of Newport News, the said pavement shall require repairs, and necessity for such repairs shall, in its opinion, be occasioned by settlement of foundation, defective workmanship or materials furnished in the construction of said pavement, then such repairs on due notice being given, at any time during said period by the said city engineer to said contractor, shall promptly be made by and at the expense of the contractor."

The paving was to be of brick laid upon a sand base, with grout filler. The city accepted the bid of the plaintiff in error at \$1.85 per square yard upon streets where there were no street car tracks and \$1.86 per square yard upon streets occupied by such tracks.

The pertinent portion of the contract which was entered into is as follows:

"In consideration of the premises, the said party of the first part agrees to pay to the said party of the second part the following prices as full compensation for furnishing all the material and labor in building and constructing, and in all respects completing the aforesaid work, and appurtenances in conformity with the plans and specifications, and to the satisfaction of the

council of the city of Newport News and the city engineer and for guaranteeing and keeping in repair the same for a period of ten years. * * * And the said party of the second part further agrees to keep all the work specified in this contract in good repair for a period of ten years after the completion and acceptance of the whole work."

It appears that within the guaranty period the work done under this contract became defective, and the city, in pursuance of section 53 of the specifications, gave notice to the plaintiff in error to make repairs as contemplated in the specifications and contract. This the plaintiff in error refused to do, whereupon the city made the necessary repairs upon all of the streets at a total cost of \$2,370.45; that portion of the repairs between the street car tracks and for two feet on each side thereof being made and paid for by the street railway company.

Thereupon the city brought this suit to recover of the plaintiff in error \$2,370.45, the sum it had expended in making the repairs mentioned. Why, is not apparent from the record, but upon the trial there was a verdict and judgment in favor of the city for only \$500, which is now before this court for review at the instance of the plaintiff in error.

Upon the trial it was the theory of the city that it was the defective construction, in that the bricks were not properly grouted so as to hold them together, whereupon some of the bricks settled from traffic, causing the paving to become uneven, defective, and out of repair, and that such defects were covered by the guaranty clauses of the specifications and the contract. On the other hand, the contention of the plaintiff in error was that the defects were caused by a natural expansion of the bricks, the sinking of the street car tracks, and other independent causes over which he had no control.

[1] The first assignment of error is to the action of the court in giving for the city the following instruction, No. 4:

"The court instructs the jury that the contract, plans, and specifications between the city and J. W. Davis, for the construction of the brick pavement mentioned in the evidence, provides for it to be constructed in part upon streets in which there are street car tracks, of which fact the said Davis had notice, and bid for the work accordingly, and if the jury believe any of the defects complained of in the pavement constructed under the contract in evidence were occasioned by settlement of foundation due to the use of the street railway tracks, this fact should have been taken into consideration by the contractor, and it was his duty to repair such defects."

We are of opinion that this instruction is based upon the evidence, that it correctly interprets the contract between the parties, and that it was therefore properly given. The plaintiff in error submitted his bid and contracted with full knowledge that there were street car tracks upon some of the streets which he was to pave within two feet of the track, and by the terms of his contract he agreed to keep all the work speci-

fied in his contract in good repair for a period of ten years. The conditions existing at the date of the contract were well known, and it is clear that the parties had the subject of the street car tracks in mind and contracted with reference to their sinking from use and thereby causing damage to the adjoining work guaranteed by the plaintiff in error.

In the case of *City of Akron v. Paving Co.*, 171 Fed. 29, 36, 96 C. C. A. 271, a similar case to the present, the paving company asked to be excused from the performance of the guaranty specifications of its contract for street paving, by reason of the settlement of the foundation of the street car tracks in streets upon which it had constructed pavement to within one foot of the rail. The Circuit Court of Appeals, speaking through Judge Lurton, said:

"Can failure of performance of such a contract be excused on the ground that the foundations of the street car tracks were out of repair? We understand from the charge of the court that performance was excused to the extent that the pavement was impaired by defects in these foundations. The conditions existing at the date of the execution of the contract must be considered. * * * Clearly, then, the parties had the subject of street car tracks in mind. But it nowhere appears in the contract, as we understand it, that performance of the paving company's covenant was to be excused by reason of defects existing in the track foundations during the life of the guaranty. * * * But here, again, we discover no provision in the contract which in terms would excuse performance of the paving company's covenant of guaranty on account of any failure or neglect of the city to require the street car company to keep in repair either the paving between rails or the track foundations."

The evidence in the case at bar shows that the street railway tracks settled, not continuously, but in places along the street; that no charge was made against the plaintiff in error for repairing any defects in the pavement between the tracks and two feet on either side thereof. As already stated, the street car company made all of those repairs, at its own expense, regardless of how far they extended from the tracks, and there is nothing in the specifications, the contract, or the evidence, that can excuse the plaintiff in error from the performance of his guaranty to keep in repair that part of the paving covered by his contract.

The objection taken to the refusal of the court to give instruction E, asked for by the plaintiff in error, is, in view of what has been already said, without merit. This instruction tells the jury that if they believe from the evidence that any of the alleged defects were caused by a sinking of the street car tracks, then the defendant is not liable for such defects. In disposing of the first assignment of error we have said all that is needful in answer to the proposition announced by this instruction.

[2] The only remaining objection taken to the action of the circuit court was to its refusal to give instruction F, asked for by the plaintiff in error, which is as follows:

"The court instructs the jury that before they can find for the plaintiff they must believe from the evidence that the defects complained of, in whole or in part, were occasioned by some default of the defendant under the terms of his contract; and if due to causes over which he had no control and for which he was not responsible by virtue of said contract, he is not liable therefor."

There was no evidence upon which to base this instruction. It invites the jury to indulge in mere conjecture as to causes over which the plaintiff in error had no control, other than the settlement of the street railway tracks, which is dealt with under the first assignment of error. The only other cause suggested for the defects is that they arose from expansion of the bricks, and that subject is expressly covered by instruction D, given for the plaintiff in error, which is as follows:

"The court instructs the jury that if they believe from the evidence that the alleged defects in the pavement, or any of them, were due to expansion of the bricks, and not to settlement of foundation, defective workmanship or materials, including bricks furnished in the construction of said pavement, then the defendant cannot be held liable for any defects caused by such expansion."

The record shows that the aggregate of repairs on those streets where there were no car tracks cost considerably more than the \$500 found by the jury, which would seem to leave little room for the untenable contention made with reference to the streets upon which cars were operated.

Upon the whole case, we are of opinion that the plaintiff in error has not been prejudiced by the judgment complained of, and it must therefore be affirmed.

Affirmed.

CARDWELL, J., absent.

(120 Va. 301)

DUNNAVANT v. DUNNAVANT et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. LOST INSTRUMENTS §8(3)—PROOF.

The jurisdiction of equity to set up lost deeds or wills will not be lightly exercised, nor except upon the clearest and most stringent proof.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. §8(3).]

2. LOST INSTRUMENTS §8(3)—PROOF.

In action by son to establish lost deed by his father, evidence that the son had made no claim to the property for 29 years after he claimed the deed had been made, and his testimony that he left it for safe-keeping with his sister, who kept it in a trunk to which the key hung near at hand, etc., held not sufficient to show the existence of the deed.

[Ed. Note.—For other cases, see Lost Instruments, Cent. Dig. § 17; Dec. Dig. §8(3).]

Appeal from Circuit Court, Henry County. Suit by Richard A. Dunnivant against Thomas W. Dunnivant and others. From judgment for complainant, the named re-

spondent appeals. Reversed, and bill dismissed.

Whittle & Whittle, of Martinsville, for appellant. Gravely & Gravely, of Martinsville, for appellees.

PRENTIS, J. Richard A. Dunnivant filed his bill against Thomas W. Dunnivant, his father, and others, alleging that in November, 1885, his father conveyed to him two tracts of land in Henry county, one known as the Stacy Watkins tract, containing 50 acres, and the other as the Nancy Watkins tract, containing 93 acres, and that the conveyance has been lost or destroyed.

[1] It is conceded by counsel for the appellees that the degree of proof necessary to establish a lost deed and its contents is correctly indicated in the case of Thomas v. Ribble, 24 S. E. 241, 2 Va. Dec. 321, which is relied upon by the appellant. That rule is there succinctly stated in these words:

"Where the instrument rises to the dignity and importance of a muniment of title, every principle of public policy demands that the proof of its former existence, its loss, and its contents, should be strong and conclusive, before the courts will establish a title by parol testimony to property which the law requires shall pass only by deed or will. That courts of equity have the jurisdiction to set up lost deeds and wills, and establish titles under them, can certainly not be denied; but it is a dangerous jurisdiction, and so pregnant with opportunities of fraud and injustice that it will not be lightly exercised, nor except upon the clearest and most stringent proof."

This doctrine has been approved by this court in the following cases: Barley v. Byrd, 95 Va. 316, 28 S. E. 329; Carter v. Wood, 103 Va. 68, 48 S. E. 553; Smith v. Lurty, 108 Va. 800, 62 S. E. 789; Johnson v. McCoy, 112 Va. 580, 72 S. E. 123; McLin v. Richmond, 114 Va. 244, 70 S. E. 301; Dickenson v. Ramsey, 115 Va. 521, 79 S. E. 1025.

[2] These facts are undisputed: That Thomas W. Dunnivant acquired title to the two tracts of land involved in this controversy, the Stacy Watkins tract in 1871, and the Nancy Watkins tract in 1883; that at the time of the alleged conveyance he resided upon the Stacy Watkins tract with his wife and son, Richard A. Dunnivant (the claimant of the property, then about 24 years old), his daughter, Eliza Dunnivant (then about 22 years of age, who in April, 1913, married Kellam and left her father's home), and an adopted daughter. The appellant continued to reside upon the property, pay the taxes thereon, and cultivate the land as the ostensible owner thereof, until, then being over 76 years old in May, 1914 (having been born on the 19th day of January, 1838), he left the place and moved into Martinsville. On the 18th day of July, 1914, he sold and conveyed the two tracts of land referred to, to W. T. Deshazo and F. E. Smith, for the consideration of \$1,500. The purchasers were willing to pay cash, but he told them he preferred to have

the interest at 6 per cent. upon the \$1,500 well secured, and so, instead of paying cash, they executed their bond for the purchase money. Since 1885, from the profits derived from his lands, he has acquired title to two other tracts of land.

He testified that he left his home because he was staying there most of the time by himself, and that his son would come in now and then, but that he told him either to stay with him or leave him, because he could not stay there by himself, which, however, is denied by the son and daughter.

The conveyance to Deshazo and Smith led to this controversy, as the appellee Richard A. Dunnivant claimed, as has been above stated, that in September, 1885, his father executed a deed of bargain and sale to him for the same property, which has never been recorded, and has been either lost or destroyed.

He undertakes to sustain this contention by his own testimony, the testimony of his sister, Eliza, and of W. A. Dove, the alleged draughtsman of the deed. The testimony of Richard A. Dunnivant and of his sister, Eliza Kellam, appears to be positive and definite to the effect that such a deed was executed in September, 1885; that the consideration therein stated was \$500; but that no money passed, and the real consideration was the past and future labor of the son on the farm. This deed, they say, was delivered by the father to the son, and by the son delivered to his sister for safe-keeping, and she says she kept it in a trunk with other valuable papers until just before she was married and about to leave home in April, 1913, when she put it in another trunk upstairs along with other valuable papers, and, to use her own language, "locked them up, and hung the key to the trunk upstairs." It is not clear to us whether she meant that she hung the key upon the trunk containing the deed, or that she hung the key upstairs. They state that, after this controversy arose, they came back to the house to look for the papers and found that the trunk had been rifled, the papers scattered, and that they were unable to find the deed referred to. Richard A. Dunnivant, in answer to a question asking him to explain why he let the deed remain off the records for 29 years, in substance stated that he never thought anything more about it until his father left, that they all lived there as one, and that what belonged to one belonged to the other.

The testimony of W. A. Dove discloses that he was a notary public, just above 21 years old in September, 1885. Without indicating the date, except to say that it was some time during his term of office from 1884 to 1888, he says that he wrote a deed for Mr. Dunnivant at his (Dunnivant's) house; that he does not know who was present, but thinks Mr. Dunnivant and his family were; that Mr. Richard Dunnivant was the grantee;

that he thinks the deed conveyed two tracts of land known as the Watkins tracts; that he thinks the consideration was \$500; that he always wrote deeds with a general warranty of title, and does not think he deviated from this custom when he wrote this deed; that it was an absolute fee-simple deed; that he does not know whether Mr. Thomas Dunnivant's wife signed the deed or not; that she was living at that time, but he thinks she did not sign it. In response to a question as to whether he could state by what names the two tracts of land were described in the deed, he says:

"I think one of them was called the Stacy Watkins tract. I do not remember the other, further than the Watkins tract."

When asked whether or not there was a seal or scroll by way of seal to the deed, he replied:

"I do not remember, but I never did write one without placing it there."

He says the deed was acknowledged before him as notary public and turned over to Mr. Richard Dunnivant, and that the deed was written and the acknowledgment taken at the request of Mr. Thomas Dunnivant. On cross-examination, this question and answer appear:

"You could not undertake to be clear and positive as to the contents of the deed that you prepared for the Dunnivants 29 years ago, could you? A. I could not, sir; except that the consideration was \$500, and I am clear on that point."

He further says that it was a clear deed; that he knows of no conditions therein; that it was an absolute deed; that he thinks, but is not sure, that the deed was sealed; that he did not know that a seal was necessary; that he cannot be positive that the deed was sealed, except that it was his custom; that he is quite sure it mentioned the number of acres, but does not remember the number; that he does not remember the date of the deed; that he does not remember whether it conveyed all of the lands Mr. Thomas Dunnivant owned or not. On re-examination he was asked whether or not his recollection is clear that it conveyed two tracts of land known as the Watkins tracts, and he says:

"I think that is correct, sir. It conveyed two tracts of land, known as the Watkins tracts of land."

Upon the other hand, Thomas W. Dunnivant denies in the most positive and definite way that he ever executed such a deed, and explicitly denies each and all of the material facts and circumstances testified to by the three witnesses above referred to, introduced to sustain the claim of his son.

It appears from the testimony of Dr. J. Beverly Deshazo that, in a conversation he had with Richard A. Dunnivant, he asked him if he had any claim or any papers to prevent his father from deeding any of his land away, and he was told by him that he did not, and that he expected his father to

go through all his property; and it also appears from the testimony of this witness that Thomas W. Dunnivant shortly before this time had a will properly executed in which the property in controversy was devised to the appellee for life and then to his adopted daughter, Mrs. Roberts, which he learned had been destroyed.

There are other collateral facts adduced in evidence by both parties to the controversy, and other conflicting testimony; but the above we regard as the pertinent and controlling evidence in the case.

So that there is an irreconcilable conflict in the testimony of the parties interested, the unconvincing testimony of the alleged draughtsman of the deed, and no circumstances corroborating the claim of the appellee, upon whom the burden of proof rests.

A fair consideration of this testimony falls very far short of convincing the impartial mind either of the existence or contents of the deed in question. It may be fairly said that it leaves the mind in a state of doubt and uncertainty. The improbabilities of the transaction, however, are very great indeed, for no sufficient explanation is given of the silence of Richard A. Dunnivant and his sister as to the deed and his claim of ownership thereunder until they heard that their father had sold, or was about to sell, the property, and no sufficient motive is assigned for the preference of the son by his father in 1885, at the time the alleged conveyance was made. It then constituted the entire real estate of the father. At that time his mother and single sister were living, and his father was in the prime of life. Another improbability is that a paper so valuable should have been hidden away for 29 years and be finally left in a trunk with the key apparently accessible to any one who desired to take possession of it.

The law requires, in such cases, that the proof shall be strong and conclusive, as to the former existence of the paper as well as of its loss and its contents, and we are of opinion that the proof in this case is weak, uncertain, improbable, and inconclusive; and therefore that the decree of the court below is erroneous and must be reversed, and this court will enter a decree dismissing the bill.

Reversed.

(120 Va. 383)

SHEPHERD et al. v. VIRGINIA STATE INS. CO. et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

INSURANCE — 8 — INSURANCE FUND — REINSURING COMPANIES — "POLICIES."

The securities deposited by a fire insurance company under Insurance Act (Laws 1906, c. 112) subc. 2, § 17, are for the protection of holders of policies on property in the state, and not an insurance company reinsuring in the depositing company its risks on property outside the state, since said section 17 provides that "holders of all policies made with residents of

this state" shall have a lien, etc., on such securities, for, although contracts of reinsurance are frequently designated as "policies," unless there is something in the context to indicate reinsurance, the use of the term "policy" in reference to fire insurance business naturally suggests, and will be understood as meaning, the commonly known contract of insurance for the protection of a property owner against loss of his property by fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 7; Dec. Dig. ¶8.

For other definitions, see Words and Phrases, First and Second Series, Policy.]

Appeal from Circuit Court of City of Richmond.

Proceeding by Joseph Button, Insurance Commissioner, against the American Union Fire Insurance Company, and suit by W. J. Shepherd and others against the same company, consolidated by order of court, in which proceeding the Virginia State Insurance Company filed claim. From a decree allowing such claim, W. J. Shepherd and others appeal. Reversed and remanded.

Loyall, Taylor & White, of Norfolk, for appellants. Geo. L. Christian, of Richmond, for appellees.

KELLY, J. The question in this case is whether a domestic insurance company, holding a contract of reinsurance on risks outside of this state with a foreign company doing business in this state, is entitled, in case of the latter's insolvency, to be classed as a policy holder and lienor under the provisions of section 17 (chapter 2) of the Virginia Insurance Act (Laws 1906, c. 112). That section is as follows:

"Upon the bonds deposited as aforesaid, with the treasurer, by any such insurance company, the holders of all policies of said company made with residents of this state, or upon property located in this state, shall have a lien for the amounts due them respectively under or in consequence of such policies, for losses, equitable values, return premiums, or otherwise, and shall be entitled to be paid ratably out of the proceeds of said bonds, if such proceeds be not sufficient to pay all of said policy holders; and whenever any such company, depositing bonds as aforesaid, shall have become insolvent or bankrupt, or shall have made an assignment for the benefit of its creditors, any holder of such policy shall have the right to file a bill in the circuit court of the city of Richmond to enforce the said lien for the benefit of all the holders of such policies."

The essential facts are these: The American Union Fire Insurance Company, a Pennsylvania corporation doing business in the state of Virginia, deposited with the treasurer of the state, as required by the statute, bonds aggregating at their par value the sum of \$25,000. In the course of its business a number of fire insurance policies were written by this company upon property in this state; and, in addition thereto, the company entered into a contract of reinsurance with the Virginia State Insurance Company, a Virginia corporation, whereby the former re-insured all the risks of the latter upon policies issued by it in the state of Alabama.

The American Union Fire Insurance Company subsequently became insolvent, and in the course of the litigation which followed, in the circuit court of the city of Richmond, the holders of the policies of fire insurance on properties in Virginia, and the Virginia State Insurance Company, respectively, presented their claims and asserted liens upon the bonds deposited with the state treasurer. The commissioner, to whom the court referred the question of liens upon the bonds, reported adversely to the Virginia State Insurance Company, holding that its contract of reinsurance did not constitute it a policy holder within the meaning of the statute. The circuit court sustained an exception to the commissioner's report upon this point, and decreed that the claim of the Virginia State Insurance Company, as to \$6,484.87, for fire losses paid by it in the state of Alabama before the failure of the American Union Fire Insurance Company, and as to \$12,272.40 for unearned premiums on policies on Alabama properties in force at the time of the failure, aggregating the sum of \$18,757.27, constituted a lien upon the bonds, and entitled that claimant to share ratably in the proceeds. Thereupon the holders of the fire insurance policies on Virginia properties obtained this appeal.

Two distinct propositions are relied upon by the appellants as grounds for a reversal of the decree. These propositions are, first, that, construing section 17 (chapter 2) of the Insurance Act with reference to sections 1, 19, 31, and other sections thereof in pari materia, the policy holders therein protected are only such as hold policies on properties situated in Virginia; and, second, that the purpose of the section, as to fire insurance, was to protect only the holders of policies on property, and not an insurance company holding a contract of reinsurance on its risks under other policies of its own.

The arguments for and against both of these propositions have been urged upon us with earnestness and ability. We are inclined to agree with the appellants upon both propositions.

Section 1 of chapter 2 of the Insurance Act provides that:

"The words 'insurance company' or 'insurance companies,' as used in this act, shall be held to mean and to include any association * * * engaged in the business of assuming insurance risks upon persons or property in this state."

The learned counsel for the appellee contend that the language just quoted does not mean that the property insured must be located in the state, but that it is the doing of such insurance business in the state which makes the insurance company subject to the act. We are unable to concur in this view. The language, so far as fire insurance is concerned, seems to us to be such as to limit the act to those companies only which write insurance policies upon property situated in this state. A broad view of the various sec-

tions of the act makes it clear, as we conceive, that the general plan or scheme of this legislation was to provide that policies should be issued by foreign fire insurance companies on property in Virginia only through regular agents residing in Virginia, and that such policies only were intended to be protected by the deposit with the state treasurer. The general impression thus obtained from a comprehensive view of the act as a whole is strengthened by a consideration of several of the specific provisions therein; but we content ourselves with this general reference to what seems to us to be the fundamental plan and purpose of the statute, without any further discussion of its specific provisions, because the case is even more plainly with the appellants upon their second contention, and we prefer to rest this decision mainly thereon.

The evident purpose of the Legislature, as it seems to us, and the one naturally attributable to it, was to protect property owners in their fire insurance contracts, and not to protect other insurance companies on their contracts of reinsurance. The business of insurance is in itself of such a character as to have evoked, in the public interest, much special legislation looking to its control. The average individual property owner is uninformed as to many of the details of the business, and, for this and other reasons, is not in a position to judge of the solvency of any particular company. The danger of imposition upon its citizens by irresponsible companies is one of the controlling reasons for the enactment of such a provision as is found in section 17 of chapter 2 of the Virginia Insurance Act. Neither this nor any other reason which occurs to us would seem to bring within the purpose of the statute a corporation whose own sole or chief business is that of insurance.

It is true that reinsurance is a legitimate part of the business of an insurance company, and likewise true that a sound public policy would naturally lead every state to encourage and foster and endeavor to stabilize its resident insurance companies; but we cannot think the Legislature ever contemplated as a possible result of section 17 of the Virginia Act that a resident company would be permitted to bring a claim for fire losses and unearned premiums under a contract reinsuring its own risks in a foreign state into a ratable distribution of the proceeds of the bonds deposited, along with the holders of fire insurance policies protected in the act. Such a construction, in our opinion, might often result, as it would do in the case at bar, in nullifying to a very material degree the ruling purpose in the statute.

We find nothing in the provision of the Insurance Act indicating any purpose to protect, by lien on bonds deposited by a foreign insurance company, any contracts except life insurance policies and fire insurance policies in the ordinary acceptance of those terms.

No reason is perceived why the Virginia State Insurance Company might not have made the contract for the reinsurance of its Alabama risks with any nonresident insurance company, regardless of whether it was licensed to do business in Virginia, or why such contracts should be the subject of any special protection by the Legislature of this state.

Contracts of reinsurance are not infrequently designated as "policies," and they are doubtless properly so called; but, unless there is something in the context to indicate reinsurance, the use of the term "policy" in reference to fire insurance business naturally suggests, and will be understood as meaning, the far more usual and commonly known contract of insurance for the protection of a property owner against loss of his property by fire. This is apparent from the manner in which the authorities discuss the two classes of contracts. See 1 Cooley's Insurance Briefs, pp. 516, 517.

The case of German National Ins. Co. v. Va. State Ins. Co., 108 Va. 393, 61 S. E. 870, is relied upon by the appellee as authority for the contention that a contract of reinsurance is a policy within the meaning of section 17 of the Insurance Act. The only disputed questions in that case, so far as the opinion shows, related to the allowance of counsel fees. The claim asserted in the bill was upon a policy of reinsurance; the German National Insurance Company having failed before a single fire insurance policy in the usual sense had been written by it for any resident of Virginia. No question seems to have been made as to the lien of the Virginia State Insurance Company in that case, and it passed unchallenged. The opinion of the court is devoted to the discussion of costs and counsel fees.

We have not been cited to, and we have not found, a discussion of the exact question here involved in any text-book or judicial decision. The reason and the right of it seem to us to be with the appellants.

The decree appealed from will be reversed, and the cause remanded to the circuit court for further proceedings to be had therein not in conflict with this opinion.

Reversed.

CARDWELL, P., and SIMS, J., absent.

(120 Va. 329)

INGE, Trustee, et al. v. INGE et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. REFORMATION OF INSTRUMENTS ⚡43—EQUITABLE ESTOPPEL—BURDEN OF PROOF.

In a suit to reform a deed executed in carrying out a partition agreement, whereby a tract that should have been conveyed to complainant was conveyed to her daughter, the daughter, admitting the mistake, had the burden of proving

the equitable estoppel by acquiescence, ratification, etc., on which she relied.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. ⚡43.]

2. REFORMATION OF INSTRUMENTS ⚡45(1)—EQUITABLE ESTOPPEL—EVIDENCE.

In such suit evidence held not to sustain the defense of equitable estoppel against the right to the relief sought.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 157, 171, 177, 182, 189, 191; Dec. Dig. ⚡45(1).]

3. REFORMATION OF INSTRUMENTS ⚡23—MISTAKE—PREJUDICE—ESTOPPEL.

In such suit the fact that after complainant had declined a reconveyance the daughter and her husband had given a deed of trust on the tract to secure money borrowed for a third party, as to which they were collaterally secured where they were able to pay off the deed of trust, in no way put her in a worse condition than she would otherwise have occupied, so as to estop the complainant from asserting her right to the tract.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 82; Dec. Dig. ⚡23.]

4. REFORMATION OF INSTRUMENTS ⚡32—MISTAKE—LACHES.

In such suit, where it appeared that scarcely a year elapsed after complainant learned of the mistake until she became ill and mentally incompetent to protect her interest, and remained so practically all the time until shortly before the bill was brought, the cause was not affected by the doctrine of laches.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. ⚡32.]

5. EQUITY ⚡72(2)—LACHES.

Whenever a delay fairly justifies the inference of acquiescence in an adverse claim, or whenever it has been such as to induce other persons to alter their circumstances or conduct so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 214-219; Dec. Dig. ⚡72(2).]

6. TRUSTS ⚡44(1)—DEED OF TRUST—INCOMPETENCY OF GRANTOR—EVIDENCE.

In a suit in equity to set aside a deed of trust, which complainant had executed to her husband, evidence held to sustain the finding that she was insane when she executed and delivered such deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. ⚡44(1).]

7. TRUSTS ⚡41—COMPETENCY OF GRANTOR—LUCID INTERVAL—BURDEN OF PROOF.

Where the evidence clearly showed that, with the exception of occasional intervals, complainant in a suit to set aside a deed of trust was generally insane for a period of four years covering the date of the execution of the deed, the burden of proving a lucid interval at that date was upon the defendant.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 60; Dec. Dig. ⚡41.]

8. TRUSTS ⚡44(1)—DEED OF TRUST—COMPETENCY OF GRANTOR—EVIDENCE.

In a suit in equity to set aside a deed of trust which complainant had executed to her husband, evidence held to show that on the date when she executed a new deed of trust, after her husband's deed of release and reconveyance, she was mentally competent to do so.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 66; Dec. Dig. ⚡44(1).]

9. TRUSTS \S 155—DEED OF TRUST—TRUSTEE.

Complainant executing a deed of trust conveying property in trust for her support, etc., notwithstanding the preference of her husband and daughter that some member of the family who would act without compensation should be named the trustee, had a legal right to name a third party trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 200; Dec. Dig. \S 155.]

Appeal from Circuit Court, Sussex County.

Suit by Helen N. Inge against S. T. Inge, trustee, S. H. Inge, and another, with cross-bill by defendants S. T. Inge and S. H. Inge. Decree for complainant, and defendants appeal. Affirmed.

W. S. McNeill, of Richmond, and T. Freeman Epes, of Blackstone, for appellants. Thos. H. Howerton, of Waverly, and R. H. Mann, of Petersburg, for appellee.

KELLY, J. This was a suit in equity brought by Helen N. Inge against her husband, S. T. Inge, and her daughter, S. H. Inge, the main objects of the suit being to set aside a deed of trust which she had executed to her husband, and to correct an alleged mistake whereby, in the deeds carrying out a certain partition agreement, a tract of land known as the "Cox place" was conveyed to her daughter when it should have been conveyed to herself.

The complainant, Mrs. Helen M. Inge, was twice married. Her first husband, B. R. Birdsong, died intestate in the year 1908, leaving by that marriage a son, J. L. Birdsong, and a daughter, Sallie H. Birdsong, and leaving also a considerable estate. Shortly after the death of her first husband, she and her son and daughter, acting under the advice of relations, agreed upon a partition of the real estate. The method by which this partition was accomplished is thus stated by the witness F. L. Birdsong, a brother of her first husband:

"After they had agreed to divide the land as we had recommended, or suggested, I got the deeds (meaning the original deeds to B. R. Birdsong), put them in three parcels or bundles, and labeled one bundle to Helen N. Birdsong, one for J. L. Birdsong, and one for Sallie H. Birdsong, and wrapped a piece of paper around them and labeled them, brought them to Judge Arnold, and instructed him to write deeds deeding to each one the respective bundles as handed him."

It further appears that the original deed for the Cox place was in Helen N. Birdsong's bundle, and that by mistake the draftsman of the partition deeds included it in the conveyance to Sallie H. Birdsong.

Very soon after this partition was made, during the year 1909, and in the order now to be named, J. L. Birdsong married Miss Inge, a daughter of S. T. Inge, who was then a widower, Sallie H. Birdsong married J. T. Inge, his son, and the widow, Helen N. Birdsong, married the widower, S. T. Inge.

On the 11th of March, 1913, Helen N. Inge

executed and delivered to her husband a deed conveying to him her property, with very full powers of management and disposition, but in trust for certain purposes therein named, the chief of which were his and her support. From the date of her marriage until September, 1914, she resided with her husband in Lunenburg county, and then left him and went to the home of her brother at Waverly, in Sussex county, where she has since made her home. Soon after going there she instituted this suit.

On the 25th of September, 1914, S. T. Inge, in his own right and as trustee, executed a deed releasing and reconveying to his wife the same property which she had conveyed to him, except such as he had in the meantime disposed of as trustee. There is some question as to whether this release deed was ever legally delivered. It was, however, turned over to her counsel, and was admitted to record on November 30, 1914, along with a new trust deed, dated November 18, 1914, from Helen N. Inge to C. E. Smith, trustee. The new deed of trust conveyed to Smith, trustee, the property embraced in the release deed. The powers of the trustee under this second deed of trust were more restricted and the control of Mrs. Inge over the property better provided for than in the one previously executed to her husband.

Both the release deed and the second deed of trust were executed after the bill of complaint in this case was filed, but before appearance by the defendants; and both were assailed in a cross-bill subsequently filed by S. T. Inge.

The cause was duly matured and heard upon the pleadings and upon a volume of testimony (the further details of which, so far as essential, will hereafter appear); and the circuit court held that Helen N. Inge was insane and mentally incompetent to make the deed of March 11, 1913, to her husband; that the release deed was valid and binding; that on November 18, 1914, when Mrs. Inge executed the deed of trust to C. E. Smith, she was of sound mind; and that the Cox place had been allotted to her, and, by mistake, had been included in the deed to her daughter, Sallie H. Inge. A decree was entered accordingly whereby the first deed of trust was set aside, the release deed and the second deed of trust were declared valid and binding, and Sallie H. Inge and her husband were directed to convey the Cox place to C. E. Smith, trustee, to be held by him subject to the terms of the deed of trust under which he held the residue of the complainant's property. There were other and subordinate provisions of the decrees appealed from which need not be here recited.

This brings us to a consideration of the assignments of error, the first of which calls in question the action of the circuit court in regard to the Cox place.

The evidence fully satisfies us that the

three parties concerned in the partition, Mrs. Birdsong and her two children, deliberately and understandingly intended to divide the real estate in such a way as that Mrs. Birdsong would receive a conveyance in fee simple for the Cox place, and that it was conveyed to her daughter by mistake. This being true, it is unnecessary to speculate in regard to the reasons which may have led the two children to agree upon a partition which apparently gave their mother a higher and more valuable estate than her dower interest would have entitled her to receive. The natural presumption that in such a partition the widow would get no land in fee simple must, of course, yield to affirmative proof to the contrary. In this case there is such proof, and it is clear and convincing.

[1, 2] But it is urged that, if there was a mistake in regard to the Cox place, which would ordinarily be relievable in equity, the complainant has lost her right to such relief, by laches, acquiescence, ratification, and conduct on her part working an equitable estoppel. These several alleged bars to her suit are urged with much earnestness by counsel for the appellants, but we are of opinion that the evidence is not sufficient to sustain either of them.

The complainant learned of the mistake shortly after the partition deeds were made. A few months later she married Mr. Inge. Very soon thereafter her daughter, Mrs. S. H. Inge, offered to reconvey the Cox place to her mother, and the latter declined to have her do so, telling her to let it stay "just like it is." As to these facts there is no dispute; but the elder Mrs. Inge states emphatically and repeatedly that she did not accept the reconveyance because she did not wish her husband to have the property, and so informed her daughter, Mrs. S. H. Inge. The clear result of her testimony is that she regarded the property as her own, expected to continue to receive the rents and profits, and that, while she probably intended to allow it to remain in her daughter's name and finally to become hers, she made no agreement to that effect, and did not intend to surrender her control over it, or her right to demand a deed, if she so desired, during her lifetime. The testimony of the daughter and of the son, J. L. Birdsong, is apparently in some particulars in conflict with her testimony as to her purpose and intention in declining the reconveyance; but the conflict is more apparent than real, when it is remembered that she practically admits the statements which they ascribe to her, and that she differs from them chiefly as to what she meant. The explanation which she gives is not inconsistent with the language she used, and Mrs. S. H. Inge, who admits the mistake, has the burden of proving the acquiescence, ratification, and estoppel upon which she relies. In carrying this burden, she must do more than merely to prove ambiguous and equivocal conduct and

statements on the part of her mother. *Baugh & Sons Co. v. Black*, 120 Va. —, 90 S. E. 607; 10 R. C. L. § 150, p. 845. And it is to be observed that Mrs. S. H. Inge nowhere in her testimony denies that her mother said exactly what she claims to have said in explanation of her refusal to accept a reconveyance. One statement in the testimony of J. L. Birdsong is susceptible of an interpretation which would mean that he heard his mother say she did not want a deed for the Cox place because she wanted her daughter to have it. It is not clear whether this statement was intended to express the opinion of the witness or to quote the language of his mother. In either event he was speaking of only one conversation, and the elder Mrs. Inge is not contradicted by any witness in her statement that she told her daughter many times that she did not want the reconveyance because she did not want her husband to get the property. This may not have been a very logical reason to assign, but it is consistent with her claim to the ownership of the property.

[3] It appears that Mrs. S. H. Inge and her husband have given a deed of trust on the Cox place since Mrs. Helen Inge declined the offer of reconveyance, and it is insisted that this has placed the daughter in a worse position than she would otherwise have occupied, and that therefore the mother is now estopped from asserting her right to the land. This contention is without merit. If it be conceded that her mother said enough to lead Mrs. S. H. Inge to think she had a right to incumber the land, the evidence is clear that she was not in fact influenced or injured thereby in the least; for she states that she did not even know the deed she had signed was a deed of trust on the Cox place. In a letter to her mother, written after the suit was brought and after her attention had been called to the fact that she had united with her husband in a deed of trust on the Cox place, she expressly states that the money secured thereon was borrowed for a third party, that she and her husband are secured collaterally for the amount, and, besides, that they are able to pay off "this deed of trust and several more like it at any time." It is perfectly apparent that the deed of trust has in no way inconvenienced or embarrassed her.

[4, 5] Upon the question of laches it is only necessary to say, in addition to what has already been said, that scarcely a year elapsed after Mrs. Helen Inge learned of the mistake until she became ill and mentally incompetent to protect her interests, and remained so practically all the time until shortly before this suit was brought. This is clear from the testimony of the appellees themselves.

"From the nature of the case, no rigid rule can be laid down as to what delay will constitute laches; every suit must depend upon its own circumstances. But whenever the delay

fairly justifies the inference of acquiescence in the adverse claim, or whenever it has been of such a character as to induce other persons to alter their circumstances or conduct, so that the element of estoppel is introduced, a court of equity will commonly hold the delay to operate as an absolute bar." Merwin's Equity & Equity PL § 908.

It is clear from this general statement of the law on the subject, viewed in the light of the foregoing review of the evidence, that the complainant's case is not, in any aspect, affected by the doctrine of laches.

[8, 7] Passing now to the alleged error of the circuit court in finding that the complainant was insane on March 11, 1913, we are of opinion that the evidence abundantly supports this conclusion. The appellants say in their petition for appeal:

"The evidence is overwhelming that, with the exception of occasional intervals, the complainant was generally insane from 1910 to September, 1914."

And, this being true, it follows that the burden of proving a lucid interval on March 11, 1913, rested upon the appellants.

In the case of Fishburne v. Ferguson, 84 Va. 37, 107, 4 S. E. 575, 580, Judge Lewis, delivering the opinion of this court, said:

"Although derangement when alleged must be proved, yet if a state of general derangement be once established, and a lucid interval is claimed to have afterwards prevailed at a particular period, then the burden of proof is on the party alleging such lucid interval to show sanity and competence at the period the act was done, and to which the lucid interval refers."

The burden thus cast upon the appellants was not sustained. The husband, S. T. Inge, does testify that she was as nearly normal on March 11, 1913, as he ever saw her; but he also says that the disease, pellagra, which attacked her in 1910, "crazed her," made her "the wildest woman he ever saw," and that she did not recover her mental faculties while they continued to live together. The other evidence relied upon as tending to show her sanity when the deed was made is negligible, and the circuit court rightly found that she was not competent to make the deed to her husband.

Having reached this conclusion, it is unnecessary to consider the next assignment of error, which assails the action of the court in finding that the deed of release and reconveyance from S. T. Inge to his wife was duly delivered, and therefore valid and binding. The original deed being void, the release is immaterial.

[8] The only other question requiring our consideration is whether the court erred in holding that on November 18, 1914, when Mrs. Inge executed the deed of trust to C. E. Smith, she was mentally competent to do so. This court is of opinion that the finding of the circuit court on this question was right, and the necessary result is that all the remaining questions raised by the appellants are without merit and require no further discussion.

The testimony of members of complainant's family tends to show that she was improving in 1914, prior to the date on which she left her husband and went to the home of her brother. The physicians who examined her after she came to Waverly considered her competent to transact business and so testified. Her own testimony, given in this suit some time after she had made the deed to Smith, while indicating some eccentricity, tends strongly to show that she fully understood the transaction.

[9] Aside, perhaps, from the question as to the Cox place, the real controversy here is as to the person who shall act as trustee. All parties concede that it is best for Mrs. Inge to have her estate in the hands of a trustee. Her husband insists that he is glad to be relieved of the trust, and she herself has selected a man who is shown to be competent and trustworthy. The appellants object to her selection and prefer some member of her family, one or more of whom would be willing to act, and, unlike Mr. Smith, to do so without compensation. This is a natural preference on their part, and it seems unfortunate that Mrs. Inge does not take the same view of the matter, but in declining to conform to their wish in this respect she is certainly within her legal rights.

There is no error in the decrees complained of, and they are affirmed.

Affirmed.

(120 Va. 233)

BROWN v. FORD et al.*

(Supreme Court of Appeals of Virginia.
Jan. 11, 1917.)

1. TRUSTS §151(3) — JURISDICTION — LIEN — TRUST ESTATE.

A court of equity, which had in three suits undertaken the entire control of a trust estate and in a fourth suit had undertaken to partition realty and distribute the personalty, has primary jurisdiction of a claim by a third party for an equitable lien on such estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 197; Dec. Dig. §151(3).]

2. TRUSTS §147(2)—EQUITABLE LIEN—CREATION—EXPRESS AGREEMENT.

An express executory agreement by a beneficiary to make the whole corpus of an estate security for a debt creates an equitable lien on the beneficiary's interest in that estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. §147(2).]

3. TRUSTS §147(2)—EQUITABLE LIEN—EXPRESS LIEN—CONTINGENT ESTATE.

The fact that the interest of a beneficiary who agreed to give a lien on the estate was contingent does not defeat the lien, but it will attach when the beneficiary's interest becomes vested.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. §147(2).]

4. TRUSTS §151(3) — JURISDICTION — LIEN — TRUST ESTATE.

Where one share of a trust estate, on the death of the contingent beneficiary before the life tenant, was by a compromise agreement between all parties vested in a claimant charged with the payment of the debts of the contingent

holder, the court in the consent decree reserving the right to determine such debts, that court had jurisdiction as against that claimant over a claim for an equitable lien against the original estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 197; Dec. Dig. ¶151(3).]

5. EQUITY ¶39(2)—JURISDICTION—INCIDENTAL RELIEF.

A court of equity, which has acquired jurisdiction to enforce a claim for an equitable lien, can retain such jurisdiction to give legal relief, such as a personal decree for the payment of money as damages for breach of contract.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-109, 114; Dec. Dig. ¶39(2).]

6. LIMITATION OF ACTIONS ¶46(6)—ACCRUAL OF RIGHT OF ACTION — BREACH OF CONTRACT.

The personal liability on an agreement between a contingent beneficiary of a trust estate to have a claim made a lien on the corpus of the estate does not arise until the death of the life tenant, since not until then could the beneficiaries have given such lien by their personal action without the court's approval, and the statute of limitations does not begin to run against the action for the breach of such agreement until the death of the life tenant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 245; Dec. Dig. ¶46(6).]

7. TRUSTS ¶151(3) — CLAIM AGAINST ESTATE—CONTINGENT PROMISE.

The claimant of an equitable lien created by the express promise of the contingent beneficiaries to make the claim a lien on the estate is not barred by laches for failing to prosecute his claim before the death of the life tenant five years after the agreement, where the delay was caused by the fault of the beneficiaries in not presenting the claim to the court as they agreed, nor is the legal claim against the beneficiaries for breach of such agreement barred.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 197; Dec. Dig. ¶151(3).]

8. TRUSTS ¶147(2)—JOINT CONTRACT—BENEFICIARIES OF TRUST ESTATE.

An express written agreement of three of the four beneficiaries of a trust estate to have a claim made a lien against the estate is a joint contract.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 192; Dec. Dig. ¶147(2).]

Appeal from Chancery Court of Richmond.

Claim by J. Henry Brown against Stewart H. Ford and others, filed in four separate chancery suits relating to the estate of A. J. Ford. From a decree denying relief prayed for, for want of equity, claimant appeals. Reversed and remanded.

Scott & Buchanan, of Richmond, for appellant. A. B. Dickinson, Abner O. Goode, and W. P. De Saussure, all of Richmond, for appellees.

SIMS, J. The decree of the chancery court complained of was entered on July 2, 1915, in four chancery causes pending therein of short styles: (1) Mary Lucy Ford, Who Sues, etc., v. A. J. Ford et al.; (2) Stewart H. Ford et al. v. A. J. Ford, Trustee, et al.; (3) Estelle Madeline Ford, Who Sues, etc., v. Charles Thompson Herndon et al.; and (4) Mary Lee Benet v. Florence B. Quincey

et al.—on the petition of appellant, J. Henry Brown, filed therein on November 14, 1910, on two reports of Commissioner Sheld, one filed June 27, 1912, and the other July 10, 1914, and on the exceptions of Stewart H. Ford and said Herndon to the second of such reports. The material part of that decree was as follows:

"* * * The court being of opinion that the claims of J. Henry Brown asserted in his said petition and reported on in the two above referred to reports of Commissioner Sheld is without equity in the premises, the exception to the report, that the same is without equity, is sustained; and it is adjudged, ordered, and decreed that the said petition be and the same is dismissed, but without prejudice to the right of J. Henry Brown to assert the claim at law"

—followed by a provision decreeing costs against the latter.

There are two assignments of error, namely, that the court below erred:

"(1) In entering the decree aforesaid, dismissing the petition of your petitioner on the above-mentioned exception to the commissioner's report.

"(2) In not entering a decree overruling the exceptions thereto and directing payment of the amounts found to be due to your petitioner by the parties above mentioned, and in default of their so doing directing their payment out of the funds in its charge."

The reports of Commissioner Sheld were made under the following decrees of reference entered in said four causes:

The first of such reports was made under decree of reference entered on February 1, 1912, the substance of which was as follows:

"It appearing to the court that the interests of Mary Lee Benet and Charles Thompson Herndon in the Ford trust estate are incumbered of record, it is adjudged, ordered, and decreed that these causes be referred to one of the commissioners in chancery of this court, who will as soon as possible report to the court the lien debts due by said Mary Lee Benet and Charles Thompson Herndon, or against their interests in the Ford trust estate, in order of their dignity and priority, respectively, and the parties primarily liable, together with any other matters deemed pertinent by the commissioner, or required to be specifically stated by the parties, or any of them. * * *"

The second of such reports was made under decree of reference entered on June 2, 1913, which so far as it related to the claim of appellant recommitted said first report with direction to further inquire and report:

"(1) Whether the debt asserted by said J. Henry Brown in his petition filed herein is payable by any party to this cause, and, if so, by whom and the amount so payable?

"(2) Whether the said claim, or any part thereof, is payable out of any of the funds under the control of this court in this cause, and, if so, what?"

In his second report, which is a very able and exhaustive one, and by which this court is greatly assisted in its consideration of this case, Commissioner Sheld reported, in effect, that appellant had an equitable lien on certain interests in or portions of the said "Ford trust estate," as follows:

Item 1. On the interests of Stewart H.

Ford, Charles Thompson Herndon, and Mrs. Mary Lee Benet in such estate for the amount of \$1,263.50, under the first contract made with appellant, hereinafter more particularly referred to.

Item 2. On the interests of Stewart H. Ford and Mrs. Benet in such estate for the amount of \$1,004.00, under the second contract made with appellant, hereinafter more particularly referred to.

Item 3. That as to the other items of his debt, amounting to \$291.50, appellant had no lien on any portion of said estate, but that Stewart H. Ford and Mrs. Benet were personally liable to him therefor.

The exceptions to said report by Stewart H. Ford and Charles Thompson Herndon, above referred to, were as follows:

"(1) That said commissioner erred in reporting that a court of equity has, or ever had, jurisdiction of the claim asserted by the petitioner, J. Henry Brown, and should have reported that a court of equity is without jurisdiction of said claim.

"(2) Said commissioner erred in holding that the pleadings are broad enough to include a claim for personal liability against S. H. Ford, when he should have reported that a claim for such personal liability was not within the pleadings.

"(3) Said commissioner erred in holding that there was or is any personal liability on either of the Ford children for petitioner's claim, and should have reported that no such liability existed.

"(4) Said commissioner erred in reporting that any personal liability now exists on said Stewart H. Ford, but should have reported that the liability against him, if any existed, has been fully discharged.

"(5) Said commissioner erred in reporting that the claim asserted by the said petitioner was or is an equitable lien upon the interests of the Ford children, or any of them, and should have reported that said claim was not a lien upon the interests of any of them.

"(6) Said commissioner erred in holding that the alleged promise of Stewart H. Ford to pay the debt of the Ford trust estate was not within the statute of parol agreements, and erred in holding that the paper signed by Stewart H. Ford exhibited in evidence was a sufficient memorandum within the requirements of that statute, and should have reported that said alleged promise was within that statute, and said paper was not sufficient to meet its requirements.

"(7) Said commissioner erred in reporting that said contract set up by petitioner was an entire contract, and should have reported that it was a several (severable) contract, and that such portion thereof as was completed in 1903 was barred by the statute of limitations.

"(8) That said commissioner erred in applying the payment made by Stewart H. Ford in part in the extinguishment of the alleged liability of Mary Lee Benet, when the whole of said payment should have been applied in the discharge of the alleged liability of said Stewart H. Ford.

"(9) Said commissioner erred in making and reporting in the enforcement of a new and different contract from that made by the parties, when he should have reported that the rights of the parties and their liabilities were fixed by the contract as made."

There were two additional exceptions by Stewart H. Ford, in which Mrs. Benet did not join, which were as follows:

"(10) Said commissioner erred in accepting the statement of the petitioner, positively denied by

this exceptant, as to the assumption of personal liability for the whole debt, thus ignoring the required burden of proof, and should have reported that said alleged statement and assumption was not sustained by the proof.

"(11) Said commissioner erred in holding S. H. Ford liable to the extent mentioned in said report, when he has already turned over to petitioner \$1,200, and should have reported that said sum was a full discharge of his alleged liability."

The petition asserted a debt and an equitable lien as security for the payment of such debt against the corpus of "the Ford estate," to the amount of \$2,559 principal, with interest thereon, for certain material furnished and work done by appellant in and about the Ford family section and A. J. Ford vault in Hollywood cemetery, under contracts or agreements therefor made at different times between appellant and certain of the Ford children entitled in remainder to the corpus of the said estate after the life estate of their mother, Mary Lucy Ford, therein, contingent upon their respectively surviving their said mother.

Of the allegations of this petition it is deemed sufficient to say that it sufficiently alleged in effect:

[1] An express executory agreement, made before the material was furnished or work was commenced contracted for thereby, in March, 1903, between appellant, on the one part, and Stewart H. Ford, B. W. Ford, and Mrs. Mary Lee Benet, on the other part (three of the four Ford children who would be entitled to the whole corpus of said estate in the event they survived their said mother) to make the corpus of said estate a security for "Item 1" of \$1,263.50, above mentioned in connection with reference to Commissioner Shield's second report.

The interests of the Ford children in said estate was then contingent, as aforesaid, and not vested.

(2) An express executory agreement made, before the material was furnished or work was commenced contracted for thereby, in 1908, between appellant, on the one part, and Stewart H. Ford and Mrs. Benet, on the other part (B. W. Ford having meanwhile died), to make the corpus of said estate a security for "Item 2," of \$1,004, above mentioned.

The interests of one-fourth each of three of said Ford children, to wit, Stewart H. Ford, Mrs. Benet, and Mrs. Florence B. Quincey in said estate, being then vested, they having survived their said mother, who died in 1908, prior to this second contract with appellant, of the interest of one-fourth in said estate which would have belonged to B. W. Ford, had he survived his mother, a portion was in 1910 vested in Charles Thompson Herndon under a compromise agreement by the terms of which the latter took such portion of such interest in the estate, by his "consent" and the consent of the other parties to such agreement, "charged" with the payment of "the debts and liabilities of" said B. W. Ford;

and by like *consent* there was embodied in a decree of said chancery court, entered April 10, 1910, in the above-mentioned four causes, the following provisions, among others, to wit:

"And the court will hereafter by proper decrees make provision for the settlement with or satisfaction of any other creditors of B. Wellford Ford, deceased, if any there be, who shall establish a valid claim against the one-fourth interest in said trust estate involved in this clause of this decree" (being the interest which would have belonged to B. W. Ford had he survived his mother), "other than those specified in this decree out of the amount payable to the said Charles Thompson Herndon under this clause of this decree."

(3) Express executory agreements, made before the material was furnished or work commenced, contracted for thereby, following the agreement last mentioned, between appellant, on the one part, and Stewart H. Ford and Mrs. Benet, on the other part, to make the corpus of said estate a security for "Item 3," of \$291.50, above mentioned.

The petition further alleges that, in consideration of and relying upon the aforesaid agreements, appellant proceeded to and did furnish the material and do the work thus contracted for in accordance with such agreements. A bill or account rendered by appellant against the "Ford trust estate," covering all of said items, was filed with the petition.

The prayer of the petition contains the following:

"* * * That petitioner may be paid the full amount of his bill, with interest, for work done and material furnished as herein shown; that an order may be entered herein establishing and fixing his said debt and interest as a debt and lien against the Ford trust estate and all the property involved and described in these causes; * * * and that such other relief may be granted to petitioner as may be right and proper and as the nature of his case may require."

There was proper personal service of process to answer the petition upon Stewart H. Ford and said Herndon, and also upon the execution of Mrs. Florence B. Quincey and upon her son, Clarence E. Quincey, Jr. They did not demur, plead to, or answer the petition. It was taken for confessed as to them.

The appellant, however, not relying upon this condition of the pleadings, introduced evidence before the commissioner; and there was rebuttal evidence introduced in behalf of said exceptants Stewart H. Ford and said Herndon.

As to the allegations of the petition stated in paragraphs 1, 2, and 3 next above, however, there is no conflict in the evidence, and such allegations are sustained by the proof, in addition to being taken for confessed as aforesaid. It is true that the testimony of appellant is not express: that there was an agreement by Stewart H. Ford and Mrs. Benet to make the corpus of the said estate a security for "Item 3" of \$291.50 above mentioned; but he testifies that this work was contracted to be done as additions to the

work under contracts covering "Item 1" and "Item 2," and his testimony stresses the fact that there were personal obligations in writing by Stewart H. Ford and Mrs. Benet for \$200 of such \$291.50 item; and Commissioner Sheild reported, as above stated, that there was no lien for such \$291.50 item, but only the personal obligations of the two last-named parties therefor. The testimony of Stewart H. Ford, however, examined as a witness for appellant when he gave his first deposition, is to the effect, indeed, that the allegations of the petition stated in paragraph 3, as well as in paragraphs 1 and 2 next above, are correct. He testified that he had gone over the entire account of appellant filed with the bill, that all the work was properly done, the charges therefor correct, and that appellant had been employed to furnish the material and do the work, with the intention to make the Ford estate security and liable therefor. And it seems to us from the whole proof clear that all of the work done and material furnished by appellant was for "the Ford estate," and that there were express executory agreements by Stewart H. Ford, B. W. Ford, and Mrs. Benet by the first contract, and Stewart H. Ford and Mrs. Benet by the subsequent contracts, to make the corpus of such estate a security for the payment of all of it; this being the primary intention of all the contracting parties.

The proof fails to sustain the allegations of the petition that Mrs. Quincey authorized her interest in the Ford estate to be bound for any of debt to appellant.

The only contention of Stewart H. Ford in his depositions given in the case, contrary to the claims of appellant, is that the former denies ever having made any express promise to be personally bound for "Item 1" and "Item 2" above referred to, of appellant's debt, claiming that his agreements were confined to the undertaking that appellant should have a lien on the Ford estate therefor. The petition, in addition to the allegations above summarized, also contained the allegations of such express personal promise on the part of Stewart H. Ford, and also of Mrs. Benet and of B. W. Ford as to "Item 1" aforesaid; but reference thereto is left out of consideration, as is also the fact that appellant testifies that such personal promises were made and the conflict thereby produced between the testimony of appellant and Stewart H. Ford on this point is also left out of consideration, because, in the view we take of this case, hereinafter more particularly set forth, whether such express personal promise existed or not is immaterial.

It will be observed that appellant's petition was not filed in said causes until November 14, 1910, and the decree complained of was not entered until July 2, 1915, long after said contracts or agreements with appellant were made. It seems that prior to the entry of such decree, just as of what date the rec-

ord does not show, and after the death of Mrs. Ford in 1908, as it would seem, although this does not clearly appear from the record, Mrs. Florence B. Quincey received and withdrew from said suits her entire one-fourth interest in said estate, and Mrs. Benet or her lien creditors did the same as to her one-fourth interest, thus leaving no part of their one-half of said estate under the control of the court upon which any lien in favor of appellant could be enforced. The evidence, however, is clear that the delay in bringing the said agreements with appellant to the attention of the court below was not the fault of appellant, but of the said parties who made such agreement with him, who expressly undertook, in effect, to bring those matters to the attention of the court and obtain such action of the court as might be necessary to perfect the lien in favor of appellant aforesaid agreed to be made as aforesaid. It is also clear from the evidence that, if said parties had lived up to their agreements with appellant, a lien would have been fixed and established on the whole corpus of said estate, certainly when the interests in remainder therein became vested on the death of Mrs. Ford in 1908.

It seems that there are funds still under the control of the court below belonging to Stewart H. Ford from his one-fourth interest in said estate, and to said Herndon, upon which such portion of any lien in favor of appellant as may be held as having attached thereto could be enforced, and out of which any lien thereon created by any personal decree against the two latter parties may be enforced.

In this situation of the pleadings, proof, and funds under the control of the court below, the following questions arise for our determination, which will be considered in the order stated below, with supplementary statements of fact shown by the record especially applicable thereto:

[1] First. Did the court of equity below have jurisdiction of the claim of J. Henry Brown asserted by his said petition?

We are of opinion that such court did have such jurisdiction.

The court had, in the three chancery causes first above named, taken jurisdiction of the management and control of the whole corpus of said estate, and in the last-named or fourth of such causes had taken jurisdiction to partition the real estate and distribute the personalty of "the Ford estate."

(a) As to Stewart H. Ford such court had unquestionable primary jurisdiction as a court of equity of the claim of appellant against him, to the extent that such claim was an equitable lien on his interest in said estate under the control of the court. This position is not controverted by him or his counsel as we understand it.

The case of *Stevens v. McCormick*, 90 Va. 735, 19 S. E. 742, cited by counsel for except-

ants, does not decide that in a partition suit a lien creditor may not invoke the jurisdiction of a court of equity by petition therein (which the statute indeed then as now expressly provides may be done), but merely that it was not incumbent on the plaintiffs in a partition suit to make creditors parties.

[2] The express executory agreement aforesaid on the part of Stewart H. Ford to make the whole corpus of the Ford estate a security for the whole debt to appellant operated to create, and had the effect that it did create, an equitable lien on his one-fourth interest in such estate.

As stated by 2 Pomeroy's Equity (2d Ed.) § 1235:

"The doctrine may be stated in its most general form that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described and identified, a security for a debt or other obligation * * * creates an equitable lien upon the property so indicated, which is enforceable against the property. * * * Under like circumstances a mere verbal agreement may create a similar lien upon personal property."

"Whatever the form of the contract may be, if it is intended thereby to create a security, it is an equitable mortgage, enforced upon the principle that equity will treat that as done which, by agreement, is to be done." *Dulaney v. Willis*, 95 Va. 608, 29 S. E. 324, 64 Am. St. Rep. 815.

The first contract or agreement with appellant was in writing, the second verbal, the third and fourth in part in writing, and the fifth in part in writing from Mrs. Benet, and ratified verbally by Stewart H. Ford. However, no issue is made before us with respect to the Ford estate being real or personal estate; hence we may treat as immaterial, so far as the existence of an equitable lien is concerned, any question of whether the agreements mentioned were verbal or in writing.

[3] That the interest of Stewart H. Ford was not vested, but contingent upon his surviving his mother, when the first agreement with appellant was made, is also immaterial. When the contingent interest became vested upon the death of his mother in 1908, the equitable lien attached thereto in favor of appellant.

As laid down in the same authority last above quoted (3 Pomeroy's Eq. [2d Ed.] § 1291):

"According to the general doctrine of equity, established beyond any doubt by the highest authorities, the * * * equitable lien upon property to be acquired in the future is valid and enforceable. * * *"

(b) As to Mrs. Benet and Mrs. Quincey, for the reasons stated above (the petition being taken for confessed as to them also) the appellant had at one time, in accordance with the allegations of the petition, an equitable lien on their one-half interest in said estate as security for his debt, which was lost by the failure of Stewart H. Ford, B. W. Ford, and Mrs. Benet to comply with their first contract with appellant, and by the same

breach of their second, third, fourth, and fifth contracts with appellant by Stewart H. Ford and Mrs. Benet; so that the court had unquestionable primary jurisdiction as a court of equity of the claim of appellant against Mrs. Benet and Mrs. Quincey, in so far as he asserted by his petition an equitable lien against their said interests in said estate.

[4] (c) As to said Herndon, by his *consent*, as above stated, and in accordance with the decree of court of April 10, 1910, above referred to, the court below had, as a court of equity, unquestionable primary jurisdiction of the claim of appellant asserted in his petition as a debt and liability of B. W. Ford against the fund under the control of the court belonging to said Herndon "charged" with the payment of "the debts and liabilities" of B. W. Ford.

As it follows from what we have said that the decree complained of was erroneous, and hence further decree will be necessary, we have to consider and pass upon the following further questions, in their order as stated below, namely:

[5] Second. The court below having jurisdiction of the case in the exercise of its primary jurisdiction as a court of equity, should it have gone on under the prayer of said petition for general relief to give appellant complete relief in accordance with his rights arising from the allegations of fact in his petition, even to the extent of enforcing all valid and subsisting legal demands?

We think the court below should have given this complete relief.

The jurisdiction of a court of equity, having once acquired jurisdiction of a cause on equitable grounds, to go on to grant complete relief, even to the extent of establishing legal rights and enforcing legal remedies, such as rendering personal decrees for money, damages for breach of contract, etc., is well settled in Virginia by a long line of decisions. See *Chichester v. Vass*, 1 Munf. (15 Va.) 98, 4 Am. Dec. 531; *Grubb v. Starkey*, 90 Va. 831, 20 S. E. 784; *Beecher v. Lewis*, etc., 84 Va. 630, 6 S. E. 367; *Walters v. Farmers' Bank*, 76 Va. 12; *McArthur v. Chase*, 13 Grat. (54 Va.) 680; *Steans v. Beckham*, 3 Grat. (72 Va.) 379; *Johnson v. Bunn*, etc., 108 Va. 490, 62 S. E. 341, 19 L. R. A. (N. S.) 1064; and other cases too numerous to cite.

The authorities cited by counsel for said exceptants on this point of *Linkous v. Stevens*, 116 Va. 898, 83 S. E. 417, *Black on Judgments*, pp. 907, 908, *Newberry v. Dutton*, 114 Va. 102, 75 S. E. 785, *Green v. Spaulding*, 76 Va. 411, *Sweeney v. Foster*, 112 Va. 499, 503, 71 S. E. 548, *Spangler v. Ashwell*, 114 Va. 325, 328, 76 S. E. 281, and *Branham v. Artrip*, 115 Va. 314, 79 S. E. 390, are not in conflict with this rule, and are not applicable to the case before us.

Third. Was the legal claim of appellant against Stewart H. Ford beyond the equitable lien on the interest of the latter in the Ford estate, a subsisting demand?

As to this counsel for exceptants take the position in their briefs that:

(a) All of the said \$1,263.50 portion of appellant's debt under the first contract is barred by the three or even five year bar of the statute of limitations, except \$200 thereof, because \$1,063.50 amount of such work was completed in 1903, more than five years before the institution of suit by said petition; exceptants claiming that, after doing such \$1,063.50 part of the first contract work, appellant abandoned work under such contract, and did not commence again until he was given the second contract.

(b) The whole of appellant's debt is barred by his laches in not sooner instituting his suit.

[6] As to position (a):

The personal liability of Stewart H. Ford to appellant—and the same is true as to Mrs. Benet, and as to B. W. Ford to the extent of his undertaking under the first contract—did not arise until there was a failure to give a lien on the corpus of the Ford estate as promised. This could not have been done by the individuals who contracted to give it, by their personal action, until the contingent interests in remainder became vested, namely, until after the death of Mrs. Ford in 1908. Until then the perfection of the lien promised was within the discretion of the court. Afterwards it was within the power of the promisors, Stewart H. Ford and Mrs. Benet, and of said Herndon, who took his share of B. W. Ford's interest cum onere as aforesaid, without depending upon court approval, to comply with said promise. Therefore the statute did not begin to run upon the completion of said portion of work, etc., done in 1903, but upon the failure to give the lien as promised, which did not occur until after the death of Mrs. Ford in 1908. See 25 Cyc. p. 1068, par. 4; 3 Page on Contracts, § 1656. This was less than three years before the petition was filed. Therefore the statute of limitations bars no part of the appellant's debt—aside from any consideration of the fact that the contract for part of the work, etc., was in writing, so that the five-year statute of limitation applied; and apart from considering whether the contract of 1903 was an entire contract, or was severable as to the items of work done, etc., under it.

[7] As to position (b):

As to the assertion of claim of said equitable lien: According to the uncontradicted evidence in the case, the delay in presenting the claim of appellant to the court was not the fault of the latter, but of Stewart H. Ford, Mrs. Benet, and B. W. Ford, and said Herndon stands in the shoes of the latter with respect to this question, having taken what the latter did of the Ford estate cum onere as aforesaid.

As to the assertion by appellant of said legal liability to him, the right to assert such liability did not arise until the failure to

give the promised lien on the Ford estate occurred, which was not until after the death of Mrs. Ford in 1908, as above stated.

Hence we do not think the doctrine of laches applies in the case before us, or can be invoked against appellant by exceptants.

[8] Fourth. Was the legal liability of B. W. Ford, Stewart H. Ford, and Mrs. Benet joint or several?

As we have stated, such liability arose from the express promises to make the entire corpus of the Ford estate a security for appellant's debt and their breach of such promise. This promise of B. W. Ford was confined to the debt which arose under the first contract. It was a contract, along with Stewart H. Ford and Mrs. Benet, of the one part, with appellant, of the other part, to the extent of \$1,263.50 of appellant's said debt, and was clearly, we think, a joint contract.

The remaining promises of Stewart H. Ford and Mrs. Benet with respect to providing such security was clearly, we think, a joint contract, and covered the remainder of appellant's debt of \$1,004 under the 1908 contract, and \$291.50 under the subsequent contracts.

Fifth. But one other matter remains to be noticed. On August 5, 1911, Stewart H. Ford paid to appellant the sum of \$1,200 "as approximately one third" of appellant's bill, "principal and interest," which Ford directed to be applied, and which appellant in fact applied, to the items of the bill or account of latter filed with his petition arising under the contracts subsequent to that of 1903. The result of this application of this payment is as follows:

1. \$1,263.50, with interest thereon from December 1, 1908, until paid, was left due and unpaid to appellant under said first contract by Stewart H. Ford, Mrs. Benet, and C. T. Herndon, for one-third of which there is a lien on the interest belonging to Stewart H. Ford under the control of the said court below, a like lien for one-third thereof on the interest of C. T. Herndon in such fund belonging to him, and a joint personal obligation for the remainder upon Stewart H. Ford and Mrs. Mary Lee Benet, decree for which will create a further lien on said Stewart H. Ford fund under control of court, and to the benefit of such decree against Mrs. Benet the said Stewart H. Ford will be entitled to be subrogated, if the lien thereof is enforced against such fund belonging to him.

2. \$292.17, with interest thereon from August 5, 1911, until paid, was left due and unpaid to appellant under the other contracts aforesaid by Stewart H. Ford and Mrs. Benet, for one-half of which there is a lien on the interest belonging to Stewart H. Ford under the control of the said court below, and a joint personal obligation of the latter and Mrs. Benet for the remainder thereof, decree

for which will create a further lien on said Stewart H. Ford fund under control of court, to the benefit of which decree he will be entitled to be subrogated against Mrs. Benet, if the lien thereof is enforced against such fund belonging to him, and with right in said Stewart H. Ford, should he so desire and be so advised, to have a personal decree over against the said Mrs. Benet for one-half of said \$1,200 paid as aforesaid by him, to wit, for \$600, with interest from August 5, 1911, until paid.

The foregoing statement under said "Fifth" heading of this opinion is worked out upon the assumption that no funds belonging to Mrs. Benet remain under the control of the court below. This seems to be the fact from the record, but it does not clearly appear. In view of the possibility of error in this matter in the condition of the record before us, this court will not enter in its decree any provisions for the payment of appellant's debt, but will remand the cause to the court below for further decree by it, as presently to be stated.

For the foregoing reasons, the decree complained of must be reversed and set aside, and these causes will be remanded to the said court below for further decree therein to be entered not in conflict with this opinion. Reversed.

(120 Va. 339)

JOHNSON v. BUTTON, Ins. Com'r, et al.
(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. INSURANCE ⚡84(2)—COMPENSATION OF AGENTS—INSOLVENCY OF COMPANY.

An insurance agent cannot be required to return part of his commissions, where the insurer becomes insolvent, requiring return of part of the premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 111; Dec. Dig. ⚡84(2).]

2. INSURANCE ⚡43—RETURN OF PREMIUM—INSOLVENCY OF COMPANY.

Insolvency of insurer entitles policy holders to return premiums on the "pro rata," instead of the "short rate," basis.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 51-53; Dec. Dig. ⚡43.]

3. INSURANCE ⚡44—FOREIGN COMPANIES—ANCILLARY PROCEEDINGS ON INSOLVENCY.

It is proper, in ancillary proceedings in respect to an insolvent foreign insurance company, to decree that premiums collected by the receiver from subagents be turned over to the general agent, instead of directing settlement therein between such agent and the subagents and the company, or that it be held to await a settlement between all parties; the general agent being liable to the company for premiums, and being under sufficient bond.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 54; Dec. Dig. ⚡44.]

4. INSURANCE ⚡44—ACCOUNTING BY AGENT—INSOLVENT FOREIGN COMPANY.

The proper place for a settlement by the general agent for two states of an insolvent insurance company of another state is in the suit in that state for general liquidation of the com-

pany's business, and not in an ancillary proceeding in one of the other two states.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 54; Dec. Dig. 44.]

5. INSURANCE 43.

The agent of an insurance company to whom, when it became insolvent, policy holders assigned their policies, has the same rights as to return of premiums, including liens on securities with the state treasurer, as other policy holders.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 51-53; Dec. Dig. 43.]

Appeal from Circuit Court of City of Richmond.

Ancillary proceeding by Joseph Button, Commissioner of Insurance, and others, against the American Union Fire Insurance Company, a foreign insolvent company. From the decree, Charles Johnson, general receiver of the company, appeals; cross-error being assigned. Amended and affirmed.

Kelley & Coulbourn, of Richmond, for appellant. John B. Minor, of Richmond, and J. Winston Read, of Newport News, for appellees.

WHITTLE, J. The American Union Fire Insurance Company, a Pennsylvania corporation, having complied with the statutory requirements, including the deposit of \$25,000 of securities with the treasurer of the commonwealth, was licensed to engage in the business of fire insurance in this state. To that end, on May 1, 1911, it appointed Sol Miller general agent for Virginia, which agency was subsequently extended so as to embrace the territory of West Virginia and include the business of the Monongahela Underwriters' Agency.

In March, 1913, the state of Pennsylvania, in a proceeding at the relation of its insurance commissioner, procured a decree from the court of common pleas of Dauphin county, in that state, determining the insolvency of the insurance company, and ordering its dissolution and liquidation of its business by the State Insurance Commissioner. By its terms the decree became effective March 27, 1913. On March 12, 1913, the commonwealth of Virginia at the relation of Joseph Button, Commissioner of Insurance, filed an ancillary petition in the circuit court of the city of Richmond against the company, alleging its insolvency and reciting the receivership proceedings against it in the Pennsylvania court. The petition also charged that there were unadjusted and unsettled demands against the company for fire losses sustained by policy holders in this state, and prayed that it be required to show cause why the Commissioner of Insurance should not take possession of its assets therein and distribute the proceeds among those ascertained to be entitled thereto. A creditors' bill was likewise filed in the circuit court against the company, which prayed for similar relief;

and the two proceedings were heard together.

The compensation of Miller was fixed by written contract at 35 per cent. commissions upon all policies written by him and his subagents in this state. Miller filed his petition in the proceedings, in which, advertising to the Pennsylvania receivership, he alleged that:

He "was advised that the appointment of said receiver ipso facto canceled all the policies of said companies then outstanding; but in addition that he had been instructed by the proper officers of said receivership to discontinue writing business for said companies, and advised that all policies should be canceled. Thereupon petitioner and his subagents took the necessary steps to cancel said policies, and return the proper proportion of the premiums to policy holders."

The company made no answer to this petition by demurrer or other pleading, and the court directed a reference to one of its commissioners in chancery to inquire into the various matters involved in the subsidiary litigation.

With respect to the main contention of the general receiver, that the Virginia agents should be required to pay back unearned commissions on policies canceled at the time of the receivership, the commissioner made the following finding: That, after the receivership, these agents, in order to protect their policy holders, issued new policies in other companies for the unexpired terms of the old policies, which latter, in consideration of the new policies, were surrendered to the agents. The agents filed the old policies of which they held assignments and claimed the return premiums for the unexpired terms. And the commissioner was of opinion that they occupied the same position that the policy holders would have occupied if they had filed their policies direct; that the agents had performed their full duty to the companies in issuing policies, collecting premiums, and delivering the policies to the insured, and that the failure of the companies was through no fault of theirs; and that their only reason for appearing in this litigation was to file their claims for unearned premiums on the policies held by them as assignees.

The commissioner's findings upon the principal questions referred to him were adverse to the company, and the general receiver appealed from a decree confirming his report.

[1, 2] The contention of appellant with respect to the agents' compensation is that, inasmuch as their commissions were based upon "net premiums," all claims for "return premiums" should be charged with their proportionate part of the commissions; and furthermore that, as the policies had not been canceled by the company, return premiums should be computed upon what is known as the "short rate" basis. The op-

posing theory of the agents conformed to the findings of the commissioner as approved by the circuit court.

The affidavits of representative agents of a number of fire insurance companies show that it is the custom and usage with such companies to construe the term "net premiums," in contracts similar to the one in question, to mean that the general or local agent of the company should return the proper proportion of all premiums which had either been canceled by the insured, or by the company while a going concern, without any neglect or default on the part of such company; but that where the company had been placed in the hands of a receiver, and its policies canceled without fault on the part of the agent, no obligation rested on such agent to return any part of the commissions received by him on premiums on policies so canceled.

In 22 Cyc. 1440, the general rule is thus stated:

"The rights of an agent to compensation as to canceled policies must be determined according to the contract, express or implied, under which he is employed, and it may be competent to show the course of dealing between him and the company in order to fix his compensation. He is generally entitled to commissions on the whole premium paid, and cannot be limited to the portion earned up to the time of cancellation"—citing *Insurance Com. v. People's Fire Ins. Co.*, 68 N. H. 51, 44 Atl. 82; *Garfield v. Rutland Ins. Co.*, 69 Vt. 549, 38 Atl. 235; *Am. Steam Boiler Ins. Co. v. Anderson*, 6 N. Y. Supp. 507.

And in 22 Cyc. p. 1404, it is said:

"The insolvency of an insurance company constitutes a breach of contract on its part, and on dissolution of the company claims of policy holders are debts due in present. * * * A company cannot recover premiums for the portion of the term of insurance after insolvency has taken place. Nor can it maintain an action against an agent for the recovery of premiums received by him, the consideration for which has thus failed. The insolvency of the company being a breach of its contract as to an existing policy holder, the latter is entitled to recover the portion of the premium paid which is unearned at the time of the insolvency, and this is so even though there is no provision for refunding premiums paid."

These authorities hold that insolvency of the company ipso facto cancels its outstanding policies and entitles policy holders to "return premiums" upon the "pro rata" instead of upon the "short rate" basis, as contended by appellant.

The case of *Hay v. Union Fire Ins. Co.*, and the *Monongahela Underwriters' Agency*, etc., 167 N. C. 82, 83 S. E. 242, involved the same question with the same companies touching the effect of their insolvency upon the North Carolina business, and therefore is directly in point. The facts in the two cases are identical, and, upon a review of the authorities, the court holds:

"Where, a fire company, after writing numerous policies, became insolvent, it could not demand a return of a proportionate part of the commissions paid the agents, there being no custom requiring such return of commissions as in case of surrender, and the company not being entitled to profit by its own default; hence no

such deduction could be made from claims of policy holders for unearned premiums assigned to the agents."

The agent's claim to commissions rests upon the conclusive ground that he has fully complied with the terms of his employment, and the transaction fails of accomplishment from no fault of his, but from the insolvency of the company. See the well-reasoned case of *Currier v. Mut. Reserve Fund Life Ass'n*, 108 Fed. 787, 47 C. O. A. (5th Cir.) 651, citing 4 Am. & Eng. Enc. Law (2d Ed.) 972; *Story on Agency*, § 329; *Mechem on Agency*, §§ 611, 612; 16 Am. & Eng. Enc. Law (2d Ed.) 911; *Kock v. Emmerling*, 22 How. 69, 16 L. Ed. 292.

An examination of the authorities relied on by appellant shows that some of them are to be distinguished from this case upon the facts, and that others have been overruled by subsequent decisions.

Upon the main question, it seems to us that the better reason and weight of authority are on the side of appellees.

[3] The second assignment of error involves the action of the circuit court in decreeing that \$911.31, collected by Receiver Johnson from subagents be turned over to the general agent Miller, instead of being held to await a settlement between all parties; and also declining to direct settlements in this proceeding, without consent of parties, between Miller and his subagents, and between him and the companies.

We find no error in this ruling. Miller had the appointment of the subagents, and was personally liable to the companies for any balances that might be due from subagents within his territory, and was under bond in the penalty of \$5,000 for the faithful performance of his contract. There is no suggestion of insolvency or inadequacy of the security given by Miller to meet any possible balance that might be ascertained to be due from him to his principal. The fund in question forms no part of the assets of the company, but is the property of Miller and was rightfully decreed to him.

[4] Nor was it error in the court, in exercising a limited statutory jurisdiction, to decline to decree a settlement between Miller and the companies. Such settlement necessarily would cover the transactions of the general agent both in Virginia and West Virginia, and the proper place for that settlement is the suit in Pennsylvania for general liquidation of the companies' business.

[5] The third assignment of error challenges the ruling of the circuit court establishing Miller's lien upon the bonds deposited with the state treasurer for return premiums as assignee of certain policies, the contention being that Miller should only be allowed a lien for such balance as might be found due upon a settlement with the company as general agent on Virginia business.

What has already been said in the discussion of the second assignment of error to

some extent applies to this assignment. With respect to policies held by Miller as assignee, he stands on the same plane with all other holders of Virginia policies canceled by the insolvency of the company, and is entitled to share with them the benefits of his statutory lien on the securities held by the treasurer. Non constat that upon a general accounting there will be any amount owing from Miller to the company. He has given a solvent bond for the faithful performance of his contract, while the company admittedly is insolvent. In these circumstances, his lien should not be postponed, and perhaps jeopardized, to meet a possible liability.

It follows from the discussion of the last two assignments that the cross-error of appellees is well assigned, and that payment of the sum of \$721.84, referred to therein, belonging to Miller, ought not to be withheld to await the result of the settlement between him and the company.

For these reasons, the decree must be amended in the particular indicated, and in all other respects will be affirmed.

Amended and affirmed.

CARDWELL, P., and SIMS, J., absent.

(120 Va. 413)

WESTERN UNION TELEGRAPH CO. v. BOLLING.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. COMMERCE — TELEGRAMS.

The transmission of intelligence by wire is "commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. —28.

For other definitions, see Words and Phrases, First and Second Series, Commerce.]

2. COMMERCE — "INTERSTATE COMMERCE" — TELEGRAM.

The transmission of a telegram between two points within the state over a line which passes out of the state and requires relaying the message outside of the state is "interstate commerce."

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. —28.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

3. COMMERCE — 8(7)—REGULATION — TELEGRAPH COMPANIES—STATE STATUTES.

Congress, by the act to regulate commerce (Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, as amended June 18, 1910 (Act June 18, 1910, c. 309, § 7, 36 Stat. 544 [U. S. Comp. St. 1913, § 8563]), which provides that telegraph companies engaged in interstate commerce shall be deemed common carriers, and section 15 of which requires such companies to file with the Interstate Commerce Commission the rates of charges and authorizes the commission to determine what shall be just and reasonable rates and what regulations or practices are fair and reasonable, occupied the field of regulating interstate commerce by telegraph, and a provision of a contract limiting the liability of the company for an interstate message, which has not been disapproved by the commission, is binding and prevents recovery of the statutory penalty

for error in transmitting which causes delay in delivery, imposed by Code 1904, § 1294h, cl. 5 and 6.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. —8(7)]

Error to Corporation Court of Newport News.

Action by L. J. Bolling against the Western Union Telegraph Company. Judgment for the plaintiff, and defendant brings error. Reversed and remanded for new trial.

Hughes, Little & Seawell, of Norfolk, for plaintiff in error. J. W. Read, of Newport News, for defendant in error.

PRENTIS, J. This is an action for the recovery of the statutory penalty (Code 1904, § 1294h, cl. 5, 6) and damages for an error in the transmission, which caused delay in the delivery, of a telegram sent on August 4, 1915, from L. J. Bolling, at Newport News, Va., to C. W. Bloxom, at Nassawadox, Va., reading as follows:

"Meet me at Cape Charles instead of Cheriton about nine morning."

Nassawadox is a small place upon the line of New York, Philadelphia & Norfolk Railroad, in Northampton county, on the Eastern Shore of Virginia. Because of the fact that the Chesapeake Bay lies between the Eastern Shore and the rest of the state, the only existing method of transmitting a message from Newport News to Nassawadox is by relaying it through the states of Maryland and Pennsylvania, and then down the Maryland and Virginia peninsula. There is no telegraph office at Nassawadox, so that under the custom of the company it was sent to Exmore, from which point it was telephoned to Nassawadox.

The mistake made was in changing the name of the addressee from C. W. Bloxom to W. N. Bloxom. The relayed messages show that the initials were correct at Newport News and Richmond, but show a change in the Washington relay to Philadelphia.

The message was sent subject to the usual conditions undertaking to limit the liability of the company printed on the telegraph blank.

The jury found a verdict for \$100 only, and added nothing for additional damages.

Error is alleged in the failure of the court to give an instruction based upon the claim that this was an interstate message, and that, Congress having legislated with reference to telegraph companies while engaged in interstate business, the penalty for dereliction of duty imposed by the state statute cannot be enforced as to such a message. The court was also asked to grant an instruction, to the effect that, if the service in the state was without fault, the court was without jurisdiction to impose the penalty for a default occurring without the state and in the city of Washington, D. C.

These facts and the alleged errors nat-

usually direct our minds to the consideration of three questions, each of which seems to be concluded by the authorities.

[1] 1. That transmission of intelligence by wire is commerce, either state or interstate, is definitely settled and no longer questioned. *W. U. Telegraph Co. v. Texas*, 105 U. S. 464, 28 L. Ed. 1067; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187; *W. U. Tel. Co. v. James*, 162 U. S. 654, 16 Sup. Ct. 934, 40 L. Ed. 1106; *W. U. Tel. Co. v. Tyler*, 90 Va. 299, 18 S. E. 281, 44 Am. St. Rep. 910; *Reed v. W. U. Tel. Co.*, 56 Mo. App. 173; *Ames v. Kirby*, 71 N. J. Law, 445, 59 Atl. 559; *W. U. Tel. Co. v. Hughes*, 104 Va. 246, 51 S. E. 227.

[2] 2. Was the message involved here interstate commerce?

This also is determined by the authorities, though the cases referred to are without exception cases of transportation by common carriers. Inasmuch, however, as under the express provisions of the act to regulate commerce, telegraph and telephone companies are common carriers, these decided cases are conclusive of the question here involved. Since the case of *Hanley v. Kansas City, etc., Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 214, 47 L. Ed. 333, there has been no dissent from the proposition that, although the point of shipment and the point of delivery are within the same state, if during the course of transportation the property passes without the boundaries of the state, such a shipment is interstate commerce. *Wichita Falls R. Co. v. Asher* (Tex. Civ. App.) 171 S. W. 1114; *Traynham v. Charleston, etc., R. Co.*, 92 S. C. 43, 75 S. E. 381; *Sternberger v. Railway*, 29 S. C. 510, 7 S. E. 836, 2 L. R. A. 105; *Frasier & Co. v. Railway*, 81 S. C. 162, 62 S. E. 14; *Hunter v. Railway*, 81 S. C. 169, 62 S. E. 13; *Crescent Brewing Co. v. Oregon Short Line R. Co.*, 24 Idaho, 106, 132 Pac. 975; *L. & N. R. Co. v. Allen*, 152 Ky. 145, 153 S. W. 198; *State ex rel. Railroad Warehouse Commission v. C., St. P., M. & O. R. Co.*, 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238, 12 Am. St. Rep. 730; *Milk Producers' Pro. Ass'n v. D. L. & W. R. Co.*, 7 Interst. Com. R. 92; *Mires v. St. Louis & S. F. R. Co.*, 134 Mo. App. 379, 114 S. W. 1052; *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088; *St. Louis, etc., R. Co. v. State*, 87 Ark. 562, 113 S. W. 203; *Patterson v. Mo. Pac. R. Co.*, 77 Kan. 236, 94 Pac. 138, 15 L. R. A. (N. S.) 733; *United States v. Erie R. Co.* (D. C.) 166 Fed. 352.

Upon principle we cannot conceive how any different doctrine can be applied to telegraphic messages between points within the state, which in the course of their transmission pass without the state into any other state or the District of Columbia. We conclude, therefore, that under the authorities the message involved herein was interstate commerce.

[3] 3. It has been held in a long line of de-

cisions that even though the message be interstate commerce, under certain conditions, in clear cases of negligence occurring within this state, the penalty of \$100 imposed by the Virginia statute may be enforced. All of these cases, however, arose prior to the amendment of the act to regulate commerce of June 18, 1910, providing that telegraph, telephone, and cable companies, whether wire or wireless, engaged in interstate commerce, shall be deemed to be common carriers within the meaning and purpose of the act to regulate commerce, shall be required to file their schedules showing their rates, fares, joint classifications, and practices with the Interstate Commerce Commission, subjecting them in general terms to all of the rules and regulations applicable to common carriers, and authorizing the Interstate Commerce Commission "to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed." Section 15.

Since that time, the decisions appear to be uniform in holding that Congress, to use the language of *Harrison, J.*, in the case of *Western Union Telegraph Co. v. Billsoly*, 116 Va. 562, 82 S. E. 91, "has occupied the field of regulation with respect to interstate telegrams," and that, "the act of Congress has ousted the state of jurisdiction over the subject." This case, holding that the statute here involved can no longer be invoked in such cases, was followed in *Western Union Tel. Co. v. First National Bank of Berryville*, 116 Va. 1009, 83 S. E. 424.

In *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, which was an action of tort from South Carolina, seeking a recovery of damages for mental anguish arising out of the alleged negligent failure of a telegraph company to deliver a telegram in the city of Washington, D. C., sent from South Carolina, the action being based upon a statute of South Carolina (S. C. Civ. Code [1902] § 2223), authorizing the recovery of damages for mental anguish, the judgment of the Supreme Court of South Carolina was reversed upon the ground that the action could not be maintained without infringing upon the exclusiveness of the control of the Congress of the United States over the District of Columbia; but *Mr. Jus-*

tice Holmes added, in closing his opinion, this language:

"But the act (referring to the South Carolina statute) also is objectionable in its aspect of an attempt to regulate commerce among the states."

A case rich in citations is that of *Gardner v. Western Union Telegraph Co.*, 231 Fed. 405, 145 C. C. A. 399. This case arose in Oklahoma, and was an action for damages for delay in sending a night letter from Syracuse, Kan., to Quinland, Okl. The evidence showed that, on account of a delay of five days in the delivery of the message, the plaintiff suffered material damage because of the decrease in the market value of broom corn. It was contended by the plaintiff that the condition upon the telegraph blank undertaking to relieve the telegraph company from liability, "unless the claim should be presented in writing within 60 days after the message is filed with the company for transmission," was void because section 9, art. 23, of the Constitution of Oklahoma provided that:

"Any provision of any contract or agreement, express or implied, stipulating for notice or demand other than such as may be provided by law, as a condition precedent to establish any claim, demand or liability, shall be null and void."

The plaintiff had failed to present his claim in writing within 60 days. The Supreme Court of Oklahoma, in previous cases, had decided that the section was valid as to telegraph companies. The Circuit Court of Appeals, Eighth Circuit, admitted that it was bound by the construction of the Constitution of the state of Oklahoma as made by the Supreme Court of that state, if applicable to the case then being considered. It was contended by counsel for the company, however, that by the act to regulate commerce, as amended June 18, 1910 (36 Stat. 539), the United States had occupied the whole field of transmission of interstate messages by telegraph, and that therefore the Constitution of Oklahoma had been suspended so far as the section in question is concerned. The court sustained this contention, and said:

"Pertinent to this contention, sections 1, 2, 6, 12, and 15 of the act to regulate commerce as amended, are cited. We cannot repeat those sections here, but it appears beyond question therefrom that, in so far as the provisions of the act to regulate commerce are applicable, it applies to all interstate telegraph business; that, as to all interstate business, telegraph, telephone, and cable companies are common carriers within the meaning and purposes of the act; that as to their interstate business telegraph companies must print and publish their rates, rules, classifications, regulations, and practices, and file same with the Interstate Commerce Commission; that they shall establish reasonable rates, rules, regulations, and practices, but messages may be classified into day, night, repeated, unrepeated, and such other classes as are just and reasonable, and different rates may be charged therefor; that all rates, regulations, and practices must be reasonable and just; that penalties are imposed for any attempt to evade the published rates, rules, practices, or regulations; that the Interstate Commerce Commis-

sion shall determine what is a just and reasonable regulation or practice; that the rules and regulations established by telegraph companies or other common carriers are deemed reasonable and just until changed by the Interstate Commerce Commission. It results necessarily from the foregoing conclusions that Congress has not only taken possession of the field of interstate commerce by telegraph, but has also specifically prescribed the rules which shall govern the transaction of such commerce."

The doctrine is also sustained by the following cases: *Dodge v. Adams Express Co.*, 54 Pa. Super. Ct. 422; *Ridge v. Erie R. Co.*, 54 Pa. Super. Ct. 603; *Strause Iron Co. v. Western Union Tel. Co.*, 59 Pa. Super. Ct. 125; *Western Union Tel. Co. v. Compton*, 114 Ark. 193, 169 S. W. 946. In the latter case the court first determined that Congress had not fully occupied the field, as to telegraph companies, and hence that the plaintiff could recover for mental anguish under the Arkansas statute; but after the opinion of the Supreme Court of the United States in the case of *Western Union Telegraph Co. v. Brown*, 234 U. S. 542, 34 Sup. Ct. 955, 58 L. Ed. 1457, was called to its attention, upon rehearing, the Arkansas court reversed itself. *Western Union Tel. Co. v. Johnson*, 115 Ark. 564, 171 S. W. 859; *W. U. Tel. Co. v. Simpson*, 117 Ark. 156, 174 S. W. 232; *W. U. Tel. Co. v. Holder*, 117 Ark. 210, 174 S. W. 552; *W. U. Tel. Co. v. Stewart*, 120 Ark. 631, 179 S. W. 813; *W. U. Tel. Co. v. Schoonmaker* (Tex. Civ. App.) 181 S. W. 264.

That common carriers may limit their liability when transporting baggage or property in interstate commerce by regulations contained in their published tariffs filed with and approved by the Interstate Commerce Commission, and that such regulations supersede state statutes and policies and furnish the exclusive rules for determining the carriers' liability, is determined by the Supreme Court of the United States in *Adams Express Co. v. Croninger*, 226 U. S. 500, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Boston & Maine R. Co. v. Hooker*, 233 U. S. 97, 58 L. Ed. 868; *Atchison, etc., R. Co. v. Robinson*, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901; *Cleveland, etc., R. Co. v. Dettlebach*, 289 U. S. 593, 36 Sup. Ct. 177, 60 L. Ed. 453; *Georgia, etc., R. Co. v. Blish Co.*, 241 U. S. 195, 36 Sup. Ct. 541, 60 L. Ed. 948. The telegraph companies so undertake to limit their liability by the conditions under which they accept and transmit interstate telegrams, and, until disapproved by the Interstate Commerce Commission, these conditions furnish the exclusive rules for determining their liability, subject to the federal statutes and general law, any state statute to the contrary notwithstanding.

We feel that this unbroken current of authority is controlling, and hence the judgment of the court below must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

(120 Va. 422)

WESTERN UNION TELEGRAPH CO. v.
MAHONE.(Supreme Court of Appeals of Virginia. Jan.
11, 1917.)COMMERCE §28—"INTERSTATE COMMERCE"—
TELEGRAM.

The transmission of a telegram between two points within the state by relaying it through points outside the state is "interstate commerce," though by handling the message oftener it could have been transmitted without leaving the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 22; Dec. Dig. §28.

For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Error to Law and Chancery Court of City of Norfolk.

Action by William Mahone, Jr., against the Western Union Telegraph Company. Judgment for the plaintiff, and defendant brings error. Reversed and remanded for a new trial.

Hughes, Little & Seawell, of Norfolk, and Albert T. Benedict and Francis Raymond Stark, both of New York City, for plaintiff in error. L. B. Way and E. A. Billisoly, both of Norfolk, for defendant in error.

PRENTIS, J. The facts in this case are these: William Mahone, at 11 o'clock on the morning of February 6, 1915, delivered to the Western Union Telegraph Company, at its office in the city of Norfolk, Va., a telegram addressed to William Mahone, Jr., at Tye River, Va., as follows:

"Stock mentioned in my letter yesterday sold. Need not come."

Tye River is a station on the Southern Railway between Lynchburg, Va., and Washington, D. C., and according to the testimony the method of transmitting such a message is from Norfolk, Va., through the city of Washington, D. C., and thence by relaying it to Tye River, Va. The message was apparently transmitted from Norfolk to Washington, D. C., promptly, but was not transmitted from Washington to Tye River until about 2:30 p. m. of that day, and the statutory penalty is claimed on account of this delay.

Witnesses for the telegraph company testified that the message was sent to Washington to be relayed to Tye River because that was the only practical and convenient way to transmit it; that there is no direct wire from Norfolk, Va., to Tye River; that in the arrangement of their business there are only three offices in Virginia for the relay of telegraphic dispatches, one in Norfolk, one in Richmond, and one in Lynchburg; that there is no direct wire to Tye River from either Richmond or Norfolk, and there is no direct wire from Norfolk to Lynchburg, but there is a direct wire from Norfolk to Washington, D. C., and a direct wire from Washington, D. C., to Tye River; that

sending it through Washington entails only two handlings, and if it had been handled in any other way it would have required more than two handlings, and thus the probability of delay and mistake would have been greater if the message had been handled in any other manner than through the relay office at Washington.

The Supreme Court of the United States, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives. A local dealer in intoxicating liquors, who lived in the state of Kansas and also maintained an office and warehouse in a small village, Stillings, on the Missouri side of the Missouri river, which was connected by a bridge with Leavenworth, Kan., transacted his business thus: After receiving his orders from his Kansas customers, he would make deliveries from his warehouse on the Missouri side of the river in his own horse-drawn wagons, either directly or by hauling the liquor to the Leavenworth railway depot for transportation to other Kansas points. The state of Kansas sought to enjoin him from carrying on this business in violation of the laws of Kansas. He claimed that his business was interstate commerce, and the Supreme Court of the United States sustained his contention, saying:

"The Supreme Court of the state gave much weight to the dealer's past conduct and animating purpose, and relied upon the language quoted from *Austin v. Tennessee*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, and *Cook v. Marshall County*, 196 U. S. 261, 25 Sup. Ct. 233, 49 L. Ed. 471. Considered in the light of our former decisions, if the business carried on by plaintiff in error after removal of his office to Stillings had been conducted by a dealer who had always operated from that place, we think there could be no serious doubt of its interstate character. And we cannot conclude that a legal domicile in Kansas, coupled with a reprehensible past and a purpose to avoid the consequences of the statutes of the state, suffice to change the nature of the transactions." *Kirmeyer v. State of Kansas*, 236 U. S. 563, 36 Sup. Ct. 419, 59 L. Ed. 721.

There is no substantial difference between the law applicable to this case and that applicable to the case of *Western Union Telegraph Co. v. L. J. Bolling*, 91 S. E. 154, this day decided; and, for the reasons there stated, the judgment of the lower court in this case will be also reversed, the verdict set aside, and the case remanded for a new trial. Reversed.

(120 Va. 206)

BAKER et al. v. LYNCHBURG NAT. BANK
et al. (No. 1).HENRY SILVERTHORN JEWELRY CO. v.
LYNCHBURG NAT. BANK. (No. 2).(Supreme Court of Appeals of Virginia. Jan.
11, 1917.)1. BANKS AND BANKING §270(8)—USURY—
STATUTE—"PAYMENT."

Reserving the amount of discount on a note is not a "payment" of such discount within Rev.

St. U. S. § 5198 (U. S. Comp. St. 1913, § 9759), imposing penalties for usury charged by or paid to a national bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1025, 1027; Dec. Dig. ¶270(3).]

For other definitions, see Words and Phrases, First and Second Series, Payment.]

2. PAYMENT ¶39(2) — APPLICATION — DISCOUNTED NOTE.

Where the maker of a note discounted at a national bank makes a payment thereon, the application of which he does not direct, the bank can apply it first to the payment of the discount, without the consent of the debtor; the rule that the court will apply the payment to the principal instead of the interest applying only where no application is made by either debtor or creditor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 105, 116; Dec. Dig. ¶39(2).]

3. BANKS AND BANKING ¶270(7) — PAYMENT—REMEDY—STATUTE.

Under Rev. St. U. S. § 5198, providing that a national bank charging a greater interest than allowed shall forfeit the entire interest and that in case the greater rate has been paid the debtor can recover back twice the amount of interest paid, usurious interest paid to the bank cannot be deducted from the principal or applied to the principal; the exclusive remedy being a recovery of the penalty.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031-1034; Dec. Dig. ¶270(7).]

4. USURY ¶16—PAYMENT—RESERVATION.

Where the transaction is in fact a reservation of usury from the principal, a device whereby it was made to appear as a payment of a bonus will be disregarded, and the court will deal with the real transaction.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 30; Dec. Dig. ¶16.]

5. BANKS AND BANKING ¶270(7)—USURY—PAYMENT—RESERVATION—DETERMINATION.

The determination of whether a payment on a usurious transaction was in fact a payment or was a reservation by the creditor which may be deducted from the principal is one of fact, to be governed by all the circumstances, and while the court will be alert to look for the true nature of the transaction, it will not, by construction, find it to be a reservation merely because that was possible.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1031-1034; Dec. Dig. ¶270(7).]

6. LIMITATION OF ACTIONS ¶59(2)—USURY—PAYMENT—RECOVERY—"USURIOUS TRANSACTION."

Under Rev. St. U. S. § 5198, providing that where excess interest has been paid, the debtor paying it may recover double the amount of interest paid, provided action is commenced within two years from the time the usurious transaction occurred, each actual payment of usurious interest is the "usurious transaction" from which the two-year period of limitation begins to run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 10; Dec. Dig. ¶59(2).]

For other definitions, see Words and Phrases, First and Second Series, Usurious.]

7. BANKS AND BANKING ¶270(9)—USURY—PAYMENT—RECOVERY—STATUTE.

While under that statute double the whole amount of interest paid, legal as well as illegal,

may be recovered, the payments recovered must each have been a usurious transaction.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1038, 1039; Dec. Dig. ¶270(9).]

8. BANKS AND BANKING ¶270(11)—USURY—PENALTY—RECOVERY—STATUTE.

The rules which govern actions to recover a debt, made void for usury or to recover the interest thereon, under Rev. St. U. S. § 5198, do not apply to actions under the latter part of that statute to recover the statutory penalty of double the amount paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1042-1053; Dec. Dig. ¶270(11).]

9. BANKS AND BANKING ¶270(6)—USURY—STATUTES—REMEDIES.

The recovery of double the interest paid to a national bank in a usurious transaction under Rev. St. U. S. § 5198, is a remedy exclusive of state statutes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1029, 1030, 1036, 1037; Dec. Dig. ¶270(6).]

10. LIMITATION OF ACTIONS ¶59(2)—USURY—PENALTY—LIMITATIONS.

Where a bank required as a condition for discounting a note at the legal rate the payment of the debt of a third person for which the makers were not liable, thereby rendering the transaction usurious, and applied the payment, when made, to the discharge of that debt, the court cannot consider the amount thereof as reserved by the bank and carried in or promised to be paid by the note, so as to render subsequent payments of interest on the face of the note usurious; but, the limitation fixed by Rev. St. U. S. § 5198, having run against an action for the penalty on the payment of that debt, the maker of the note cannot recover the penalty on subsequent payments of interest.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 332; Dec. Dig. ¶59(2).]

11. BANKS AND BANKING ¶270(4)—USURY—PENALTY—PAYMENTS ON SUBSEQUENT NOTE.

The rule that a renewal note executed after discharge of all of the usury is purged of the usury, while it does not apply to a suit by a national bank on a usurious note under Rev. St. U. S. § 5198, providing that the bank shall forfeit all interest, legal as well as usurious, does apply to an action under the latter part of the section to recover the statutory penalty of double the amount of the interest paid.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1026; Dec. Dig. ¶270(4).]

Appeal from Corporation Court of Lynchburg.

Separate actions by the Lynchburg National Bank against E. M. Baker and others and by Henry Silverthorn Jewelry Company against the Lynchburg National Bank. Judgment for the plaintiff in the first action and for defendant in the second action, and the defeated parties appeal. Judgments affirmed.

Amonette & Bailey and R. C. Blackford, all of Lynchburg, for appellants. Wilson & Manson, of Lynchburg, for appellees.

SIMS, J. These two actions at law were heard together in the court below; a jury was waived, and all questions of law and fact were submitted to such court for decision.

The case above designated as No. 1 was

an action of debt instituted by the Lynchburg National Bank, hereinafter referred to as "bank," against the appellants, hereinafter referred to as "defendants," to recover \$1,984.17, balance due of principal and certain interest thereon agreed to be paid by three negotiable notes sued on, and \$1.74, protest charges on one of such notes.

Defendants filed a plea of usury.

The usury proved was this: On March 29, 1911, the bank discounted a note of E. M. Baker, one of defendants, at four months, for \$6,730, indorsed by three other of defendants, upon condition that in addition to the legal rate of interest thereon the bank should be paid a debt of an insolvent concern to it, the assets of which concern Baker wanted to raise money by this loan to buy, but for which debt neither E. M. Baker nor any of defendants were in any way liable prior to the making of such condition by the bank. E. M. Baker and certain of the defendants thereupon, and subsequently the remainder of the defendants afterwards coming into the transaction in privity with said Baker, agreed to such condition. This debt of such insolvent concern proved to be \$930.11, and was accordingly paid to the bank by defendants on May 3, 1911.

Defendants paid only the legal rate of interest or discount on the face of the \$6,730 note and on all renewal notes for portions of this debt, but said agreement and payment of the \$930.11 bonus made the charge of the bank of interest on said loan evidenced by the note for \$6,730 at a rate greater than that allowed by law, and hence made such \$6,730 note usurious.

Two of the notes sued on were for \$2,000 each, subject to certain credits of payments of principal. Such payments amounted to \$2,000 on one of such notes, paying the principal in full, but leaving unpaid interest thereon from its due date, March 25, 1914; and to \$615.03 on the other of such notes, leaving unpaid \$1,484.97 principal and interest on \$2,000 from its due date, February 22, 1914. These two notes had their origin in said \$6,730 note. The latter was reduced to the amount evidenced by these notes by certain payments from time to time.

The remaining note sued on was for \$500, and was not affected by the usurious transaction mentioned.

Hence, by the notes sued on there was agreed to be paid \$1,484.97, principal of, and certain unpaid interest on, said usurious debt, and \$500 of principal of a different debt, unaffected by the usury, making \$1,984.97 of principal and protest charges of \$1.74 on the \$500 note.

Reference to the fact that another separate note was on March 29, 1911, given to the bank for part of the \$930.11 is omitted as an immaterial circumstance.

With respect to the payments which had been made on said \$6,730 note, the following

only need be here said: At the time the bank discounted such note, on March 29, 1911, it retained the discount of \$140.20 on it, which was at the legal rate on its face, and paid over or placed to the credit of E. M. Baker (which was the same thing in effect) only \$6,589.80. When the \$6,730 note first fell due, July 31, 1911, \$730 was paid to the bank on account of this note, not specifically applied by defendants to discount and principal, but which the bank applied as follows: \$140.20 to the payment of said discount reserved by it as aforesaid, included in the face of and agreed to be paid by the note; and \$589.80 to the principal of such note, reducing it to the principal amount of \$8,000. All subsequent payments made of interest and principal were specifically paid by defendants to be applied, and hence were applied by defendants, just as they were applied by the bank.

The court below entered judgment in case No. 1 for the plaintiff for the sum of \$1,986.71, with interest on \$1,984.97, part thereof, from December 20th, until paid.

This action of the court below is complained of and made the basis of two assignments of error before us, which are, in effect, that in addition to the forfeiture of all interest *agreed to be paid* by said two notes sued on which were affected by their usurious origin, there should have been deducted from the amount sued for:

(1) The said \$140.20 discount retained or reserved by the bank on said original loan; and

(2) The further deduction of said \$930.11 bonus, paid as aforesaid, with interest thereon.

The case designated as No. 2 above was an action of debt instituted on December 22, 1914, by the appellant, one of the appellants in case No. 1, hereinafter referred to as the jewelry company, against said bank, to recover from it the penalty provided by section 5198 of the United States Statutes of double the amount of interest paid by the jewelry company to such bank on renewal notes covering portions of said \$6,730 debt, within two years next preceding the institution of such action, being payment to said bank of discount on three renewal notes of defendants (said two \$2,000 notes and a \$1,000 note), unpaid within such two-year period, on which such installments of discount were demanded by the bank and paid by the jewelry company when such renewal notes were, from time to time, accepted by the bank.

None of these payments included a greater rate of interest than one-half of 1 per cent. for 30 days on the face of such renewal notes. This rate the bank had the legal right to charge and receive in advance under section 5197, U. S. Rev. Statutes (U. S. Comp. St. 1913, § 9758).

As above stated, all of these payments were specifically paid by the jewelry company to be applied, and they were applied by

the bank, to the discharge of the installments of discount which were paid as aforesaid. These payments within said two-year period aggregated \$324.88, and the penalty sued for was \$648.76.

Question was raised by the bank in this action as to the right of the appellant to maintain the action; but the lower court refrained from passing on it, and decided the case against the appellant on its merits. It is unnecessary for us, therefore, to pass on such question, as our conclusion is the same on the merits of the case.

The judgment of the court below in this case No. 2 dismissed the action of the jewelry company with costs against it. This action of such court is complained of and made the basis of one assignment of error, which is the third assignment of error we have to consider, namely:

(3) That the trial court erred because it did not enter judgment in favor of appellant in case No. 2 for twice the amount of interest paid to the bank within two years prior to the institution of such action.

We will consider the assignments of error in the order stated above—first the two in case No. 1 and lastly that in case No. 2.

Both of these cases are governed and depend for their right decision upon the proper construction of said section 5198, U. S. Rev. Statutes (U. S. Comp. St. 1913, § 9759). This statute is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

As will be observed, this statute has to do with two classes of cases:

First. Where there is an action instituted by the bank on an obligation which is usurious, in which case the bank must forfeit the *entire interest* agreed to be paid by the obligation but not in fact paid, and can recover only the principal of the debt agreed to be paid by the obligation sued on.

Second. Where there is an action by the borrower to recover the penalty provided by the statute of double the amount of a greater rate of interest than allowed by law which has been in fact paid, in which case the action must be commenced within two

years "from the time of the usurious transaction."

Case No. 1 is of the first class; case No. 2 is of the second class.

In the former case there is no limitation of time within which the defense given by the statute may be made by the debtor when sued by the bank. If he pleads and proves that the debt agreed to be paid is usurious, all interest on such debt, legal as well as illegal, is forfeited, and there can be no judgment rendered except for the principal only sued for.

So far there is no controversy between counsel for appellants and appellees as to the proper construction of this statute.

Coming now to the consideration of the first assignment of error, namely:

[1] 1. That the said \$140.20 discount retained or reserved by the bank on said original loan should have been deducted from the said amount of \$1,484.97 agreed to be paid, which is sued for in case No. 1.

[2] It is true, as counsel for appellants contend, that the reserving of this discount by the bank was not a payment of it. *McCarthy v. First Nat. Bank*, 228 U. S. 493, 32 Sup. Ct. 240, 56 L. Ed. 323. This \$140.20 was therefore embraced in the original \$6,730 note. Counsel contend that it continued to be embraced in the succeeding renewal notes, and was embraced in the two \$2,000 notes sued on. This depends upon the application of the payment of \$730, which was made July 31, 1911. As we have seen above, this payment stands alone as the single payment which was not specifically applied by the debtor making it. It was merely a general payment on the debt. The bank applied \$140.20 of it to the payment and discharge of such item of discount. If that was a legal application, such item was not thereafter embraced in succeeding renewal notes, nor in the two \$2,000 notes sued on. Counsel for appellants claim that the creditor cannot make such an application in such case without the assent of the debtor, and that the court will apply the payment to the principal of the debt, and cite the cases of *Danforth v. Nat. State Bank of Elizabeth* (C. O. A. 3d Cir.) 48 Fed. 271, 1 C. C. A. 62, 17 L. R. A. 622 and *Citizens' Nat. Bank v. Fromana*, 111 Ky. 206, 63 S. W. 454, 757, 56 L. R. A. 673, which sustain this position according to the rule in those jurisdictions. However, aside from the assent of the debtors to the application of the payments in question, evidenced in the instant case by their acquiescence therein for over three years before these suits, the prevailing rule is different. As said by Judge Keith, in delivering the opinion of this court in *Munford v. McVeigh*, 92 Va. 462, 463, 23 S. E. 857, 863, in reference to this question of payments on a usurious debt:

"The settled rule upon this subject is that the debtor may apply the payment when made. If he fails to exercise this right, the creditor may make the application, and if it is made by nei-

ther the debtor nor creditor, the duty then, and not otherwise, devolves upon the court when the question comes before it." (Italics supplied.)

Therefore the bank had the right to make the application it did of said \$730 payment, which paid off said item of \$140.20 on May 3, 1911, so that it is not embraced in said two \$2,000 notes sued on. Hence there is no merit in the first assignment of error.

[3] We come now to the second assignment of error, namely:

2. That the further deduction of said \$930.11 bonus paid as aforesaid, with interest thereon, should have been made from said amount of \$1,484.97 agreed to be paid, which is sued for in case No. 1.

Counsel for appellants contend that this bonus should be deducted from the principal of the money actually loaned by the bank, claiming that it cannot be considered as illegal interest paid, but must be considered as money *reserved* by the bank on the original loan. They admit that, if it was money *paid to and not reserved by* the bank, it would be properly regarded as illegal interest paid, i. e., as "a rate of interest," which said section 5198 condemns, and that their contention cannot be maintained, because they further admit that it is well settled by decisions of the Supreme Court of the United States that usurious interest paid cannot be deducted from, or—what is the same thing—applied to the principal of the debt, the remedy for recovery of usurious interest actually paid being an action under said section 5198 to recover the penalty provided for thereby, and only that action; such remedy being made an exclusive remedy by such statute. *Barnet v. Nat. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Brown v. Marion Nat. Bank*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801; *Driesbach v. Nat. Bank*, 104 U. S. 52, 26 L. Ed. 858; *Haseltine v. Bank*, 183 U. S. 134, 22 Sup. Ct. 50, 46 L. Ed. 118.

[4] It is true that if this transaction was in fact a reservation by the bank of the \$930.11, and the device of making it appear as a separate payment to the creditor as a bonus was only a shift to disguise the real transaction, the court would deal with the real transaction, in which case the \$930.11 would be, in effect, discount reserved by the bank, just as the item of \$140.20 above mentioned was discount reserved by the bank, and the \$930.11 would have been carried with the \$6,730 note or promised to be paid thereby, and since such \$930.11 was not subsequently paid off, as the \$140.20 item was, the position of counsel for appellants would be correct, that this \$930.11 would be still carried with the said renewal notes sued on and promised to be paid thereby (*Scurry v. Freeman*, 2 Bos. & Pul. [Eng. Reprint] 381, cited and relied on by counsel for appellants), and could not be recovered in the action by the bank on such notes, but should be deducted from the face of such notes.

[5] The issue is one of fact. No particular importance is to be attached to any single circumstance attending the transaction, such as that the \$930.11 was not paid until May 3, 1911, over a month after the original loan, nor any other matters of mere form, because the shifts and devices by which the real nature of such transactions may be sought to be concealed are innumerable. But without recounting in detail the actual circumstances of the transaction in the instant case, it is deemed sufficient to say that it is clear from the whole of it that the \$930.11 was really a payment to the bank and not a shift or device to conceal a reservation of that sum by the bank out of the original loan. Indeed, it is not even contended by counsel for appellants that it was not a payment in fact, but the court is asked to arrive at the fact that it was not, by construction, on the theory that such a shift or device was possible. The answer to this is that, while it is true that the court will be alert to look beneath the surface for the true nature of the transaction, it will not, by any constructive reasoning, assume that a different state of facts exists from that affirmatively shown to exist by the proof in the case. In *Scurry v. Freeman*, *supra*, the pretended payment was plainly in fact a reservation by the lender of the bonus in excess of the legal interest, and not in truth a payment of it.

Therefore the \$930.11 being in fact a payment in the instant case of interest at a rate greater than that allowed by law, it was not carried with, or promised to be paid by, the obligations in question sued on, and hence could not be set off or deducted from the said amount agreed to be paid by such obligations.

Therefore we cannot sustain the second assignment of error.

We take up now the third and only remaining assignment of error, which is as follows:

3. That the trial court erred because it did not enter judgment in favor of appellant in case No. 2 for twice the amount of interest paid to the bank within the two years prior to the institution of such action.

It will be remembered from the above statement of facts that all of the interest paid in the instant case within said two years was in the shape of discount on the notes affected by the usury, renewed within this period, and all of it was at the legal rate, computing same on the face of such notes.

[6] It is now well settled that in actions by the debtor under this statute to recover the penalty of double the interest paid for which it provides a remedy, the said two-year period of limitation begins to run from each actual payment of usurious interest; that each such payment is "the usurious

transaction" referred to in that part of the statute which gives such remedy, and that the statute runs upon each separate payment of such interest, so that no penalty for any payment of it, made more than two years next before the commencement of the action, can be recovered under such statute. *McCarthy v. First Nat. Bank*, 223 U. S. 493, 32 Sup. Ct. 240, 56 L. Ed. 523.

It should be noted, however, that all the payments of interest involved in the case last cited were payments at a greater rate than was allowed by law on the face of the obligation, so that the precise point involved in the instant case, namely, whether interest paid at the legal rate on the face of the obligation was usurious, was not involved in that case.

Under the rule established by the *McCarthy v. First Nat. Bank* Case the recovery of any penalty for the payment of the \$930.11 bonus on May 3, 1911, if that were sued for, was barred. It is not sued for, however, but the payments within said two years of interest or discount, at the legal rate on the face of the renewal notes in question, are sued for.

This raises the interesting and, it seems, novel question, with respect to the construction of said federal statute, section 5198, whether such interest is "the greater rate of interest" than allowed by law—I. e., usurious interest payments—for which such United States statute provides the remedy of recovery of "twice the amount of the interest thus paid."

Was each of such payments a "usurious transaction?"

[7] It is true that it is also well settled that in case of such payment of interest as is a "usurious transaction" under such statute—I. e., where the payment is at a rate greater than allowed by law—double the whole amount paid, legal as well as illegal interest, may be recovered. *First Nat. Bk. v. Watt*, 184 U. S. 151, 22 Sup. Ct. 457, 46 L. Ed. 475. But it is also true by the very terms of the statute that the payments themselves, the statutory penalty for which the action is brought in the instant case, must each have been "themselves respectively a "usurious transaction," else the statute does not provide a remedy for their recovery. Hence the question remains, Were the payments of interest at the legal rate on the face of the obligations in the instant case, respectively, usurious transactions?

[8] The rule set forth in *Webb on Usury*, § 308, is urged upon us, which is as follows:

"If a transaction is usurious in its inception, it remains usurious until purged by a new contract; and all future transactions connected with or growing out of the original are usurious and without valid consideration. An original taint of usury attaches to the whole family of consecutive obligations and securities growing out of the original vicious transaction; and none of the descendant obligations, however remote, can be free of the taint if the descent can be fairly traced."

Under this rule, the principal as well as all interest on the notes sued on would be forfeited.

An examination has been made of the numerous decisions cited by the author to support the text quoted. They are without exception, where at all in point, cases of suits on the obligation by the holder of it against the debtor, where the aid of the court is sought to enforce an obligation to pay money agreed to be paid but not in fact paid; not of a debtor asking the aid of the court to disturb a transaction which is closed by his own act and to recover back what he has in fact paid.

The rule quoted from *Webb on Usury*, and of the cases which support it, is based on the fact that the usury statutes of the jurisdiction of such cases, which controlled their decision, made the usurious obligation absolutely void. When a suit is on a void obligation, there is no halfway ground that the court can take of allowing recovery of what *ex aequo et bono* should be recovered. The whole recovery must be denied because there is no obligation on which any recovery can be based. It is true the federal statute (section 5198) has this same effect to the extent of "the entire interest" in case of a suit by a national bank on a usurious obligation, and on all renewals of it, as is now well settled; but this is because of the express enactment of the statute that the "entire interest" which the obligation carries with it, or which is "*agreed to be paid*," on the obligation, shall be forfeited. (*Italics supplied*.) *Brown v. Marion Nat. Bk.*, 169 U. S. 416, 18 Sup. Ct. 390, 42 L. Ed. 801, and numerous other cases cited in note 5 *Fed. Stat. Anno.* p. 135.

With respect to suits to recover on obligations tainted with usury, therefore, to the extent that the obligation to pay any interest is void, the text quoted from *Webb on Usury*, and the said federal statute, rest upon the same principle, namely, that there can be no recovery upon a void obligation.

But with respect to suits by the debtor to recover the penalty provided by the statute, there is no enactment that double the "entire interest" *paid* can be recovered. In suits of the latter class, the statute itself gives the right of action, and a wholly different principle is involved.

As said in the case of *Lynch v. Merchants' National Bank*, 22 W. Va. 554, 46 Am. Rep. 525, cited by counsel for appellants, where such case refers to some of the cases of suits on the usurious obligation, or on renewals of it, which construe the federal statute with respect to such suits, as above noted:

"But all the cases relied on by plaintiff in error were actions or suits by the bank to recover the loan from the borrower. * * * None of them were actions by the borrower against the bank to recover the penalty for taking illegal interest, and therefore they are not authority upon the question in the case at bar, which is an action by the borrower against the bank to recover such penalty."

There are other reasons than those above mentioned why the line of authorities applicable to suits on usurious obligations have no application to suits to recover back interest after it has been in fact paid, or the penalty provided by statute for payment of usurious interest. Among them the following are important: The former suits concern executory contracts, which the court is asked, in effect, to enforce; the latter executed contracts, which the court is asked, in effect, to set aside and compel one of the parties thereto to part with what has been paid to him by the very person asking the court to undo what he himself has done.

At common law, an action of assumpsit would lie by the borrower to recover back interest paid at a greater rate than that allowed by the usury statutes, although no action whatever would lie by the lender to recover anything on the usurious obligation. But in such an action at common law by the borrower he could recover only the excess over the legal rate of interest paid (Tyler on Usury, p. 2124; Kendall v. Davis, 55 Ark. 318, 18 S. W. 185), and could recover only those payments of such excess of interest as were made within the period of the statute of limitations governing such action. Other payments of excess over legal interest, and payments of principal and all legal interest thereon, after they were in fact made, were allowed to stand, although by action on the usurious obligation the lender could not have enforced any such payments.

The rule at common law was the same upon a suit in equity by the borrower. *Munford v. McVeigh*, supra.

Similarly, when we come to interpret statutes on the subject of recovery back of usurious interest, or of the recovery of a penalty for such payments, in fact made, the common-law rule in favor of letting stand undisturbed payments of the principal actually lent and of legal interest actually made—and even payments of usury where not sued for within the period of the general statute of limitations applicable to actions of assumpsit—will not be held to be changed, except to the extent that the provisions of the statute law plainly make the change.

In other words, the inquiry, upon the construction of said federal statute, section 5198, is: What effect does the penalty side of this statute have upon actual payments of interest, or bonus, which have been in fact made by the borrower—not mere fictitious payments which were shifts or devices to conceal the true nature of the transaction, but where the usury was in fact paid and not reserved? Does this statute intend to disturb such payments and, by a fiction indulged in, make a different application of them than was in fact made by both the debtor and creditor?

We do not think it so intends.

We have seen from the quotation above from the case of *Munford v. McVeigh*, supra, what the settled prevailing rule on this subject is; even in cases of suits by the creditor to enforce the executory usurious obligation to pay the money thereby agreed to be paid. A fortiori we would not expect the statute we are considering to intend to disturb such payments, in cases of suits to recover the penalty of payment back of double the amount of such payments actually made, further than the terms of the statute plainly so require.

We cannot agree, therefore, with the reasoning of counsel for appellants, in the instant case, that "the same principles govern whether the forfeiture clause or that for the recovery of the penalty is relied on" of said statute 5198. As indicated above, in our view of the subject there is a wide difference between the principles governing in the application of the one side of said federal statute from those governing in the application of the other side of it. We must construe such federal statute in the light of this difference in the principles applicable to the two sides of it.

When its correct meaning is ascertained, that side of said statute allowing recovery of the penalty thereby provided must govern and determine the decision of case No. 2 before us.

[9] As is said in *Barnet v. National Bank*, 98 U. S. 558, 25 L. Ed. 212:

"The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case. Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers' & Mechanics' Bank v. Dearing*, 91 U. S. 29, 23 L. Ed. 196."

[10] Counsel for appellants have cited no case of an action under section 5198 aforesaid for the penalty provided thereby, where the recovery of interest paid at only the legal rate on the face of the debt was allowed. We have been able to find only one such case. That is the case of *Louisville Trust Co. v. Kentucky Nat. Bank* (C. C.) 102 Fed. 442, which, however, does not base its holding upon the idea that such payments were themselves usurious, or constituted, respectively, an "usurious transaction," but upon the authority of *McBroom v. Scottish Investment Co.*, 153 U. S. 318, 14 Sup. Ct. 852, 38 L. Ed. 729. The latter case did not arise under said federal statute, but under the usury statute of the territory of New Mexico. In it Mr. Justice Harlan, delivering the opinion of the court, held that the period of limitation upon the time within which suit must be brought to recover back payments of usurious interest did not begin to run at the time of the payment of the usurious interest, but from the payment of the whole debt; that until the whole debt was paid the court would not consider payments of illegal interest as paid as usury, although they were so

paid in fact, because a locus penitentiae should be left open for the lender—the latter might repent at any time before the principal actually loaned should be paid, and might credit usurious payments in a legal way on the debt, or treat them as having been paid on the principal, or else refund the usurious payments outright. That is to say, the payments which were in fact made by the debtor and accepted and applied by the creditor as usury were treated by the court as not so made or applied, but, by a fiction indulged in by the court, were considered to be unapplied, and left to so stand subject to be applied later, should the creditor repent, as payments of interest at the legal rate, or as credits on the principal, so as to leave open a locus penitentiae to the creditor.

A position in effect the same is taken by counsel for appellants before us when it is urged upon us that the \$930.11 in fact *paid* as a bonus or illegal interest by the jewelry company and accepted and applied by the creditor bank as usury, should be treated by the court as "a part of the original loan until paid" that is, as held unapplied by the debtor and creditor, but to be applied by the court, on account of legal interest on such loan, or applied by the court as a credit on the principal of such loan, that is, as if it had been reserved by the bank as discount, so that the effect would be to render the payments of discount made within two years next before the action in the instant case include interest on such *reserved* amount, which would make the discount so paid at a usurious rate on the unpaid balance of such debt thus ascertained, notwithstanding the fact that the latter payments were made at the legal rate as in fact made and applied by both creditor and debtor, and notwithstanding the fact that the \$930.11 was in fact *paid* to and not *reserved* by the bank.

Such fictions were held by the Supreme Court of the United States, in the case of *McCarthy v. First National Bank*, supra, to have no place in the construction of the federal statute (section 5198), it being held by such case that "there was no locus penitentiae," unless the creditor, by some act in declining to accept an usurious payment, thereby evidences an actual repentance; that the said two-year period of such statute (section 5198) began to run from the date of each payment of interest, which was at a greater rate than allowed by law, in actions to recover the penalty thereby provided for such payments; and the decision in *McBroom v. Scottish Investment Co.*, supra, was overruled in so far as it could have any effect upon the construction of section 5198, in the following language:

"Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by statements of Mr. Justice Harlan in *McBroom v. Scottish Investment Co.*, 153 U. S. 318 [14 Sup. Ct. 852, 38 L. Ed. 729], which involved * * * the usury statute of the territory of New Mexico. That act differed in sev-

eral respects from Rev. Stat. § 5198. But that case did not rule that in a suit under the act of Congress the statute did not run from the date usury was paid and received as such. * * *

Thus the case of *Louisville Trust Co. v. Ky. Nat. Bank*, supra, resting upon the authority of the case of *McBroom v. Scottish Investment Co.*, supra, was in effect rendered of no authority on the point we have under consideration.

Counsel for appellants cite only two cases of actions by the debtor against the creditor (which, however, were not brought under said federal statute), namely:

The English case of *Scurry v. Freeman*, 2 Bos. & Pul. 381 (Eng. Reprint), above referred to, in which the facts were that £500 were formally paid over by the lender to the borrower, but the latter immediately handed back £50 of it to the son of the lender at the request of the latter and executed his obligation later to the lender for £500 and interest thereon at the legal rate of 5 per cent. per annum. This was, in effect, £50 *reserved* by the lender as discount on the loan, and the device or shift referred to did not conceal the true nature of the transaction. Hence the obligation in question carried with it, or promised to pay (under a like rule as that established in *McCarthy v. First National Bank*, supra), the £50 discount, and it was held that every payment of the interest was at a rate greater than allowed by law, or was a payment of usury, although at the legal rate on the face of the obligation. This was so because the interest paid included interest on the £50 which was *never paid* in that case, but only reserved by the lender and promised to be paid by the borrower. The report of this case does not give the statute under which it arose, nor show for what amount the action was brought; but it was an action *quidam*, and evidently for the recovery of the penalty provided by the English usury statute, possibly 12 Ann. C. 16 (4 Stat. at Large, p. 247) or a similar statute. If it be assumed that the legal principle involved was the same as that which arises under the said federal statute in the instant case—which seems likely to be true—still, as noted above in considering the assignment of error with respect to said \$930.11 bonus payment in case No. 1 before us, the instant case is different from that of *Scurry v. Freeman*, in that it differs in its facts. For the reasons stated above in connection with said assignment of error, the \$930.11 was not reserved in the instant case by the borrower—was not carried with the usurious obligations sued on or promised to be paid thereby, so that the interest payments sued for did not include interest on the \$930.11. Therefore the interest payments sued for in the instant case were not on the \$930.11 *paid*, as they were on the £50 *reserved* in the *Scurry v. Freeman* Case, and hence the latter case is not in point.

The other case cited of an action by the debtor against the creditor is that of *Oyster v. Longnecker*, 16 Pa. 269. This also was a *qui tam* action to recover the penalty provided by the Pennsylvania usury statute enacted March 2, 1723 (1 Smith's Laws, p. 156), which is given in the report of the case. The penalty provided by this statute for the taking, or receiving, of usury was the forfeiture of the whole debt, the provision as to this being that:

"Upon conviction thereof, the person or persons so offending, shall forfeit the money and other things lent, one half thereof to the Governor, for the support of government, and the other half to the person who shall sue for the same, by action of the debt," etc.

The statutory period of limitation on such suit for the penalty, provided by another and general statute of limitations, was one year from the commission of the offense of taking or receiving a payment of usury. The facts in the case were that \$700 were formally paid over by the lender to the borrower, but the latter immediately handed back to the former \$35 and executed his obligation for the \$700. There was but one payment made on this debt, which was of the whole \$700 and interest on the face of it at the legal rate; and this whole payment was made within one year next before the action was instituted. The court held that the \$35 bonus was in effect discount reserved, which was carried with and promised to be paid by the obligation, but not in fact paid at the time of the original transaction; that it was not paid until the payment of the \$700 and interest thereon was made by the debtor, which was within the statutory period of limitation, and as such payment then included interest on the \$35 discount reserved, the interest paid was at a rate greater than allowed by law, was a payment of usury, and the plaintiff was entitled to recover. This case, therefore, is not in point.

There are two other cases only cited by counsel for appellants on the point under consideration, neither of which are in point.

The case of *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 811, was an injunction suit, and involved the right of the creditor to recover on a usurious obligation which carried with it and promised to pay the bonus agreed to be paid. It did not involve any question of the right of the debtor to recover from the lender any usury in fact paid, and hence is not in point.

The case of *Hutchinson v. Herrick*, 58 Minn. 478, 59 N. W. 1103, involved the same question as in the case last above referred to, and hence is not in point.

The quotation from 29 Cyc. by counsel for appellants on the subject of usury has reference to suits on the usurious obligation, and hence is not in point.

[11] Furthermore:

There is a line of cases of actions, on renewal obligations for balance left due of an originally usurious debt after application

of payments sufficient in amount to pay off and discharge all of the usury, which hold that in such situation the renewal obligation is purged of the usury, and there may be recovery upon it in suits by the creditor against the debtor. With reference to this this line of cases *Webb on Usury*, § 310, says:

"If a partial payment is made upon the usurious note amounting to the usury and a new note be afterwards given for the balance, such new security cannot be avoided as usurious" (citing several cases).

To the same effect are the following cases not cited by this author, namely: *Darling v. March*, 22 Me. 184; *Postlethwait v. Garrett*, 3 T. B. Mon. (Ky.) 346; *Fowler v. Garrett*, 3 J. J. Marsh. (Ky.) 681; *Pierce v. Conant*, 25 Me. 33.

The rule of these authorities, as noted, is applied even in cases of suits by the creditor on the executory contract in question. But they were not controlled by such a statute as said section 5198 with its phraseology with respect to the forfeiture of "the entire interest," and hence we do not consider that such rule would be applicable to a suit by a national bank on the executory obligation. But we do think that this rule should apply to suits by the debtor to recover the penalty provided by the statute, because the policy of such statute with respect to leaving undisturbed all payments of interest actually made and applied is in accordance with the principle underlying such rule.

The \$930.11 was a payment made by the debtor in the instant case to be applied, and it was in fact applied by the creditor, to the payment and discharge of the only usury that was in fact charged by the creditor or paid by the debtor; the renewal notes in question for interest payments on which action in case No. 2 before us was instituted were afterwards given for the balance of the debt. It is contrary to the policy of the law, with respect to leaving undisturbed executed contracts, even where usurious in their origin, and payments actually made thereon, acquiesced in by the borrower for a time beyond that of the statutory period of limitation on suits to recover back usurious payments on the penalty for receiving same, that the debtor should be allowed to go behind his action in giving such renewal obligation, for the purpose of setting aside the application of prior payments which he himself made and applied, and which by the giving of such renewal obligation he has again affirmed.

We think, therefore, that the authorities last cited rest in principle upon the policy of the law to which we have just referred and strengthen the positions we have above taken as to the underlying principles governing the consideration of the federal statute (section 5198) on the penalty side of it.

Hence we conclude, upon these authorities and upon the principles and authorities referred to above, that there is no merit in the third and last assignment of error.

We are therefore of opinion, for reasons stated above, that there is no error in either of the judgments complained of, and they will be affirmed.

Affirmed.

(120 Va. 252)

CARY v. HARRIS.*

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. CONTRACTS — 99(3) — FRAUD — 58(1) — RESCISSION—BURDEN OF PROOF.

A party alleging fraud must prove it by clear and convincing testimony particularly in cases involving the rescission of a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 449-453, 1199; Dec. Dig. — 99(3); Fraud, Cent. Dig. § 55; Dec. Dig. — 58(1).]

2. COMPROMISE AND SETTLEMENT — 2 — FAVOR OF LAW.

Compromise agreements are favored by the law.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 1-4; Dec. Dig. — 2.]

3. COMPROMISE AND SETTLEMENT — 3 — FRAUD.

A party who made a deliberate settlement of all alleged fraud upon him with his eyes wide open was bound by his contract, since parties may settle frauds as well as anything else if they act with knowledge of the facts.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 5, 6; Dec. Dig. — 3.]

Appeal from Chancery Court of Richmond.

Bill by J. W. Harris against W. M. Cary. From a decree for complainant, defendant appeals. Decree reversed, and decree entered dismissing complainant's bill.

Jas. E. Cannon and S. A. Anderson, both of Richmond, for appellant. G. A. Hanson and P. W. Hardin, both of Richmond, for appellee.

HARRISON, P. This is the second appearance of this cause upon the docket of this court. See *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350. At the first hearing a demurrer to the complainant's bills, original, amended, and supplemental, which had been sustained by the lower court, was overruled, and the cause remanded for further proceedings; this court holding that the bills stated a good cause of action, entitling the complainant to relief, if the facts alleged were established by the evidence to be adduced. The cause is now heard upon its merits, the question being: Has the complainant by the evidence adduced established the facts alleged so as to entitle him to the relief prayed for?

The salient facts alleged are stated in *Harris v. Cary*, supra, and need not be repeated in detail here. This suit was brought for the rescission or cancellation of two contracts, one dated March 6, 1908, and the other March 18, 1908, upon the ground that said

contracts were obtained from him by force, fraud, intimidation, and duress. The contract of March 18, 1908, was the necessary result of the contract dated March 6, 1908, and neither added to nor took from the latter. It is the contract of March 6, 1908, known in this record as the "March contract," around which this controversy revolves, and to which our attention is chiefly directed.

It appears from the record that the complainant, J. W. Harris, his brother, W. E. Harris, and the latter's wife, Caroline H. Harris, and W. M. Cary were engaged in obtaining options and buying coal lands in Buchanan county, Va., for purposes of speculation, and that in furtherance of this enterprise "the Buchanan Coal & Coke Company" was organized and chartered, in which these parties held stock in proportion to their respective interests. For his interest the complainant, J. W. Harris, was to furnish no money, but was to remain in Buchanan county, prospect for coal in conjunction with W. E. Harris, take options on land, and do what was necessary there to promote and advance the venture. By contract dated May 23, 1904, it was agreed that the money advanced in furtherance of the scheme should constitute the preferred stock of the company and be first paid back with interest, and that all other money, land, or property remaining to the corporation should be treated as profit and belong to the common stockholders, and that J. W. Harris, in lieu of his services rendered in securing the property and to be rendered until the preferred stock was redeemed, should receive one-third of the common stock to be issued.

It is apparent from the record that the contemplated purchases under this contract were very modest compared with those that were subsequently made. Very soon thereafter much larger purchases were made than had been contemplated, and W. M. Cary, who had to pay three-fourths of the purchase money, realizing that this increased expenditure would greatly increase his risk, notified the Harrises that, under the circumstances, he considered the allowance to J. W. Harris, under the May contract, of one-third of the profits for securing options, unduly large, and thereupon, after considering the matter, the parties entered into the contract dated September, 1904, by which the May contract was modified in respect to the division of the common stock of the company. By the terms of this contract the complainant was to receive two-ninths of the common stock instead of one-third thereof, as provided in the May contract.

After the September, 1904, contract was executed, the ideas of the parties still further expanded, the complainant particularly urging that more lands be bought, until March, 1906, when the company had acquired

more than 23,000 acres and W. M. Cary had expended \$60,000 in paying for them. During the time from 1904 to 1908, when these largely added purchases were made, W. M. Cary repeatedly told the Harrises that in view of the increased purchases, which entailed upon him heavier and more serious risks, there would have to be a different distribution of the common stock from that which existed under the September contract. The record shows that there was considerable correspondence and difference of opinion on this subject until the contract of March, 1908, was executed. That was clearly a compromise adjustment and intended as a final settlement of all differences between the parties.

After this contract had been duly executed, under seal, by the complainant, J. W. Harris, and his brother, W. E. Harris, and by the appellant, W. M. Cary, it was kept by the Harrises, or one of them, for several days, and then returned to W. M. Cary with the signature of Caroline H. Harris thereto. This contract recites that differences existed between the parties concerning their respective rights, and that they were desirous of terminating those differences and arriving at an equitable agreement with respect to their interests in the stock of the company, and that therefore, in consideration of the premises and the mutual concessions moving to and from the parties, the contract was made. It provides that an issue of common stock (which had not theretofore been made) should be made as soon as possible after its execution, and that the complainant, J. W. Harris, should receive three-eighths thereof in return for services rendered, and that he should not be required to remain longer on the property of the company.

This is the solemn contract under seal which the complainant asks to have rescinded upon the ground that it was obtained from him by force, fraud, intimidation, and duress.

[1] It is elementary that a party alleging fraud is required to prove the same by clear and convincing testimony, and this is particularly true in cases involving the rescission of a contract.

In *Virginia-Carolina Co. v. Carpenter*, 99 Va. 292, 38 S. E. 143 it is said:

"To act in bad faith is to act fraudulently, and, as every one has attached to his actions the presumption of innocence, it is an established principle that a charge of fraud or bad faith must be clearly and distinctly proven"—citing *Hord v. Colbert*, 28 Grat. (69 Va.) 49; *Gregory v. Peoples*, 80 Va. 355.

In *Bonsal v. Camp*, 111 Va. 595, 69 S. E. 978, cited with approval in *Sweeney v. Foster*, 112 Va. 499, 71 S. E. 548, it is said:

"One of the first principles with respect to the rescission of a contract is that, in seeking a remedy which calls for the highest and most drastic exercise of the power of a court of chancery—to annul and set at naught the solemn contracts of parties—there must be first a sufficient averment of facts showing the plaintiff entitled in equity to the relief which he seeks, and satisfactory proof of these facts,

to justify the interposition of the court, and in addition to all this the court must be able substantially to restore the parties to the position which they occupied before they entered into the contract."

In the recent case of *Ford v. Engleman*, 118 Va. 89, 86 S. E. 852, Judge Keith says:

"Duress is a species of fraud, and hence must be clearly proved."

Authorities upon this point might be multiplied, but it is too well settled to call for further discussion.

[2] It cannot be expected that this court, within the limits of an opinion, can go into a detailed consideration of the great mass of evidence presented by the record before us. It is sufficient to say that, after a careful and laborious examination of all the evidence adduced, we are of opinion that the complainant has failed to establish the charges in his bills with that degree of clearness and certainty that the law requires. On the contrary, the decided weight of the evidence and the circumstances attending the execution of the contract established the negative. The contract the rescission of which is here asked is under the hands and seals of the parties, and appears upon its face to be an equitable settlement of differences of opinion, and the evidence shows that it was intended as a compromise of all matters in dispute between them. Compromise agreements are favored. They are properly resorted to every day as a means of avoiding litigation, by a final adjustment of disputed matters by the parties themselves.

In *U. S. v. Ohltd*, 12 Wall. 232, 20 L. Ed. 360, Mr. Justice Miller, speaking for the Supreme Court, says:

"We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner, and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unlitigated and controverted demand a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him; for the compromise will be void as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void."

The case of *Andrews v. Connolly* (C. C.) 145 Fed. 43, in which the disputes and disagreements between the parties arose over mining properties and continued for years before the final written contract was executed, presents some striking analogies to the case at bar. The court, after stating that it did not deem it necessary to review the history of the various disputes between the brothers,

nor to attempt to fix the blame therefor, and further that it was sufficient for the purposes of the case that such disputes did in fact exist, and that the parties attempted to settle them by a written contract wherein the rights of the parties were defined, expressed the opinion that there was no duress, and in discussing the subject said, in part:

"The proofs contained in the record do not show that Michael Connolly did any unlawful act to deprive the defendant of his property, or to compel him to do what he acknowledges he did do—yield to the pressure of the circumstances surrounding him and sign the agreement of settlement. I think the signing of the contract, under the circumstances disclosed by the record in this case, must be regarded, both at law and in equity, as a voluntary act, as it was unattended by any act of violence or threat of any kind calculated in any degree to intimidate the defendant, or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he doubtless did; still the fact remains that he did consent when he might have refused, and, having consented and signed the contract, I think he is bound by its terms. This is especially true when we come to consider the character of the transaction and the relation of the parties to the contract. It was entered into for the purpose of defining the rights of the parties and putting an end to the disputes and disagreements which had theretofore existed between the brothers."

In *French v. Shoemaker*, 14 Wall. 314, 20 L. Ed. 852, second syllabus, it is said:

"Equity will not set aside a contract whose purpose is a settlement of disputes simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing. Equity favors amicable compromise of controversies where pecuniary interests are complicated and conflicting."

See, also, *Mason v. United States*, 17 Wall. 67, 21 L. Ed. 564; *Hackley v. Headley*, 45 Mich. 569, 8 N. W. 511; *Batavian Bank v. North*, 114 Wis. 637, 90 N. W. 1016; *Ham v. Hamilton*, 29 Ga. 40.

These decisions all declare the doctrine that a contract of compromise, entered into with full knowledge of all the facts, cannot be set aside on the ground of duress when the other party has not been guilty of any unlawful act.

[3] As said in *Ham v. Hamilton*, *supra*:

"If the complainant ever had any equity, it is clear he has settled himself out of it. He made a deliberate settlement of all the alleged fraud, with his eyes wide open. Parties may settle frauds as well as any thing else, if they act with knowledge of the facts; and such a settlement is as effectual when made by the parties, as when made by a court. He is here asking the court to act where he has already himself taken final action. There must be an end to litigation."

The complainant in the court below has, at the bar of this court, pressed upon our notice the contention that a fiduciary relationship existed between himself and the appellant; that the appellant as president of the company and owning a controlling interest in the stock occupied the position of trustee

for the benefit of the other stockholders; and that, as such trustee, he had violated his trust. This position does not appear to have been urged in the lower court or noticed by the learned judge who there considered the case. Without considering whether any such relation existed between these parties as is now claimed, it is sufficient to say that the record does not show that the appellant has violated any confidence reposed in him with respect to the complainant, or done any act to his prejudice that he was under any legal duty to refrain from doing.

Upon the whole case, we are of opinion to reverse the decree appealed from and to enter here such decree as the lower court ought to have entered, dismissing the complainant's bills, with costs.

Reversed.

(120 Va. 230)

CITY OF DANVILLE v. LIPFORD.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. APPEAL AND ERROR \Leftrightarrow 1005(3)—REVIEW—CONFLICTING TESTIMONY.

If by disregarding the testimony of defendant the evidence is sufficient to sustain a finding of negligence on his part, no error is committed by refusing to grant a new trial urged on the ground that such finding is contrary to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3360-3376, 3949; Dec. Dig. \Leftrightarrow 1005(3).]

2. MASTER AND SERVANT \Leftrightarrow 291(1)—INJURIES TO SERVANT—INSTRUCTIONS.

Instructions given in an action by a workman against a city to recover for injuries sustained in stepping through a treacle of the city gas plant held proper.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1133; Dec. Dig. \Leftrightarrow 291(1).]

3. TRIAL \Leftrightarrow 260(1)—INSTRUCTIONS ALREADY GIVEN.

Denial of a requested instruction that the "unbending test" of negligence is the standard established by usage in like business and that plaintiff must show by a preponderance of evidence that such standard was not lived up to was not error, where the court otherwise instructed that "ordinary or reasonable care is such care as other reasonably prudent companies use in conducting like business."

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. \Leftrightarrow 260(1).]

4. APPEAL AND ERROR \Leftrightarrow 1053(3)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a personal injury suit, evidence of ice on a treacle improperly admitted because not alleged in declaration, and not stricken out on motion, held cured by an instruction that, if ice was proximate cause of injury, there was no liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180-4182; Dec. Dig. \Leftrightarrow 1053(3); Trial, Cent. Dig. § 977.]

Error to Circuit Court of City of Danville.

Action by J. D. Lipford against the City of Danville. From a judgment for plaintiff, defendant brings error. Affirmed.

Plaintiff's instructions given:

Instruction No. 1: "The court instructs the jury that it was the duty of the defendant to use ordinary care to provide and maintain a reasonably safe and suitable trestle or structure upon which it required plaintiff to perform duties it assigned him, and if they believe from the evidence that defendant failed to do this, and plaintiff was injured while in discharge of his said duties without negligence on his part, and said injuries were proximately caused by said negligence, they should find for the plaintiff, unless they believe from the evidence that the injuries complained of resulted from a defect in the trestle that was open and obvious to the plaintiff or he had actual knowledge of such defect. [Southern R. Co. v. Lewis] 110 Va. 850 [67 S. E. 357]."

Instruction No. 2: "The court further instructs the jury that the plaintiff had a right to presume that defendant had performed its duty in regard to providing him a reasonably safe place in which to work and a reasonably safe trestle or structure upon which to work, unless the defect complained of was open and obvious to the plaintiff or he had actual knowledge of such defect. [N. & W. R. Co. v. Nunnally's Adm'r] 88 Va. 546 [14 S. E. 367]; [Richlands Iron Co. v. Elkins] 90 Va. 249 [17 S. E. 890]."

Instruction No. 3: "The court instructs the jury that, if they should find for the plaintiff, they may, in estimating the damages, take into consideration his physical and mental suffering arising from his injury, his loss of wages, if any, and the time he was prevented by said injuries from working, all moneys paid out and expenses incurred by him in his endeavor to be healed of said injuries, and proper compensation for his being deprived by said injuries from following such calling or business as he could have followed but for said injuries, all of which shall not exceed \$2,000, amount charged in declaration."

Defendant's instructions given:

Instruction A: "The court instructs the jury that the mere fact that the plaintiff was injured while working on a trestle maintained by the city of Danville will not warrant them in finding a verdict against the city of Danville. The gravamen of this action is the alleged negligence of the defendant, and until this is shown by a preponderance of the evidence to the satisfaction of the jury there can be no recovery against the defendant."

Defendant's instruction B: "The court instructs the jury that ordinary or reasonable care is such care as other reasonably prudent companies or persons use in conducting a like business; that it was only the duty of the city of Danville to use reasonable care as above set out in conducting its gas business, but it was not its duty to adopt a mode of conducting its business different from its usual custom, because some may think such mode a safer way to conduct it; that the city of Danville was not an insurer of said Lipford, and was not bound to provide him an absolutely safe place to work in, but was only bound to exercise ordinary care to provide him a reasonably safe place in which to work."

Defendant's instruction C: "The court instructs the jury that, when a servant enters the service of the master, he assumes all the ordinary risk of such service, and also, as a general rule, assumes all risk from causes which are known to him, or should be readily discernible by a person of his age or capacity, in the exercise of ordinary care. When the employé is placed by his employer in a position where he can see, or with reasonable intelligence and care find and disclose the dangers of such position, and is a mature man, doing the ordinary work which he has engaged to do, and whose risks are obvious to any one, he assumes the risk of the em-

ployment, and no negligence can be imputed to the employer for an accident to him therefrom."

Defendant's instruction D: "The court further instructs the jury that, if they should believe from the evidence that the defendant city was negligent in maintaining said trestle, yet if they further believe from the evidence that the plaintiff knew, or could by the exercise of ordinary care have known, of the danger incident to the use of said trestle, and by the use of ordinary care on his part have avoided this alleged defect, and through his own lack of care contributed to his injury, they must find for the defendant."

Defendant's instruction F: "The court further instructs the jury that the defendant in this action was under no greater obligation to care for the safety of the plaintiff, J. E. Lipford, than the said J. E. Lipford was to care for his own safety; and if the jury believe from the evidence that said Lipford knew of the alleged defect in said trestle, and that it was dangerous to step in or get his foot caught in said hole, and that in the exercise of due care he should have avoided coming in contact with said hole, then they should find for the defendant in this action."

Defendant's instruction G: "The court instructs the jury that, even if they believe from the evidence that the trestle was defective, as alleged in the declaration, and that this was due to neglect on the part of the defendant, yet if they further believe from the evidence that this defect was open and obvious and that plaintiff had full knowledge of its danger, the use of the trestle by plaintiff in its dangerous condition was a risk assumed by the plaintiff and you should find for the defendant."

Defendant's instruction H: "The court further instructs the jury, if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of his injury, they must find for the defendant."

Instructions requested by defendant refused by court:

Instruction E: "The court instructs the jury that the unbending test of negligence is the general usage and practice of companies using like instrumentalities, and in order to establish negligence on the part of the defendant plaintiff must show by a preponderance of the evidence that the trestle in question was dangerous and was not up to the standard established by the ordinary usage of the business. [South. Ry. Co. v. Lewis] 110 Va. 847 [67 S. E. 357]."

Instruction I: "The court instructs the jury that, if they believe from the evidence that the weight of the loaded car or the handling of the car caused plaintiff to lose his balance and step in the opening or fall from the trestle, they must find for the defendant."

Instruction J: "The court instructs the jury, if they believe from the evidence the opening in the trestle was open and obvious, or plaintiff could in the exercise of ordinary care have known of the opening and the danger of slipping in same, this was a risk assumed by the plaintiff, and they must find for the defendant."

E. Walton Brown, of Danville, for plaintiff in error. B. H. Ouster, of Danville, for defendant in error.

KELLY, J. This is a writ of error to a judgment in favor of J. D. Lipford against the city of Danville in an action for damages for personal injuries.

Lipford, whom we shall hereinafter call the plaintiff, was employed as a laborer by the city in connection with the operation of its gas plant. His duty was to load tipples

cars with coke in the basement of the gas plant, place them on an elevator, hoist them to the level of a tipple track, push them out on the tipple, and dump their contents to the ground under the trestle. The trestle was some 10 or 12 feet high. The track on the trestle was supported by ties laid about 20 inches apart. A walkway was provided between the rails by means of two thick planks nailed down lengthwise close together, filling up practically all of the space between the rails. Outside of the rails, on the projecting ends of the ties, planks about 7½ inches wide were nailed down parallel to the rails, extending along the entire length of the trestle. The space between these planks and the outer edge of the rail varied somewhat, but at no point was it over 5 inches. The manager of the plant testified that the regular and usual distance was 2½ to 3 inches. These outside planks were placed there primarily as a walkway to enable employes to pass around the cars when they are dumped.

The plaintiff had been working for the city in this same capacity for seven or eight years. There were two branches or spurs to the trestle, however, and he had not been on the branch on which he was hurt for about six months prior to the night of the accident. At about 3 o'clock a. m. he was attempting to dump a car, and his foot slipped into what is designated practically throughout the testimony as "a hole" on the outside of the rail. The weight of the car threw him over, his foot was caught, and his leg was broken.

The case was tried upon an amended declaration to which there was no demurrer. The first count, and the one to which the evidence seems to have been directed, may be epitomized as an allegation of the defendant's breach of duty to furnish the plaintiff a reasonably safe place to work, in that the trestle was insufficiently lighted and contained the hole in question, which had been negligently permitted to remain there in a condition liable to result in an accident such as the one by which plaintiff was injured.

There are three assignments of error; the first being that the court erred in refusing to grant defendant a new trial on the ground that the verdict of the jury was contrary to the law and the evidence. We do not think this assignment is good. There is much in the evidence tending to show that the plaintiff's injury was due to a mere accident, without fault on the part of the defendant, but there is also evidence sufficient to sustain the finding of the jury to the contrary, and we cannot interfere with that finding.

There is evidence clearly tending to show the following facts, in addition to those above recited: That all over the trestle at different places the timbers had from time to time given way leaving holes and defects requiring frequent repairs; that at the point where the plaintiff fell there was a "crack"

or opening "on the outside of the rails" where the planks were rotten or decayed; that this hole or crack was the largest one there, being "about eight inches," or an "eight-inch hole in there"; and that the lights that morning were low and dim.

At the conclusion of the evidence the jury, by consent of both sides, were given a view of the premises. This, of course, could not add to the evidence, but it did place the jury in a position which enabled them to fully understand and comprehend the conditions at the time of the accident; the fact appearing that these conditions remained the same up to the time of the trial.

We do not overlook the contention of the defendant that plaintiff knew, or ought to have known, of the alleged defect. It is true that he was an old employe, and had worked for a long time on the trestle on which he was hurt; but he had not, as we have seen, been on it for nearly six months prior to the night on which he was hurt. He says:

"I had not been on the old trestle since June 1st. [He was injured November 24th.] * * * We had used the new trestle up to that night. * * * I did not know the lumber was rotted out, because the trestle had been filled up [with coke dumped under it] ever since May. The lights were down low that morning. They got real dim. I don't know what was the matter with them, but they had just as good been out for that fog from the car."

The "fog" he speaks of was a steam or vapor from the coke caused by water turned on it at the loading point to cool it.

[1] Enough of the evidence has been recited to show that, if the jury disregarded the opposing evidence of the defendant, as they might within their province have done, they were warranted in finding that the defendant was negligent as charged in the declaration, and that the plaintiff is not barred from a recovery, either by contributory negligence or by assumption of the risk. In other words, upon a demurrer to the evidence, as we must view it, the case is with the plaintiff.

[2, 3] The next assignment of error is to the action of the court in giving and refusing instructions to the jury. The instructions given and those refused will appear in full in the official report of this case. We shall content ourselves, in the main, by saying, on this branch of the controversy, that the instructions deal with familiar principles, that those which the court gave fully and fairly submitted to the jury the theory of each party, and that this assignment of error is without merit. The only instruction which we shall mention specifically is instruction E asked for by the defendant and refused. It is as follows:

"The court instructs the jury that the unbending test of negligence is the general usage and practice of companies using like instrumentalities, and in order to establish negligence on the part of the defendant, plaintiff must show by a preponderance of the evidence that the trestle in question was dangerous and not up to the standard established by the ordinary usage of the business."

The evidence upon which the defendant sought to avail itself of the "unbending test" to be found in the ordinary usage of the business was exceedingly meager. If it had the right at all under the evidence to have the jury consider the practice of persons using trestles similar to the one in question here, that right was fully protected by the portion of instruction B given for defendant which stated:

"That ordinary or reasonable care is such care as other reasonably prudent companies or persons use in conducting a like business."

[4] The remaining assignment of error is based upon the refusal of the court to exclude all evidence in relation to the ice which was shown to have formed on the surface of the trestle and on the outside plank at or near the alleged "hole." There was no mention of this ice in the declaration, but the motion to exclude the evidence in regard to it was not made until after the plaintiff had been fully cross-examined about it, had rested his case, and the defendant had examined the principal witness in its own behalf. Counsel then stated to the court that "in going over the declaration again" he had noticed that the ice was not mentioned, and he therefore moved the court to exclude the evidence in regard to it. The court replied that:

"It would hardly be proper to exclude that evidence entirely; it may go to the jury in order that the whole surrounding circumstances may be considered; but the jury will be instructed, if requested, that if they believe that the ice on the track was the proximate cause of the injury, there could be no recovery in this case."

This statement by the court seems to have been made in the presence of the jury; and, in addition thereto, when all the evidence was in, the court did give the following written instruction:

"The court further instructs the jury, if they believe from the evidence the plaintiff slipped on ice and this was the proximate cause of the injury, they must find for the defendant."

Under these circumstances we are of opinion that there was no error in the action of the court in this regard.

The judgment is affirmed.

Affirmed.

(120 Va. 863)

TYLER v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. BURGLARY \S 42(1) — EVIDENCE — POSSESSION OF STOLEN GOODS.

Possession of stolen goods is not even prima facie evidence of housebreaking or of burglary, and there must be some evidence of inculpatory circumstances, at least of extrinsic mechanical indications, before the presumption of burglary or housebreaking is superadded to that of larceny.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 104; Dec. Dig. \S 42(1).]

2. BURGLARY \S 42(2) — EVIDENCE — POSSESSION OF STOLEN GOODS.

To raise the presumption of burglary or housebreaking from the possession of stolen goods, with other supporting evidence, the possession on the part of the accused must be exclusive.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 105; Dec. Dig. \S 42(2).]

3. BURGLARY \S 29 — EVIDENCE — BURDEN OF PROOF.

The burden was on the state to prove that the alleged possession of the stolen goods by the accused was an exclusive possession.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 79-82; Dec. Dig. \S 29.]

4. BURGLARY \S 42(1) — POSSESSION OF STOLEN GOODS — ASSERTION OF OWNERSHIP.

A statement of one accused of burglary on being asked by the witness if he could wear the stolen watch charm, "All right, I don't care if you do," was not an unequivocal claim of ownership.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 104; Dec. Dig. \S 42(1).]

5. BURGLARY \S 42(2) — EVIDENCE — SUFFICIENCY.

In a prosecution for burglary, evidence that the stolen goods were found in the kitchen of the house in which accused had rooms, and to which others than accused had access, held insufficient to show that they were in the exclusive possession of accused.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 80, 105; Dec. Dig. \S 42(2).]

Error to Corporation Court of Staunton.

Thomas Tyler was convicted of housebreaking, and he brings error. Reversed.

L. Travis White, of Staunton, for plaintiff in error. The Attorney General, for the Commonwealth.

SIMS, J. In this case the indictment charged the accused with feloniously breaking and entering, in the nighttime, a storehouse of one S. P. Mann, with the intent to commit larceny, and that the accused did feloniously steal, take, and carry away one gold watch charm of the value of \$5, of the goods and chattels of the said S. P. Mann in the said storehouse then and there being found, etc. There were two trials. Upon the first trial the jury were unable to agree. Upon the second trial the verdict of the jury was as follows:

"We, the jury, find the prisoner guilty of housebreaking and fix his punishment at three years in the penitentiary."

The accused moved the court below to set aside the verdict as contrary to the law and the evidence and grant him (accused) a new trial. This motion the court overruled, and entered judgment passing sentence in accordance with said verdict. To this action and judgment of the court the accused excepted, and in his petition to this court for a writ of error and supersedeas assigns three grounds of error, which raise practically two questions only, both of them questions of fact:

a. Whether there is any evidence in the case of "other inculpatory circumstances," in addition to the possession of the stolen goods, to warrant the jury in finding the accused guilty of housebreaking.

b. Whether there is sufficient evidence in the case to sustain the burden which rests upon the commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession.

[1] The law in Virginia is well settled that the possession of stolen goods is of itself not even *prima facie* evidence of housebreaking or of burglary. *Gravely's Case*, 86 Va. 396, 10 S. E. 431; *Walker's Case*, 28 Grat. (69 Va.) 969; *Porterfield's Case*, 91 Va. 801, 22 S. E. 352.

The rule in Virginia, however, is that:

"* * * Where goods have been obtained by means of a burglary or housebreaking, the fact of such possession is a most material circumstance to be considered by the jury, and where, in addition to such possession, other inculpatory circumstances are proved, such, for example, as the refusal of the accused to give any account, or his giving a false account, of how he came by the goods, such proof will warrant a conviction. In other words, to use the language of the books, there should be some evidence of guilty conduct, besides the bare possession of the stolen property, before the presumption of burglary or housebreaking is superadded to that of larceny, but extrinsic mechanical indications may constitute such additional evidence." *Gravely's Case*, *supra*.

[2] It is also well-settled law that the possession of stolen goods contemplated by the rule in Virginia above referred to is an exclusive possession on the part of the accused; otherwise such rule is not applicable.

"The exclusive possession of money recently stolen, unaccompanied by a reasonable account of how the possession was acquired, creates a presumption that the possessor is the thief." *Porterfield's Case*, 91 Va. 801, 805, 22 S. E. 352, 354.

"But to raise the presumption of guilt from the possession of the fruits of [or] the instruments of crime by the prisoner it is necessary that they be found in his exclusive possession. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed, as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others had equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone." 3 *Greenleaf*, Ev. § 33.

As we understand it, this proposition of law is not controverted before us. At any rate, we consider it a correct statement of the law.

It is, in effect, conceded on the part of the commonwealth that the "other inculpatory circumstances" relied on by it are of a character insufficient to sustain the conviction of the accused, unless the alleged possession of stolen goods by the accused was such as to bring the case within the rule in Virginia

above referred to, laid down in *Gravely's Case* and other cases above cited; that is to say, unless such possession on the part of the accused was exclusive.

Therefore, in the view we take of this case, it will not be necessary for us to pass upon the first assignment of error, but only upon the second assignment of error and the single question of fact thereby raised, namely:

[3] 1. Is there sufficient evidence in the case to sustain the burden which rests upon the commonwealth to prove that the alleged possession of the stolen goods by the accused was an exclusive possession?

The facts of the case bearing on this point are as follows: The most that can be said of the evidence is that it proved a constructive possession on the part of the accused of the stolen watch charm. It was not found upon his person, or in his private apartment, although that was searched twice, nor in a place of which he kept the key. His "private apartment" was a room in a house rented by one Katie Houston. The stolen watch charm was found in Katie Houston's kitchen on top of a safe. The commonwealth, it is true, proved that the accused had access thereto; but it did not prove that he was the only person that had access thereto. Certainly, from the testimony introduced by the commonwealth, Katie Houston "had right of access" and "equal facility of access" to her kitchen as did the accused. In this, a criminal case, the commonwealth cannot sustain the position that, in the absence of proof on the part of the accused that Katie Houston, or some one other than himself, did in fact occupy her kitchen, or enter it, he must be considered as the sole person having access to such room. The burden of proof on this point, one of the essential links in the chain of evidence upon which it depended for conviction, was upon the commonwealth, and not upon the accused, and was clearly not sustained in this particular.

The only remaining evidence bearing on the question of exclusive possession is the following: One Will Adams, colored, being in the kitchen room above mentioned while the accused was cooking his breakfast one Sunday morning, on reaching up on the kitchen safe for a match, found the stolen watch charm. On finding the watch charm Adams said: "I'm going out into the country to-day; can I wear this?" Accused said: "All right; I don't care if you do." This reply of accused is relied on by the commonwealth to prove an assertion of ownership by the accused of the watch charm, i. e., to prove accused's possession of it.

As laid down by 2 *Wharton's Cr. Ev.* (10th Ed.) 1509:

"The possession must be personal, must be recent, must be unexplained, and must involve a distinct and conscious assertion of property by the defendant."

[4] We cannot feel that the reply of the accused quoted is sufficiently distinct and un-

equivocal in meaning to prove, with that degree of certainty required in a criminal case, an assertion of property by the accused in the watch charm. It is consistent, it is true, with a claim of ownership on his part; but it is also consistent with a position of indifference to and lack of interest in the subject, and with the meaning that so far as he was concerned there was no objection to Adams wearing the charm.

The only case cited in brief for the commonwealth on the latter point is that of *Clark v. Whitaker*, 19 Conn. 319, 48 Am. Dec. 160, 163. That was a civil case, and in that case there was actual personal possession taken of the property in question.

[8] On the whole, therefore, it seems clear that the commonwealth has not sustained the burden of proof resting upon it in the instant case to show exclusive possession by the accused of the stolen property. On this ground we are of opinion to reverse the judgment complained of and to grant the accused a new trial, which will be accordingly done.

Reversed.

(120 Va. 347)

KLAFF v. VIRGINIA RY. & POWER CO.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

PLEADING §11—SETTING OUT EVIDENCE.

It is enough for the declaration in an action for malicious prosecution, showing the plaintiff was acquitted, to allege want of probable cause, without setting out the evidence thereof; such allegation not being the assertion of a conclusion of law, but of an ultimate fact, that is, one in issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. §11.]

Appeal from Law and Chancery Court of City of Norfolk.

Action by Isaac Klaff against the Virginia Railway & Power Company. From a judgment of dismissal, plaintiff appeals. Reversed and remanded.

Rumble & Campe, of Norfolk, for plaintiff in error. R. E. Miller and W. H. Venable, both of Norfolk, and H. W. Anderson, of Richmond, for defendant in error.

WHITTLE, J. This action was brought by the plaintiff in error against the defendant in error to recover damages for a malicious prosecution. The declaration, upon the point involved, charges that the defendant maliciously and without any reasonable or probable cause instigated and procured the plaintiff to be indicted by the grand jury of the corporation court of the city of Norfolk for grand larceny, etc., and caused the plaintiff to be tried for that offense, and that upon the trial the plaintiff was acquitted and the prosecution finally ended.

The trial court sustained a demurrer to the declaration; and, the plaintiff having declined to amend, the judgment under review was entered, dismissing the action.

It is admitted that the finding of an indictment by a grand jury is *prima facie* evidence of probable cause; and the single question to be determined is whether, under the practice in this state, it is necessary, where the declaration discloses an indictment by a grand jury, in addition to alleging a want of probable cause, to set out the evidence upon which that averment is predicated.

The essentials of the action for malicious prosecution are thus stated in *Burks' Pl. & Pr.* p. 233:

"The form of action is trespass on the case generally. In order to sustain the action it must be alleged and proved: (1) That the prosecution was set on foot by the now defendant, and that it has terminated in a manner not unfavorable to the now plaintiff; (2) that it was instituted, or procured by the co-operation of the now defendant; (3) that it was without probable cause; and (4) that it was malicious."

There is no suggestion in the text that in such case matters of evidence which merely go to establish the constituent elements of the action are required to be set out in the declaration. To the contrary the learned author (page 946) lays down as a subordinate rule of pleading that:

"It is not necessary in pleading to state that which is merely matter of evidence."

At pages 947, 948, he observes:

"This is a rule, so elementary in its kind and so well observed in practice, as not to have become frequently the subject of illustration by decided cases, and (for that reason probably) is little, if at all, noticed in the digests and treatises. It is, however, a rule of great importance, from the influence which it has on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent that minuteness and prolixity of detail in which the allegations, under other systems of judicature, are involved."

But we need not invoke "modern instances" to support the declaration in this case. It follows literally, in the matter drawn in question by the demurrer, the form given in 2 Chitty on Pleading (6th Am. Ed.) p. 612d, a work that has been the *vade mecum* of the Virginia lawyer for more than three-quarters of a century, and is the accredited source of many valuable forms found in the appendix to 4 Minor's Institutes, Pt. II, p. 1307.

The contention of defendant in error rests upon the fundamental error that the allegation in the declaration that the prosecution was without probable cause is only the assertion of a conclusion of law. It fails to distinguish between the allegation of a fact which constitutes the cause of action and the evidence which upon the trial is required to prove the existence of such fact. The former is an ultimate fact which must be pleaded, while the latter is mere matter of

evidence which has no place in the pleadings. "Ultimate facts" are defined as:

"Facts in issue as opposed to probative or evidential facts, the latter being such as serve to establish or disprove the issue." 2 Bouvier's Law Dict. (Rawle's Rev.) 1152.

Of course, a different principle applies where there has been a conviction, in which case the presumption of the existence of probable cause is not merely *prima facie*, but conclusive, unless it is alleged and proved to have been procured by the defendant through fraud or by means of evidence which he knew to be false. The cases of *Saunders v. Baldwin*, 112 Va. 431, 71 S. E. 620, 34 L. R. A. (N. S.) 958, Ann. Cas. 1913B, 1049, and *Craft v. Moloney Belting Co.*, 117 Va. 480, 85 S. E. 486, represent types of the latter class.

Where the declaration simply alleges that the plaintiff was convicted of the crime for which he was prosecuted, obviously it states no cause of action. Therefore in such case it is essential to repel the otherwise conclusive presumption of probable cause arising from the judgment of conviction, both by averring and proving that the conviction was procured by the defendant by fraud or by means of evidence which he knew to be false.

Rightly interpreted, the case of *Saunders v. Baldwin*, *supra*, is authority for the sufficiency of the declaration in the instant case. The first count in that case alleged a want of probable cause, but it furthermore showed a judgment of conviction by the justice, which afterwards on writ of error was reversed, and the accused discharged. And the controlling question there was whether the original conviction established conclusive or only *prima facie* evidence of probable cause. Judge Buchanan, in a convincing opinion, shows that the conviction by the justice was conclusive evidence of probable cause, and for that reason held that the first count, which failed to aver that the conviction was procured by the defendant through fraud or by means of evidence which he knew to be false, was bad on demurrer.

We have not deemed it necessary to review outside authority on what we conceive to be a well-settled rule of Virginia practice. Nevertheless an examination of the cases to which our attention has been drawn shows that the weight of authority and "the rule of reason" sustain the declaration in this case.

For these reasons, the judgment under review must be reversed, and this court will enter such judgment as the trial court ought to have entered, and will overrule the demurrer to the declaration and remand the case for further proceedings.

Reversed.

CARDWELL, P., absent.

(120 Va. 875)

LEWIS v. COMMONWEALTH.

(Supreme Court of Appeals of Virginia. Jan. 16, 1917.)

FALSE PRETENSES \S 38—INDICTMENT—VARIANCE.

The charged offense of larceny of money by false pretenses defined by Code 1904, \S 3722, was substantially proven by evidence that the money was fraudulently obtained through a check acquired by respondent's false statements as to the death of the person insured, which check he had cashed.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. $\S\S$ 50-53; Dec. Dig. \S 38.]

Error to Hustings Court of Richmond.

J. A. Lewis was convicted of larceny of money, and brings error. Affirmed.

L. O. Wendenburg, of Richmond, for plaintiff in error. The Attorney General, for the Commonwealth.

HARRISON, P. The plaintiff in error, J. A. Lewis, was indicted, tried and convicted in the hustings court of the city of Richmond for the larceny of money amounting to the sum of \$174, the property of the Home Beneficial Association, and sentenced to serve a term of one year in the penitentiary in accordance with finding of the jury. To that judgment this writ of error was awarded.

The certified facts are very few, and not disputed. It appears that the life of Emily Capps was insured in the Home Beneficial Association in the sum of \$174 for the benefit of Lucy Ruffin, who claimed the amount due under the policy under the false pretense that Emily Capps was dead; that the prisoner, who was a practicing physician, falsely and fraudulently certified to the association that the insured was dead, and presented an order from Lucy Ruffin, directing all money due her under the claim of Emily Capps to be paid to the accused, Dr. J. A. Lewis. Thereupon the Home Beneficial Association delivered to Dr. Lewis a check for \$174, drawn upon the Merchants' National Bank of Richmond. This check the accused indorsed and had cashed by the St. Luke's Penny Savings Bank, where he did business. From this bank the check passed in due course through the clearing house of Richmond, to the Merchants' National Bank, upon which it was drawn, where it was paid and charged to the account of the Home Beneficial Association.

The sole contention of the prisoner is that the indictment alleged the larceny of money, whereas the proof showed the larceny of a check, thereby creating such a variance between the allegata and the probata as entitled him to a new trial.

Code 1904, \S 3722, provides that:

"If any person obtain, by any false pretense or token, from any person, with intent to de-

fraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof."

Under this statute, if it was larceny to obtain the money by false pretenses, it was equally larceny to obtain the check by the same means. The check was received as an equivalent for the money, according to the universal custom in such cases, and was the usual and proper means for obtaining the money. It has been repeatedly held by this court that, upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment. *Anable's Case*, 24 Grat. (65 Va.) 563; *Pitsnogle v. Commonwealth*, 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867.

We are of opinion that, upon the facts in the case at bar, the ultimate offense of obtaining money by false pretenses is supported by the evidence that such money was fraudulently obtained by means of a check fraudulently acquired. In every real sense money was paid to the accused, and therefore the charge in the indictment was substantially proved. The check was but an incident of the transaction by which the fraud was perpetrated, and but one of the steps leading to the ultimate crime of obtaining money under false pretenses.

The identical question here involved, so far as advised, has not, until now, been before this court. It has, however, been considered and disposed of in many other jurisdictions, the great weight of authority sustaining the view we have taken.

In *State v. Palmer*, 40 Kan. 474, 20 Pac. 270, the indictment charged that the accused unlawfully and fraudulently, with intent to cheat one Certwell, did falsely represent that he was the owner of a certain three year old roan mare then in his possession, and could pass a good title thereto; that the said Certwell, believing the false representation to be true, was induced to purchase the said roan mare and pay the said Palmer the sum of \$85. The court said:

"The evidence, however, shows that Certwell drew the check for \$75 in favor of the defendant upon the Bank of Western Kansas, and then went with the defendant to the bank, identified him, and the bank then took the check from the defendant and paid him \$75 out of money deposited in the bank by Certwell, and charged the same to Certwell's account. This was certainly the obtaining of money as well as the obtaining of the check. *Roberts v. People*, 9 Colo. 458, 13 Pac. 681."

In *State v. Terry*, 109 Mo. 601, 19 S. W. 206, the court said:

"The point is made that the indictment charges that defendant attempted to obtain the money, but that the proof shows that, had the offense been consummated, he would not have received any money, but merely a check. There is no force in this contention, because the attempt is the gravamen of the charge, and the fact that the result of the completed crime would only have been a check, upon which the money

could have been obtained, cuts no figure in the case and has no tendency to disprove the fact of the attempt having been made."

In *State v. Daniel*, 83 S. C. 309, 65 S. E. 236, 237, in which it was held that proof of a larceny of a note will not support an indictment charging larceny of money, the court said:

"In *Hunt v. State*, 72 Ark. 241, 79 S. W. 769, 65 L. R. A. 71, 105 Am. St. Rep. 34 [2 Anz. Cas. 33], proof of obtaining a check on which the bank paid the money was held to be not a fatal variance in a trial for obtaining money under false pretenses. In that case the court well says: 'It would be carrying a technicality to a most dangerous extreme to hold that proof of the mere instrumentalities of obtaining the money constituted a variance with the charge of obtaining the money itself, where the same evidence also showed the fact of obtaining the money itself.' The same principle was applied in *People v. Lammerts*, 164 N. Y. 137, 58 N. E. 22, *Schaumloeffel v. State*, 102 Md. 470, 62 Atl. 803; *People v. Hoffman*, 142 Mich. 531, 105 N. W. 838; *State v. Palmer*, 40 Kan. 474, 20 Pac. 270; *State v. Gibson*, 132 Iowa, 53, 106 N. W. 270. * * * All [of] these cases rest on the ground that as an ultimate fact the money was obtained; the check being only a means of obtaining it." Approved in *State v. Jackson*, 87 S. C. 407, 69 S. E. 883 (decided in 1911).

In *State v. Gibson*, 132 Iowa, 53, 106 N. W. 270, the indictment charged the defendant with obtaining \$24.80 by false pretenses. The evidence was that the defendant obtained a check for \$24.80 drawn upon a bank in Des Moines, Iowa, received by him in Chickasaw county and cashed in a bank at New Hampton. The court said:

"Again, it is argued that there is a variance between the allegations and proof, in this: That defendant is charged with having received money, whereas the proof shows that he received a check. There is also some conflict in the adjudicated cases upon this proposition; but we think the better rule is that, under such circumstances as we have here, the defendant should be held to have received money from the insurance association, at the place where the check was cashed by the bank upon which it was drawn, the intermediate bank which took it up or advanced defendant the money thereon being defendant's agent to forward the same and to receive the money thereon for the defendant, and that the final payment by the bank upon which it was drawn was a payment to the defendant. *State v. Palmer* [40 Kan. 474, 20 Pac. 270] and *Commonwealth v. Wood*, supra [142 Mass. 459, 8 N. E. 432]. See, also, *People v. Dimick*, supra [107 N. Y. 13, 14 N. E. 178]. But, however this may be, there was no variance under any of the cases to which our attention has been called, for the reason that defendant did, in fact, receive money from the plaintiff; the check simply being an instrument through which the money was received. This may not be the rule as to foreign bills of exchange or other papers to which the law merchant is fully applicable; but as to checks, which are ordinarily nothing more than equitable assignments of a fund, this seems to be the more logical view."

In *State v. Germain*, 54 Or. 395, 103 Pac. 521, upon an indictment for obtaining money by false pretense, the court said:

"It was claimed on the argument that there was a variance between the indictment and the

proof, as the evidence showed that Clinesmith gave defendant his check on a Portland bank, while the indictment alleges that the defendant received money. The evidence also shows that defendant cashed the check before he was arrested. The check was the mere vehicle by which defendant was enabled to obtain Clinesmith's money, and there was no variance."

To the same effect are the cases of *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178; *Bates v. State*, 124 Wis. 612, 103 N. W. 251, 4 Ann. Cas. 365; *Schaumloeffel v. State*, 102 Md. 470, 62 Atl. 803.

We recognize the rule that certainty to a reasonable extent is an essential requirement of criminal pleading. One of its objects is to give notice to the party of the nature of the charge. We are unable, however, to see how there can be any danger of surprise in the present case, where the prisoner is charged with stealing \$174 from the Home Beneficial Association. The substance of such a charge

is that the accused has fraudulently converted that sum of money to his own use, and whether it was done by means of a larceny at common law or by obtaining, by false pretenses, a check representing the money, which he has cashed, can make no difference in regard to taking the accused by surprise. As said by Judge Moncure in *Anable's case*:

"He knows what the law is, and that if it be proved that he effected his criminal intent by either of the means mentioned he will be convicted of larceny, and he must be prepared to meet that proof if he can."

"One of the chief objects of our criminal statutes is to prevent the acquittal of guilty persons on account of some nice technical distinction between the offense charged and the offense proved against a person accused of crime." *Anable's Case*, supra.

We are of opinion that the plaintiff in error has not been prejudiced by the judgment complained of, and it is affirmed.

Affirmed.

(120 Va. 390)

STEIN et al. v. MORRIS et al.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. TRADE-MARKS AND TRADE-NAMES ¶70(1) — UNFAIR COMPETITION — MORRIS PLAN OF INDUSTRIAL BANKING.

The "Morris plan of industrial banking" is not an infringement of the mutual installment plan of industrial savings and loan banking, known as "Merchants' & Mechanics' Savings Association," since the first plan is operated on fixed capital and the borrowers and savers do not participate in the profits and losses.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ¶70(1).]

2. PROPERTY ¶2 — SUBJECTS OF PROPERTY RIGHTS.

If an individual originates a scheme or idea of banking, he could not have a property right in such method or idea without any physical means or devices for carrying it out.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 2; Dec. Dig. ¶2.]

3. ATTORNEY AND CLIENT ¶106—VIOLATION OF CONFIDENCE—EVIDENCE—SUFFICIENCY.

Where the complainant, who claimed to have originated a scheme of banking, approached an attorney, one of the defendants, asking him to organize a similar association in another city, and the two entered upon the organization, but it resulted in failure, the essence of the proposition requiring that the attorney discuss the plan and make it known to the public, there was no violation of the client's confidence when the attorney subsequently evolved a prima facie similar but essentially different scheme.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 217, 219; Dec. Dig. ¶106.]

4. ATTORNEY AND CLIENT ¶109—VIOLATION OF CONFIDENCE.

No communication to a lawyer for the express purpose of having it brought to the attention of the public or communicated to another is privileged.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 221, 222; Dec. Dig. ¶109.]

Appeal from Circuit Court of City of Norfolk.

Bill by David Stein and others against Arthur J. Morris and others. Decree for defendants, and complainants appeal. Affirmed.

The Stein system, as stated in the opinion is explained by the following table and letter:

"Dear Sir:—As per your request, I send you herewith a rough estimate of the profit to be derived from a business such as I have proposed. If you should do no business at all, except with the \$20,000 alone, this amount will bring you a profit positively and surely as I have figured it in rough for 52 weeks or one year, of from 17½ to 18 per cent.; a net profit of \$3,748 or \$3,750. Now, according to my plan, of which you know, I or whoever else should manage this business, would have to sell class A stock, and the money from this would be loaned out, and the profit will go on the \$20,000, which we will call B stock. We will also sell some B stock, besides the \$20,000, from which these people will not get any profits before the annual meeting should they draw out and could not pay for it, or should they draw out after the annual meeting when the dividend has al-

ready been divided. They only get one-half of the money it has made. All the profit of this money goes on the \$20,000. * * * Even if no other money were gotten there is already a profit of 18 per cent., which is better than any bank business; and besides this we will have the lapses, which means the installment stock and B stock withdrawn before they get anything. * * *

Very truly yours,

D. Stein."

Week.	Loans.	Income.	Balance.	Discount.	Total.	Profit.
1	21250	20000	25	1275	21275	1275
1	450	425	27	27	477	27
2	450	434	38	27	488	37
3	500	443	11	30	511	80
4	450	453	41	27	491	27
5	500	462	33	30	533	30
6	500	472	35	30	535	30
7	550	482	—	33	550	33
8	500	493	22	30	523	30
9	550	503	9	33	559	33
10	550	514	6	33	556	33
11	550	525	14	33	564	33
12	550	536	33	33	583	33
13	600	547	16	36	616	36
14	600	559	11	36	611	36
15	600	571	13	36	618	36
16	600	583	27	36	637	36
17	650	595	21	39	671	39
18	650	608	18	39	663	39
19	650	621	28	39	678	39
20	700	634	4	42	704	42
21	650	648	41	39	691	39
22	700	667	40	42	740	42
23	700	671	42	42	743	42
24	750	685	23	45	773	45
25	750	700	13	45	798	45
26	750	715	23	45	778	45
27	800	730	6	48	806	48
28	800	746	—	48	800	48
29	800	762	16	48	810	48
30	800	778	26	48	836	48
31	850	794	31	51	851	51
32	850	811	43	51	883	51
33	900	828	25	54	925	54
34	900	846	25	54	925	54
35	900	864	43	54	943	54
36	950	882	23	57	963	57
37	950	901	40	57	960	57
38	1000	920	20	60	1000	60
39	1000	940	20	60	1020	60
40	1000	960	40	60	1040	60
41	1050	980	33	63	1053	63
42	1100	1001	—	66	1100	66
43	1050	1023	29	63	1059	63
44	1150	1044	2	69	1159	69
45	1100	1067	35	66	1135	66
46	1150	1087	41	69	1191	69
47	1200	1110	23	72	1223	72
48	1200	1134	29	72	1239	72
49	1250	1158	12	75	1263	75
50	1250	1183	20	75	1270	75
51	850	783	4	51	864	51
52	850	791	—	51	850	55
	62400	58659				3748

Explanation of "Morris Plan" referred to in opinion:

"The Morris Plan Company of New York is organized to operate what is known as the 'Morris plan,' having for its object the twofold purpose of lending money to persons of moderate means at reasonable rates of interest, and of providing a safe and sound investment for small funds. * * *

"The capital stock of the Morris Plan Com-

pany of New York is \$100,000, and the cash dividend on this stock is limited to 6 per cent. of its book value.

"The company will accept no deposits, but will issue its paid-up and installment certificates of investment.

"The paid-up certificates, designated as class B certificates, are sold in multiples of \$50, and 5 per cent. interest is allowed thereon, payable semiannually.

"The installment certificates, designated as class C certificates, are likewise issued in multiples of \$50, and are sold on an installment plan calling for the payment of \$1 a week for each \$50 certificate purchased.

"After 25 payments have been made on the installment class C certificate, the company allows interest on the sum paid at the rate of 4 per cent. until the full \$50 is paid, at which time the holder of the class C installment certificate may convert it into a paid-up class B certificate bearing 5 per cent. interest.

"Holders of these B and C certificates may borrow on them as collateral, without indorsers or other security, to an extent equal to the amount paid in on each certificate. * * *

"Loans are made on the basis of the character of the applicant and his indorsers, with due consideration for the earning capacity of each. * * *

"If the applicant is the holder of paid-up B certificates of investment, or other acceptable collateral, this is the only security required. Otherwise the person desiring to borrow in making application for a loan offers the names of two persons as comakers. * * *

"If the loan is made, but not otherwise, a charge toward the cost of investigation is made at the rate of \$1 on each \$50 loaned; no charge to exceed \$5.

"The applicant, together with his comakers, then signs a collateral note provided by the company, payable a year after date, in a sum equal to the amount of the loan required. Six per cent. interest on this amount is deducted in advance by the company for the period for which the loan is made, usually one year. For every \$50 or part thereof loaned, the borrower subscribes to one class C installment certificate of investment. When the note is executed, this certificate is assigned to the company and becomes a security for the note and a protection for the comakers.

"The borrower pays \$1 a week for 50 weeks on each class C certificate so subscribed for. At the end of 50 weeks his payments on class C certificates will equal the amount of his loan.

"Two weeks later, when the loan is due, the borrower can cash his C certificate and thereby pay his loan, or he may avail himself of options offered by the company that will otherwise provide for the payment of his loan and afford him the opportunity of becoming an investor in the interest-bearing class B certificates issued by the company."

S. M. Brandt, of Norfolk, for appellants. Hicks, Morris, Garnett & Tunstall, of Norfolk, and Harlan F. Stone, of New York City, for appellees.

HARRISON, P. This bill in equity was filed by the appellant, David Stein, asking for an accounting and praying for an injunction to restrain the appellees, Arthur J. Morris, the Fidelity Corporation of America, and the Industrial Finance Corporation, from appropriating or using the plan of banking known in this record as the "Morris Plan of Industrial Banking," of which the complainant claims to be the owner.

It appears from the record that in March, 1910, A. J. Morris, one of the appellees, to-

gether with several associates, organized in the city of Norfolk the Fidelity Savings & Trust Company, Inc., which began in May, 1910, to conduct the business of a loan and savings company for the accommodation of people of small means who could not get accommodation from the ordinary commercial banks. This corporation prospered to such an extent that by the end of the first year the financial soundness of the principle on which it operated was demonstrated, and other similar institutions were established in different parts of the country. In the summer of 1912 it was found that an extensive development of this system of banking would require a larger capital, and the Fidelity Corporation of America was thereupon organized with an authorized capital of \$300,000. To this company Morris and his associates conveyed all of their rights in the business theretofore conducted by them of organizing such institutions. These industrial banks grew so rapidly that in July, 1914, Morris and his associates organized in the city of New York the Industrial Finance Corporation with a capital stock of \$1,500,000, to which the Fidelity Corporation of America transferred all of its assets of every character, together with the good will of the business which it had theretofore conducted of organizing banks on the plan which had then become known as the "Morris Plan of Industrial Banks." The record shows that at the time of the institution of this suit these industrial banks had been established in many localities throughout the United States.

In addition to the capital invested in the Industrial Finance Corporation, approximately \$7,000,000 has been invested in the capital of the numerous operating banks that have been established by that corporation. It is this business that the appellant, five years after the movement began, seeks to restrain and call to account, upon the ground that he is the originator of the installment plan of industrial savings and loan banking, and that the use of his idea by the appellees is wrongful and prejudicial to his rights.

It appears that in April, 1901, appellant and a number of associates organized in Newport News, Va., a corporation known as the "Merchants' & Mechanics' Savings Association," for the purpose of prosecuting the business of savings and loans in the city of Newport News. The claim alleged is that this institution and a certain table and letter filed with the bill constitute a unique plan of lending to poor people money, returnable in weekly installments and reinvesting these weekly installments, which is owned exclusively by the appellant, and that the same idea has been adopted by the appellees in their plan of establishing industrial banks.

[1] It is, we think, clear from the evidence that the respective plans of banking under consideration are not substantially similar, but are fundamentally different. The two

plans are clearly differentiated by experts showing that one is operated upon a mutual basis, the members or borrowers subscribing to the capital stock and participating in the profits and losses; while the other is operated upon a fixed capital, the stockholders being the managers and proprietors of the banking institution, and the borrowers and savers not participating in the profits and losses. The appellant contends that the letter and table filed with his bill show that his plan is substantially the same as the "Morris plan." This contention cannot be sustained. The wording of the letter plainly conveys the idea that the plan was mutual in its character. This interpretation of the letter is sustained by the by-laws of the "Merchants' & Mechanics' Savings Association," which admittedly embody appellants' whole scheme and plan of banking. The table merely shows a simple calculation of profits to be derived from a given sum in accordance with the "Stein plan," the theory being that the periodical payments and interest would be immediately reloaned on similar terms.

The evidence of those who united with the appellant Stein in organizing the Merchants' & Mechanics' Savings Association of Newport News, which he claims to be the sole and complete embodiment of his system, is overwhelmingly to the effect that the scheme was not original, but was an old one which had been in operation in Europe for many years, and that Stein acquired his knowledge of the system in Europe from whence he emigrated to America in 1892. The witness Rosenbaum, who was an active officer of the Newport News corporation, says he never heard of any scheme of proprietorship from the organization of the company in 1901 until about 1914. This testimony of Stein's own witness, who was in a position to know, would alone seem to be sufficient to show that the present claim of invention and property was conceived after Stein had seen the unusual growth and prosperity of the "Morris plan."

[2] If, however, appellant had originated the scheme or idea of banking of which he claims to be the owner, he could not have a property right in such a method or idea for conducting business without any physical means or devices for carrying it out. In other words, he could not put such an idea into operation without it at once escaping his own grasp and becoming the property of mankind. (*Bristol v. E. L. A. Society*, 52 Hun, 161, 5 N. Y. Supp. 131; *Burnell v. Chown* (C. C.) 69 Fed. 993; *Bristol v. E. L. A. Society*, 132 N. Y. 264, 30 N. E. 506, 28 Am. St. Rep. 568; *Hamilton Mfg. Co. v. Tubbs* (D. C.) 216 Fed. 401.

In *Bristol v. E. L. A. Society*, 52 Hun, 161, 5 N. Y. Supp. 131, supra, it is said:

"It is difficult to conceive how a claim to a mere idea or scheme, unconnected with particular physical devices for carrying out that idea, can be made the subject-matter of property. So long as the originator of the naked

idea, whether, germinating under the laws of metaphysics, it be regarded as Platonic or Cartesian in its make-up, keeps it to himself, it is his exclusive property, but it ceases to be his own when he permits it to pass from him."

As further said in the case cited, such ideas in their relation to property belong to the claimant as long as he keeps them. But if he permits them to go he cannot follow them.

In *Hamilton Mfg. Co. v. Tubbs*, supra, it is said:

"Where an idea, or trade secret or system, cannot be sold or negotiated or used without a disclosure, it would seem proper that some contract should guard or regulate the disclosure, otherwise it must follow the law of ideas and become the acquisition of whoever receives it."

In the case of *Haskins v. Ryan*, 71 N. J. Eq. 575, 64 Atl. 436, a leading authority on the subject, the court, in a luminous discussion of this subject, says:

"The means of carrying out the plan, of giving effect to the idea lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called property. It lacks that dominion—that capability of being applied by its originator to his own use—which is the essential characteristic of property. It differs fundamentally from the secret process or patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now, it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in *Jeffreys v. Boosey*, 4 H. L. Cas. 965: 'Volat irrevocabile verbum, whether borne on the wings of the wind or the press, the supposed owner instantly loses all control over it. * * * He has produced the thought and given it utterance, and eo instanti it escapes his grasp.'"

[3] The contention of complainant that he imparted his plan or scheme of banking to Morris, as his attorney, in confidence and with a restriction against his using the same, and that Morris violated such professional confidence when he established the "Morris plan," is not tenable. It appears that several years after Stein had united with others in organizing the Merchants' & Mechanics' Savings Association of Newport News, through which organization he made known to the public his so-called scheme and method of doing business, he approached Morris with the request that he would unite with him in organizing a similar savings association in the city of Norfolk. Morris did unite with Stein in an effort to organize such a company, but the effort resulted in failure, and thereupon Morris' connection with the matter and with Stein ended. The preponderance of the evidence shows that no scheme was committed to Morris in confidence; on the contrary, the very thing he was asked to do necessarily involved his discussing Stein's plan and making it known to the public. This Stein did himself and in no other way could

a company have been established in Norfolk or elsewhere.

[4] No communication to a lawyer for the express purpose of having it brought to the attention of the public, or communicated to another, is privileged. *Weeks on Attorneys at Law* (2d Ed.) 151; *Bartlett v. Bunn*, 56 Hun, 507, 10 N. Y. Supp. 210; *Commonwealth v. Bacon*, 135 Mass. 521. It is true that an attorney should be held to the highest good faith in dealing with a client, but it is obvious, in the present case, that the charges of disloyalty on the part of Morris, if he ever was attorney for Stein, are wholly without merit.

The appellees have urged upon us other grounds of defense to the claim asserted by the appellants, but in the view we have already taken of the case it is not necessary to refer to them.

In conclusion, we are of opinion that the claims of the appellant are without foundation in law or in fact, upon any view of the case. The decree complained of, denying the relief prayed for, is therefore plainly right, and must be affirmed.

Affirmed.

CARDWELL, P., absent.

(120 Va. 410)

WALKER v. WALKER.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. DIVORCE \S 133(1)—DESERTION—SUFFICIENCY OF EVIDENCE.

In a husband's suit for absolute divorce on the ground that his wife willfully abandoned and deserted him without just cause or excuse, evidence held insufficient to entitle plaintiff to the decree for which he prayed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 446; Dec. Dig. \S 133(1).]

2. DIVORCE \S 37(1)—ABSOLUTE DIVORCE—WILLFULNESS OF DESERTION.

Desertion, to justify a decree for an absolute divorce, must be willful, and a decree for absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 107; Dec. Dig. \S 37(1).]

Appeal from Corporation Court of Danville.

Suit for divorce by G. S. Walker against Maggie Walker. From a decree denying plaintiff's prayer for a decree of divorce a vinculo matrimonii, he appeals. Decree affirmed.

Harry Wooding, Jr., of Danville, for appellant.

PRENTIS, J. This is an appeal from a decree denying the prayer of the appellant for a decree of divorce a vinculo matrimonii.

The allegation of the bill is that the appellee "willfully abandoned and deserted the appellant without just cause or excuse there-

for, and still continues in such desertion and abandonment."

The evidence is meager and consists of the deposition of the appellant, to the effect that his wife left him of her own accord; that he gave her no cause to leave him; that she just got tired, and decided to leave, and left; that he provided for her support while they were living together; that she left about 4 years prior to the time he testified; and that the last place of her residence that he knew of was North Carolina.

Another witness, who it appears was less than 21 years of age at the time of the occurrence as to which he testifies, says that she left him without any cause, so far as he knows; that she just left him because she wanted to; and that, so far as he knew, the husband gave her no cause for doing so.

Another witness testified that he always thought that he made her a good husband and provided for her the best he could, but "she seemed to have got tired of him and just left" for no cause that he knew of.

Upon this testimony the judge of the lower court was of opinion that the evidence was not sufficient to entitle the plaintiff to the decree which he prayed for.

[1, 2] We agree with this conclusion. The desertion, to justify a decree for an absolute divorce, must be a willful desertion, and the court to which the evidence is submitted can only determine whether or not such desertion is willful by having all the facts and attendant circumstances fully and frankly presented. It is difficult to find an event which stands alone, entirely unconnected with previous events. The evidence in such a case should show all of the circumstances immediately preceding the separation; such as, whether the departure was secret or open, whether it was accompanied by any threat to remain away or by promises to return, and every other pertinent declaration or circumstance to enable the court to determine whether or not the desertion was willful. It should also show the events immediately succeeding the separation, such as the efforts, if any, to ascertain the new place of residence of the consort complained of, as well as the efforts at reconciliation, if any, of either of the parties. The policy of the law is against divorce by consent, and if the sanctity of the marriage tie is to be preserved and divorces by consent prevented, full and satisfactory evidence should be required, so that the court may determine the legal questions involved from the facts presented, and a decree for an absolute divorce for desertion should not be granted unless the evidence proves willful desertion without justification or excuse.

A separation by mutual consent, or because of the fault of either of the parties, may be just as well inferred from the evidence submitted in this case as a desertion by the wife,

and it falls far short of proving the allegations of the bill.

For these reasons the decree complained of will be affirmed.

Affirmed.

(120 Va. 699)

CHESAPEAKE & O. RY. CO. v. HUNTER'S ADM'R.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. EVIDENCE \S 539½(1)—EXPERTS—COMPETENCY.

A stationary engineer who operated locomotives some 25 years previous and testified that he was able to tell whether an engine had the steam shut off was not incompetent, as a matter of law, to testify as an expert whether a locomotive observed by him had cut off its steam.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2350; Dec. Dig. \S 539½(1).]

2. TRIAL \S 140(1)—QUESTIONS FOR JURY—CREDIBILITY OF EXPERT WITNESS.

Where no objection was made to a witness' testimony because of his alleged incompetency as an expert, the credibility and weight to be given his testimony was solely for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 334; Dec. Dig. \S 140(1).]

3. RAILROADS \S 348(1)—CROSSING ACCIDENT—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a verdict for plaintiff on theory that defendant railway company did not promptly endeavor to stop one or both engines on its "double-header" train after discovering plaintiff's automobile stalled on its track at a crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1133, 1140, 1141; Dec. Dig. \S 348(1).]

Error to Circuit Court, Rockbridge County.

Action by Hunter's administrator against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Perry, of Staunton, for plaintiff in error. Curry & Curry and Timberlake & Nelson, all of Staunton, for defendant in error.

SIMS, J. This is an action by the appellee (plaintiff in the court below and hereinafter referred to as "plaintiff") against the appellant (hereinafter referred to as "defendant") for damages to an automobile belonging to W. S. Hunter, deceased, the plaintiff's intestate, caused by collision therewith of a freight train of the defendant at and upon a public road crossing of the defendant's main line of railway at Bell's Valley station in Rockbridge county.

Upon the trial of the case there was a demurrer to evidence by the defendant and a verdict of a jury in favor of the plaintiff for the sum of \$500, with interest and costs, subject to such demurrer. The court below overruled the demurrer and entered judgment on the verdict in favor of the plaintiff. This action of such court is assigned as error here.

In the view we take of the case we need consider only one question, namely:

[1-3] 1. Was the defendant liable for said damages under the doctrine of the last clear chance?

As bearing on this question, the essential facts, ascertaining them under the rule applicable on demurrer to evidence, are as follows:

The automobile was being operated by the wife of the decedent, W. S. Hunter, when it came upon the railway track of the defendant. W. S. Hunter was seated on the front seat to the right side of his wife, with a child about four years old in his lap. The automobile was a Maxwell five-passenger car, weighing about 3,000 pounds. The rear seat was occupied by Mrs. Daniels and Mrs. Via and two children, one of the ladies holding one of the children in her lap, and the other child, about nine years old, was seated between these ladies. Mrs. Hunter, operating the automobile, was seated on the front seat on the left side. When the automobile was within a few feet of the crossing of the railway, an approaching train was first heard or seen by its occupants. It was then seen by Hunter, who cried out to his wife, "A train is coming." Thereupon she endeavored to stop the automobile before it ran upon the railway track, but failed to do so, and did not succeed in stopping it until its front wheels passed over one rail—the south rail—of the track, and ran a little way towards the center of it. As the front wheels dropped over the rail the engine of the automobile "went dead," was "killed" by the jar, and stopped, and the automobile, after exhausting its momentum, and under the influence of the foot brake, stopped in the position above indicated, partly on the railway track and partly off. There was an incline in the roadway at this point, because of which the rear wheels of the automobile were slightly lower than its front wheels as it stood after it stopped.

Whether the automobile stopped when it did because of the negligence of the plaintiff's intestate, or of Mrs. Hunter, his chauffeur, or of the defendant in failing to maintain the crossing in proper repair, or whether subsequently Hunter was guilty of negligence in remaining too long in a position of danger, trying to roll his automobile off the track, are immaterial, in the view we take of the case, so we need not refer to the testimony bearing especially on those questions, or to the authorities cited in argument bearing thereon.

When the automobile ran upon the track and stopped, Hunter, taking the child which had been in his lap with him, immediately sprang out of the automobile through its front door on its right side. At the same time Mrs. Hunter and the two other ladies, taking the two other children with them, al-

so immediately got out of the automobile. The train was then, according to Mrs. Hunter's testimony, "a long way off, * * * I judge about half a mile," approaching from the east going west, i. e., facing the right side of the automobile.

As he got out of the automobile and on getting out, Hunter, with his hat in one hand waved toward the train, put the child he had had in his lap down on the side track 9.09 feet south of the south rail of the main railway track, came back on the main track in front of the automobile, and facing the train, with his hands and arms upraised, with his hat in one hand, gave the "shut-off" or "stop signal" used by and well known to railroad men, and directed Mrs. Via to wave her red garment (supposed to be a red scarf or sweater) across the track. Hunter then tried to crank the automobile, but failed to start its engine.

The railway track from the crossing east was perfectly straight, and the engineer and fireman of the approaching train had a full and unobstructed view of the crossing for a mile distant east of it. It was a clear day and in broad daylight when the accident happened. The train was a "double-header," that is, pulled by two large locomotives or engines. The train consisted of 35 cars besides the two engines, composed of 30 cars loaded with cement of 50 tons each, 4 empty steel coal cars, and the caboose.

There was a "hump" or "rise" in the railway track east of the crossing in question, located on the blueprint filed by defendant with the record about 2,142 feet east of such crossing. This place in the track was plainly discernible to any one looking along the track eastward from said crossing or from the depot platform on the north of the track, also east of the crossing.

The grade of the railway track from the "hump" or "rise" to the crossing was slightly down grade. The train approached the crossing from the "hump" or "rise" at a speed of 30 to 35 miles an hour, until its speed was checked by the air brakes, and was going at a rate of 18 to 20 miles an hour when it struck the automobile.

Luck, a witness for plaintiff, who was on the depot platform when the automobile came upon and stopped on the railway track at the crossing, testified that he saw the automobile when it stopped, looked toward the approaching train, and that the train was then "beyond the rise," on the east side of the "rise"; that is, it was then more than 2,142 feet away, according to the measured distance of such rise, as shown on said blueprint. Luck stated this distance as 9 rails from the crossing to the point on the platform where he was, and 66 rails from him to the "hump" or "rise" in the track, as per his counting of the rails the next day after the accident, when he was giving the claim agent of defendant information asked by latter of him on the subject, making the train then more

than 2,250 feet away from the crossing (a rail being 30 feet long), according to Luck's testimony.

Luck further testified that, when Hunter had waved the shut-off or stop signal and then tried to crank his automobile, he (Luck) then looked towards the train a second time, and that the train was then "still beyond the rise," or more than 2,142 feet, per said blueprint, or more than 2,250 feet per Luck's rail count, or about half a mile away from the crossing and from the automobile stalled on the track.

The testimony of plaintiff as to what then ensued is that Hunter, after trying and failing to crank his automobile, waved his hat at the approaching train again (as Mrs. Hunter testified), that he called for help to "try to push the car backwards off the track," told Mrs. Hunter to take hold of the left front wheel, which she did, and he took hold of the right front wheel and put his shoulder against the front of the automobile, and they pushed the automobile back until its front wheels came against the south rail of the railway track, when it stopped, and they could push it no farther. Hunter then cried out, "Get out of the way." The front engine of the train was then "beyond the switch," or a little east of the switch, according to Luck; the switch being about 735 feet east of the crossing according to said blueprint.

When Hunter cried, "Get out of the way," his wife left the wheel she was trying to roll over the railway rail and made her escape from the railway track by running back south of such track. Hunter at the same time tried to make his escape, but found one of his feet caught between the guard rail and the south rail of the track, whereupon, leaning on the front of the fender over the front wheel of the automobile which he had been trying to roll, with his left side towards the approaching train, his back north, very nearly the same position as that in which he had been ever since he tried to crank the automobile and failed and attempted to roll the automobile off the track, he struggled to free his foot, which held him fast. Not seeing her husband when she reached a place of safety, Mrs. Hunter ran around the rear of the automobile in search of him, and, seeing him in the position mentioned with his foot caught, as stated, she started to go to his rescue, when she tripped over a rail of the side track and fell. Before she could recover her footing she saw her husband get his foot loose, as the front engine of the train was almost upon him, and at that instant she saw him leap backwards and toward the north side of the track. She thought he had escaped, but the engine struck him on his left side, threw him some 10 or 12 feet high and some 80 feet distant west of the crossing to the north side of the track, killing him instantly, and struck the automobile at the same time and threw it to the south side of the track

about 80 feet west of the crossing, practically demolishing it.

The red garment was meanwhile being waved by Mrs. Via, standing on the side track, south of where Hunter was, from the time he told her to wave it until the front engine of the train was within about 180 feet of the automobile and Hunter.

It will be observed that when the automobile stopped upon the track, and its chauffeur and all its passengers were leaving, or had left it, and Hunter gave the stop signal to the approaching train, the automobile being a large car of some 3,000 pounds weight, it was in itself obviously a dangerous obstruction on the track; and it was clearly the duty of the defendant, after it was seen by the engineer or fireman of the front engine of the train, to use every reasonable effort to stop the train or bring it under such control as to be able to stop it before it should reach the automobile, unless the latter was removed from the track before the train reached it. Such effort, as shown by the testimony of the said engineer and fireman themselves, would have included in the situation and under the circumstances thus presented the shutting off of the steam from the engine, the putting on of the air brakes, the sanding of the track as soon as could reasonably be done after such engineer or fireman saw the automobile on the track, and also the shutting off of the steam from the second engine as soon after its engineer felt the air brakes had been put on as could reasonably be done.

As the learned judge of the court below says in his opinion given following the first trial of the case of L. E. Hicks, Administrator of W. S. Hunter, v. C. & O. Ry. Co., argued before this court along with the case we are now considering, in reference to the signal of Hunter to the engineer to stop: "That was notice to him that the automobile was on the track and might be destroyed. * * *". As the same learned judge says in his opinion given following the second trial of the case of L. E. Hicks, Administrator, v. C. & O. Ry. Co., next above referred to:

"The evidence of the plaintiff is that Hunter immediately signaled the approaching train to stop, and that at the time he so signaled it there was yet time for it to have done so and have avoided the accident altogether."

At no time after the automobile stopped on the track did its obvious situation change as to its being a dangerous obstruction on the track until it was struck by the train. That it was such an obstruction and called for immediate efforts on his part, such as above stated as being included within the duty of the defendant towards stopping or getting the train under control, was recognized and acted upon by Hinebaugh, the engineer of the front engine, as he says in his testimony, immediately upon his seeing the automobile on the track at the crossing and its passengers jumping out. He admits that he saw it at

the point of time when its passengers were jumping out, and says that he immediately applied the air brakes, sanded the track, began to sound the danger signal of quickly successive short blasts of the whistle. On these subjects he testifies as follows:

"* * * I saw an obstruction on the track, and I stuck my head out of the window to take a good look, and saw it was some kind of vehicle on the track; I didn't know whether it was a car, buggy, or what it was when I first saw it, only I saw the passengers jumping out all around the car.

"Q. Were the people you saw jumping out of the car? A. Yes, sir; they were jumping out of the car when I saw them.

"Q. What did you do? A. I applied my brake in the emergency immediately and began to sound the danger signal. * * *

"Q. As I understand you, then, as you turned around you saw a vehicle on the track? A. Yes, sir.

"Q. And as you saw it you saw people getting out of it? A. Yes, sir.

"Q. You at once applied the emergency? A. I applied the emergency brake just as quick as I could; it was right at my side, and it only takes a thought to apply it.

"Q. Then what did you do after putting that emergency on? A. I began to sound the danger signal.

"Q. What is the danger signal? A. Successive short blasts of the whistle.

"Q. Go ahead and tell what occurred. A. I saw the gentleman come around the end of the car, and he walked out near the north rail and gave me a signal just like this (illustrating), just one time.

"Q. The man there at the car then gave you a signal; what did that signal mean? A. It was a stop signal.

"Q. Did you see anybody else waving to you? A. No, sir; my attention was attracted absolutely to that man, for I saw the dangerous position. Immediately after giving that signal he dropped down in front of the car, placed his shoulder against the front of his car to push it off the track, and my attention was attracted to him from that on. He was a man absolutely in danger.

"Q. What else did you do on that engine in order to stop? A. Applied the brake and opened the sand was the only plausible thing I could do. * * *

"Q. Had you cut off or not? A. I shut off.

"Q. When did you shut off? A. When I first saw the obstruction.

"Q. After you first put on the emergency or afterwards? A. I shut off first.

"Q. What is your usual order of putting on your emergency brake or air; do you shut off first and put on the air afterwards? A. Yes, sir; shut the steam off and then apply the brakes.

"Q. So as you went down there you were without steam, you had your emergency on, and you were sanding the track? A. Yes, sir."

Fultz, the fireman of the front engine, says in his testimony on this subject as follows:

"Q. Where were you when you first came in sight of the crossing; I mean where were you sitting? A. On my seat box on the left side.

"Q. What were you doing? A. I was looking ahead.

"Q. Did you see those people on the track before Mr. Hunter was struck? A. Yes, sir. * * *

"Q. What did you see when you first saw them; did you see them when they came on the track? A. Yes, sir; I seen them when the car run up and stopped. * * *

"Q. You saw the car stop? A. Yes, sir.

"Q. Then what happened? A. Well, it seem-

ed like the ladies or women was jumping out, and it seemed like they threw wraps out or something like that, red, looked like they were thrown up in the air. I seen the ladies get out of the car, and also seen one man get out of the car.

"Q. What did you do in the meantime? A. Well, as soon as I seen this I started to holler to the engineer.

"Q. Where was he? A. He was on the seat box, and just as I fixed to holler he threw his brakes in emergency. Of course, the brake valve makes quite a fuss. I knew there was no use to holler as soon as I hear him throw the brake in emergency; I knew there was no use; he seen them. I seen him raise up in his seat box and look out ahead, and I raised off my seat box and began ringing the bell; I never said a word to him; I knew he did all he could when he threw the brake valve in emergency. * * *

"Q. What happened, now, from the time this emergency went on to the end of the business? A. Well, the ladies jumped out of the car. They went this way (indicating), and the man went the other way, went over and looked as if he was pushing at the car to get off the track. He pushed at it a short while, and run in between the wheels of the car, and I supposed he was taking the brake off. I was standing there ringing the bell living in hopes he would get the car off. After he run in between the wheels and did a little something in there, he didn't stay but an instant, just so quick, you know, you could hardly know he had been there. He ran around and got against the car in the front end and began pushing just like that. It looked as though he had just got it started the last glimpse I got of him. Of course, I couldn't see Mr. Hunter when he was hit at all, but we were close as from here to the door the last time I seen Mr. Hunter.

"Court: What was he doing at that time? A. Looked like he was down pushing against the head or fender, something like that; he was crouching over in that position, looked as if he was trying to push the car off; I thought he had the car off. * * *

Cross-examination:

"By Mr. Timberlake:

"Q. Did you maintain a lookout for that crossing as you approached it? A. Yes, sir.

"Q. You maintained a constant lookout? A. Yes, sir.

"Q. Now, you can see that crossing for a distance of about a mile, couldn't you? A. Yes, sir; every bit of it.

"Q. And if you had seen an automobile stalled on that crossing with people getting out of it you would have regarded that as an immediate notice of danger which would have required you to stop? A. Sure.

"Q. That would have presented a condition of affairs to you that showed you the necessity of stopping? A. Sure.

"Q. And you tell the jury now that you maintained an uninterrupted lookout from the time you first came in sight of this crossing until this accident occurred? A. Yes, sir. * * *

"Q. You saw the red scarf or garment thrown up? A. Yes, sir.

"Q. And you saw people standing around the car? A. I saw them getting out of the car."

The testimony for the defendant was that the train could and should have been stopped on this occasion, and its witnesses claimed that it was in fact stopped, 1,200 feet from the point at which the air brakes were put on.

A witness for plaintiff testified that the train could have been stopped within 800 to 900 feet from the point at which the air brakes were put on, but the learned judge

of the court below held that the testimony of this witness must be disregarded, because he based his testimony on only one instance in his experience when conditions did not approximate those existing in the case at bar, and further because such testimony was in conflict with the known laws of physics. Without passing upon the correctness of this holding, we will disregard the testimony of this witness in the case and consider the fact to be that the train could and should have been stopped within 1,200 feet of the point at which the air brakes were put on if the engineers of the front and second engines exercised reasonable care and diligence in their efforts to stop the train thereafter.

Concerning the question as to whether such reasonable care and diligence were exercised by the engineer of the second engine, there is a conflict between the testimony for the plaintiff and for the defendant. This conflict is in regard to when the steam was shut off from the second engine.

Phillip Moore, a witness for plaintiff, testified as follows:

Direct examination:

"By Mr. Curry:

"Q. Mr. Moore, where do you live? A. I live at the old stone quarry at Bell's Valley.

"Q. How far do you live from the railroad? A. Something about 250 yards, something like that.

"Q. On the south or north side of the track? A. On the south side of the track.

"Q. On the southeastern side, I believe, is it?

A. Yes, sir; the southeastern side of the track.

"Q. What is your occupation? A. Engineer.

"Q. How long have you been an engineer? A. All my lifetime.

"Q. You are a stationary engineer? A. Yes, sir.

"Q. You have been running engines all your life? A. All my lifetime been around engines.

"Q. You have worked, then, on railroads, too? A. Yes, sir; some.

"Q. What did you do on the railroad? A. Firing.

"Q. Are you familiar with the working and running of engines? A. Very much so.

"Q. Can you stand off and look at an engine and say whether it is in power or not? A. Yes, sir.

"Q. A locomotive running on the track? A. Yes, sir.

"Q. Can you tell whether the steam is on or not? A. Very likely; yes, sir.

"Q. Well, is there any doubt about you being able to tell it? A. No; there is no doubt about it that my eyes would deceive me that much that I couldn't tell.

"Q. Now, do you know about the time, or the time, Mr. Hunter was killed at Bell's Valley? A. The 27th day of September.

"Q. What year? A. 1914.

"Q. Was it Sunday or what day? A. Sunday.

"Q. Did you see him when he was struck? A. No, sir.

"Q. Did you see the train when it passed the point where he was killed? A. I seen it after it passed the point.

"Q. How many engines were there; more than one engine to the train? A. There was two.

"Q. Where did you first see the engine? A. When it passed the crossing a piece.

"Q. Where were you when you saw it? A. I was over there close to my house.

"Q. Now, where is that with reference to the crossing? A. Well, that would be just about southeast, just as near as I could tell you, and about 250 yards from the railroad.

"Q. Then you were on the lower side as we generally speak of it going west? A. Yes, sir.

"Q. Do you know whether the engines, after they passed that crossing, or when they passed that crossing, were cut off? A. The front engine was cut off, shut down entirely, but the second engine wasn't.

"Q. How do you know that? A. I could tell by the moving of the engine, by the smoke, and the sound of the exhaust.

"Q. And the sound of the exhaust? A. Yes, sir.

"Q. Was it cut off at all? A. The second one?

"Q. Yes. A. No, sir; he was working at full power.

"Q. How far did it go? A. Well, as near as I could tell, along about four or five or six rails, something like that.

"Q. After it passed the crossing? A. After it passed the crossing.

"Q. Did you see the accident? A. No, sir.

"Q. You were not in a place to see that? A. No, sir; I wasn't in place to see that.

"Q. How did you happen to notice that the front engine was cut off and the second wasn't? A. After the danger whistle was blown I knew there was something up, and I come up to the hill there where I could see across, and I made up my mind if they done anything they will certainly shut down, and I made it strictly a point to look at the engines when they passed me to see whether they were both shut off or not, and I looked and seen the first one shut off and the second still working for a piece, and finally he shut off, too.

"Q. And he shut off about how many rails after he passed the crossing? A. Four or five or six; it was done so quick I couldn't tell exactly."

Cross-examination:

"By Mr. Perry:

"Q. You say you have worked with engines all your life? A. Yes, sir.

"Q. What has been your experience with engines? A. Well, I have run engines.

"Q. On what road? A. I haven't run any on the road.

"Q. You have never run a railroad engine? A. I have fired.

"Q. You fired a railroad engine when? A. About 25 years ago.

"Q. On what road? A. C., H. & D.

"Q. That is the Cincinnati, Hamilton & Dayton? A. Yes, sir.

"Q. How long did you fire for them? A. I should judge something along about close on to a year.

"Q. Twenty-five years ago? A. Yes, sir.

"Q. Now, how is it you tell whether an engine is cut off or not? A. When I was looking at it I could see the engine was working; you could tell by the exhaust, by the smoke coming out of the stack, and by the sound of the exhaust.

"Q. What makes you say, then, this second engine was not shut off is the fact that you could see smoke coming out as if it was being exhausted? A. You could hear the exhaust, too.

"Q. You could hear the exhaust? A. Yes, sir.

"Q. What could you see about the steam? A. You can tell by the working of the steam passing out through the stack whether the engine was pulling.

"Q. You could hear it puffing, could you? A. Yes, sir.

"Q. Do you mean to say you heard the engine puffing? A. Yes, sir.

"Q. Do you know whether the engine was reversed? A. Very likely he wouldn't exhaust by being reversed.

"Q. Why not? A. He might have, but it didn't look to me like it was.

"Q. The exhaust runs one way just the same as the other, and don't you know that? A. No; I don't know.

"Q. Don't your engine exhaust in exactly the same way whether you are going backwards or forwards; isn't the whole thing worked, and the motion of the pistons, precisely the same whether the engine is going backwards or forwards; isn't that a fact? A. Yes, yes; so far as the works is concerned.

"Q. So, so far as you know, the exhaust you saw that evening might just as well have been from a reversed engine as from an engine going forward? A. Yes; it was too far up for me to tell, but I thought he was pulling.

"Q. You thought he was pulling because it was a good piece away from you and he was going fast? A. Yes; the engine was working; that is all I could tell you; the engine was working one way or the other.

"Q. Do you know anything about a mechanical stoker? A. I haven't run any of them.

"Q. You don't know whether these engines had mechanical stokers on or not? A. I didn't pay any attention to the stokers.

"Q. You don't know whether that engine had a stoker or not? No, sir.

"Q. You don't know whether the stoker was running or not? A. It don't throw smoke out like it would if the engine was working.

"Q. How far to the southeast of this road crossing is your house where you were? A. I was just about 250 yards from the railroad crossing.

"Q. You were 250 yards southeast of the railroad crossing? A. Yes, sir.

"Q. And this train was going west? A. Yes, sir.

"Q. And you didn't see the train until just after it passed the crossing? A. I didn't pay no attention to it, didn't know there was anything about it until I heard the danger whistle.

"Q. You heard the danger whistle? A. Yes, sir.

"Q. Blowing a right smart? A. Yes, sir.

"Q. You were behind the house when you heard it? A. No, sir; in front of it.

"Q. How far did you run in order to see what was happening? A. The length of this room here.

"Q. That is about 45 feet? A. Something like that.

"Q. Right towards the railroad? A. Yes, sir.

"Q. Did you get 45 feet nearer the crossing by running that way? A. Yes, sir.

"Q. And when you got to that point you could see the engine just passing the crossing; is that right? A. Yes, sir; he was a little past the crossing before I seen it; he was just a little bit past the crossing when I got there.

"Q. That is, the first and second engines? A. Yes, sir.

"Q. And from that you concluded the engine had power on? A. Yes; and by the sound of the exhaust.

"Q. And by the sound of the exhaust? A. Yes, sir.

"Q. Now, what other signs were there? A. That is about all.

"Q. That and the speed? A. Yes, sir.

"Q. Yet you have already said you couldn't tell whether the power was on in reverse or forward motion? A. The engine was in working order one way or the other, forwards or back.

"Q. He stopped very quickly after that, didn't he? A. About four or five rails, something like that; he quit throwing out the smoke and exhaust.

"Q. You saw Mr. Hunter after he was killed? A. Yes, sir.

"Q. Did you look at all at his injuries? A. Well, now, I didn't pay much attention to his injuries, but I was the man that partly took care

of him when he was there; I laid him down, kind of put his feet together and his arms."

Redirect examination:

"By Mr. Curry:

"Q. Now, was that second engine running like the first engine or differently? A. Oh, yes; he was pulling; he was working.

"Q. Now, were the wheels running backwards and catching, or were they running forwards? A. They looked to me like they were running forwards.

"Q. Now, when an engine is reversed, why they run the wheels backwards and catch and skid, don't they?

"(Objection.)

"Court: Just tell how the drivers were moving. A. As near as I could tell the engine was in full working order and was running forwards.

"Q. We asked you how the drivers move when an engine is reversed? A. They run backwards; they work back action; they work against the engine then.

"Mr. Curry: These were not running backwards? A. It didn't look to me like they were running backwards.

"Court: Could you see them to tell? A. It looked to me like the drive rods were running in the same direction; I was watching the driving rods on the side.

"Mr. Timberlake: The only difference between the two engines was the front was cut off and the other was not? A. He was cut off, but the second wasn't, the second was pulling.

"Q. Is that a matter that can be readily seen by anybody looking at the engine, very easily told? A. Very easily, it can be seen.

"Mr. Perry: Q. How do you know she was pulling? A. Well, I couldn't see any way but what she would be pulling.

"Q. You come back to the same thing, that you saw the exhaust and heard the exhaust, and therefore think she was pulling? A. Yes, sir; and while I was watching the engine the driving rods looked like they were working in the same direction.

"Q. You couldn't see the spokes in the wheels? A. No, sir.

"Q. Don't the driving rods go in exactly the same direction whether the engine is going forward or backwards? (No response.)

"Mr. Perry: Stand aside."

The testimony in the case shows that as a matter of fact the second engine was not reversed; so that did not explain the appearance of exhaust testified to by Moore.

In regard to the testimony of Moore, the learned judge of the court below says in his opinion after the first trial of the case of L. E. Hicks, Adm'r, v. C. & O. Ry. Co., above referred to:

"Mr. Philip Moore in direct examination says that the power was not cut off of the second engine promptly, but his cross-examination shows that he has no sufficient reason for this statement."

In the opinion above mentioned, after the second trial of the case just referred to, the same learned judge on the subject of this testimony of Moore says:

"It is also said that the railroad was negligent in that the power from the second engine was not cut off; indeed, that it was not cut off until that engine was four, five, or six rail lengths beyond the crossing. (Page 88.) At page 93 the witness was asked:

"Q. How do you know she was pulling? A. Well, I could not see any way but what she would be pulling.

"Q. You come back to the same thing, that you saw the exhaust and heard the exhaust,

and therefore think she was pulling? A. Yes, sir; and while I was watching the engine the driving rods looked like they were working in the same direction.

"Q. You could not see the spokes in the wheel? A. No, sir.

"Q. Don't the driving rods go in exactly the same direction whether the engine is going forward or backward? (No response.)

"A very rapid exhaust does show that a locomotive is pulling, but frequently there is an exhaust from an engine when the train is standing still, due, it is believed, to some manipulation of the air, but, however that may be, this fact remains and is one of common knowledge, and the sound is the same, but does not approach that of an engine pulling hard up grade.

"But if we assume that this evidence on demurrer is sufficient to show that the power of the second engine was not cut off, yet the fact remains that this engineer never saw nor could see Hunter. His view was cut off by the front engine. And if he had seen him he was entitled to the same presumptions that the engineer of the first engine was, namely, that Hunter would remove himself from his place of peril in ample time.

"But whether the power from the second engine was cut off or not, the emergency brakes had been applied to it, and there is nothing to show the propelling power of an engine independent of its momentum in such circumstances.

"As a matter of fact, did the train stop with a due promptness when the emergency brakes were applied? The defendant's evidence shows that it did—that a good stop was made."

As was said by this court in the case of *Arminius Chemical Co. v. Landrum*, 113 Va. 7, at page 21, 73 S. E. 459, at page 466 (38 L. R. A. [N. S.] 272, Ann. Cas. 1913D, 1075), in regard to the testimony of Maury, so we say in regard to the testimony of Moore in the case now before us:

"* * * We cannot say that it clearly appears that he was not a competent witness. * * *

There was no objection to the testimony of Moore in the case now before us on the ground of his incompetency to testify as an expert; therefore the credibility and weight to be given his testimony was solely for the jury. The jury may have drawn a different conclusion from this evidence from that drawn by the trial judge, or by us had we been upon the jury.

Grove, the engineer of the second engine, a witness for the defendant, testified that he knew the moment the front engineer put on the air brakes, and that he shut off the steam from the second engine "not very far" after that. Now, under the rule applicable as on demurrer to evidence, the testimony of Grove must be disregarded on this point, because in conflict with that of Moore, and the jury might have found, if they believed the testimony of Moore to be correct, that the second engine was not shut off promptly following the putting on of the air brakes, but that such engine was pulling under a full head of steam until after the front engine had struck the automobile and passed the crossing from five to six rails, or from 120 to 180 feet. We cannot agree with the trial judge that the absence of express evidence as to the effect of the nonshutting off of the

second engine leaves the case as if the second engine had been promptly shut off. It seems to us that the known laws of physics must of necessity have been in operation in such a situation, and the stopping power of the air brakes upon the train must have been neutralized precisely to the extent of the pulling power of the second engine. That power was one-half of the power which pulled this heavy train, and hence must have been tremendous. Knowledge of precisely what such power was and its effect upon the braking power of the air brakes, so as to neutralize the effect of the latter and to what extent it would neutralize such effect, was peculiarly within the knowledge and in the possession of the defendant, and, as it introduced no evidence on the subject, we cannot say that the jury were not warranted in finding that it had a great effect in delaying the stopping of the train after the air brakes were put on (see *Goodman v. Richmond, etc., R. Co.*, 81 Va. 576, and *Copperthite v. Loudoun Nat. Bank*, 111 Va. 70, 68 S. E. 392, as to principle referred to); and if they believed from the evidence for the plaintiff that the train was approximately half a mile, or 2,640 feet, away when the automobile first came on the track, and that it was approximately 2,250 feet away when the front engineer saw and realized the situation, and if they believed from the front engineer's testimony that he then put on the air brakes, the jury may have disregarded that part of the testimony of such engineer which related to the location of the train on the track when he put on the air brakes, as in conflict with his own testimony that he put on such brakes immediately following the jumping out of its passengers from the automobile, and have believed that the front engineer in fact put on the air brakes when the train was some 2,250 feet from the crossing, or, if not that precise distance, at a sufficient distance to have stopped the train before it reached the crossing, and that the neglect of the engineer of the second engine to shut off the engine promptly after the air brakes went on, and the consequent pulling of the second engine under a full head of steam, with the track sanded as it was, until the front engine had struck the automobile and passed the crossing 120 to 180 feet, delayed the stopping of the train and was the proximate cause of the accident. If the jury might have so believed from the evidence and absence of evidence peculiarly within the power of the defendant to produce, the court below should have so held, and this court must so hold. *Citizens' Bank v. Taylor*, 104 Va. 164, 51 S. E. 159, *Richmond City v. Barry*, 109 Va. 274, 63 S. E. 1074, and other cases of this court on this point.

There is practically no conflict between the testimony for the plaintiff and defendant as to what occurred at the crossing after the automobile came on and stopped upon the track; and there is no conflict between such

evidence as to the fact that the defendant's servant, the engineer of the front engine, saw the automobile on the track as soon as he reasonably could have seen it, that is, the instant after it stopped and while its passengers were yet getting out of it, and correctly apprehended the situation on the crossing at once and acted immediately as he should have acted; nor is there any conflict between such evidence as to the fact that the fireman of the front engine saw the automobile the very instant it came on the track, and that before he could call out to the engineer of such engine the latter had put on the air brakes, etc. It is not claimed or suggested in the testimony of such engineer or fireman that they or either of them acted upon any expectation that the automobile would be removed from the crossing before the train reached it, unless the latter was stopped, or that a collision could have been avoided save only by stopping the train. On the contrary, they both testified that it was a case as they saw it from the time the automobile stopped on the track, on to the end of the tragedy, for the utmost effort on the part of defendant to stop the train before it reached the automobile, and that from the very instant of time that the automobile had stopped and its passengers were jumping out, the brakes were put on, the track then sanded, etc. Now, if this had been done when the train was approximately half a mile away from the crossing, or 2,250 feet, or 2,142 feet, or more than 1,200 feet away, the preponderance of evidence is clearly that the train would have been stopped before the collision with the automobile, if the second engine had been shut off when its engineer testified it was.

There is a conflict of evidence on the question of fact, which is the turning point in the case, as to how far away the approaching train was when the automobile stood on the crossing with its occupants jumping out, or out of it, and Hunter was giving the stop signal.

The testimony for the plaintiff on this point has been noticed above, to the effect that the train was at least more than 2,142 feet, or nearly half a mile, away from the crossing at this turning point of time or distance in the case.

The testimony of two witnesses for the defendant, Mrs. Clayton and Miss Burke, corroborates that for the plaintiff as to the distance the train was away when the automobile stopped on the track and the passengers were jumping out, when considered in connection with the testimony of a number of witnesses for defendant as to the blowing of a single long blow for the station, next two blasts of the whistle for the crossing, and next the danger signal of frequent short blasts. The engineer of the front engine and its fireman and several other witnesses for defendant testify that the whistle for the station was blown at the station whistle

board or post, which the evidence shows was "a little less than half a mile from the station," and hence was about a half mile east of the crossing. Mrs. Clayton and Miss Burke both testify that, while they were not in sight of the train, they were of the automobile when it stopped and its passengers were jumping out, and that at that instant of time they heard the single long blast of the whistle, and afterwards the two blasts for the crossing, and after that the danger signal, and that upon hearing the first long whistle one thought, "They will be killed," and the other remarked, "It has stopped on the track and the train is coming," which fixed the time of their hearing this long blast, and fixed the time that the fireman saw the automobile come on the track, as the time when such long blast was blown, and the time when the engineer of the front engine put on the air brakes, as immediately following the long blast of the whistle, which in turn fixed the location of the train when the air brakes were put on at approximately half a mile away from the crossing.

The remaining testimony in the case as to when the air brakes were put on is that of the two witnesses, the engineer and fireman of the front engine, Grove, the engineer of the second engine, and Goodbar, a brakeman, all of whom testified that the air brakes were put on just about the east switch, or a little east of the east switch, which is 735 feet east of the said crossing, and the engineer and fireman of the front engine fix this as the location of the train on the track when they first saw the automobile. Such testimony of such engineer and fireman was in conflict with their own testimony, as above noted. All of such testimony was also in conflict with the inference which might fairly be drawn from the testimony for plaintiff as to the distance the train was away when the automobile stood on the track at the time when said engineer and fireman admit they first saw it, and when they say the air brakes were put on; hence, it must be disregarded upon demurrer to evidence. Therefore—

The jury may have found that the seeing of the automobile and its situation on the track at the crossing by the engineer of the front engine was just when the passengers were jumping out of it, as he himself testified, and that he put on the air brakes immediately, as he testified, when the train was approximately half a mile away, and that this was in ample time to stop the train so as to prevent the collision, and would have prevented it but for the neglect of the engineer of the second engine to shut it off, or the jury may have disbelieved the testimony for the defendant that the air brakes were put on, the track sanded, etc., immediately following the seeing of the automobile in the situation above noted by said engineer and

fireman of the front engine, because in conflict with the testimony for the plaintiff, the physical facts shown thereby, and the inference fairly to be drawn therefrom that if this had been done it would have been done when the train was approximately half a mile away, and the train would have stopped before reaching the crossing, and have yet believed the testimony for defendant of the said engineer and fireman that they saw the automobile at the period of time when it was in the situation aforesaid, which was not in conflict, but in accord, with the testimony for plaintiff, and testimony of Mrs. Clayton and Miss Burke for defendant.

Hence there are two aspects of the case in which the jury might have found for the plaintiff. In either aspect the court below was right in sustaining the verdict of the jury and overruling the demurrer to evidence.

We therefore find no error in the judgment complained of, and it will be affirmed.

Affirmed.

WHITTLE and KELLY, JJ., concur in result.

PRENTIS, J., absent.

(120 Va. 261)

CARY v. HOLT'S EX'RS et al.*

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. CONTRACTS ¶164—CONSTRUCTION—REFERENCE TO OTHER CONTRACTS.

Where defendant sold a portion of his right under contracts whereby he was to furnish a part of the capital necessary in transaction of the business of a corporation formed to purchase coal lands, for which he was to receive common stock, and the sale contract expressly referred to the prior contracts, it must be construed with such contracts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. ¶164.]

2. CORPORATIONS ¶77 — CONTRACT OF PROMOTERS—CONSTRUCTION.

Where defendant's contract to furnish three-fourths of the capital necessary in the transaction of the business of a corporation for which he was to receive stock provided that all expenses incident to the successful carrying out of the purposes of the corporation were to be borne by the corporation, he was obligated to pay his proportion of the amount needed to defray all expenses incident to the successful carrying out of the purposes of the corporation, including his salary as president of the corporation and for this he was entitled to stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243, 455; Dec. Dig. ¶77.]

3. CORPORATIONS ¶85 — CONTRACTS OF PROMOTERS—ASSIGNMENT—AGREEMENT TO FURNISH CAPITAL—SALARY.

Where plaintiffs when purchasing an interest in such contracts knew of all the provisions thereof and of salary expense of the corporation, and that by resolution of the board of directors

the corporation had allowed defendant as president a salary, they were charged with notice of defendant's rights.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 194; Dec. Dig. ¶ 85.]

4. CORPORATIONS ¶ 425(2) — ESTOPPEL — STOCKHOLDERS OBJECTING TO ACTS DONE BY THEM AS DIRECTORS.

Where the salary paid defendant subsequent to the sale contract was approved by the purchasers as directors, they cannot object that such resolution was not made at a stockholders' meeting in compliance with a pooling agreement made on the same date as the sale contract which continued defendant's salary for one year to be voted on at a stockholders' meeting at the end of such term.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1698; Dec. Dig. ¶ 425(2).]

5. ESTOPPEL ¶ 83(5) — GROUNDS.

Letters written by the defendant to the purchasers in which he stated the amount of liabilities of the corporation, without mentioning the expense for his own salary, but in which he requested the purchasers to come and look into everything for themselves, could not operate as an estoppel against the defendant on his claim that such salary item should be computed in calculating his input under the sale contract.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 218, 227, 228; Dec. Dig. ¶ 83(5).]

6. CORPORATIONS ¶ 85 — CONTRACT TO FURNISH CAPITAL — CONSTRUCTION.

The salary expense, having been treated by the corporation as a necessary expense attendant upon the acquisition of the lands of the company, and having been so recognized by the purchasers, should be computed in the input of defendant under the sale contract, in calculating the proportion of common stock to which he is entitled.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 194; Dec. Dig. ¶ 85.]

7. CORPORATIONS ¶ 77 — RESOLUTION OF DIRECTORS — NECESSARY EXPENSE.

A resolution of the board of directors that a bill furnished by defendant for office rent and stenographers' hire should be approved and stock issued to him in satisfaction of the bill was satisfactory evidence that such expenses were proper expenses incident to the successful carrying out of the purposes of the corporation, and were within the obligation of defendant as to input of money to defray same if necessary at that time.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243, 455; Dec. Dig. ¶ 77.]

8. CORPORATIONS ¶ 77 — CONTRACT TO PAY NECESSARY EXPENSES.

An input made by defendant to satisfy outstanding obligations should be computed in the calculation of the proportion of common stock to which he is entitled, although funds were received by the corporation because of the exercise of an option subsequent to the input and before the obligations became payable, as he could not have known that the option would be exercised.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210-212, 219-243, 455; Dec. Dig. ¶ 77.]

Appeal from Law and Equity Court of City of Richmond.

Suit by Charles A. Holt's executors and another against W. M. Cary and others.

From the decree, the named defendant appeals. Reversed.

Jas. E. Cannon and S. A. Anderson, both of Richmond, for appellant. J. M. Perry, of Staunton, for appellees.

SIMS, J. The question before us in this case is: What proportion of the common stock of the Buchanan Coal & Coke Company, Incorporated, belongs to appellant and appellees, respectively?

The business of the Buchanan Coal & Coke Company, Incorporated, was that of dealing in the purchase and sale of coal lands, including lands in fee and mineral, mining, and surface rights pertaining to such lands. Its authorized capital stock was \$500,000, of which \$200,000 was authorized to be issued as preferred stock and \$300,000 as common stock.

What proportion of said common stock belongs to appellant and what to appellees depends upon the construction of the contract of March 27, 1908, under which these parties claim such stock, designated in the record as the "sale contract," and upon certain facts as to items in controversy of input of appellant into the capital of said company.

The following statement will sufficiently disclose the provisions of the "sale contract" which are pertinent to the question before us:

It is recited in the preamble of this contract that the organization of said company was effected upon the distinct understanding that appellant "should advance three-fourths of the cost of said property [referring to said coal lands], or so much thereof as might be necessary for the purposes of the company," and that he should have eleven-eightieths of all profits to be made upon said advancements to be realized through the organization of said company to take over said lands. The contract of appellant with certain Harrises is referred to "for further particulars." Three prior contracts in writing between appellant and the Harrises are referred to, which contain "the contract with the Harrises." And it is further recited in said preamble that it is provided in the contract of appellant with the Harrises that appellant "would be required to advance only so much of his agreed input aforesaid as might be required to pay the cost of the property before a sale of the same by the company was effected, and that all common stock of the company (except 23 shares thereof held by Smarr and Boyd) should be divided between the parties to said [the Harrises] contract in the proportion above mentioned" (i. e., seven-eightieths to the Harrises and eleven-eightieths to appellant).

The "sale contract" preamble further recites what amounts of input of capital of the

company the Harrises and appellant respectively, had made up to the date of such contract.

From the body of this contract itself it appears that appellant on the date thereof, March 27, 1908, for \$15,000 cash in hand paid, sold to Charles A. Holt and Julius L. Witz fifteen eighty-thirds part of his eleven-eighteenth interest "*Under his said contract with the said Harrises in and to the capital stock of said Buchanan Coal & Coke Company, Incorporated,*" with the provision, however:

That the said fifteen eighty-thirds part of appellant's said interest so sold "is subject to reduction, ratable with said Cary's [appellant's] remaining sixty-eight eighty-thirds part thereof in case of the necessity of further cash input and of actual cash input by said Cary *under his said contract with the Harrises,* to the extent herein-below stated and no further."

Then follows the provision that:

"In case any further input of cash towards the payment of said Cary's input of three-fourths of *said purchase money* is required of and made by him, * * * the said Holt and the said Witz, under this agreement, * * * shall be entitled to such proportion of eleven-eightieths of 2,977 shares of common stock * * * of said Buchanan Coal & Coke Company, Incorporated, * * * as is represented by a fraction whose numerator is 15 and whose denominator is 83, plus the number of thousands (\$1,000 being the unit) of dollars of such addition actual input made before sale. * * *"

"The contract with the Harrises" referred to in said "sale contract" was contained in three contracts in writing, specifically mentioned in the preamble of the "sale contract," one of March 6, 1908, another of September 3, 1904, and still another of May 23, 1904.

These contracts provide, in effect, that the input of appellant into the company shall be three-fourths of the capital necessary for the transaction of its said business. Beyond this there is nothing in the March 6, 1908, contract which is material to the question before us.

The only provision in the contract of September, 1904, having any special bearing on the question before us is the following:

"* * * It is agreed that *any expenses of said company* which is paid in the common stock of the company is to fall equally upon or be paid equally by all and each party to the agreement."

The contract of May 23, 1904, provides, in effect, that the input which appellant was obligated to make into said company should be paid for in preferred stock of such company; that the preferred stock should be issued at par and only for the necessary capital of the company; that this stock should bear interest at the rate of 6 per cent. per annum, and that when the property of the company should be sold, or its affairs came to be wound up, "* * * it is further agreed that after redeeming the preferred stock * * * and paying the interest on amounts invested in said preferred stock by the parties hereto, that all other money, land, or property remaining to said corpora-

tion [the Buchanan Coal & Coke Company Incorporated] shall be treated as profit and belonging to the common stockholders." It then contains the following clause:

"*All expenses incident to the successful carrying out of the purposes of said corporation are to be borne by the said corporation.*"

The italics appearing in quotations above are supplied by us.

With respect to input of the appellant into the said company, the following should be here said:

There are two items of such input in controversy before us:

(a) The amount of \$5,050, which appellant paid into the treasury of said company between April 1, 1908, and October 4, 1909, inclusive, to cover the expenses of such corporation due to its payment to appellant of such amount on account of his salary of \$200 per month from May 1, 1907, to October 4, 1909, for services to the company in and about the purchase of the property; and

(b) The amount of \$1,088, which appellant paid into the treasury of said company February 27, 1909, to cover expenses of such corporation for office rent and stenographer's hire from July 1, 1904, to May 1, 1907.

The decree of the court below, entered October 11, 1915, held that, while appellant was justly and legally entitled to the item (a) above noted as salary, such item of \$5,050 should not be computed as input of appellant under said sale contract because this item, "in the opinion of the court, was not a necessary expense attendant upon the acquisition of the said lands of said defendant company." This holding is the sole ground of error assigned before us by appellant.

The court below held that said item (b) should be computed as input of appellant under said "sale contract," and this is assigned as cross-error before us by appellees.

Appellees also assign as cross-error that there was a mistake in the figures of \$102,200, total input claimed by appellant.

We have therefore but the three questions to decide, which we will consider in their order as stated below, namely:

1. Was the \$5,050, item (a), above referred to, an input of appellant into said corporation which he is entitled to have computed in the calculation of the amount of common stock of such corporation to which he is entitled?

[1] We think it was. The "sale contract" referred to the existing agreement between appellant and the Harrises as fixing the "input" into the treasury of the said corporation which appellant had contracted to make and by which his proportion of the common stock of such corporation was to be ascertained. Such existing agreement was contained in said prior contracts above referred to, of date May 23, 1904, September 3, 1904, and March 6, 1908. The "sale contract" must therefore be construed along with such three

prior contracts in determining what "input" aforesaid appellant had contracted to make and by which his proportion of common stock aforesaid was to be ascertained. While it is true that there is a phrase in the "sale contract" which refers to such "input" as being "any further input of cash towards the payment of said Cary's agreed input of three-fourths of said purchase money" of the company's property, in the same "sale contract" Cary's agreed input of three-fourths of the cost of the company's property is used with the same meaning. Therefore it is manifest that the true construction of the "sale contract" could not be that appellant's said "input" must have been confined to money actually paid to the vendors of the property as purchase money. Some expenses of the company or corporation aforesaid were clearly contemplated by the "sale contract" as included in the language "purchase money" or "cost of the company's property." This is admitted in the bill of appellees where the position is taken that "the amount of expenses paid by said corporation * * * actually constituting a part of the cost of said lands" are properly to be computed, where contributed by appellant as his "input" aforesaid; and in the brief of counsel for appellees the same position is taken. Now, when we look to the contract of September 3, 1904, we see that other expenses than actual payment by the corporation of purchase money to vendors of the property of the company are contemplated. Further, when we look to the contract of May 23, 1904, which is the contract which fixes the obligation of appellant with respect to input aforesaid, we find this express language with reference to what expenses are to be paid by the corporation, to wit:

"All expenses incident to the successful carrying out of the purposes of the said corporation are to be borne by the said corporation."

[2] It is therefore clear that the true construction of the "sale contract" is that appellant was obligated thereby to pay into the treasury of the corporation his proportion of three-fourths or so much thereof as was needed to defray "all expenses incident to the successful carrying out of the purposes of the said corporation" as well as to pay what was strictly "purchase money" of the company's property. The evidence is further that appellee Witz and the decedent, Holt, of whom the executor appellee is the personal representative, knew of all of the provisions of all of said prior contracts before the "sale contract" was entered into.

The inquiry with respect to the item of input under consideration is reduced to this: Was this \$5,050 of salary an item of the "expenses incident to the successful carrying out of the purposes of the said corporation"?

That it was such an item is shown by a resolution of the board of directors of the

corporation adopted February 29, 1908, allowing appellant, as president thereof, a salary of \$2,400 per annum, beginning with May 1, 1907. This, it is true, was prior to the date, March 27, 1908, of the "sale contract" by which appellees' rights were fixed; but it appears from a letter of date March 23, 1908, of counsel for Messrs. Holt and Witz, parties to such "sale contract," that Mr. Witz, who was acting for himself and Capt. Holt, knew of the salary expense of the corporation before the "sale contract" was entered into, and the only suggestion in the way of an objection to such expense was that Mr. Witz "is of opinion that the salary should be limited to a term of one year, and its amount thereafter to be fixed by the pool; the permanent salary at a figure such as that now had, unless agreed to by the pool, would be unattractive to him."

[3] At the date the "sale contract" was entered into, therefore, appellees are charged with knowledge that appellant was entitled to draw a salary of \$200 per month from May 1, 1907, which, as of March 31, 1908, would have amounted to \$2,000, as an expense "incident to the successful carrying out of the purposes of the said corporation," and to defray which along, with other outlay, it followed from the provisions of the "sale contract" the "input" of appellant was obligated by him to be made, etc.

On the same date as the "sale contract," to wit, March 27, 1908, a "pooling" agreement was entered into between appellant and the same other parties as those to the "sale contract." In this "pooling" agreement the said resolution of February 29, 1908, of the board of directors of said corporation was referred to in the following language:

"The present salary of the president of said corporation \$200 per month, as fixed by directors' resolution of February 29, 1908, shall continue for the term of one year from the date of said resolution; but at the end of said term, at a stockholders' meeting wherein such matters can be arranged, the trustees shall vote said common stock for such salary only to the president as shall be suggested to them by a writing signed by at least two-thirds in number of the parties hereto, and, in default of such direction, shall vote against any further continuance of said salary after the end of the year commencing February 29, 1908."

This also evidences full notice to one appellee, Witz, and to Holt, under whom the other appellee claims, of the expense of salary incurred by said corporation up to February 29, 1909, which amounted to \$4,400 of the \$5,050 item under consideration.

On April 30, 1909, the entire membership being present, including said Witz, the directors of said corporation adopted the following resolution:

"Resolved that the present salary of the president of this company shall continue at the same rate for another year; that is to say, from February 29, 1909, until February 29, 1910, he shall receive the salary of \$200 per month, but in the event of a sale this salary shall terminate when a deed is made by the company."

It is true this was an action of a directors' and not at a stockholders' meeting, as provided for in the said "pooling" agreement, but appellees cannot be heard to make this objection, as Mr. Witz, representing himself and Mr. Holt, took part in this action.

[4] Thus the remainder of said \$5,050 input of appellant to cover said salary expense was authorized and approved by said corporation, and by appellees, in effect, as an item of the expenses for the defraying of which appellant was obligated to make the input aforesaid, and which he is entitled to have included in the computation of to what proportion of said common stock he is entitled under said "sale contract."

A letter of appellant of date February 27, 1908, is relied on by appellees as an estoppel of appellant's claim that said \$5,050 item was an expense of the corporation. This letter was addressed to Capt. Holt. It was in reply to a letter from the latter to appellant, one inquiry of which was:

"What amount of money would clean up all the indebtedness against the company so there would be no further sums to raise?"

In his letter of February 27, 1908, to Capt. Holt appellant stated:

"\$40,000.00 will clean up all the indebtedness against the company, and there will be no further sum for me to raise. * * *

"As I advised you when here, I shall not need more than \$15,000.00 for the next possibly eight months, in which time I am perfectly confident that the property will be sold at a handsome profit. Failing in this, however, there will be no trouble in the world in securing whatever other moneys we may need even should it become necessary to pay off the entire indebtedness. * * *

"Since writing the above it has occurred to me that \$12,000 will answer my purposes until you get back from California. Should the property, however, not have been sold by that time, and I find it necessary to raise a few thousand more, we can arrange the same after you return or you might arrange for me to get it if I wish while you are gone, as I really prefer not to take more than \$12,000 at this time. * * *

"I cut out 1,000 acres in fee in order to reduce our total money requirements."

This letter was written before the resolution of February 29, 1908, of board of directors was passed making the said salary from May 1, 1907, an expense of the corporation, and hence an indebtedness of it. Prior to that time appellant had been rendering valuable services to the corporation without any salary compensation. It was on the motion of W. E. Harris that the resolution of February 29, 1908, was adopted, the directors thinking then that this salary expense should be made an indebtedness of the corporation. Hence there was no misrepresentation by appellant of the indebtedness of the corporation in his letter of February 27, 1908.

Appellant wrote Capt. Holt under date February 29, 1908, as follows:

"As I told you, a friend of mine and myself are now taking care of \$14,000 of this debt, so

we won't have to raise very much more even if the property is not sold in a year, while I confidently believe now that it will be sold in ninety days. * * *

"P. S. Think now that I will be able to give you a definite answer not later than Tuesday next. If you join me would want you to come to Richmond and close the matter before you leave for the West."

Again, under date March 1, 1908, after the last-named resolution was passed, appellant wrote Capt. Holt:

"From my statement you will observe that fully 70 per cent. of the property is paid for. Several thousand acres have been paid for in full, while of the average cost of the entire property, including attorney fees, perfecting titles, surveying each and every tract, maps, reports, making coal openings all over the property, in other words, proving the property, over an area of some 25 or 30 miles, costing alone some \$1,400, to \$1,500, and maybe more, but money well spent, because it is now proven to be a magnificent coal bed, second to none in quantity or quality. * * * Now I have endeavored to make myself perfectly and clearly understood. Want you to know everything, could not would not keep back anything for my life, much less a few dollars, so I respectfully request that you and your friends come to Richmond at once and look into everything for yourselves, and if they are not to the letter as I have stated, then you can't put one dollar into this proposition. I particularly request you to come, Captain, before you leave for the West and bring your friends with you."

It does not appear that there was any misrepresentation in these two letters of February 29 and March 1, 1908, concerning the salary expense to February 29, 1908, as an indebtedness of the corporation or cost of its property. It is true appellant does not mention expressly the salary expense, but he urges that Capt. Holt and his friends "come to Richmond at once and look into everything for themselves," and he added:

"I particularly request you to come, Captain, before you leave for the West and bring your friends with you."

[5] Two statements, one of bills payable as of March 1, 1908, the other of the condition of said corporation at the close of business February 29, 1908, are filed with the bill as "Exhibit A," marked in record, pages 130 and 128, as "Complainants' No. 20" and "Complainants' No. 19," which do not show any indebtedness of the corporation to appellant for salary; but it appears from Mr. Witz's deposition that it is not clear that these statements were furnished him until June, 1908, after the "sale contract" was entered into. However, in view of the fact that a trip to Richmond and looking "into everything for themselves" would have disclosed the February 29, 1908, resolution, and especially in view of the specific knowledge on the part of Mr. Witz, acting then for himself and as agent for Capt. Holt, subsequently acquired, as above stated, of the existence of the resolution of February 29, 1908, before the "sale contract" was entered into, the express recognition of the existence of that resolution in the "pooling" agree-

ment, cotemporaneous with the "sale contract," and hence the recognition of said salary to February 29, 1908, as a legitimate expense of the corporation, the authorization of the continuance of such expense by such "pooling" agreement from February 29, 1908, to February 29, 1909, and the subsequent authorization of a like continuance from February 29, 1909, to February 29, 1910, or until sale of the company's property by the resolution of board of directors of April 1, 1909, in which Mr. Witz participated as above noted, which salary expense appellant ceased to draw on October 4, 1909, we do not think there was any action of appellant which could have misled Capt. Holt or Mr. Witz, and hence which could operate as an estoppel against appellant as to such salary item of expense of the corporation.

The evidence in the case shows that, if this salary item was a proper expense of the corporation "incident to the successful carrying out of the purposes of the said corporation," the input made by appellant to cover same was necessary, as the corporation was not in funds to meet same and its other obligations up to October 4, 1909, when such input for salary expense ceased.

[6] This salary expense having been treated by the corporation, in effect, as "a necessary expense attendant upon the acquisition of the said lands of said defendant company," and, having been so recognized subsequently by Capt. Holt and Mr. Witz, as aforesaid, we think the decree complained of was erroneous in holding to the contrary.

We come now to consider the remaining question before us in the case, namely:

2. Was the \$1,088, item (b), above referred to, properly held by the court below to be an input of appellant into said corporation which he is entitled to have computed in the calculation of the amount of common stock of such corporation to which he is entitled?

We think it was.

[7] On February 7, 1909, appellant presented the bill for this \$1,088 to the board of directors of the company, and the following resolution was adopted by such board, of which Mr. Witz was a member, on this subject:

"It was moved and seconded that the bill of W. M. Cary for office rent and stenographers' hire, amounting to ten hundred and eighty-eight dollars (\$1,088.00), be paid, and that preferred stock be issued to him in satisfaction of said bill. The motion was unanimously adopted."

[8] This is satisfactory evidence that such expenses were proper "expenses incident to the successful carrying out of the purposes of said corporation," and hence fell within the obligation of appellant as to input of money to defray same, if the situation was such at the time of the input by appellant to defray same that such input was then necessary.

This input of appellant on account of meeting and defraying such expenses was made February 27, 1909, as appears from record,

page 191. Such input was unquestionably necessary to defray such expenses at that time as the record shows. However, it seems that the appellant made an input of money into the treasury of the company of \$1,000 on October 4, 1909, for which preferred stock was issued to him. This is a separate and distinct matter from the \$1,088 item as to which cross-assignment of error is made before us, as we understand it. But if we were to consider the \$1,000 input on October 4, 1909, involved in such cross-assignment of error, the following seem to be the facts as to the need for such input at that time:

In reply to inquiry as to such \$1,000 input, appellant testified:

"Yes, sir; I made it because on that date, October 4, 1909, the company had outstanding obligations due and payable amounting to, principal and interest, between \$21,000 and \$22,000, for three-fourths of which I was personally liable under the March 6, 1908, contract with the Harrises. * * * I felt it my duty to make provision for whatever demands might come upon the company on account of these past-due and payable obligations; and so, whenever I had any money to spare which I felt would contribute to that end, I put it to the credit of the company's account in bank and received credit upon the books of the company."

While it is true that in November, 1909, purchasers of property from said corporation paid to it a very large sum of money on an option not exercised until then, and it turned out that appellant might have waited until then for funds to meet existing obligations of the corporation, and if he had not paid in the last \$1,000 of input by him into the treasury of the corporation it would not have been sued on its obligations, still the fact was that appellant had no means of knowing on October 4th that such option would be exercised or that the corporation would be in funds from any other source to meet obligations then existing of between \$21,000 and \$22,000, for nearly all of which appellant's obligation as to input required him to make input into the treasury of the company as he was behind in his input to the extent of some \$18,800 of his proportion of three-fourths of needed capital, the Harrises having made an input of \$34,999 under their obligation to contribute one-fourth of such capital, and appellant having contributed only \$101,200, not including such \$1,000, but including said salary amount of \$5,050 and said \$1,088 item, he had \$1,000 personal funds available for application to that small extent to such obligation, and made the input of it on that date in good faith, with no thought or purpose of unduly swelling his proportion of the common stock of the company; and we therefore think the court below was clearly right in holding as it did, in effect, that appellant is entitled to have this \$1,000 input as well as said \$1,088 input computed in the calculation of the proportion of common stock to which he is entitled.

3. We come now to the remaining assignment of cross-error, which involves the ques-

tion whether there was a mistake in figures by which the total input of appellant was ascertained to be \$102,200.

In the brief for appellees a tabulation of figures is given, taken from the cross-examination of Mr. Sutton, the accountant, exclusive of appellant's salary, as follows:

Paid on account of lands and notes given for deferred payments on lands by the company	\$100,322 16	
Paid on interest account.....	2,884 19	
Paid for expenses of every kind from the organization of the company including office rent, stenographers' salary, etc., but excluding any salary to W. M. Cary (<i>and including also the \$1,088 item above mentioned to Cary</i>)—(italics supplied, and counsel is in error, as it seems to us, in statement contained in language italicized, as presently pointed out)	14,298 84	
Total	\$117,505 19	
During the same time the Harries had contributed \$35,006 (correct amount per page 196, record)	\$ 34,999 00	
Income from sources other than Harries and Cary.....	5,786 50	40,785 50
(Note.—The tabulated statement referred to also deducts \$2,039.10 cash on hand, but clearly this should not be done.)		
Total input by appellant per these figures	\$ 76,719 69	
(Not including his salary item of \$5,050.00)		
Add such salary item.....	5,050 00	\$ 81,769 69
Add also the October 4, 1909, \$1,000 input not included in figures given in said tabulated statement	1,000 00	\$ 82,769 69

Comparing this witness' statement on page 196 of record with those on pages 188 and 144 of record, there is some discrepancy in totals which the record does not give sufficient details to check out, but it is evident that the foregoing figures are taken from the "cashbook" of the company.

This witness testifies that to those figures should be added the following items of input of appellant credited on the "journal" of the company and not on the "cashbook," viz.:

Ratlift land	\$ 11,404 93	
McCue input, principal.....	5,156 28	
McCue input, interest.....	300 00	
Expense before opening of books of company.....	442 00	
Above named item of.....	1,088 00	18,391 21
Total input of appellant arrived at in this way....		\$101,160 90
Instead of	\$102,200 00	
as per itemized statement of witness Sutton, pages 189, 190, of record.		
An error (to balance) of.....	1,039 10	
	\$102,200 00	\$102,200 00

However, this witness furnishes said itemized statement which totals said input of \$102,200.

He also testifies on page 189, record, that appellant's input, as shown by said cashbook totals \$ 83,808 79
(A discrepancy of \$1,039.10 from the total of \$82,769.69 above ascertained by dealing with the items given in this witness' deposition on cross-examination, page 196, record.)

He positively testifies, however, on page 189 of record, that the said journal entries are to be added to the \$83,808.79 input shown by said "cashbook"..... 18,391 21

Making a total of..... \$102,200 00

In the condition of the record before us, therefore, we cannot say that there has been an error in figures made in the total of \$102,200 as the input of appellant into said company, by which the denominator of the fraction is to be ascertained, which fixes his proportion of the common stock of the said company, and also the proportion of such stock to which appellees are entitled, and such \$102,200 must be held to be the correct denominator of such fraction, and the cross-errors assigned as aforesaid cannot be sustained.

Because of its holding above referred to, however, with respect to said \$5,050 input of appellant, the decree of the court below complained of must be reversed, for the reasons stated above, and the cause is remanded to the law and equity court for further proceedings therein not in conflict with this opinion.

Reversed.

(120 Va. 397)

VIRGINIA RY. & POWER CO. v. HILL.
(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. TRIAL \S 295(6) — INSTRUCTIONS — CONSTRUCTION AS A WHOLE.

Where plaintiff, riding in a taxicab, was injured by collision with street car at crossing where taxi had the right of way, the evidence being conflicting as to whether motorman or chauffeur was guilty of negligence causing the accident, an instruction that the street railway company would be liable if their motorman was guilty of negligence, which was the proximate cause of the accident, even though the chauffeur was also negligent, was proper, where the whole charge correctly submitted the question of whether one or both were guilty of negligence which was the proximate cause.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. \S 295(6).]

2. STREET RAILROADS \S 118(16) — INSTRUCTIONS—PROXIMATE CAUSE OF INJURY.

In action for personal injuries, an instruction that, if "before the accident occurred" the motorman ran his car into the automobile as result of his negligence which was the proximate cause of the injury, the street railway company was responsible, even though the chauffeur was also negligent, the words "before the accident occurred" did not render the instruction misleading.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 260; Dec. Dig. \S 118(16).]

3. TRIAL \S 210(1)—INSTRUCTIONS—INCREDIBLE TESTIMONY.

The refusal to instruct jury that they are not required to believe incredible testimony, being a self-evident proposition, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 490, 494; Dec. Dig. \S 210(1).]

4. STREET RAILROADS \S 118(1) — INSTRUCTIONS—DEFINING CARE REQUIRED.

In action against a street railway company and a taxicab company for injuries received by passenger in taxi, in a collision, the refusal to give instruction requested by defendant railroad company to effect that the taxicab company owed plaintiff as a passenger the highest degree of care, while the railroad company owed him only ordinary care, was not erroneous, where the plaintiff did not ask that the taxi company's duty be defined.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 258, 259; Dec. Dig. \S 118(1).]

5. STREET RAILROADS \S 118(8) — INSTRUCTIONS—REGULATION OF TRAFFIC.

In action for injuries sustained in collision between taxicab and street car at a corner where the ordinance gave the taxi the right of way, an instruction that street cars are not required to stop for vehicles having a right of way "unless a prudent motorman would deem it necessary under all the circumstances" correctly interpreted the ordinance, and it was not erroneous to give this in place of four other instructions which were prolix.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 264; Dec. Dig. \S 118(8).]

6. DAMAGES \S 216(8)—PERSONAL INJURIES—LOSS OF TIME—INSTRUCTIONS.

Where in a personal injury case the evidence showed that plaintiff was in the hospital three weeks, and for six weeks thereafter was able to devote only a part of each day to his business, although no evidence that the business was affected thereby, an instruction that the jury might consider "any loss of time heretofore sustained by plaintiff from his work as result of his injuries" was not erroneous, where the other elements of damage were correctly stated.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 553; Dec. Dig. \S 216(8).]

Error to Hastings Court of Richmond.

Action by Walter C. Hill against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, A. B. Guilgon, and T. J. Moore, all of Richmond, for plaintiff in error. Nelson & Nelson and Gunn & Mathews, all of Richmond, for defendant in error.

KELLY, J. This action was instituted by Walter C. Hill against the Virginia Railway & Power Company and the Virginia Taxi Service Company to recover damages for a personal injury sustained by him in a collision between a street car and an automobile. The street car was owned and operated by the railway company, and the automobile by the Taxi Service Company. The plaintiff was a passenger in the latter vehicle.

The jury found for the taxi company, but against the railway company; and, to a

judgment for the plaintiff on that finding, the railway company brings this writ of error.

The accident occurred in Richmond on February 16, 1914, about midnight. The plaintiff had been drinking, and his son, E. Raymond Hill, was taking him home from a down-town restaurant in an automobile which he had ordered for that purpose from the taxi company, a corporation engaged in carrying passengers for hire. This automobile was going west on Grace street on the way to the plaintiff's home, with him and his son as passengers, when, at the intersection of Grace and Laurel streets, it was struck by the street car which was going north on Laurel street, crossing Grace at right angles. The automobile was wrecked and both passengers were injured. The chauffeur seems to have escaped unhurt. The other facts, in so far as they may be essential to this discussion, will appear in connection with the several assignments of error.

[1] The first of these assignments challenges the correctness of the following instruction, given at the instance of the defendant taxi company:

"The court instructs the jury that, even though you may believe from the evidence the driver of the automobile was guilty of negligence, yet if you further believe from the evidence that before the accident occurred the motorman in charge of the street car of the Virginia Railway & Power Company ran his car into the automobile as the result on his part of some act of negligence charged in the declaration, and that this was the proximate and immediate cause of the accident, then the Virginia Railway & Power Company is alone responsible for the accident, even though you may believe from the evidence that the accident could not have occurred but for the remote neglect of the driver of the automobile."

It is conceded that this instruction, in the main and in the abstract, correctly states the established doctrine as to remote and proximate cause; but the claim is made: First, that the instruction was without evidence to support it; and, second, that the words "before the accident occurred" rendered it misleading and confusing to the jury. We will consider these two objections in the order named.

Under the terms of the traffic ordinance, hereinafter quoted in full, the automobile had the right of way at the point where the accident occurred. The motorman, as he traveled north on Laurel street, and reached a point 85 feet from the exact spot where the collision took place, could, if he looked, see down Grace street in an easterly direction 52 feet; at 65 feet from that spot he could see down Grace 120 feet; and at 51 feet from that spot he could see all the way down Grace to the end of the block. He could stop his car, when running as he claimed to be at that time, in a distance of about 40 feet. There was a conflict in the testimony as to the rate of speed at which he and the chauffeur, respectively, were running,

and as to the distance within which he did in fact stop his car. As to the weight of the testimony, we can have nothing to say. It is difficult to understand how the accident could have occurred at that point at all, except by a concurrence of negligence on the part of the motorman and the chauffeur; but, without going further into the details of the evidence, we deem it sufficient to say that a careful consideration of it all satisfies us that it was such as to render proper a submission by the trial court to the jury of these three leading questions of fact: (1) Were both defendants guilty of negligence which concurred as proximate causes of the accident? or (2) Was the defendant railway company guilty of negligence which was the sole proximate cause? or (3) Was the taxi company guilty of negligence which was the sole proximate cause?

The first of these questions was sufficiently presented in an instruction for the plaintiff to which no objection is here made.

The second question was properly presented in the instruction quoted above; and the third was submitted in the following instruction given at the railway company's request:

"The court instructs the jury that, even though they may believe from the evidence that the motorman of the street car was guilty of negligence, yet if they further believe from the evidence that the chauffeur in charge of the automobile of the Virginia Taxi Service Company, Incorporated, negligently ran his automobile so as to render the accident unavoidable, and that this was the proximate and immediate cause of the accident, then the Virginia Taxi Service Company, Incorporated, is alone responsible for the accident, even though the jury may believe from the evidence the accident could not have occurred but for the remote negligence of the motorman of the street car."

The court having fairly submitted these three main questions of fact to the jury by instructions which, when read together, could not have tended to unduly emphasize the liability of the railway company, the objection to the instruction under consideration, based upon a lack of evidence to support it, must be overruled.

[2] Nor do we think the instruction was subject to any valid objection because of the words "before the accident occurred" which appear therein. We are unable to see how any confusion or misunderstanding could have been produced in the minds of the jury by these words. That they were unnecessary, and that the instruction would have been in better form without them, may be conceded; but there is nothing in them as they stand which could have deceived the jury as to what the trial court meant, and there is nothing in the evidence to which they might reasonably have been applied with any misleading effect.

[3] The second assignment of error calls in question the action of the court in refusing to give at the instance of the railway company the following instruction:

"The court instructs the jury that they are not required to believe incredible testimony, and if they believe from the evidence that the street car was going northwardly along Laurel street where it could have been seen by the chauffeur had he looked as it was his duty to do, then the jury are not bound to accept the testimony of the chauffeur that he did look, but did not see the car."

This instruction asserts a self-evident proposition, and involves no possible principle of evidence which any competent jurymen would not be presumed to understand. Juries do not need, or at least must be presumed not to need, as a matter of instruction and information, to have the court tell them that they are not to believe the impossible. Sometimes their verdicts indicate that they have done so, and are set aside accordingly as being without evidence to sustain them. But there is no duty on the court to presume that a jury will believe what manifestly cannot be true, and to warn them against such belief. There may be cases in which it would not be error to give an instruction similar to the one here in question, but there can hardly be a case in which it would be error to refuse such an instruction, unless it would also be error to refuse to set aside an adverse verdict in the case for want of evidence. See *Southern Ry. Co. v. Mason*, 119 Va. —, 89 S. E. 225. In this case we think the instruction was properly refused. It ignores certain facts and circumstances in the evidence tending to corroborate the testimony of the chauffeur and to show that the statement assailed in the instruction may have been true.

[4] It is urged, as a third ground for the reversal of the judgment, that the trial court erred in refusing to give, on behalf of the railway company, two instructions which in substance told the jury that the taxi company owed the plaintiff, as a passenger, the highest degree of care, and that the railway company owed him only the duty of exercising ordinary care. Some of the counts in the declaration charge the defendants with concurring negligence, and allege their respective duties to the plaintiff substantially as set out in the two instructions in question.

We are unable to indorse the contention made on behalf of the railway company to the effect that these instructions state "a proposition of law vitally important to the plaintiff in error namely, the relative degrees of care required of each defendant." So long as the degree of care owing by the railway company to the plaintiff was properly defined, that company had no legal right to complain merely because the instructions did not define the degree of care owing by its co-defendant. Other instructions properly fixed the burden of proof and defined the degree of care so far as the railway company was concerned, and this was the sole test of its liability, regardless of how much care the taxi company owed the plaintiff, or how little care it exercised for him. As to the rail-

way company's liability, the case is not in the least different from what it would have been if the relationship of carrier and passenger had not existed between the chauffeur and the plaintiff. As Judge Keith said in *Carlton v. Boudar*, 118 Va. 521, 529, 88 S. E. 174, 177, referring to an injury resulting from a collision between an automobile owned by a private individual and one owned by a carrier, the plaintiff being a passenger in the latter:

"The fact that two defendants are joined upon whom the law imposes different degrees of duty to the person injured is not material, and if each of the defendants have been guilty of negligence, it matters not that one may have been more negligent than the other."

If the plaintiff had asked for an instruction defining the taxi company's duty, and it had been refused, he would have had the right to except; but not so with the codefendant railway company, the rule being, as held in *Walton, Witten & Graham v. Miller*, 109 Va. 210, 220, 63 S. E. 458, 132 Am. St. Rep. 908, that all persons whose negligence contributed proximately to a tort are jointly and severally liable with no right of contribution among them or remedy over by one against the other, and that consequently the party injured may bring his action in the outset against either or all, or, having begun it against all, may thereafter abandon it as to some while pursuing it as to others.

This court is entirely in accord with the contention of counsel for the railway company that in cases of this character, if one joint tort-feasor should obtain an erroneous instruction which improperly fixes the liability on another, the latter has the right to except. Any other rule would be indefensible. But we have no such case here. The alleged error complained of in this assignment simply tended to benefit the taxi company, not to unduly inculpate the railway company.

[5] The fourth assignment of error complains of the action of the court in refusing four instructions requested by the railway company and giving in lieu thereof the following:

"The jury are instructed in determining the question of negligence they may consider the fact that the ordinances of the city of Richmond, Va., provide that all vehicles and street cars going in an easterly or westerly direction shall have the right of way over all vehicles or street cars going in a northerly or southerly direction. But the court further tells the jury that they must give a reasonable application to said ordinance, and that street cars going north and south on Laurel street are not required to stop and wait for vehicles going east and west on Grace street, unless in the exercise of ordinary care and prudence a prudent motorman would deem the stopping of his car necessary under all the circumstances at the time of the approach to Grace street."

This instruction and the four in place of which it was given all had their origin in the fact that one count in the declaration charged the railway company with a violation of section 21 of the traffic ordinance of the city of Richmond, which is as follows:

"Vehicles and street cars going in an easterly or westerly direction shall have the right of way over all vehicles or street cars going in a northerly or southerly direction."

The instruction appears to us to be a clear and practical interpretation of the ordinance and one which sufficiently covered the requirements of the case. The four instructions refused, taken altogether, were prolix in their statements, and would have been less helpful to the jury than the one given by the court, and, in so far as they were proper, they were either covered by it or by other instructions given in the case.

[6] Finally, it is contended that there was error in that portion of the instruction on the measure of damages which told the jury that they might consider "any loss of time heretofore sustained by the plaintiff from his work as a result of his injuries."

The argument in support of this assignment is based upon the want of evidence to show any actual pecuniary loss to his business resulting from his loss of time. The evidence shows that the plaintiff was in the hospital for three weeks, and that thereafter for six weeks he was only able to spend a part of each day at his place of business. It does not affirmatively appear that the business in which he was engaged was either profitable or unprofitable, or that it was affected by his absence; but we cannot feel that, under the circumstances here, there was any such prejudicial error in the instruction as would warrant a reversal of the judgment. The other elements of damage, to wit, physical and mental suffering and shock, their effect upon the condition of his health, and whether permanent or temporary, and the expenses incurred by reason of his injuries for medical treatment, were all properly set out in the instruction, and the evidence as to these other elements of damage is such as to leave little room to doubt that they overshadowed in the minds of the jury the mere loss of a few weeks' time which the plaintiff had "theretofore sustained." His injuries were of a dangerous, grievous, and permanent nature, and counsel for the railway company concede that the evidence in this respect would have supported even a much larger verdict. If there was liability on the defendant, the verdict for \$5,000 was in all probability very little, if at all, affected by any consideration of three weeks' total loss and six additional weeks' partial loss of time from a business the character and extent of which was not shown to them in the evidence. We fully appreciate and recognize the general rule that, when an erroneous charge upon the measure of damages has been given to the jury, even though the error goes only to one element of damage, the courts will not undertake to say how far the error has affected the total result. But we are unwilling to carry the application of this general rule far enough to reverse a judgment obtained upon a fair and otherwise regular trial, when

the only error therein, tested by every reasonable probability, could not have affected the result in an amount beyond that which would fall within the influence of the maxim, "De minimis lex non curat."

A large number of instructions appear to have been requested. The court gave three as offered for the plaintiff, two for the taxi company, four for the railway company, one on its own motion, and refused the others. The instructions given fully and fairly cover every phase of the case so far as the railway company's liability is concerned, and we are of opinion that the verdict was supported by sufficient evidence, and that the judgment must be affirmed.

Affirmed.

(120 Va. 408)

VIRGINIA RY. & POWER CO. v. HILL.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

DAMAGES — 130(1) — EXCESSIVE — PERSONAL INJURIES.

Where plaintiff was thrown from an automobile, and complained of constant pain from injured eye and arm during nine months, and testified that the pain was growing worse, a verdict for \$1,000 will not be disturbed as excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 372; Dec. Dig. —130(1).]

Error to Hastings Court of Richmond.

Action by E. Raymond Hill against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

H. W. Anderson, A. B. Guilgon, and T. J. Moore, all of Richmond, for plaintiff in error. Nelson & Nelson, and Gunn & Mathews, all of Richmond, for defendant in error.

KELLY, J. This is a companion case to that of Virginia Railway & Power Company v. Walter C. Hill, 91 S. E. 194, in which an opinion is handed down to-day affirming the judgment complained of. The two cases were, by agreement, tried jointly by the same jury; separate verdicts, however, being returned. In the present case the verdict was for \$1,000; and the only question not passed on in the Walter C. Hill Case which we are called upon to decide here is whether the trial court erred in refusing to set aside the verdict on the ground that the amount was excessive.

The plaintiff fell or was thrown from the automobile and received a cut in the face near his eye and an injury to his arm. He said at the trial: "I have pain constantly even from the night of the accident, haven't stopped a minute, from my left eye, and my arm troubles me very often;" also that he continued to have trouble in moving and using his arm, could not carry it straight, could not raise it above his head without pain, and that it seemed to be getting worse. This testimony was given by him more than

nine months after the accident. That we cannot interfere with the verdict as being excessive is perfectly clear under the well-established rule in this state. *Richmond Ry. & Elec. Co. v. Garthright*, 92 Va. 627, 635, 24 S. E. 267, 32 L. R. A. 220, 53 Am. St. Rep. 839.

The judgment must be affirmed.

Affirmed.

(120 Va. 308)

FOREST VIEW LAND CO., Inc., v. ATLANTIC COAST LINE R. CO. *

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

1. RAILROADS — 94(5) — CONSTRUCTION — ALTERATION OF COUNTY ROAD — CHANGE IN CROSSING — STATUTE.

Under Code 1904, § 1294b, cl. 3, providing that a railroad deeming it necessary in the construction of its works to cross a county road may do so, provided that, if it wishes to change any road to avoid the necessity of any crossing, a change shall be made by agreement between itself and the county board of supervisors, and that for damages to lands it shall make compensation, and in view of section 1294d, cl. 38, declaring the state's policy against grade crossings, a relocation of a county road bounding plaintiff's property on the north 50 feet further north and a conversion of the grade crossing at the road into an overhead or bridge crossing with embankments on the side of the road for some distance back from the bridge was within the statute, since, though the road crossed the tracks at practically the same point as formerly, a grade crossing was abolished.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 270; Dec. Dig. —94(5).]

2. DEEDS — 90 — CONSTRUCTION — FAVORING GRANTEE.

The court should look to the purpose of a conveyance as disclosed, not only by its terms, but by the surrounding circumstances and the situation of the parties, and should resolve any doubt against the grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 234-237, 247, 248; Dec. Dig. —90.]

3. EMINENT DOMAIN — 282 — RELEASE OF DAMAGES — CONSTRUCTION — "RAILROAD WORKS" — "ON THE LAND" — "ON."

A release of all damages to the remainder of the tract by the construction of a railroad or railroad works on the land which could be recovered in condemnation proceedings under the statute, contained in a conveyance by plaintiff's predecessor of additional strips of land adjoining a railroad right of way made for a consideration materially in excess of its market value at the time, and when a comprehensive scheme for reducing grades and double-tracking the line was contemplated, and when the grantor, though without actual knowledge of the particular change, contemplated some damages therefrom to the residue, barred plaintiff's action for damages from the road's relocation of a county road forming the northern boundary of the tract at a point further north, and its change of the grade crossing at the road to an overhead crossing, since the change was incident to the construction of "railroad works," and was within the release provisions "on the land"; the word "on" not always or necessarily implying actual contact, but often used to designate nearness in place or situation (citing Words and Phrases, First and Second Series, On).

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 777; Dec. Dig. —282.]

Error to Circuit Court, Chesterfield County.

Action by the Forest View Land Company, Incorporated, against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Smith & Gordon and Jas. F. Minor, all of Richmond, for plaintiff in error. Wm. B. McIlwaine, of Petersburg, and E. P. Cox, of Richmond, for defendant in error.

KELLY, J. This action was brought by the Forest View Land Company against the Atlantic Coast Line Railroad Company to recover damages for an alleged taking of and damage to certain land belonging to the former company. There was a verdict for the defendant, and to a judgment by the trial court in accordance therewith the plaintiff obtained this writ of error.

The grievance complained of in the declaration was based upon certain changes in the grade of the defendant company's road-bed adjacent to the land involved, and also upon certain changes in the location and grades of two county roads known, respectively, as the Bon Air road and the River road, upon each of which the land abutted. In the course of the proceedings, however, the controversy has narrowed itself, as we understand the record, to the single question of the plaintiff's right to recover for a change in the location and grade of the River road.

The portion of the plaintiff's land directly affected by the changes thus complained of is a tract containing about 30 acres, bounded on the east, for 1,925 feet, by the railroad right of way, on the south for more than half that distance by the Bon Air road, on the west and northwest, for 2,437 feet, by other lands, and on the north for a distance of 38 feet by what was formerly and until changed by the defendant company, the south line of the River road. It will not be necessary for the purposes of this discussion to deal with the balance of plaintiff's land. This 30-acre tract, as may be inferred from the foregoing general description, lay mostly toward the Bon Air road, upon which it had an extensive frontage. On the side next to the River road it ran out to a narrow point, ending with 38 feet of frontage on the River road. There was no roadway over this point connecting the tract with the River road, and although such a connection could have been established, the character and condition of the land was not well adapted to that purpose. The Bon Air and River roads form a junction not far to the east of this land, thus giving the entire tract access to both.

The right of way through or along this property was originally acquired, and the railroad was originally built, in 1889. At that time the railroad crossed the Bon Air road at the south of the 30-acre tract and the River road at the north, not exactly at grade, but by what are usually called "grade

crossings." The tracks along this land and at these crossings are a part of a belt line running around and to the west of the city of Richmond forming a connection with the defendant company's main line south of the city. This connection was originally made in 1889 at Clopton, a station about three miles south of Richmond. In 1906 the defendant company planned some very extensive changes and improvements of this belt line, involving an increase of its tracks, a widening of its right of way, an extension of the line to a meeting point with the main line some three miles further south at Falling creek, an entire change of grades throughout, and the substitution of an overhead crossing or bridge instead of a grade crossing of the tracks at the River road. To this end the company acquired, by deed dated August 23, 1906, from Eliza H. Schutte and her husband (the then owners of the property here involved), two additional strips of land adjoining the old right of way, one of which is approximately 60 feet wide, and, extending the entire distance between the Bon Air and the River roads, forms the eastern boundary of the above-described 30-acre tract. The deed conveying these additional strips of land, for which the consideration paid was materially in excess of the market value at that time, contained the following provision:

"All such damages to the remainder of the tract of land of the parties of the first part by the construction of a railroad or railroad works on the land hereby conveyed as could be recovered in condemnation proceedings under the statutes are contained in the consideration for this conveyance and are hereby released."

The plan for the readjustment, reconstruction, and improvement of the belt line, which the evidence shows was in contemplation at or about the time when the deed was obtained, was not put into effect until the spring of 1912, about one year after the land alleged to be damaged thereby had been acquired by the plaintiff company. This delay is not otherwise explained than by the suggestion of counsel that it was due to "the historical fact that in the fall of 1906, the winter of 1907, and for several years following, this country passed through times of great financial depression, and that individuals as well as public service corporations were required to exercise the strictest economy and to husband all their resources." This explanation seems entirely plausible, but, whatever may have been the reason, nothing is disclosed whereby the delay may be held to have prejudiced the rights of the defendant company under its deed from Mr. and Mrs. Schutte.

[1] Recurring now to the plaintiff's claim for damages, and to a more minute consideration of the complaint upon which, as finally reduced, its demand rests, we find the exact things complained of to be that in converting the grade crossing at the River road into an overhead or bridge crossing embankments were made on the sides of the road for

some distance back from the bridge, and that the location of the county road itself at that point was shifted some 50 feet further north, so that the 30-acre tract is now entirely cut off, both by reason of the embankment and by reason of an intervening strip of land, from access to the River road. This, upon a careful analysis of the record, as it comes to us, is the whole of the plaintiff's case. Can it be maintained?

In constructing the overhead crossing and in making the slight alteration of the location (to straighten the road at the crossing), the defendant company acted under the authority and with the approval of the board of supervisors of the county, duly obtained pursuant to the provisions of section 1294b, cl. 3, of the Code of Virginia, which, so far as it need be quoted here, is as follows:

"If any railroad, canal, turnpike, or other public service corporation deems it necessary in the construction of its works to cross any other railroad, canal, turnpike, or works of any other public service corporation, or any county road, it may do so; provided, * * * If * * * such company desires that the course of any other railroad, turnpike, canal, or other works shall be changed to avoid the necessity of any crossing, or frequent crossings of the same, the change may be made in such manner and on such terms as may be agreed on by the company desiring the change, and the company, person, or county owning or having charge of the works to be affected by such change. If any such crossing or change as is provided in this section cause damage to the works of any company, or of any county, or to the owner or occupant of any lands, the company exercising the privileges herein granted shall make proper compensation for such damage, * * * but any county road, or stream, or water course, may be altered by any such company for the purposes aforesaid whenever it shall have made an equally convenient road or waterway in lieu thereof, the said company having first obtained the consent of the board of supervisors of the county to the alteration of any road or highway."

See in this connection *C. & O. R. Co. v. Board of Sup'rs, Scott County*, 109 Va. 34, 38, 63 S. E. 412 et seq.

Counsel for the plaintiff contend that the foregoing section does not apply to the change made in the instant case, because, as they claim, no crossing was in fact avoided. We cannot accede to this view. It is true that the road still crosses the tracks at practically the same point as formerly, but the grade crossing is avoided, and, recalling the solemnly declared policy of this state against grade crossings (Code, § 1294d, cl. 38), we have no difficulty in holding that the change here made comes well within the meaning of the statute.

And with reference to the further contention of the plaintiff that, if the above section 1294b (3) does "purport to authorize such changes as were made here, and in the mode adopted without notice or hearing, the requirements of due process of law and just compensation were not obeyed," it is only necessary to say that, as will hereafter more fully appear, we regard the release above quoted as fully covering any compensation

which the plaintiff might otherwise have demanded, and therefore the question of notice and due process of law does not arise.

A great deal of testimony was introduced at the trial pro and con relating to the alleged damage to the land. It was earnestly contended on behalf of the defendant that the plaintiff had in fact sustained no damage; and, if the case had come to us merely upon the sufficiency of the evidence to sustain the verdict for the defendant, we could very promptly and very properly affirm the judgment, with the simple comment that the verdict, to say the least of it, was not without abundant evidence to support it. The determinative question, however, presented by this writ of error involves the propriety and correctness of an instruction by which the trial court directed a verdict and ended the case in favor of the defendant. That instruction was as follows:

"The court instructs the jury that all the elements of damage claimed by the plaintiff in this case could be recovered in condemnation proceedings under the statutes of the state of Virginia, and as Eliza Schutte and Henry R. Schutte, her husband, the predecessors in title of the plaintiff, did receive payment for all such damage from the Atlantic Coast Line Railroad Company, and did release the same to the said company in a certain deed dated the 23d day of August, 1906, introduced in evidence, the jury must find a verdict for the defendant."

It was the duty of the court to construe the release, and we are of opinion that this instruction embodied a correct interpretation thereof, and was therefore properly given.

[2, 3] It is not easy to conceive of a more comprehensive and far-reaching acquittance than the one in question; but if we concede that there is doubt as to its application to the exact damages here claimed, then, under familiar and settled rules of construction, the court should look to the purpose of the conveyance as disclosed not only by its terms, but by the surrounding circumstances and the situation of the parties, and should resolve the doubt against the grantor. 2 Dev. on Deeds (3d Ed.) §§ 839, 848. In the present instance, as we have seen, it is reasonably clear from the evidence that substantially the same changes which were made at the River road crossing, as a part of "a comprehensive and unified scheme" for reducing grades and double-tracking the roadway from James river to Falling creek were under contemplation at the date of the execution of the deed from Eliza and Henry Schutte. It does not affirmatively appear that these grantors actually knew of this scheme. Mr. Schutte himself, who was examined as a witness for the plaintiff, was not interrogated as to their knowledge of these plans of the defendant at the time of the conveyance, and he made no statement upon the subject. But even if they did not actually know of the company's purpose, they must now be charged with notice of it. The railroad was already built through their land, upon a right of way acquired in 1889. They were paid a

large price for the additional strip of land, and it is certain that damages of some kind to the residue of the tract were in the minds of the parties. What damages, if not those which the plaintiff is now seeking to recover? At all events, Mr. and Mrs. Schutte were paid for and executed a sweeping release, and their vendees are precluded from claiming compensation for any damage which falls within the fair interpretation of the language used to express the exemption.

It must be apparent that, if the railroad company, instead of taking the deed from the owners of the land, had proceeded to acquire by condemnation proceedings the requisite additional strip, together with the right to change the grades, shift the location of the crossing, construct the overhead bridge, etc., it would of necessity have taken a course which would have brought under consideration for compensation the very elements of damage embraced in the plaintiff's demand. It could not have prosecuted the "condemnation proceedings under the statutes" designated in the release without disclosing in advance, and as a matter of public record, "the cuts and fills, trestles and bridges" in contemplation, together with much other information, informing the property owner of the exact manner and extent to which his estate would be affected. Code, § 1105f (4); *Lanford v. Va. A. L. R. Co.*, 113 Va. 68, 71, 73 S. E. 566. Whether Mr. and Mrs. Schutte had all this information when they made the deed we cannot say, but they at least saw fit to sell the land at a price which they stated over their hands and seals embraced "all such damages to the residue of the tract . . . by the construction of a railroad or railroad works on the land hereby conveyed as could be recovered in condemnation proceedings under the statutes"; and it seems to us clear that what the defendant company is charged with doing in this case must be regarded as incident to the construction of "railroad works" on the land conveyed, and the damage therefrom, if any, to the residue of the tract, such as would have been recoverable under condemnation proceedings. The bridge at the crossing was built and is maintained, as the law in such cases requires, by the railroad company.

In the case of *City of Richmond v. R. & D. R. Co.*, 21 Grat. (62 Va.) 604, 608, Judge Staples, speaking for this court, said:

"The word 'works' is one of very extensive signification. In military engineering it means fortresses, fortifications, ramparts, bastions, and the like. In civil engineering it is often applied to depots, engine houses, bridges, embankments, and other structures essential to the franchise

and the proper conduct of a railway, or other work of public improvement."

In *Parker v. Boston, etc., R. Co.*, 3 Cush. (Mass.) 107, 116, 50 Am. Dec. 709, Chief Justice Shaw, referring to a statute regulating the exercise of the right of eminent domain, said:

"All these provisions are parts of one act, to be taken and construed together as one system of rules; and hence it appears that the raising of a common road, with an embankment of sufficient length on each side to form an easy slope to a high bridge, is a part of the franchise given by the charter, as much as the right to take private property, or to pass over navigable waters. These bridges, and the embankments extending laterally from them, are as much a part of the structure authorized by the charter as the railroad itself. This brings the case of one damaged by such structure within all the reasons and within all the provisions which give compensation for damages occasioned by the laying out, making, and maintaining of the railroad."

The plaintiff contends, however, that it is not claiming against the release, and insists that the damages sued for are not covered thereby, because the location of the county road was shifted and the bridge actually built a few feet north of the road as originally located, so that there was not any actual physical contact of the structure with the strip conveyed, and hence no railroad works "on the land." If it be conceded that no part of the embankment and approach to the bridge on the west side of the track actually touches the strip conveyed to the defendant—a fact not shown clearly, if at all, by the record—the meaning sought to be ascribed to the word "on" is too restricted. Bearing in mind the rule already alluded to by which the words in the deed must be taken most strongly against the grantor, it is entirely consonant with both reason and authority to accord to the words "on the land" the precise meaning claimed for them by the defendant and attributed to them by the trial court. The word "on" does not always or necessarily imply actual contact, and is not infrequently used to designate nearness in place or situation. Structures are often described as being on a street, or on a road, or on a stream, when in fact they do not physically touch the street, road, or stream. This latitude in the use of the word is recognized in law. See 29 Cyc. 1484; *O'Mara v. Jensma*, 143 Iowa, 297, 121 N. W. 518, 519; *Burnam v. Banks*, 45 Mo. 349, 351; 6 Words and Phrases, p. 4963.

There is no error in the judgment complained of, and it is affirmed.

Affirmed.

CARDWELL, P., absent.

(120 Va. 319)

FRANCIS et al. v. TAZEWELL et al.
(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

SLAVES §25 — LEGITIMACY OF CHILDREN — "MARRIED"—"LEGITIMATE."

Under Code 1904, § 2227, providing that, where colored persons prior to February 27, 1866, agreed to occupy the relation of husband and wife, and were cohabiting together at that date, they shall be deemed husband and wife, and their children be deemed legitimate, and where they had ceased to cohabit before that date, for any cause, the woman's children recognized by the man to be his shall be deemed legitimate, they, having before that date cohabited under a bona fide agreement to live together as man and wife, are to be deemed "married," and her children by him "legitimate," though before that date he abandoned her for unfaithfulness, as this could not dissolve the bond of marriage, and if it could, would not affect the legitimacy of the children.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115; Dec. Dig. § 25.

For other definitions, see *Words and Phrases*, First and Second Series, *Marriage*; *Legitimate*.]

Appeal from Circuit Court, Northampton County.

Suit by Leah Francis and others against Thoroughgood Tazewell and others. From an adverse decree, plaintiffs appeal. Affirmed.

Otho. F. Mears, of Eastville, for appellants. Thos. H. Nottingham and J. T. Wilkins, III, both of Eastville, for appellees.

WHITTLE, J. This is a controversy over the estate of Benjamin Tazewell, deceased, between appellants, a brother and sister, and the children of a deceased sister of decedent, plaintiffs, and appellees, Thoroughgood Tazewell, the son, and the children of Cora Winder, deceased, who was the daughter of decedent, defendants.

The parties are negroes, and the son and daughter of decedent were the offspring of what is claimed to have been a legalized marriage between him and Emily Smaugh by virtue of an act of the General Assembly passed February 27, 1866.

The question of heirship was referred to a commissioner in chancery, whose finding in favor of the legitimacy of the children was approved and confirmed by the court. From a decree awarding the property to the defendants, the plaintiffs appealed.

The act in question (now section 2227 of the Code) declares that:

"Where colored persons prior to February 27, 1866, agreed to occupy the relation * * * of husband and wife, and were cohabiting together * * * at that date, whether the rites of marriage had been celebrated between them or not, they shall be deemed husband and wife, and be entitled to the rights and privileges, and subject to the duties and obligations of that relation in like manner, as if they had lawfully married; and all their children shall be deemed legitimate, whether born before or after said date. And where the parties had ceased to cohabit before February 27, 1866, in consequence

of the death of the woman, or from any other cause, all the children of the woman, recognized by the man to be his, shall be deemed legitimate."

This legislation was rendered necessary to meet the abnormal condition that existed among the colored race in consequence of the abolition of negro slavery in the South as a result of the Civil War.

Without this enabling act, slave marriages which largely obtained among that class of the population were invalid, because, being slaves, the parties were incapable to make any contract including that of marriage. When, therefore, these former slaves were emancipated and clothed with the rights and privileges of citizenship, the good order of society demanded that these inchoate marriages should be recognized as lawful and the children legitimated. And the right of children of slave marriages to inherit property from the father was regarded of sufficient consequence to be expressly secured both by the Constitutions of 1869 and of 1902 (Constitution of Virginia 1869, § 9, art. 11, and section 195, art. 14, of the present Constitution).

The evidence justified the conclusion reached by the commissioner and the circuit court that Benjamin Tazewell and Emily Smaugh (both of whom were slaves) agreed to occupy the relation to each other of husband and wife, and in pursuance of that agreement cohabited together prior to February 27, 1866; that the appellee Thoroughgood Tazewell and Cora Winder were the children of that union, and were always acknowledged by Benjamin Tazewell as his children.

Subsequently, in the year 1863, Benjamin Tazewell left his home in Northampton county and enlisted as a soldier in the Federal army. Upon his return from the army, in July, 1866, he sought his wife and children; but, discovering that the wife was eniente by another man, he abandoned her, and in December following married another woman. He took his two children to his home to live with him, and nurtured and maintained them until they were old enough to provide for themselves, and always regarded them as his own children.

In these circumstances appellants insist that the conduct of Benjamin Tazewell and the woman Emily after his return from the army amounted to a mutual abandonment of their former relations, and that their children are not within the protection of the statute and are illegitimate.

This contention is utterly untenable. Having once reached the conclusion that Benjamin Tazewell and Emily Smaugh were lawfully married within the contemplation of the act of February, 1866, it is obvious that neither husband nor wife, nor indeed both acting in concert, could by abandonment or other act dissolve the bond of the pre-exist-

ing marriage. But if that were possible, or even if the marriage had been dissolved by a decree of a court of competent jurisdiction in a suit brought for that purpose, it could in no wise have affected the legitimacy of the children.

Section 2554 of the Code prescribes that: "The issue of marriages deemed null in law or dissolved by a court, shall nevertheless be legitimate."

The case of *Francis v. Francis*, 31 Grat. (72 Va.) 283, 289, is conclusive authority for affirming the decree under review. Judge Staples, in delivering the opinion of the court in that case, observes:

"My opinion, therefore, is that the circuit court did not err in holding that the appellee was, under the act of February, 1866, the lawful wife of the appellant at and after the passage of that act, and the appellant could no more release himself of the duties and obligations of that position by any act of his than he could if he had been legally united to the appellee by the rites of matrimony."

See, also, *Fitchett and Others v. Smith's Adm'r, etc.*, 78 Va. 524, and *Smith v. Perry, Adm'r, etc.*, 80 Va. 563.

The case of *Patterson v. Bingham*, 101 Va. 372, 43 S. E. 609, is relied on to reverse the decree. But there, upon the facts, the court was of opinion that it was not a case of intended marriage within the meaning of the act, but of concubinage merely. Of course, the statute does not apply to cases where the cohabitation is a purely meretricious connection. There must have been a bona fide agreement, express or implied, between the parties to live together as man and wife.

The decree is plainly right, and must be affirmed.

Affirmed.

(106 S. C. 255)

BURNETT v. CITY OF GREENVILLE. (No. 9573.)

(Supreme Court of South Carolina. Jan. 16, 1917.)

1. MUNICIPAL CORPORATIONS — 764(1) — "DEFECT IN STREET" — STATUTE.

Statute making city liable for injuries occurring "through a defect in any street" includes keeping street in such physical condition that it is reasonably safe for street purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1616, 1619, 1620; Dec. Dig. 764(1).]

For other definitions, see *Words and Phrases*, First and Second Series, Defect.]

2. MUNICIPAL CORPORATIONS — 762(3) — TORTS — USE OF STREETS FOR RACING AUTOMOBILES.

A city is liable for personal injuries resulting from permitting the use of streets for racing and testing automobiles; such streets not being reasonably safe for ordinary street purposes.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1609-1611; Dec. Dig. 762(3).]

Appeal from Common Pleas Circuit Court of Greenville County; Frank B. Gary, Judge.

Action by W. M. Burnett against the City of Greenville. Judgment for defendant, and plaintiff appeals. Set aside and remanded.

Townes & Earle, of Greenville, for appellant. Oscar Hodges, of Greenville, for respondent.

GAGE, J. Action for damages to the person and to personal property; order sustaining demurrer to the complaint; appeal by the plaintiff. There are four exceptions, but only one issue: Does the complaint state a case? The complaint ought to be reported.

The statute allows an action to (1) "any person who shall receive * * * damages in his person or property (2) through a defect in any street * * * (3) or by reason of defect or mismanagement of anything under the control of the corporation." The numerals are supplied.

[1] The plaintiff received the damage to his person and to his car; there is no denial of that; but it is denied that the hurt came through a defect in the street. If the plaintiff has an action, it arises out of those words of the act we have prefaced by the numeral (2), to wit, "through a defect in any street." These words were recently construed by us in an elaborate opinion, and we there held them to include the keeping of a street in such physical conditions that it will be reasonably safe for street purposes. *Irvine v. Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363.

The advent of the automobile, like the coming of the locomotive engine, and like a starting application of the laws of nature to any new appliance, is about to change society. If that device is of inestimable use to men, it is also of great and increasing peril to the people.

We take notice of these facts: That Greenville is a city of some 25,000 or more inhabitants, and that Main street is a great thoroughfare thickly settled and much used by the people. The amazing allegation of the complaint is that the plaintiff was struck with great force by an automobile running on that street at a terrific rate of speed, probably 75 to 100 miles an hour, which was using said street as a place of practice for hill climbing * * * with the knowledge and consent of the city, its mayor, councilmen, and policemen. That is admitted to be true.

It is suggested by the city that the dedication of the public ways to automobile racing lay wholly outside of the powers of the corporation, for which act the corporation is not liable. That is another way of saying the corporation is liable if the authorities act within the law, and is not liable if the authorities act without the law. The prime duty of any city is to keep its streets clear for the public travel. The incumbrance of the streets with automobiles running at a

dangerous rate of speed, just for practice, is a violation of that prime duty. To answer that the mayor and council had no authority to authorize such a use of the streets, is to admit the wrong.

It is true there are decisions from other jurisdictions which sustain this view of the respondent, but they do not commend themselves to our judgment, and they do not express the general rule of law. See cases cited in 28 Cyc. 1356, note 36.

[2] We are of the opinion that the street thus dedicated by the authorities to a hazardous use was not then reasonably safe for prime street purposes. We have held the city of Columbia liable in tort under that portion of the statute we have signalized by the numeral (3) for injuries inflicted by its flying fire car bent on a public mission. *Creps v. Columbia*, 104 S. O. 372, 89 S. E. 318. Much more ought Greenville to be liable when flying autos imperiled the reasonably safe use of the streets by the people, and when the autos were not in the performance of a public duty.

The further discussion and the differentiation of other cases from other jurisdictions would becloud the issue; and we rest content with the authority and relevancy of those we have cited.

The judgment below is, we venture to think, against the law; and it is set aside, and the cause is remanded for further procedure.

GARY, C. J., and FRAZER, J., concur.
HYDRICK and WATTS, JJ., did not sit.

(146 Ga. 307)

HILL et al. v. MERRITT. (No. 193.)

(Supreme Court of Georgia. Dec. 18, 1910.)

(Syllabus by the Court.)

1. WITNESSES — 139(1) — COMPETENCY — TRANSACTIONS WITH DECEASED PERSON.

Where suit is instituted by the personal representative of a deceased person, the defendant is an incompetent witness to testify in his own behalf as to any transaction or communication with the deceased.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 582; Dec. Dig. 139(1).]

2. DEEDS — 194(2) — DELIVERY — PRESUMPTIONS.

Where a signed warranty deed containing an attestation clause in the usual form is found, after the death of the grantee, in a private safety-deposit box in a bank, in which box the grantee's papers have been kept, delivery of the deed by the grantor will be presumed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 576, 577, 623, 634; Dec. Dig. 194(2).]

3. DEEDS — 66 — ACTIONS — DELIVERY — DIRECTED VERDICT.

The evidence authorized the direction of a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 127, 633; Dec. Dig. 66.]

4. APPEAL AND ERROR — 1075 — REVIEW — MOOT QUESTIONS.

The pleadings and the briefs of counsel for the plaintiffs in error having eliminated all questions save as dealt with above, the court will not pass upon other assignments of error in the bill of exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4253; Dec. Dig. 1075.]

(Additional Syllabus by Editorial Staff.)

5. WITNESSES — 164(9) — COMPETENCY — TRANSACTIONS WITH DECEDENTS.

The making of a deed is a "transaction" under Civ. Code 1910, § 5858, par. 1, providing that, where any suit is instituted or defended by the personal representative of a deceased person, the opposite party shall not be admitted to testify in his own favor against the deceased person, and therefore the grantor is incompetent to testify relative thereto after the death of the grantee.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 693; Dec. Dig. 164(9).]

For other definitions, see *Words and Phrases*, First and Second Series, *Transactions*.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Petition by Mrs. M. C. Merritt, as executrix of the estate of Mrs. Rebecca M. Seymour, against David W. Hill and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

C. L. Bartlett, C. H. Hall, Jr., and Roland Ellis, all of Macon, for plaintiffs in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

GILBERT, J. Under the will of Mrs. Rebecca M. Seymour, Mrs. M. C. Merritt was appointed executrix, and David W. Hill executor. The executrix filed a petition against David W. Hill, Judson S. Hill, and James B. Hill, asking for direction by the court as to her duty in regard to certain matters touching the estate; that a certain deed alleged to have been executed and delivered by the defendants to the deceased be impounded and held by the clerk or some other officer designated by the court; that David W. Hill and his codefendants be restrained from changing the status of the property described in the deed; and that said property be decreed to be the property of Mrs. Seymour, deceased, subject to be administered according to the terms of the will. The plaintiff also alleged that the deed in question, after the death of Mrs. Seymour, was found in a private safety-deposit box in the vault of a bank, which box was rented by Mrs. Seymour. The defendants denied that the property described in the deed was the property of Mrs. Seymour. They admitted that "in a safety-deposit box rented by Mrs. Seymour * * * there was found a paper purporting to be a deed, the same being in the language and form of a deed, and signed by these defendants," and they identified such paper as the deed de-

scribed in the petition of Mrs. Merritt, and attached thereto as an exhibit.

On the trial the plaintiff introduced in evidence the will of Mrs. Seymour, and the deed, and testimony that the deed was found in the safety-deposit box of Mrs. Seymour after her death. The defendants insisted that the effect of this evidence was to show that Mrs. Merritt placed the deed in the box after the death of Mrs. Seymour. The defendants undertook to show that the deed was never delivered, and that the safety-deposit box, while rented by Mrs. Seymour, was really used jointly by her and by David W. Hill. The only issue was whether or not the deed had ever been delivered by the plaintiffs to Mrs. Seymour. The decision of this question depended upon the admissibility of certain testimony offered by the defendants, to wit, David W. Hill was introduced as a witness, and the following questions were propounded to him:

(1) "When was the paper [deed] signed?"
 (2) "Did you ever receive any money for the signing of that deed?"

(3) "Was that deed ever delivered to any one?" (Counsel stated to the court that they proposed to prove that the deed signed by the three defendants was never delivered to any one, and was kept in the possession of David W. Hill.)

(4) "In whose possession was that deed after it was signed?" (Counsel stated to the court that they proposed to show that the deed was physically in possession of the witness, and that it was not a transaction with the deceased.)

(5) "Was that paper [deed] signed?"

(6) "How long ago was it signed?"

(7) "Was there in this box [referring to Mrs. Seymour's safety-deposit box] any of your private papers?" (Counsel stated to the court that they proposed to show that the box was the joint box of Hill and Mrs. Seymour, and that it was in his possession at the time of her death, and never left his possession.)

Judson S. Hill was sworn for the defendants, and the same questions were propounded to him. He was asked the further questions:

"Do you remember signing the deed? At what place in Macon was it signed?"

The defendants also offered to prove by James B. Hill "that he never saw this deed, that he never signed it, and that he never delivered it." The plaintiff's counsel objected to all of these questions, on the ground that the testimony had reference to a transaction between the defendants and Mrs. Seymour, the grantee of the deed, who was dead. This objection was sustained. The court directed a verdict for the plaintiff, and the defendants excepted.

[1, 5] 1. "Where any suit is instituted or defended * * * by the personal representative of a deceased person, the opposite

party shall not be admitted to testify in his own favor against the * * * deceased person, as to transactions or communications with such * * * deceased person." Civil Code 1910, § 5858, par. 1. It must be determined, therefore, whether the defendants in this case were undertaking to testify in regard to such a transaction with the deceased as is inhibited by this Code section. In the case of *Chamblee v. Pirkle*, 101 Ga. 790, 792, 29 S. E. 20, the court defined such a transaction to be a "transaction or communication had directly with the deceased, something personal between the surviving and the deceased parties, a transaction or communication of such character that the deceased, if alive, could deny, rebut, or explain the statement of the other party." The making of a deed is such a transaction, and therefore the grantors are not competent witnesses to testify in regard to such a transaction after the death of the grantee. *Chambers v. Wesley*, 113 Ga. 343, 38 S. E. 848; *Wall v. Wall*, 139 Ga. 270, 77 S. E. 19, 45 L. R. A. (N. S.) 583.

It is contended by the plaintiffs in error, however, that they had the legal right to show that in fact there was no transaction at all. This contention is unsound, as was held in *Dowdy v. Watson*, 115 Ga. 42, 47, 41 S. E. 266. The ruling of the court in excluding the testimony on the ground urged against it was not error.

[2] 2. The deed in question is in the usual form of a warranty deed, and contains the clause:

"In witness whereof, the said James B. Hill, Judson S. Hill, and David W. Hill have hereunto set their hand, affixed their seal, and delivered these presents, the day and year first above written."

Then follow the purported signatures of all three of the defendants, and the attesting clause, "Signed, sealed, and delivered in the presence of," and the signatures of two witnesses, one being a notary public, with the notarial seal. After the death of the grantee, this deed was found in a private safety-deposit box in a bank, which contained her private papers. A presumption of delivery of the deed will arise from such possession.

[3] 3. There was no conflict in the evidence, and, with all reasonable deductions or inferences from the evidence introduced, a verdict for the plaintiff was demanded, and the court did not err in so directing.

[4] 4. The ruling announced in the fourth headnote does not require elaboration.

Judgment affirmed. All the Justices concur.

(146 Ga. 357)

HUTCHINSON v. COPELAND et al.
(No. 210.)

(Supreme Court of Georgia. Jan. 11, 1917.)

*(Syllabus by the Court.)***1. INJUNCTION** \S 111—**VENUE** — “PENDING PROCEEDING.”

The pendency of a proceeding to condemn land as a way of necessity for a tramroad under Civ. Code 1910, \S 804, is such a pending proceeding as to give the superior court of the county where the condemnation proceeding is pending jurisdiction to entertain a petition to enjoin such proceeding.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. $\S\S$ 195, 196; Dec. Dig. \S 111.]

For other definitions, see Words and Phrases, First and Second Series, Pending.]

2. EMINENT DOMAIN \S 167(1)—**CONDEMNATION PROCEEDINGS—PROCEDURE.**

The procedure for the condemnation of a right of way for a tramroad under Civ. Code 1910, \S 804 et seq., is that prescribed in Civ. Code 1910, \S 5206 et seq.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. $\S\S$ 451, 454, 456; Dec. Dig. \S 167(1).]

3. EMINENT DOMAIN \S 227—**CONDEMNATION PROCEEDINGS—ASSESSORS—DOMICILE.**

It is not essential that the assessors appointed in a condemnation proceeding under Civil Code 1910, \S 5206 et seq., should be residents of the county where such proceeding is instituted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. \S 581; Dec. Dig. \S 227.]

4. EMINENT DOMAIN \S 246(1)—**CONDEMNATION PROCEEDINGS—APPLICATION.**

Where an application for condemnation is filed, and no steps are taken thereunder, and it is abandoned, a new application may be made without reference to the application which had been abandoned.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. \S 246(1).]

Error from Superior Court, Grady County; E. E. Cox, Judge.

Action by S. E. Hutchinson against H. C. Copeland and others. Judgment for defendants, and plaintiff brings error. Affirmed, with directions.

F. T. Myers, of Tallahassee, Fla., T. S. Hawes and C. W. Wimberly, Jr., both of Bainbridge, and Ira Carlisle, of Cairo, for plaintiff in error. Roscoe Luke and C. E. Hay, both of Thomasville, and M. L. Ledford, of Cairo, for defendants in error.

EVANS, P. J. The Caldwell Lumber Company is a partnership engaged in the business of operating a sawmill. Its sawmill is located at Metcalf in Thomas county, a station on the Atlantic Coast Line Railroad Company. The sawmill company owns various lots of timber land in Thomas and Grady counties. It has constructed a tramroad for the purpose of conveying timber to the Atlantic Coast Line Railroad Company, with which it has a connecting track at Metcalf, over which the tram cars, loaded with timber, are conveyed to their mill. The company desired to extend its tramroad further into Grady

county for the purpose of reaching timber land owned by them in that county. The route selected for the extension of the tramroad passes through the corner of a lot of land owned by S. E. Hutchinson. Hutchinson refused consent to the lumber company to construct the tramroad across his land. The lumber company filed with the commissioners of roads and revenues of Grady county an application to condemn a right of way for a tramroad over the land of Hutchinson, agreeably to the provisions of sections 804 and 805 of the Civil Code of 1910. Thereupon Hutchinson filed a petition in the superior court of Thomas county, the residence of the partners composing the firm of the Caldwell Lumber Company, to enjoin the defendants from entering upon or condemning his land on the ground that the lumber company's enterprise was a private and not a public business, and that they were not entitled to a right of way over his land, nor to condemn it for a strictly private use. A temporary injunction was refused, and the judgment was upheld by this court, on conflicting evidence, as to the necessity of the lumber company to cross Hutchinson's land in order to connect with the railroad company. *Hutchinson v. Caldwell Lumber Co.*, 144 Ga. 565, 87 S. E. 777. While the writ of error in the case just cited was pending in the Supreme Court, the lumber company projected its tramroad around the land of Hutchinson to the timber which they were seeking to reach by means of the route over Hutchinson's land. Hutchinson filed a second petition in Thomas superior court to enjoin the condemnation on the ground that it had been demonstrated by the actual construction of the tramway to the timber lands of the Caldwell Lumber Company that a route over his land was not indispensably necessary for the lumber company to reach its timber. The trial court again refused to enjoin the lumber company, and its judgment was reversed. *Hutchinson v. Caldwell Lumber Co.*,¹ this day decided. A few days after the institution of the second application for injunction Hutchinson filed a petition in the superior court of Grady county against the Caldwell Lumber Company and Copeland and others, the assessors appointed in the condemnation proceeding pending in that county to enjoin the defendants from entering upon his land in pursuance of their appointment as assessors in the condemnation proceeding. The court refused the injunction, and Hutchinson excepted.

[1] 1. The Caldwell Lumber Company opposed the grant of an injunction by demurrer and by answer. One ground of the demurrer was that the superior court of Grady county was without jurisdiction of the case for the reason that no substantial relief is prayed against any defendant resident of the county of Grady. It appeared from the petition as amended that the partners composing the

Caldwell Lumber Company were residents of Thomas county, and that two of the assessors appointed in the condemnation proceeding were also residents of Thomas county. The only defendant residing in Grady county was one of the assessors in the condemnation proceeding. The Constitution of this state requires all petitions for equitable relief to be brought in the county of the residence of one of the defendants against whom substantial relief is prayed. However, in cases of injunction to stay pending proceedings the action may be brought in the county where the proceeding is pending, provided no relief is prayed as to matters not included in such litigation. Civ. Code 1910, § 5527. There being no substantial relief prayed against the resident defendant, the jurisdiction over the petition depends upon whether the application to condemn the land is such a pending proceeding that it may be enjoined in the county where it pends without regard to the residence of the defendants. It is provided in Civ. Code 1910, § 804 et seq., that any person desiring to construct a tramway to connect with any waterway or railroad in this state for the purpose of transporting lumber, naval stores, and timber, by means of the same, may make application in writing to the ordinary or county commissioners, as the case may be, of the county in which such tramway is to be located, setting out the length of such way, together with the place of starting and the terminus of the same, and the line of its location as near as may be. When the application is filed, all proceedings thereafter shall be the same as are now allowed and directed by the Code for condemning property, except that the strip of land to be used for such purpose shall not exceed in width 15 feet. The statute relative to condemnation of land makes provision for litigation over the assessment in the county where the condemnation proceeding is instituted. Such a proceeding is a pending proceeding in the meaning of the Code section, and the superior court of Grady county had jurisdiction to inquire into the issues involved in the condemnation proceeding, but not into extraneous equities between the parties.

[2] 2. The procedure pursued in the condemnation case was that provided by Civ. Code 1910, § 5206 et seq. This is the general law for condemnation of private property for public use. The plaintiff in error makes the point that this section is inapplicable because the application is to condemn land for private purposes, and not for a public use. Private property cannot be taken for private use except in case of indispensable necessity and on making adequate compensation. The provisions of Civ. Code 1910, § 804 et seq., relating to the construction of tramroads and the condemnation of land to secure a necessary right of way, only applies to instances where such tramways are necessary to connect with a railroad or waterway for the purpose of transporting lumber, naval stores,

and timber by means thereof. *Valdosta, Moultrie & Western Railroad Co. v. Adel Lumber Co.*, 136 Ga. 559, 71 S. E. 803; *Alaculsey Lumber Co. v. Shippen Bros. Lumber Co.*, 143 Ga. 296, 84 S. E. 967. Private property also may be taken for public use on the payment of adequate compensation. It is within the province of the Legislature to provide one method for condemnation where private property is taken for private use in cases of necessity, and another method where private property is taken for a public use. Or, in its wisdom the Legislature may provide a single method as applicable to both cases. An elaborate and detailed procedure is prescribed in the case of condemnation for a public use and is found in Civ. Code 1910, § 5206 et seq. There is no other complete plan of condemnation provided in the Code. Hence the provision in section 805, that all the proceedings after filing the application for condemnation "shall be the same as are now allowed and directed by this Code for condemning property," must have reference to section 5206 et seq. This view is strengthened by this court's construction of certain Code sections on a related subject. The Code section 795 et seq., defining how persons engaged in mining and quarrying may obtain a right of way for a railroad, turnpike, or common road across the lands of others necessary for the successful prosecution of their business, contain a provision that proceedings relating to condemnation shall be "according to the method of condemning land in this Code provided," and it was held that as there was no other provision for condemnation, except for condemnation of private property for public use, that method of condemnation should be followed in proceedings instituted under these sections of the Code. *Jones v. Venable*, 120 Ga. 1, 47 S. E. 549. The analogy of the statute with reference to condemnation for mining and quarrying purposes to that providing for the condemnation of rights of way for tramroads is so intimate that the principle of *Jones v. Venable*, supra, would seem to control, and indeed was impliedly recognized in the litigation between the parties to this record. *Hutchinson v. Caldwell Lumber Co.*, 144 Ga. 565, 87 S. E. 777.

It is argued that there is a conflict between the case of *Garbutt Lumber Co. v. Georgia & Alabama Railway*, 111 Ga. 714, 36 S. E. 942, and the case of *Jones v. Venable*, 120 Ga. 1, 47 S. E. 549. The former case was considered in the opinion in the latter case and clearly differentiated.

[3] 3. The point is made that the condemnation proceeding is illegal because two of the assessors do not reside in the county of Grady, where the condemnation proceeding is pending, but are residents of Thomas county. The provisions of Civ. Code 1910, § 5206 et seq., providing for the condemnation of property, do not limit the selection of assess-

sors to the county where the condemnation proceedings are instituted.

[4] 4. There is no merit in the attack made upon the condemnation proceeding on the ground that about a year before the present application was filed the defendants in error had made an application to the ordinary which had not been prosecuted. The court was authorized to find that that proceeding had been abandoned, as nothing had been done under it and a new proceeding was instituted without reference to any prior application. The condemnation proceeding was not defective on account of failure to comply with the statute, but inasmuch as the right of plaintiff in error to an injunction in the case pending in Thomas county has been considered in connection with the present writ of error, in affirming the judgment of the court we give direction that the further proceedings in the condemnation be stayed to await the final determination of the issues as to whether or not the lumber company is entitled to condemn the land of the plaintiff in error involved in the proceeding pending in Thomas superior court.

Affirmed, with directions. All the Justices concur.

(146 Ga. 356)

HUTCHINSON v. CALDWELL LUMBER CO. et al. (No. 212.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. EMINENT DOMAIN §56—CONDEMNATION PROCEEDINGS—PRIVATE ROAD.

"In a proceeding under Civ. Code 1910, § 807 et seq., to condemn a private way over the lands of another person, in order to entitle the applicant to relief, it must appear that the way sought by him is absolutely indispensable as a means of reaching his property." *Wyatt v. Hendrix*, 90 S. E. 957, decided November 17, 1916, and cases cited.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160; Dec. Dig. §56.]

2. EMINENT DOMAIN §56, 196—INJUNCTION—CONDEMNATION OF PRIVATE WAY.

A private way over another's land, whether under Civ. Code 1910, § 807, or section 804, is based on necessity, though the procedure to obtain the same may be different. *Valdosta Railroad Co. v. Adel Lumber Co.*, 136 Ga. 559,

71 S. E. 803. Where a lumber company operating a sawmill sought to condemn a private right of way for the purpose of constructing a tramroad belonging to another person, in order to reach certain timber lands belonging to the applicants, under section 804 et seq. of the Civil Code, the burden was on the applicants to show the absolute necessity for such right of way as a means of reaching their property; and where in such case an equitable petition was filed to enjoin the defendants from entering upon and condemning a right of way through the lands of the plaintiff, and the defendants answered the petition admitting that "a tramroad has been constructed in a roundabout way in an effort to reach and remove defendants' timber sought to be reached by the proposed tramroad," but averring that on account of the steep grades it required two engines to pull three log trucks loaded with logs, and that it is only with great expense that the tramroad can be operated for transporting the timber, and such condition renders the existing route practically valueless, such admission conclusively negatives the opinion evidence of witnesses for the applicant to the effect that the proposed way across the plaintiff's land is a necessity; and it was therefore error for the trial judge, on the hearing of the petition for injunction, to dissolve the temporary restraining order and to refuse the injunction.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 147-160, 529-534; Dec. Dig. §56, 196.]

3. RES ADJUDICATA.

There is no merit in the contention as to the plea of res adjudicata. The facts presented in the record differ in a material particular from those appearing in the record before the court when the decision was rendered in the case of *Hutchinson v. Caldwell Lumber Co.*, 144 Ga. 565, 87 S. E. 777. A tramroad around the land of plaintiff to the defendants' timber lands has been constructed and operated by the defendants since the former trial.

Error from Superior Court, Thomas County; W. E. Thomas, Judge.

Action by S. E. Hutchinson against the Caldwell Lumber Company and others. Judgment for defendants, and plaintiff brings error. Reversed.

F. T. Myers, of Tallahassee, Fla., T. S. Hawes and C. W. Wimberly, Jr., both of Bainbridge, and Ira Carlisle, of Cairo, for plaintiff in error. Roscoe Luke and C. E. Hay, both of Thomasville, and M. L. Ledford, of Cairo, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(79 W. Va. 419)

FOX v. HARRIS, Clerk of Senate.

SAME v. PRICHARD, Clerk of House of Delegates.

(Supreme Court of Appeals of West Virginia.
Jan. 16, 1917.)*(Syllabus by the Court.)*

1. CONSTITUTIONAL LAW §70(1)—DIVISION OF POWERS—POWERS OF JUDICIARY.

Courts have no power to interfere with the proceedings of the Legislature, or to regulate the official conduct of the clerks of the respective branches thereof, after its adjournment, in completing their journals, so long as they are obeying its rules and commands.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137; Dec. Dig. §70(1).]

2. JURISDICTION OF COURTS.

Jurisdiction to prevent the clerks of the respective houses of the Legislature, after its adjournment, from falsifying the journals suggested, but not decided.

3. MANDAMUS §69 — CLERKS OF LEGISLATURE—POWERS.

This court will not undertake by mandamus to compel the clerks of the respective houses of the Legislature, in making up the journals of those bodies, after adjournment of the Legislature, to expunge from the report of one of their joint conference committees on disagreeing votes in the two houses, on the passage of a certain bill, matter alleged to have been improperly and fraudulently incorporated therein, after the report had been adopted by the two houses, when it appears such matter was agreed on by said committee, but was inadvertently omitted from its report, by its clerk, and was afterwards inserted therein by the joint committee on enrolled bills, pursuant to a joint rule of the two houses, and the bill, as thus corrected, was called to the attention of the respective houses which adjourned sine die, without further action with reference thereto.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. §69.]

Original petitions by Fred L. Fox for writs of mandamus against John T. Harris, Clerk of Senate and Guy Prichard, Clerk of the House of Delegates. Writs denied.

W. E. R. Byrne and Thos. A. Bledsoe, both of Charleston, for petitioner. R. A. Blessing, of Point Pleasant, and J. L. Wolfe, of Ripley, for respondent.

WILLIAMS, P. Suing as a citizen, resident, and taxpayer of the county of Braxton, state of West Virginia, and as a member of the state Senate, relator prays for writs of mandamus against John T. Harris, clerk of the Senate, and Guy Prichard, clerk of the House of Delegates, commanding them that, in making up the journals of the proceedings of the respective houses on the 28th of November, 1916, they "shall strike, omit and expunge from the report of the committee on conference on disagreeing votes of the Senate and House of Delegates on Senate Bill No. 1," the following matter, which the alternative writ alleges was falsely, fraudulently, and unlawfully forged by pasting on and inserting in said conference report, by some

person or persons to the relator unknown, as a part thereof and after said report had been adopted by a vote of the Senate, viz.:

"x on page 12 line 7 after word 'district' where it appears the second time insert the following:

"Provided, that in the year in which a President of the United States is to be elected, the county court of each county shall convene in regular or special session on the first Monday in May of such year, instead of the first Monday of the month preceding.

"On page 14, beginning with line 69, transpose all of subsection 2 of section 98—a-VII to line 1, page 12, making it subsection 1."

In their returns respondents deny that this matter was forged or unlawfully inserted in the committee's report, and respondent John T. Harris avers the facts in relation thereto to be as follows:

"That on the 28th day of November, 1916, the chairman on the part of the Senate of the committee of conference on the disagreeing votes of the two houses as to Senate Bill No. 1, known as the registration bill, submitted a report from said committee which was read by the clerk and adopted by the Senate; that immediately thereafter the bill itself was taken up for further consideration and passed as amended by said report, and the action of the Senate was ordered to be communicated to the House of Delegates; that a communication from the House to the Senate announced that that body had adopted the report of the committee of conference and had passed the bill as amended by said report; whereupon orders were given the supervisor of printing for the immediate enrollment of the bill; that after a copy of the bill as enrolled had been delivered by the printer, upon an examination of the same by members of the committee of conference, it was stated by them that there were omissions in the bill as printed, and they subsequently asked for and were handed the conference committee's report, which upon examination showed, as was claimed, that the omissions had occurred in the report itself; that the omitted matter had been inadvertently left out by the clerk of the committee; that said matter had been agreed upon by the committee, and, not having been embodied in the report, should be inserted therein; that it had been fully discussed in the committee, and was understood by the members thereof; thereupon there was produced a memoranda of the said omitted matter, which was reduced to typewriting and embodied in the report of the conference committee; that said bill was then re-enrolled and turned over to the joint committee upon passed bills, otherwise known as the joint committee on enrolled bills, and the errors and omissions therein corrected according to the correction of said conference report, and the chairman of the Senate Committee, comprising such joint committee on passed bills, otherwise known as the joint committee on enrolled bills, was signed by the President of the Senate and the Speaker of the House and reported to the Governor for his approbation by said committee and by the Governor duly signed; and that the chairman of the Senate committee, comprising such joint committee on passed bills, otherwise known as the joint committee on enrolled bills, reported to the Senate the action of said committee upon said bill, and that the same had been delivered to the Governor. And respondent, as clerk of the Senate of West Virginia at said time, denies any and all imputation of fraud, forgery or wrongdoing on his part, relative to said correction and says that he is advised as a matter of practice and law, that under the joint rules of the Senate and House of Delegates as adopted and in effect

during said special session of said Legislature, said joint committee on passed bills, otherwise known as the joint committee on enrolled bills, had the right and were empowered to correct any errors or omissions they might discover in said enrolled bill, as provided in rule 2 of the joint rules of the Senate and House of Delegates. And respondent says that said enrolled bill as corrected and signed by said joint committee on passed bills, otherwise known as the joint committee on enrolled bills, and by the President of the Senate and the Speaker of the House, was approved by the Governor before the institution of this proceeding and had become a law."

Respondent Harris admits that, on the re-assembling of the Senate after recess, on the 28th of November, 1916, relator did make inquiry, on the floor of the Senate, relative to the correcting of said conference committee's report and says:

The "Chairman of the conference committee on the part of the Senate arose and on the floor of the Senate explained said omission and the correction of said report complained of; that at that time there was considerable confusion in the Senate chamber, that body being in the process of adjournment."

He also avers he was directed by the President of the Senate to incorporate in the journal of the proceedings of that day the report of the conference committee with the aforesaid omission supplied.

Respondent Prichard denies any knowledge respecting the directions that were given to John T. Harris, clerk of the Senate, by its President, and denies that he, as clerk of the House of Delegates, was ever directed to insert or incorporate in said Senate Bill No. 1 "any forgery or alteration or amendment other than the amendment agreed to by said conference committee and adopted by the said House of Delegates," and avers he is acting in obedience to the will of the House of Delegates, and that it passed said Senate Bill No. 1 and adjourned sine die, before these proceedings were instituted.

[1] Jurisdiction of the court to control the action of the clerks of the Senate and the House of Delegates in making up the journals of those bodies, as well as the right of a member of either of those bodies or of a private citizen to the relief sought, is questioned by demurrer and motion to quash the alternative writ. Being a co-ordinate branch of the state government, distinct from and independent of the judiciary, it is unquestionably true that the Legislature is not amenable to the courts. They have no power to interfere in any manner with the proceedings of either of its component branches, or with the action of their respective clerks in making up the journals of their proceedings, so long as they are acting in obedience to the will of those bodies. This proposition is self-evident, otherwise the judiciary would be superior to the legislative branch of the government. We are speaking only of the power of the courts relating to their interference with legislative proceedings, and not of their long-recognized, and frequently exercised right and power to declare, in a prop-

er case, a legislative act unconstitutional, after it has been passed. That question does not arise here. The constitutionality of Senate Bill No. 1 is not, and could not be, asserted in these proceedings. But we do not say the courts are powerless to control the official conduct and actions of the clerk of the respective branches of the Legislature, after its adjournment, if a case were clearly made out, showing they were violating the command or the rules of those bodies and were falsifying the records of their proceedings.

[2] The fact that the journals of the Legislature, after they are completed, become verities and cannot be contradicted would seem to require that jurisdiction should exist in some tribunal to prevent their falsification. Such jurisdiction, of course, belongs to the Legislature itself, so long as it is in session, but after its adjournment, the courts would seem to be the only proper tribunals to exercise it, in order to prevent the perpetration of a fraud upon the state. However, it is not necessary to pass on the question of jurisdiction in such case, until a case arises which demands a decision of that question.

[3] In the present case the facts do not show that either of the respondents is violating any rule or command of the branch of the Legislature of which he is the clerk. We may also assume that, in such case, a member of the Legislature, or a citizen, who is a voter and taxpayer, has such interest as would entitle him to maintain a proper proceeding in court to prevent the fraud. But for the purpose of this case, it is only necessary to inquire whether or not respondents are acting in obedience to the will of the Legislature, respecting the matter incorporated in Senate Bill No. 1, after the report of the joint committee thereon had been adopted by a vote of the Senate and of the House. The matter in question had been discussed in the meeting of the joint committee of the two houses, and had been agreed upon by it, but the clerk of said committee had inadvertently omitted the matter in making up the committee's report, and then, acting under its interpretation of joint rules No. 2 of the Senate and House of Delegates, the committee on enrolled bills incorporated the omitted matter into the enrolled bill. This all transpired on the 28th of November, 1916, at a special session of the Legislature. After the reconvening of the Senate on that day, after it had recessed, the alleged fraudulent alteration in the report of the committee was called to the attention of that body, and a motion was made by one of its members that permission be given the relator to place in the record a statement in reference thereto, and, by a vote of the Senate, the privilege was denied him, and shortly thereafter the Senate adjourned sine die. Having refused to expunge the matter, after its attention was called to it, the Senate consented, at least tacitly, to the action of

the committee on enrolled bills in incorporating into Senate Bill No. 1 the matter in question.

So much of joint rule No. 2, adopted by the House and the Senate, and by which they were then being governed, as applies to the question involved, is as follows:

"The joint committee on passed bills, otherwise known as the joint committee on enrolled bills, shall consist of five members of the Senate and five members of the House of Delegates, to be appointed by the presiding officer of each house, whose duty it shall be to compare carefully all bills and joint resolutions passed by both houses, with the enrollment thereof, and to correct any errors or omissions they may discover and to make report to their respective houses each day of the correctly enrolled bills or joint resolutions."

The enrollment of Senate Bill No. 1 with the omitted matter supplied, by the committee on passed bills, must therefore be regarded as having been done in accordance with the will of the Legislature and according to its interpretation of its own joint rule above quoted. It is the duty of respondents to obey the will of the Legislature, and, it appearing they are doing so, it would be assuming a power, which clearly does not belong to this court, to undertake to control their action in the premises, and the writs are therefore denied.

RITZ, J., absent.

(19 Ga. App. 140)

EASON v. STATE. (No. 7876.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL PROSECUTION—CONVICTION.

No error of law is complained of, and the evidence is sufficient to show the guilt of the accused beyond a reasonable doubt.

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Horace Eason brings error from a conviction. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. W. F. Slater, Sol. Gen., of Eldora, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 123)

SAVANNAH ELECTRIC CO. v. WILHOIT. (No. 7529.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

DEMURRERS—OVERRULING.

The petition as amended was not subject to the general and special demurrers urged against it, and the court did not err in overruling the demurrers.

Error from City Court of Savannah; Davis Freeman, Judge.

Action between the Savannah Electric Company and A. S. Wilhoit. There was a judgment for the latter and the former brings error. Affirmed.

Osborne, Lawrence & Abrahams, of Savannah, for plaintiff in error. Bonhan & Herzog and E. S. Elliott, all of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 124)

JACKSON v. BRANCH. (No. 7537.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

OVERRULING CERTIORARI—PROPRIETY.

Considering the entire record, the trial court did not err in overruling the demurrer to the defendant's plea, and in thereafter directing a verdict in his behalf; and the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between P. P. Jackson and A. B. Branch. Certiorari to the Superior Court was overruled, and the former brings error. Affirmed.

Gober & Jackson, of Atlanta, for plaintiff in error. Thos. J. Lewis, of Atlanta, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 135)

HARRIS v. EXCHANGE BANK OF FT. VALLEY. (No. 7632.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR—§ 1190—REVIEW—LAW OF CASE.

The judgment of this court at the October term, 1915, in the case then pending between the parties in this matter (17 Ga. App. 700, 88 S. E. 40) was a final judgment upon the controlling questions in the affidavit of illegality, and the court did not err in dismissing the illegality on motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4674-4676; Dec. Dig. § 1190.]

Error from City Court of Houston County; A. C. Riley, Judge.

Action between W. H. Harris and the Exchange Bank of Ft. Valley. A demurrer was sustained to the affidavit of illegality to an execution issued on the judgment, and W. H. Harris brings error. Affirmed.

Duncan & Nunn, of Perry, for plaintiff in error. Brown & Brown, of Ft. Valley, for defendant in error.

GEORGE, J. This case was before this court at the October term, 1915. Harris v. Exchange Bank of Ft. Valley, 17 Ga. App. 700, 88 S. E. 40. The case was then considered on the refusal of the trial court to set aside and vacate the judgment upon which was issued the execution to which the present affidavit of illegality is filed. The grounds of the motion to set aside the judgment, so far as material here, are: (1) Movant was not a party to the trial of the case in the court below, and never had his day in court. (2) Movant made answer to a summons of garnishment in this case, but did not admit any indebtedness to the defendant in *fi. fa.* Subsequently a claimant interposed a claim to the fund referred to in the answer of movant and gave a bond to dissolve the garnishment, and for this reason no legal judgment could thereafter be rendered against movant. (3) Movant's answer, in which indebtedness to the defendant was denied, was not traversed, and no valid judgment could have been rendered against him without a traverse of his answer. All the questions made by movant on the former review of this case were ruled against him. It must therefore be considered as finally adjudicated in this case that the plaintiff in error was a party to the proceeding in which judgment was rendered against him; that no traverse of his answer in that proceeding was necessary; that the said answer did admit indebtedness due by him to the defendant in the main case; and that the judgment rendered against him was legal and binding. In the affidavit of illegality stricken by the order now under review it is alleged: (1) The debt purported to be represented by said execution has been paid by this defendant in full, payment being made to the alleged claimant after the filing of a claim bond and before judgment against the plaintiff in error was rendered in the court below. (2) Defendant never had his day in court, and has been denied his constitutional right of trial by jury. (3) The court rendering the judgment was without jurisdiction to render the same, there being no pleadings upon which any judgment could be legally rendered against the plaintiff in error. (4) The third ground is amplified in the fourth, in which it is again averred that, without a traverse to the answer of plaintiff in error in the garnishment proceedings in the court below, no legal judgment could have been rendered against him.

The presiding judge properly dismissed on motion the affidavit of illegality. The validity of the judgment having been declared by this court, the plaintiff in error could not go behind the judgment and plead a payment thereof to an alleged claimant made by him before the judgment was entered against him. He is precluded, upon every ground made in

his affidavit of illegality, by the rule last announced, and by the order of the trial judge refusing to vacate and set aside the judgment. If *res adjudicata* is a matter for plea only, as is insisted by counsel for the plaintiff in error, and if a trial court may not take notice of the matters appearing of record in the same case and before him upon the trial of an issue raised in the case, including former judgments of the court, certainly the trial judge is, under the circumstances of this case, bound to enforce the ruling of this court in the same cause, involving the same questions, in the main, and between the same parties. In *Robinson et al. v. Dumas*, 42 Ga. 615, Judge McCay ruled that the affidavit of illegality in that case was properly stricken on motion. The precise point made by counsel for the plaintiff in error in this case was not raised in the case last cited, and the decision in that case may not be authority binding upon this court, but the judgment in dismissing the affidavit of illegality must, for the reasons hereinabove stated, be affirmed. This inevitably follows, since this court has held the very judgment in question to be legal and binding on the plaintiff in error.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 136)

ENGLISH v. GRIFFIN MERCANTILE CO.
(No. 7025.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

OVERRULING OF CERTIORARI—PROPRIETY.

Under the facts of this cause, as shown by the answer of the justice of the peace to the certiorari, the court did not err in overruling the certiorari.

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Action between R. C. English and the Griffin Mercantile Company. Certiorari to review a judgment of justice of the peace was overruled by the superior court, and the former brings error. Affirmed.

B. H. Maury, of Barnesville, for plaintiff in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 162)

BRANDON v. AMERICAN NAT. BANK.
(No. 7381.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

OVERRULING OF CERTIORARI—PROPRIETY.

Under the facts of this case the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between H. H. Brandon and the American National Bank. Certiorari by the former was overruled by the superior court, and the former brings error. Affirmed.

Watt Kelly, of Atlanta, for plaintiff in error. M. Herzberg, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 122)

NATIONAL CO. v. A. KOMMEL & SON.
(No. 7503.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. CHARGE OF COURT—SUFFICIENCY.

The charge of the court, when considered as a whole, was most favorable to the plaintiff in error, and not subject to the objections pointed out in the record.

2. VERDICT—EVIDENCE—SUFFICIENCY.

The issues of this cause were fairly submitted to the jury, and there was evidence to authorize the verdict.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action between the National Company and A. Kommel & Son. There was a judgment for the latter, and the former brings error. Affirmed.

Franklin & Langdale, of Valdosta, for plaintiff in error. Woodward & Smith, of Valdosta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 126)

BISHOP v. MAYOR, ETC., OF CITY OF SAVANNAH. (No. 7755.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS — 816(1) — ACTION — NEGLIGENCE — SUFFICIENCY OF PETITION.

The petition as amended set forth a cause of action, and the court erred in dismissing it on general demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1711; Dec. Dig. 816(1).]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by L. M. Bishop against the Mayor, etc., of Savannah. Judgment for defendant dismissing the petition upon demurrer, and plaintiff brings error. Reversed.

Oliver & Oliver, of Savannah, for plaintiff in error. Robt. J. Travis and David S. Atkinson, both of Savannah, for defendant in error.

BROYLES, P. J. This was a personal injury damage suit against the city of Savannah. The petition alleged that:

"On September 2, 1915, and prior thereto, the mayor and aldermen of the city of Savannah, through its agents, servants, and employes, had been engaged in the laying of a pavement on that portion of the Louisville Road west of the Ogeechee canal, and in performing other general repairs and overhauling of the said street, and, while so employed, they had and maintained a large concrete mixing machine, which concrete mixing machine the said mayor and aldermen of the city of Savannah had, through its servants, agents and employes, set up in close proximity to the street car track of the Savannah Electric Railway passing westward on the Louisville Road. On September 2, 1915, petitioner was employed as a street car conductor for the Savannah Electric Company, and at about 7:30 o'clock upon that morning was running his car out the Louisville Road to Mill Haven, and had on his car 39 or 40 passengers. Petitioner was busily engaged, and had his attention centered in the collecting of fares from his many passengers, and in attending to the varied duties required in the operation of a street car, and, as his car was proceeding westward, he was standing on the running board, on the right-hand side of said car, going west, with his face toward the inside of the car, collecting his fares aforesaid, and, as he was thus standing, with his right side toward the front of the car, and his face toward a passenger, of whom he had just collected a fare, and as he was reaching up to ring up the fare which he had just collected, he was struck just back of his right ear by the concrete mixing machine, which was, at that time, standing * * * about 18 inches from the north rail of the street car track. This position was so close to the said street car track as to be a menace to the employes of the Savannah Electric Company and passengers thereof, which fact was known to the said mayor and aldermen of the city of Savannah, its servants, agents, and employes. In the exercise of ordinary care the mayor and aldermen of the city of Savannah should have known of such danger; * * * the concrete mixing machine being then in the position where it had been placed by the mayor and aldermen of the city of Savannah."

The petition then minutely describes the injuries sustained by the plaintiff, and proceeds as follows:

"At the time of receiving the injuries described, he was in the exercise of all ordinary care and diligence, did not know of the presence of the concrete mixing machine, could not, in the exercise of ordinary care, have discovered the same, and is free from fault. Petitioner's injuries are due entirely to the fault and negligence of the mayor and aldermen of the city of Savannah, for the following reasons: (1) Because the said mayor and aldermen of the city of Savannah had stationed said mixing machine in such close proximity to the street car track as to be a menace to petitioner and other persons properly riding on street cars; (2) because the said mayor and aldermen of the city of Savannah had not performed its legal duty in having its streets reasonably clear of obstructions, for the operation of street cars thereon, as it is legally bound to do; (3) because the said mayor and aldermen of the city of Savannah, for the reasons aforesaid, had not furnished a

safe and suitable highway for the operation of street cars along the said track."

Questions of negligence are ordinarily for the jury. In this case, under the facts as shown in the petition, there are several such questions, to wit: (1) Was it negligence for the city to leave the concrete mixing machine within 18 inches of the street car track? (2) If so, was such negligence the proximate cause of the plaintiff's injuries, or was it a contributing cause thereto? (3) Was the plaintiff, or the motorman of the street car, negligent, under the facts as alleged, in attempting to move the street car by the concrete mixing machine? (4) If so, was such negligence the proximate cause of the plaintiff's injuries, or a contributing cause thereto? (5) Could the plaintiff, or the motorman, by the exercise of ordinary care, have avoided the consequences of the defendant's previous negligence? All these questions of fact, with appropriate instructions, should have been submitted to the jury. It follows that the court erred in dismissing the petition on general demurrer.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 125)

MORROW v. ALBANY WAREHOUSE CO.
(No. 7631.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

NONSUIT—NO ERROR.

Under the facts of the case as disclosed by the record, there was no error in awarding a nonsuit.

Error from City Court of Albany; Clayton Jones, Judge.

Action by E. H. Morrow against the Albany Warehouse Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Walters & Redfearn, of Albany, for plaintiff in error. R. J. Bacon, R. H. Ferrell, and Pottle & Hofmayer, all of Albany, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 184)

HORTON v. UNION STORE. (No. 7598.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §246(4)—LIEN—SUBTENANT—STATUTE.

Where a tenant sublets land without the landlord's permission, the landlord is entitled to make his rent out of the crop grown on the land by the subtenant, on a distress warrant issued against the principal tenant. Civ. Code

1910, § 3340; Alston v. Wilson, 64 Ga. 482; Andrew v. Stewart, 81 Ga. 53, 7 S. E. 169 (3); Thompson v. Commercial Guano Co., 93 Ga. 282, 20 S. E. 309; Hudson v. Stewart, 110 Ga. 37, 40, 41, 35 S. E. 173; Leonard v. Fields, 143 Ga. 479, 481, 85 S. E. 315; Long v. Clark, 16 Ga. App. 355, 85 S. E. 358 (1).

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 997; Dec. Dig. § 246(4).]

2. RENDITION OF JUDGMENT.

Under the ruling of the authorities cited in the preceding headnote and the agreed statement of facts in the instant case, the court, exercising by consent the functions of both judge and jury, did not err in rendering judgment in favor of the plaintiff in the distress warrant.

Error from City Court of Sparta; R. W. Moore, Judge.

Proceedings upon distress warrant by Union Store against Paul Horton. Judgment for plaintiff, and defendant brings error. Affirmed.

T. M. Hunt, of Sparta, for plaintiff in error. Burwell & Fleming, of Sparta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 125)

EMPIRE STATE JEWELRY CO. v. GRANT JEWELRY CO. (No. 7578.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. SALES §354(6), 435(3) — WARRANTY — PLEADING.

The plea sufficiently indicated that the guaranty as to the respective weights of the diamonds sold to the defendant was made before the purchase, and not thereafter, and that the alleged false representations as to the weights induced the purchase; and the court did not err in overruling the demurrer thereto upon that and other grounds.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1015, 1241-1243; Dec. Dig. § 354(6), 435(3).]

2. SET-OFF AND COUNTERCLAIM §27(2)—ACTION ON NOTE FOR PRICE OF GOODS—RECOUPMENT.

The fact that the purchaser afterwards gave notes for the remainder of the purchase price then unpaid would not prevent the purchaser from setting up by way of recoupment a claim for damages based on an alleged deficiency in the weights of the diamonds purchased, since such damages arose out of the original contract of purchase, and not under any special conditions or stipulations contained in the simple promissory notes executed to close the original purchase-money account. The case of Dooley v. Gorman, 104 Ga. 767, 31 S. E. 203 (1), is not in point, as the note sued upon in this case does not purport to set forth the entire contract between the parties, but only fixes in part the amount to be paid by the maker to the payee, and the date when one such payment shall be made.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 46; Dec. Dig. § 27(2).]

3. SALES \S 288(6)—**ACTION FOR PRICE—DAMAGES FOR BREACH OF WARRANTY.**

According to the testimony in behalf of the defendant, the notes given to the plaintiff in settlement of the amount due on open account for the purchase money of certain diamonds were executed and delivered before the defendant had discovered, or there had been brought to its attention, any reason to investigate, and before it had a reasonable opportunity to discover the breach of warranty on the part of the seller as to the weights of the diamonds purchased, and therefore the defendant was not estopped from setting up its claim for damages because of the giving of the notes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 823; Dec. Dig. \S 288(6).]

4. APPEAL AND ERROR \S 1002—**VERDICT—CONCLUSIVENESS.**

The testimony was in sharp conflict, but there was evidence to support the finding of the jury in favor of the defendant; and, since that finding has been approved by the trial judge, this court will not set it aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3935-3937; Dec. Dig. \S 1002.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action between the Empire State Jewelry Company and the Grant Jewelry Company. Judgment for the Grant Jewelry Company, and the Empire State Jewelry Company brings error. Affirmed.

D. S. Sanford, of Milledgeville, for plaintiff in error. Hines & Vinson, of Milledgeville, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 144.)

BRYANT v. STATE. (No. 7962.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(*Syllabus by the Court.*)

1. HOMICIDE \S 309(5) — **VOLUNTARY MANSLAUGHTER—INSTRUCTIONS—EVIDENCE.**

The evidence made out a case of justifiable homicide or of murder, and the court therefore erred in instructing the jury as to the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 654; Dec. Dig. \S 309(5).]

2. CRIMINAL LAW \S 1134(3) — **APPEAL—REMARKS OF COUNSEL—CONSIDERATION.**

The exception taken to certain remarks of counsel for the state need not be considered, since the case must be retried, and it is not reasonable to suppose that the remarks complained of, which were withdrawn by counsel, will be repeated.

The remaining exceptions are without merit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2989, 2990, 3056; Dec. Dig. \S 1134(3).]

Error from Superior Court, Hall County; J. B. Jones, Judge.

Herman Bryant was convicted of crime, and he brings error. Reversed.

W. B. Sloan, of Gainesville, E. O. Dobbs, of Buford, and C. R. Faulkner, of Belton, for plaintiff in error. Robt. McMillan, Sol. Gen., of Clarksville, for the State.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 115)

BOWMAN & TARPLEY v. ATLANTIC ICE & COAL CORP. (No. 7241.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917. Motion for Rehearing Denied Feb. 1, 1917.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR \S 1058(1)—**REVIEW—HARMLESS ERROR.**

Error in sustaining an objection to the admissibility of evidence is cured if subsequently the testimony objected to be admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4195, 4200; Dec. Dig. \S 1058(1).]

2. EVIDENCE \S 174(5)—**SECONDARY EVIDENCE—WHAT CONSTITUTES.**

Where a bill of lading is executed in triplicate by the same stroke of the pen, any one of these three papers may, upon proper identification, be used as an original. Especially is this true where the evidence shows, as in this case, that one of the triplicate bills of lading was delivered to the defendant, one to the railroad company, and the other retained by the plaintiff; the one retained by the plaintiff being marked "original," and it being the one offered in evidence in this case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 567; Dec. Dig. \S 174(5).]

3. SALES \S 343, 344—**ACTIONS—RECOVERY.**

A provision in a contract for the sale of goods, "the cash for the amount wanted to accompany each order," does not require the court to charge the jury that the plaintiff could not recover if credit be extended.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 947-955; Dec. Dig. \S 343, 344.]

Error from City Court of Carrollton; James Beall, Judge.

Action by the Atlantic Ice & Coal Corporation against Bowman & Tarpley. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Leon Hood, of Carrollton, for plaintiff in error. Buford Boykin and Raymond Robinson, both of Carrollton, for defendant in error.

LUKE, J. This is an action by the Atlantic Ice & Coal Corporation against Bowman & Tarpley upon an account. The right of action arises by reason of a contract entered into between the plaintiff and the defendants, wherein the plaintiff agreed to ship ice to the defendants at Bowdon, Ga., at a stated price. The contract provides that it is not transferable except upon the written consent of the Atlantic Ice & Coal Corporation. It contains the further language:

"The cash for the amount wanted to accompany each order."

The plaintiff contended that it shipped, pursuant to the contract, ice to the amount of \$131.50. The defendants pleaded that:

"While the ice was shipped, yet the partnership of Bowman & Tarpley did not receive the ice; that the ice was received by Bowman & Williams, another partnership; that A. J. Bowman, a member of both partnerships, notified the plaintiff at the time the first order was placed for ice of the dissolution of the firm of Bowman & Tarpley and the formation of a new partnership of Bowman & Williams, and instructed the plaintiff to ship the ice to the new partnership."

The trial of the case resulted in a verdict favorable to the Atlantic Ice & Coal Corporation. Bowman & Tarpley excepted to the rulings of the court in the admission of evidence.

[1] 1. The first assignment of error is that the court refused to permit the defendants during the trial to prove by the plaintiff's manager, Mr. Hancock, that he had actual knowledge of the dissolution of the partnership before any ice was shipped under the contract: such knowledge having been given by the said A. J. Bowman. When the defendants first undertook to make this proof while Mr. Hancock was testifying, the court did rule out the evidence, and that ruling was adhered to when objection was made while A. J. Bowman was testifying, but the record shows subsequently that A. J. Bowman testified without objection as follows:

"I told him, Mr. Hancock, the manager of the Atlantic Ice & Coal Corporation, that the firm of Bowman & Tarpley had been out of business about six weeks, and that Bowman & Williams had purchased the German restaurant at Bowdon and had repacked the icehouse and had overhauled it, and if they wanted to sell Bowman & Williams at the price contracted for with Bowman & Tarpley, to send it ahead, and he sent it; that the first shipment of ice was shipped to Bowman & Williams and the balance of the ice was shipped to Bowman & Williams, and such payments as were made on the ice were made by Bowman & Williams."

Mr. Hancock, the manager of the Atlantic Ice & Coal Corporation, the person with whom contract and all conversations were had, was recalled as a witness, and permitted without objection to testify:

"I have heard what Mr. Bowman said about having a conversation with me in May over the telephone, and that he told me that Bowman & Tarpley had dissolved, and that Bowman & Williams had formed a partnership and I could ship the ice to them on those terms. I never had any such conversation. I never knew about Bowman & Williams."

These witnesses having, subsequently to the objections which were overruled, answered without objection the questions objected to, the issues were submitted to the jury, and error, if any, was cured.

[2] 2. Error was assigned upon the admission of the bills of lading covering the several shipments of ice sued for; the objection offered being that copy bills of lading were in evidence instead of originals. The record shows that the bills of lading were executed

in triplicate and made with one stroke of the pen, and that the one admitted was marked "original." One of the bills of lading was sent to the railroad, one to Bowman & Tarpley, and the other was retained. The one introduced in evidence was the one retained by the shipper. In *Greenleaf on Evidence*, § 561, it is said:

"There are three cases in which notice to produce is not necessary: First, where the instrument to be produced and that to be proved are duplicate originals; if, in such case, the original being in the hands of the other party, it is in his power to contradict the duplicate original by introducing the other, if they vary; secondly, where the instrument to be proved is in itself a notice, such as a notice to quit, or notice of the dishonor of a bill of exchange; and, thirdly, from the nature of the action, the defendant has notice that the plaintiff intends to charge him with possession of the instrument, as, for example, in trover for a bill of exchange."

Also see *American Tie & Timber Company v. Tyler*, 18 Ga. App. 640, 90 S. E. 86; *Lewis v. Phillips-Boyd Publishing Company*, 18 Ga. App. 181, 89 S. E. 177. This ground is without such merit as would entitle the plaintiff in error to a reversal of the judgment of the lower court.

[3] 3. The plaintiff in error excepts because the judge failed to charge the jury that, if the contract provided that no ice was to be shipped unless the cash accompanied the order, there could be no recovery. The language in the contract, "the cash for the amount wanted to accompany each order," would not defeat the plaintiff's right to recover for the ice sold and delivered simply because credit was extended to the purchaser. This ground of exception is without merit.

There was evidence to support the verdict. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 142)

WEST v. STATE. (No. 7922.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 278(2)—GRAND JURY § 18, 19—OBJECTIONS TO JURORS—CHALLENGE.

Objection that one of the grand jurors named on the indictment and who returned the indictment was ineligible as a grand juror because he had served as a grand juror of the court at the term thereof next preceding the finding of the indictment should have been made by challenge, it affirmatively appearing that the defendant was arrested, gave bond, and was fully apprised of the fact that the grand jury returning the true bill of indictment would investigate the case against him; and this is true whether the grand juror was a regularly drawn juror or was "caught up" by the sheriff under instructions of the court. The disqualification of the grand juror is propter defectum. On being sworn such grand juror stood upon the same basis as if he had been regularly drawn. His service became a matter of public record, and of challenge by the defendant in the exercise of due diligence. The plea in abatement, setting up

the ground indicated above, was properly overruled. *Folds v. State*, 123 Ga. 167, 51 S. E. 305(2); *Edwards v. State*, 121 Ga. 591, 49 S. E. 671(2); *Parris v. State*, 125 Ga. 777, 54 S. E. 751(3); *Brooks v. State*, 12 Ga. App. 105, 76 S. E. 765.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 640, 641; Dec. Dig. ¶ 278(2); *Grand Jury*, Cent. Dig. §§ 48–55; Dec. Dig. ¶ 18, 19.]

2. CRIMINAL LAW ¶ 589(5) — TRIAL — CONDUCT OF SHERIFF.

The sheriff, before the call of the case for trial, remarked that "Bob West [the defendant] was a very good negro, but that he would gamble or skin," and this remark was made the basis for a motion for continuance of the case for trial by another jury; whereupon the court ordered the entire panel of jurors to be put upon the voir dire, required the statutory voir dire questions to be propounded to each juror, and in addition inquired of each juror whether he heard the remark of the sheriff, and whether such remark would influence them upon the trial, and especially instructed the jurors that the case should be tried according to the evidence, and not upon the remark of the sheriff. *Held*, the motion was properly overruled. If the motion is considered either as a challenge to the array or to the poll, the timely conduct of the judge, the investigation made by him, and his decision that the jurors were qualified to try the case, were at once proper and correct. Compare *Wells v. State*, 102 Ga. 658, 29 S. E. 442; *Lewis v. State*, 118 Ga. 803, 45 S. E. 602; *Bryan v. State*, 124 Ga. 79, 52 S. E. 298.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1315; Dec. Dig. ¶ 589(5).]

3. CONVICTION—EVIDENCE—SUFFICIENCY.

There was positive evidence of the guilt of the accused, and, although there was an attempt to impeach the witness for the state by proof of bad character, the jury believed his testimony.

Error from City Court of Madison; K. S. Anderson, Judge.

Bob West was convicted of crime, and he brings error. Affirmed.

Williford & Lambert, of Madison, for plaintiff in error. A. G. Foster, of Madison, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 137)

THOMPSON OIL MILL CO. v. MURRAY CO. (No. 7653.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

ACCOUNT, ACTION ON ¶ 23—ACTIONS—EVIDENCE—SUFFICIENCY.

The undisputed evidence demanded a finding for the plaintiff in at least the amount recovered. The court therefore did not err in directing the verdict.

[Ed. Note.—For other cases, see *Account, Action on*, Cent. Dig. §§ 74–77; Dec. Dig. ¶ 23.]

Error from Superior Court, Pulaski County; E. D. Graham, Judge.

Action by the Murray Company against

the Thompson Oil Mill Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

W. L. Grice, of Hawkinsville, and Hall & Grice and Chas. J. Bloch, all of Macon, for plaintiff in error. H. F. Lawson, of Hawkinsville, for defendant in error.

GEORGE, J. The Murray Company brought suit against the Thompson Oil Mill Company upon an open account, in the city court of Pulaski county. This court was abolished and the case transferred to the superior court of Pulaski county, in which court the trial resulted in the direction of a verdict for the plaintiff. While the case was pending in the city court of Pulaski county, the plaintiff filed a demurrer to the answer of the defendant, which demurrer was overruled in part and sustained in part. To the ruling on the demurrer no exception was taken. The case is here upon exceptions of the defendant to the overruling of a motion for a new trial, and to the direction of the verdict.

The Murray Company sold to the Thompson Oil Mill Company, upon a written order, certain parts of machinery to be used in connection with a gin plant, already in operation. The defendant admitted that the articles sued for were received by it, but alleged that one of its gin plants had been damaged by fire; that it was necessary to make repairs thereon, and that its manager who gave the order for the parts of the machinery was unfamiliar with machinery, and, in purchasing the articles sued for, relied upon representations as to what was necessary to put the gin in good condition, made by the salesman of the Murray Company; that when the articles ordered were received it was found that they would not fit, in that the feeder system was too shallow one way and too wide the other, but it is admitted by the defendant that these feeders were made to answer the purpose by the outlay of \$25 in labor and material. It was alleged that the press boxes also gave trouble, but that these were made to answer the purpose upon an outlay of \$50 in labor and material. In this connection it was claimed by the defendant that the purchase of a hydraulic system, at a cost of \$500, was necessary to make the press boxes answer the purpose for which they were intended. It is to be noted, however, that the judge of the city court struck this particular allegation of damage upon demurrer, and no exception was taken. The defendant further contended that it operated two gin plants, one of which was operated under the plant's own power, and the other of which was operated with power furnished from the oil mill, with which the two gin plants were connected. It alleged that it was not able to do any ginning with one of the plants, and was forced to do all the ginning with the plant farthest removed from the power system of the oil

mill, at an extra cost in fuel and labor of \$1,000. It also claimed certain other items of damage, to wit: Expenses on the articles covered by the bill of particulars, \$17; freight on all articles ordered, \$68; and for labor in taking out the cylinder and changes thereon, \$75. The defendant summed up its allegations by a plea of total failure of consideration, and asked, in addition, for the recoupment of damages in a sum stated.

It is contended by the plaintiff in error that the law of the case was fixed in the city court, and that the ruling upon the demurrer in that court was controlling upon the judge of the superior court. On a careful reading of the entire record in the case, it will be seen that this contention is beside the question. The verdict could not have been directed upon the theory advanced by the plaintiff in error, that the items of damage claimed were not recoverable. Manifestly the court, in directing the verdict, must have gone on the theory that, after allowing the defendant all the items of damage which it had proved, or which the evidence offered even tended to prove, the undisputed evidence in the case entitled the plaintiff to a verdict in at least the sum directed by the court. The plaintiff consented to the direction of the verdict by the court. It is true that the defendant's superintendent testified as follows: "We ginned only 97 bales of cotton on eight 70-saw gins during one season." There is not a line in the evidence tending to show the cost of fuel and labor necessary in order to do the ginning required of the defendant on its gin plant farthest removed from its power plant. The evidence does not disclose how many bales of cotton could, or might have been, ginned upon the particular gin plant for which the articles were purchased, during the season when only 97 bales were in fact ginned, nor indicate, in any way, what profit it thereby lost. The evidence for the defendant shows that only two of the articles sold the defendant were not properly adjusted to its gin system in use. To quote from the evidence of its witness Wynne: "Only two things were wrong, the feeder system and press boxes." There was no inherent defect in either of these parts, but certain work had to be done in order to fit these parts to the system in use by the defendant. It was admitted by the defendant that every article furnished by the plaintiff was finally made to serve the purposes of the defendant. The superintendent, Mr. Peacock, admitted that none of the parts furnished by the plaintiff were worthless. The contention of the defendant was that they were worthless to it before they were adjusted to the system in use by the defendant. The plea of total failure of consideration was therefore wholly unsustainable by the evidence. See *Trippe v. McLain*, 87 Ga. 536, 13 S. E.

523; *Clegg-Ray Co. v. Indiana Scale & Truck Co.*, 125 Ga. 558, 54 S. E. 538. The trial judge allowed the defendant every item of damage supported by the evidence in the case. Moreover, he did not allow interest on the account, which under the undisputed evidence matured in July, 1912. If the accrued interest from July, 1912, to the date of the verdict, March 16, 1916, should be taken into account, it is plain that deductions in excess of every item of damage referred to in the evidence have been allowed the plaintiff in error; and it is therefore in no position to complain of the verdict directed against it.

The judgment is therefore affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 147)

ELLIS v. CITY OF GREENSBORO.
(No. 8004.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1179 — APPEAL — AFFIRMANCE.

There is no error of law complained of, and the judgment of the mayor, finding the defendant guilty, is supported by direct evidence, and has been approved by the judge of the superior court. This court will not interfere with the judgment of guilty, although the credibility of the witness sworn for the city is attacked by more than one witness. *Combs v. Mayor and Council of Carrollton*, 17 Ga. App. 328, 86 S. E. 738; *Rice v. City of Eatonton*, 15 Ga. App. 505, 83 S. E. 868.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. §1179.]

Error from Superior Court, Greene County; J. B. Park, Judge.

Proceeding by the City of Greensboro against Fletcher Ellis. Judgment finding defendant guilty, and he brings error. Affirmed.

J. G. Faust, of Greensboro, for plaintiff in error. Noel P. Park, of Greensboro, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 141)

HAYNES v. STATE. (No. 7921.)

(Court of Appeals of Georgia, Division No. 1,
Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §1064(1) — APPEAL — NEW TRIAL.

The motion for a new trial is based upon the general grounds only, and, the evidence being sufficient to support the verdict, the judgment is affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. §1064(1).]

Error from City Court of Nashville; C. A. Christian, Judge.

Joe Haynes was convicted, and he brings error. Affirmed.

Wm. Story, of Nashville, for plaintiff in error. J. H. Gary, Sol., and J. P. Knight, both of Nashville, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 157)

JAMES v. BOYETT. (No. 7330.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. VERDICT—EVIDENCE—SUFFICIENCY.

This was a suit on account brought by James against Boyett for fertilizer furnished to one Holmes, and the jury found for the defendant. The controlling issue in the case was whether there was an original undertaking between James and Boyett, or whether the fertilizer was sold by James to Holmes upon an oral promise by Boyett that he would become surety for Holmes in the transaction, and there was evidence which authorized the jury to find that it was a case of suretyship only.

2. APPEAL AND ERROR—§1078(6)—ASSIGNMENTS OF ERROR—ABANDONMENT.

The grounds of the amendment to the motion for a new trial, not being specifically argued in the brief of counsel for plaintiff in error, are deemed abandoned. The general statement in the brief that "plaintiff in error insists most strongly on each and all of the amended grounds of motion for new trial and does not abandon any of them, but says that the court erred as set forth in each of the amended grounds" is not sufficient to change the rule. *Youmans v. Moore*, 11 Ga. App. 66, 74 S. E. 710(4); *Muse v. Hall*, 18 Ga. App. 651, 90 S. E. 222 (3).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261; Dec. Dig. § 1078(6).]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by D. W. James against C. E. Boyett. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Bille B. Bush, of Colquitt, for plaintiff in error. Glessner & Collins, of Blakely, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 141)

NELSON v. STATE. (No. 7878.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW—§913(1), 1159(4)—NEW TRIAL—PROVINCE OF JURY.

There was direct evidence to support the verdict of guilty. The motives actuating the witnesses for the state were for consideration by the jury in weighing their testimony, and may not be inquired into by this court. There was

no error in overruling the motion for a new trial, which was based on general grounds only.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145, 3077; Dec. Dig. § 913(1), 1159(4).]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Joe Nelson was convicted of crime, and he brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. W. F. Slater, Sol. Gen., of Eldora, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 183)

LYTLE v. HANCOCK COUNTY. (No. 7725.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. NEGLIGENCE—§93(1)—IMPUTED NEGLIGENCE—CHAUFFEUR.

The negligence of a chauffeur, in failing to avoid danger while driving his master in an automobile, is imputable to the master. *Read v. City Railway Co.*, 115 Ga. 366, 41 S. E. 629(4).

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147, 148; Dec. Dig. § 93(1).]

2. BRIDGES—§46(6)—COUNTY BRIDGE—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE.

The great preponderance of the evidence was to the effect that the county bridge on which the plaintiff's automobile was being driven at the time of the injury sued for was in a reasonably safe condition, and that her injuries were caused solely by the negligence of her employé and chauffeur in driving the automobile at a reckless and high rate of speed upon and over the bridge, which, like all other such bridges, slightly sagged in the middle, and that the same chauffeur had often driven over this bridge and was well acquainted with its condition at the time of the injury. The evidence as a whole strongly authorized the verdict returned for the defendant.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 114½, 119; Dec. Dig. § 46(6).]

3. CHARGE OF COURT—HARMLESS ERROR.

There were slight errors in the two excerpts from the charge of the court excepted to, but, under the facts of the case, they were harmless and do not require a new trial.

Error from City Court of Sparta; R. W. Moore, Judge.

Action by Mrs. A. L. Lytle against Hancock County. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. McGregor, of Warrenton, and R. L. Merritt, of Sparta, for plaintiff in error. Burwell & Fleming, of Sparta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 192)

JOHNSON v. STEVENS. (No. 7708.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. ACCESSION** \Leftrightarrow **1—INCREASE OF ANIMALS.**

The increase of all animals follow the condition of the mother and belong to the owner of the mother at the time of birth. Civ. Code 1910, § 3651. Under this section of the Code the plaintiff was entitled to recover, not only the bitch which was wrongfully taken from his possession, but also the puppies afterwards born of her.

[Ed. Note.—For other cases, see Accession, Cent. Dig. §§ 1-10; Dec. Dig. \Leftrightarrow 1.]

2. ACCESSION \Leftrightarrow **2 — EVIDENCE** \Leftrightarrow 568(4) — **WEIGHT OF EVIDENCE — VALUE — QUESTION FOR JURY.**

Jurors are not absolutely bound by opinion testimony as to the value of property sued for, although such testimony may not be contradicted by any other evidence in the case. *Jennings v. Stripling*, 127 Ga. 778, 56 S. E. 1026(3); *Bonds v. Brown*, 133 Ga. 451, 66 S. E. 156(2); *Martin v. Martin*, 135 Ga. 162, 68 S. E. 1095; *Graham v. Graham*, 137 Ga. 668, 74 S. E. 426(2); *McCarthy v. Lazarus*, 137 Ga. 282, 73 S. E. 493(2); *Southern Ry. Co. v. Lowe*, 139 Ga. 362, 77 S. E. 44(3); *Morris Storage Co. v. Wilkes*, 1 Ga. App. 752, 58 S. E. 232; *Minchew v. Nahunta Lumber Co.*, 5 Ga. App. 154, 62 S. E. 716(4). In this case the sole evidence as to the value of the property sued for was the following testimony given by the plaintiff: "The said dog and puppies were mine; said property was worth \$50; and the reason I say they are worth \$50 was that I gave a \$25 watch for the bitch." (Italics ours.) This testimony amounted to nothing more than that, in the opinion of the witness, \$50 was the value of the dog and her puppies. The question as to their value should have been submitted to the jury, and the trial judge erred in directing a verdict for the plaintiff for the sum of \$50.

[Ed. Note.—For other cases, see Accession, Cent. Dig. §§ 11-14; Dec. Dig. \Leftrightarrow 2; Evidence, Cent. Dig. § 2394; Dec. Dig. \Leftrightarrow 568(4).]

Error from City Court of Americus; W. M. Harper, Judge.

Action between Walter Johnson and M. J. Stevens, Jr. Directed verdict for plaintiff, and Johnson brings error. Reversed.

L. J. Blalock, of Americus, for plaintiff in error. Wallis & Fort, of Americus, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 118)

JOHNSON v. JAMES. (No. 7312.)(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. COURTS** \Leftrightarrow 190(1) — **MUNICIPAL COURTS — NEW TRIAL—CERTIORARI—REMEDY—MOTION FOR NEW TRIAL.**

The making of an oral motion for a new trial in the municipal court of Atlanta, as provided for in Acts of 1913, p. 167, § 42(a), (b), is

a cumulative remedy, and does not defeat the right of certiorari.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \Leftrightarrow 190(1).]

2. SUSTAINING OF CERTIORARI—PROPRIETY.

Upon the petition for certiorari and the answer of the judge of the municipal court, the order sustaining the certiorari was demanded.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Andrew Johnson against Mary James in the municipal court of Atlanta, taken to the superior court by certiorari. There was a judgment for the latter, and the former brings error. Affirmed.

Hines & Jordan, of Atlanta, for plaintiff in error. W. T. Moyers, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 167)

CINCINNATI, H. & D. RY. CO. v. QUINCEY & ROGERS. (No. 7489.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***CARRIERS** \Leftrightarrow 177(4) — **CARRIAGE OF GOODS—INTERSTATE CARRIAGE—STATUTES.**

A common-law action against a connecting carrier for loss or damage to freight, where it is expressly alleged that the injury or damage complained of was caused by the negligence of the defendant carrier, is not prohibited by the terms of the act of Congress of June 29, 1906 (34 Stat. 595, c. 3591, § 7, para. 11, 12) known as the Carmack Amendment to the Hepburn Act and Act Feb. 4, 1887, 24 Stat. 338, c. 104, § 20 (U. S. Comp. St. 1913, § 8592).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-803; Dec. Dig. \Leftrightarrow 177(4).]

Error from Superior Court, Irwin County; W. F. George, Judge.

Action by Quincey & Rogers against the Cincinnati, Hamilton & Dayton Railway Company. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Rogers & Rogers, of Ocilla, for plaintiff in error. Quincey & Rice, H. E. Oxford, and W. M. Rogers, all of Ocilla, for defendants in error.

JENKINS, J. Suit was brought by attachment, in the city court of Irwin county to recover damages from the Cincinnati, Hamilton & Dayton Railway Company for a tort alleged to have been committed by the defendant in the handling of certain shipments of freight which had been intrusted to it as a connecting carrier, whereby the plaintiffs had been injured and damaged. At the trial term of this case, which had been transferred by operation of law to the superior court of Irwin county, the defendant filed a motion to dismiss the action upon the ground—

"that the declaration shows upon its face that the contract of affreightment was for shipment

of interstate commerce, and that said shipment, being an interstate shipment, was controlled by the Carmack Amendment to the Hepburn Act, which is paramount and exclusive of any state regulation; that, under the federal statute, embodied in the said Carmack Amendment to the Hepburn Act, the initial carrier, the Ocilla Southern Railroad Company, alone is liable for any loss, damage, or injury to the shipment, caused by any transportation company over whose line the shipment might have passed, and the remedy of plaintiffs, if any they have, is confined to an action against the said Ocilla Southern Railroad, which road issued the bill of lading."

His honor Judge George, trying the case, overruled the motion to dismiss, and the defendant excepted to this ruling.

The sole question for determination by this court is whether or not, under the Carmack Amendment of June 29, 1906, to the Hepburn Act of February 4, 1887, a connecting carrier of an interstate shipment of freight may be sued on its common-law liability, where it is expressly alleged that the injury complained of was committed by such defendant.

1. The provisions of the Carmack Amendment, pertinent to an understanding of the question involved in the present case, are as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." 34 Stat. at L. 584, 595, c. 3591, Comp. Stat. 1913, §§ 8563, 8592.

Congress having, by this act, intended to take possession of the subject-matter of interstate shipments, its law is paramount as to all transactions covered by the act, and the decisions of the Supreme Court of the United States construing it are, of course, binding upon the state courts; but, as pointed out by this court in the case of *A. C. L. Ry. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019, the act of Congress, in making the initial carrier liable for damage to goods on any portion of the route, created no new remedy, but is merely declaratory of the common law as enforced in this state. The shipper, as there stated, could always have exercised his rights to sue the initial carrier, and he could have always exercised his right to bring his action at common law against the road actually at fault. Thus, the federal act was designed, primarily to fix the liability under the contract of freightment, and make the rules governing same uniform throughout the several states. There appears to have been some misapprehension

growing out of the misinterpretations of a ruling of the Supreme Court of the United States in the case of *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, in which reference was made to the question here involved, but in the later case of *C. N. O. & T. P. Ry. Co. v. Rankin*, decided by that court and reported in 241 U. S. 319, 36 Sup. Ct. 555, 60 L. Ed. 1022, Mr. Justice McReynolds, speaking for the court, said:

"Properly understood, neither this [referring to the case of *Adams Express Co. v. Croninger*, supra], nor any other of our opinions, holds that this amendment has changed the common-law doctrine theretofore approved by us in respect to a carrier's liability for loss occurring on its own line."

In the recent case of *Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, carried from this court to the Supreme Court of the United States, that court, in its opinion rendered by Mr. Justice Hughes, said:

"There are only two questions presented here, and these are thus set forth in the brief for the plaintiff in error: First. That the plaintiff's exclusive remedy was against the initial carrier, the Baltimore & Ohio Southwestern Railroad Company, under the Carmack Amendment of section 20 of the Hepburn Bill. * * * The first contention is met by repeated decisions of this court. The connecting carrier is not relieved from liability by the Carmack amendment, but the bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation, and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid."

This doctrine thus appears to be well recognized and fully established by the Supreme Court of the United States. It has also been followed by the Supreme Court of this state in the case of *W. & A. Ry. Co. v. White Provision Co.*, 142 Ga. 246, 82 S. E. 644, in which the following language was used:

"It was contended that the suit, if it could be maintained at all, should have been brought against the Nashville, Chattanooga & St. Louis Railway, because, by the amendment of 1906 (U. S. Comp. St. 1911, p. 1397), above referred to, the initial carrier was made liable. But it was expressly provided in that amendment that 'nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.' The wrong here complained of was committed by the defendant, not by the initial company, and the plaintiff is not excluded from suing the wrongdoer."

The rule here given was distinctly recognized in the case of *A. C. L. Ry. Co. v. Thomasville Live Stock Co.*, supra, and the interpretation there announced as to the common-law remedy has never been altered by any decision of this court.

Furthermore, there are various decisions, rendered by different state courts of last resort, which plainly follow the rule herein adopted: for example, in the case of *Elliott v. Chicago*, etc., 35 S. D. 57, 150 N. W. 777 the following language is used:

"The Carmack Amendment merely places the shipper in a position where he may be able to

recover for injured property and relieve himself, oftentimes, from the task of locating the active tort-feasor. But if the shipper knows which one among a number of carriers caused the injury, he may sue that one alone."

In *Baltimore, C. & A. Ry. Co. v. William Sperber & Co.*, 117 Md. 595, 84 Atl. 72, the court said:

"The Carmack Amendment of June 29, 1906, to the Hepburn Act, making an initial carrier liable for damage * * * to his shipment upon the line of the connecting carrier, is intended merely to give a cumulative remedy, and does not prevent the shipper from maintaining an action against the connecting carrier at fault."

In the case of *Varnville Furniture Co. v. C. & W. C. Ry. Co.*, 98 S. C. 63, 79 S. E. 700, the following language was used by the court:

"The federal statute does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the initial carrier receiving property for interstate transportation. While it says that that carrier shall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier alone. * * * To hold that the initial carrier alone is liable to the holder of the bill of lading would, in many cases, cause the very expense and inconvenience which the statute was designed, in part, at least, to obviate."

Thus it appears that the rule indicated, as laid down by the Supreme Court of the United States and followed by the Supreme Court of the state and by this court, is fortified by the rulings of various courts of highest resort in other states.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J.,
concur.

(19 Ga. App. 190)

WILLIAMS v. BOSTON OIL & GUANO CO.
(No. 7652.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. AGRICULTURE ⇐7—"COMMERCIAL FERTILIZER"—"FERTILIZER MATERIAL"—PENALTY. Cotton seed meal is a "commercial fertilizer" and "fertilizer material," within the meaning of the act of the General Assembly approved August 22, 1911 (Acts 1911, pp. 172, 173; Park's Ann. Code, §§ 1778a-1778c).

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 13, 14; Dec. Dig. ⇐7.]

For other definitions, see *Words and Phrases*, First and Second Series, *Commercial Fertilizers or Manures*.]

2. AGRICULTURE ⇐7—COMMERCIAL FERTILIZER—DAMAGES—PETITION.

The petition set forth a cause of action, and the court erred in dismissing it on general demurrer.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. §§ 13, 14; Dec. Dig. ⇐7.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Suit by W. W. Williams against the Boston Oil & Guano Company. Judgment for de-

fendant, dismissing the petition on general demurrer, and plaintiff brings error. Reversed.

Merrill & Grantham, of Thomasville, and Branch & Snow, of Quitman, for plaintiff in error. Titus, Dekle & Hopkins, of Thomasville, for defendant in error.

BROYLES, P. J. W. W. Williams brought suit against the Boston Oil & Guano Company for damages, under the act of the General Assembly approved August 22, 1911, regulating the branding and sale of commercial fertilizers and fertilizer material. The petition as amended alleged that the defendant sold to the plaintiff 50 tons of cotton seed meal, that this meal had fallen more than 3 per cent. below its guaranteed and commercial value, that it did not contain 6.18 per cent. nitrogen (equivalent to 7.50 per cent ammonia), as branded on the sacks and as required by law, but that it contained only 5.45 per cent. nitrogen, a deficiency of 10.5 per cent. below its guaranteed analysis as branded and tagged on the packages. The petition alleged, further, that the cotton seed meal was purchased by the plaintiff as commercial fertilizer, and that "it is commercial fertilizer and fertilizer material, and is so used." The plaintiff sought to recover the penalty prescribed by the act, to wit, 25 per cent. of the purchase price, in addition to the shortage in the commercial value of the fertilizer. The court sustained a general demurrer and dismissed the suit, and the plaintiff excepted.

[1, 2] In our judgment the petition set forth a cause of action and was not subject to general demurrer. While the act of the General Assembly approved July 8, 1910 (Acts 1910, p. 82), deals specifically with the branding and sale of cotton seed meal, we do not think it is the exclusive and only legislative regulation of the branding and sale of such meal when it is sold as a commercial fertilizer, or as fertilizer material. In that act the branding and sale of cotton seed meal is regulated, not only when it is sold as feed-stuff, but also when it is sold as a commercial fertilizer, as is specifically declared in section 1. It is clear, therefore, from this language, that the Legislature recognized that cotton seed meal was, under certain circumstances, a "commercial fertilizer." That act makes it a misdemeanor for any one to violate its provisions, but fails to furnish any adequate remedy for damage inflicted upon the purchaser of cotton seed meal which is falsely branded, and the actual commercial value of which is below its guaranteed commercial value. A subsequent statute, Acts 1911, pp. 172, 173, § 2, provides a remedy in damages to the purchaser for the false branding and the deficiency in value of "any commercial fertilizer, or fertilizer material sold in this state." In our opinion the latter stat-

ute was intended by the Legislature to be supplemental and additional to all other acts upon the same subject-matter, including the act of 1910, as is in fact shown by the language in section 5 thereof. The general trend of legislation in Georgia upon the subject of the sale of fertilizers has been to safeguard and protect to the greatest extent possible the buyer and user of fertilizers, and to make it "hard sledding" for the dishonest manufacturer or dealer, both by making the false branding and fraudulent sale of inferior fertilizers a penal offense, and by providing for the recovery of damages in a civil suit by the person so defrauded. And our courts of last resort have uniformly interpreted the various acts upon this subject in the light of that legislative intention.

It is insisted by counsel for the defendant in error that cotton seed meal is not a "commercial fertilizer" within the meaning of the act of 1911, for the reason that it does not contain either phosphoric acid or potash, and that the caption of the act and section 1 thereof show that it was the intention of the Legislature to regulate therein the branding and sale of such commercial fertilizers only as contain, or are designed to develop, as plant food, phosphoric acid, potash, and nitrogen. This court, as a matter of law, has no knowledge of the ingredients of cotton seed meal; but the official bulletin issued by the department of agriculture of this state (Serial No. 57, Season 1911-1912, p. 41) contains a report from the state chemist which shows that, as a matter of fact, cotton seed meal not only contains nitrogen, but also phosphoric acid and potash in an appreciable amount. Irrespective, however, of the question whether it does or not, we do not think that the legislative intent was to confine the operation of the act of 1911 to such commercial fertilizers only as contain, or are designed to develop, as plant food, phosphoric acid, potash, and nitrogen; but, in our opinion, it was intended, as shown by the broad language in sections 2, 3, 4, and 5 of the act, and especially of section 2, to apply its provisions to "any commercial fertilizer, or fertilizer material sold in this state." It is a matter of common knowledge, of which

this court will take judicial cognizance, that cotton seed meal is used extensively in this state, not only as fertilizer material, in the making and blending of commercial fertilizers, but as a commercial fertilizer in itself; and, the petition in this case alleging that the cotton seed meal was purchased by the plaintiff as a commercial fertilizer, the court erred in dismissing the petition on general demurrer.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 144)

PETERSON v. STATE. (No. 7938.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 538(3), 741(3)—EVIDENCE—CONFESSION—PROOF OF CORPUS DELICTI.

Not only was there proof of a plenary confession by the accused, apparently made without improper inducement, but the corpus delicti was shown by independent testimony, and there were circumstances in proof which definitely connected the accused with the perpetration of the crime. Proof of the corpus delicti may itself be sufficient corroboration of a confession. *Wimberly v. State*, 105 Ga. 188, 31 S. E. 162; *Westbrook v. State*, 91 Ga. 11, 16 S. E. 100; *Davis v. State*, 105 Ga. 803, 813, 32 S. E. 158; *Sutton v. State*, 17 Ga. App. 713, 714, 88 S. E. 122, 587, and cases there cited. The amount of corroboration necessary is not fixed, but is for the jury. *Griner v. State*, 121 Ga. 614, 49 S. E. 700; *Holsenbake v. State*, 45 Ga. 43; *Cook v. State*, 9 Ga. App. 208, 70 S. E. 1019.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1221, 1229, 1716, 1727, 1728; Dec. Dig. \S 538(3), 741(3).]

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Jim Peterson was convicted of crime, and he brings error. Affirmed.

T. J. Ripley and W. M. Bailey, both of Atlanta, for plaintiff in error. Eb. T. Williams and John A. Boykin, Sol. Gen., A. L. Ivey, and E. A. Stephens, all of Atlanta, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 183)

WILKINS v. GEORGIA CASUALTY CO.
(No. 7418.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. INSURANCE — 645(2)—ACCIDENT INSURANCE—POLICY.**

Where, under the terms of an accident policy, a suit is brought for the entire and irrecoverable loss of the sight of an eye, it is incumbent upon the plaintiff to show that such loss is both entire and irrecoverable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1633; Dec. Dig. 645(2).]

2. EVIDENCE — 67(1)—PRESUMPTIONS—CONTINUITY OF CONDITION.

If, in a suit of such character, it is shown that such loss is entire, there will exist no presumption of law that such condition will remain until the contrary is proved.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 87; Dec. Dig. 67(1).]

3. INSURANCE — 668(13)—ACCIDENT INSURANCE—JURY QUESTION.

Under the facts in this case, the jury should have been allowed to say whether or not a prima facie case of irrecoverable injury had been made by the plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1746, 1765; Dec. Dig. 668(13).]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by J. W. Wilkins against the Georgia Casualty Company. There was a judgment of nonsuit, and plaintiff brings error. Reversed.

Eubanks & Mebane, of Rome, for plaintiff in error. Barry Wright, of Rome, for defendant in error.

JENKINS, J. On March 13, 1915, J. W. Wilkins brought an action against the Georgia Casualty Company for \$1,000 in the city court of Floyd county; the same being a suit under the terms of a policy of accident insurance for loss of the sight of an eye. The clause in the policy under which suit was brought, so far as pertinent to an understanding of the case before us, is as follows:

"If such injuries * * * shall result, independently and exclusively of all other causes, in one of the losses enumerated below * * * within ninety days from the date of the accident, * * * the company will pay the sum set opposite such loss * * * for loss of * * * sight of one eye one-half principal sum. * * * Loss shall mean, * * * with regard to eyes, entire and irrecoverable loss of sight."

The trial judge granted a nonsuit on the ground that it was not shown that the loss of the eye was "irrecoverable," as required by the terms quoted from the policy. The only question this court is now called upon to decide is whether or not the trial judge erred in sustaining the motion to nonsuit, for the reason indicated.

The evidence of the plaintiff, Wilkins, nowhere affirmatively undertakes to show

that the loss of sight is irrecoverable. He testified that it was total, and testified as to the nature and extent of the injury, but he did not undertake to say directly whether or not the injury was permanent and irrecoverable. However, it is thought proper to state the substance of plaintiff's testimony, for the purpose of throwing such light as it may upon the issue here to be determined. The plaintiff testified that he was employed by an express company, for which he drove a wagon; that on October 3, 1914, in order to tighten a tap on the wheel of the company's wagon which he drove, he was striking it with a wrench which caused particles of steel to fly off, hitting and penetrating his right eye; that in consequence of this injury he was unable to work for the balance of that day, and on October 5th consulted a physician, who on that day removed the steel from the injured eye and continued to treat the eye from time to time until January 20th of the following year; that he had not seen out of the injured eye since the date of the injury so as to tell what anything was; that there had never been a time since the eye was hurt when by its use he could have found his way home; that he had not been able to distinguish anything by the use of the injured eye from the time of the injury; that he could tell daylight from dark, but could distinguish nothing; that he kept thinking and hoping it would get better, but it continued to grow worse in spite of the treatment given; that he could not see quite as well in January as he could in the preceding January; that the steel went directly into the center of the pupil, and his physician worked faithfully to save it, but failed to do so.

Dr. L. W. Gerard testified for the plaintiff as follows:

"I am a practicing physician and do a little surgery. I have been practicing about nine years. I am a graduate from the University of Georgia. In my opinion, assuming that on the 2d day of October, 1913, a piece of steel flew from a wrench, or hammer, and struck the plaintiff in the center of the cornea of the right eye and imbedded itself to such an extent it had to be located by an X-ray to be removed, that immediately he lost, from the striking, as soon as it was struck, the vision of that eye, that it has remained lost from then until the present time, in my opinion it would be a permanent injury. I examined Mr. Wilkins' eye in there a moment ago. There seems to be an opacity in the eye there, and sometimes by the removal of the lens you might restore it. It is rather doubtful in this case, from what I can see there. An operation might benefit it; no certainty of that. Opacity is a milky substance back in the posterior portion of the eye caused from inflammation brought about by injury. A person's eye when it goes blind either from a natural or unnatural cause—most generally that eye does change in color, opacity sets up and gradually grows, and it goes on, the eye gradually changes from what you would call dead to deader, and after a long time it gets white. After a man's eye is injured and vision is destroyed, it still is sensitive to light and heat—bright light somewhat. The more the opacity the more the light

is shut out. Practically all blind people for several years after they have lost their vision can tell the difference between daylight and dark and things of that kind to some extent. I do not treat the eyes very much. Naturally very often cases come through, in the practice of medicine, where a man is called upon to look at a person's eye, and he usually refers them to a specialist. I have never operated on the eyes more than to remove foreign bodies in the cornea, on the outside of the ball or stuck in. An operation such as I described for Mr. Wilkins' eye is entirely possible. This condition of Mr. Wilkins' eye is somewhat similar to a cataract on the lens. In fact, from what I can see, it looks like the lens is affected. Sometimes you get good results from a surgical operation, and sometimes you don't. That is true about any operation, more or less. In an operation for appendicitis sometimes the undertaker gets the good end of it. Any operation is liable to be a success or a failure, as the case may be, but it is doubtful as to his eye. From what I can see of the condition of his eye I think an operation would be all right. If I were called upon to advise Mr. Wilkins to have an operation or not, I would advise him to try an operation, without making a further examination of the case. The thing about an operation is to let that cataract get good and ripe. An operation now would probably stand a better chance than an operation shortly after the injury, because the cataract has gotten riper. I would not swear that the loss of this eye is irrecoverable, that is, by an operation, or otherwise. A cataract grows on the lens; it is a disease of the lens. This opacity is on the lens, what I can see of it. I mean by saying that I would advise an operation that I would advise that as an experiment, to see if it cannot be restored. I would not advise him, in my judgment, that an operation would restore it. I would not give it as my opinion that an operation would restore his sight, but I think it worth trying. I could not positively say that after a man had been blind for 18 months that an operation would be successful, in my opinion. I was asked a while ago as to my expertness in these matters. I have witnessed such operations, and I have studied the eye in my regular practice."

[1.2] 1, 2. We cannot agree with the contention of counsel for the plaintiff in error in his application of the doctrine of the "presumption of continuity" as applied to this case. It is argued by counsel that, when a state of things is once proved to exist, there is a presumption that it will continue until a change or some adequate cause of change is made to appear. The true doctrine of this rule invoked is that, when a condition is shown to exist prior to the trial, there is a legal presumption of its continuity at the time of trial; and the application of this rule should not be applied to a presumption of future continuity. Where the question is whether an injury is recoverable or irrecoverable, there can be no application of the doctrine invoked, as the issue itself relates entirely to the future. The doctrine of presumption of continuity does not raise a presumption that something shown to exist will continue, but raises the presumption that something shown to exist has continued. We do not think that the rulings in *Anderson v. Blythe*, 54 Ga. 508, *Coleman & Burden Co. v. Rice*, 105 Ga. 164, 31 S. E. 424,

nor the ruling in *Sasser, Assignee, v. Byrd et al.*, 8 Ga. App. 824, 70 S. E. 157, cited by counsel for the plaintiff in error, contravene our construction of this doctrine. By the terms of the policy under which the suit was brought, it was incumbent upon the plaintiff to allege and prove that the injury to his eye, which is the basis of his suit, was not only entire, but also irrecoverable. If, therefore, by the evidence for the plaintiff, the injury to the eye has been established to be "entire," in accordance with the terms of the policy, there is no presumption of law arising from such proof that such condition will continue so as to shift the burden of proof upon the defendant. Even where the doctrine of presumption of continuity can be properly applied, it is a well-settled principle that presumptions, except conclusive presumptions, must give way to proof; and the plaintiff is therefore compelled to stand upon the evidence introduced in support of his contentions.

[3] 3. We think the jury should have been allowed to pass upon the question as to whether or not the injury was irrecoverable. While the testimony of the expert witness, which in the statement of facts has been set forth in full, does not positively assert that an operation would not benefit the injured eye, still he gives it as his positive and unequivocal opinion that such an injury as is shown by the facts of this case is a permanent one. He testifies that he would advise an operation as an experiment, but would not state that in his judgment such an operation would restore the sight. According to the evidence, it was his opinion that such an operation was "worth trying," and the jury might have been authorized to assume that it was for that reason that he was unwilling to testify positively that the loss of the sight is absolutely irrecoverable. Furthermore, the jury need not have been governed entirely on this point by the testimony of the expert witness, but would have had the right to consider the testimony of the plaintiff himself, who, it will be recalled, had testified that he had never been able to see with the injured eye from the date of the accident. In view of this testimony of plaintiff, taken together with the other evidence in the case, it was for the jury to say whether or not the sight of the injured eye was irrecoverably lost.

It is therefore the judgment of this court that the ruling of the trial judge granting a nonsuit was erroneous.

Judgment reversed because the court erred in awarding a nonsuit.

BROYLES, P. J., and GEORGE, J., presiding in place of BLOODWORTH, J., disqualified, concur.

19 Ga. App. 113)

**HODGES v. J. I. CASE THRESHING
MACH. CO. (No. 7207.)**(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR — 1195(1) — REVIEW —
LAW OF CASE.**

The court did not err in sustaining the demurrer to the defendant's answer as amended. The law of this case is fixed by the former decision of this court therein. 16 Ga. App. 327, 85 S. E. 205.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661; Dec. Dig. — 1195(1).]

**2. COURTS — 189(15) — FINAL JUDGMENT —
ENTRY.**

The presiding judge, under the provisions of the order granted in term, did not have authority to enter a final judgment in this case in vacation. Civ. Code 1910, § 4854.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 458; Dec. Dig. — 189(15).]

Error from City Court of Americus; W. M. Harper, Judge.

Action between B. C. Hodges and the J. I. Case Threshing Machine Company. There was a judgment for the latter, and the former brings error. Reversed.

Wallis & Fort and J. A. Hixon, all of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

GEORGE, J. [1] 1. When this case was before this court at the March term, 1915, it was decided "that the answer and plea of the defendant as a whole as finally amended should have been stricken on demurrer, as the answer was a manifest effort to add to and vary by parol the terms of the unambiguous written contract between the parties upon which the suit was brought," and the case was reversed for error of the trial court in not sustaining the demurrer to the answer and in overruling the motion for a new trial filed by the present defendant in error. Case Threshing Machine Co. v. Hodges, 16 Ga. App. 327, 85 S. E. 205. Before the remittitur of this court was made the judgment of the court below, the plaintiff in error offered an amendment to his answer, which was allowed by the court, subject to demurrer. By reference to the pleadings filed by the plaintiff in error, and under consideration by this court at the March term, 1915, and by reference to the original briefs of file in that case, it is clear that the defenses contained in the amendment to the answer made after the decision of this case in this court, but before that decision was made the judgment of the lower court, are in substance and effect the same as those set up in the former pleadings. It is true that the amendment now under consideration seeks to avoid the contract sued upon, for the reason that it does not "possess finality of utterance; that there has never been an agreement that the writing is a complete and final uttered embodi-

ment of all the terms of a contract presently operative and binding." This is alleged to be so because of the same facts set up in the answer considered by the court in this case heretofore. While the amendment to the answer now under consideration contains the general averment set out above, the facts set forth in the answer show that the defendant did have possession of the traction engine, the consideration named in the contract and notes, and was actually using it, and that he had paid a large portion of the purchase price represented by the first of the series of notes, as provided in the contract. Moreover, the contract and each of the notes, including the note paid, signed by the defendant, and set out in the petition by the Case Threshing Machine Company, recited that they were "signed, sealed, and delivered" in the presence of an officer of the law authorized to attest the same. This identical defense was made in the original answer as finally amended.

[2] 2. While the ruling sustaining the demurrer to the defendant's answer as finally amended was proper, the judgment made in vacation, in awarding final judgment in favor of the plaintiff for principal, interest, and attorney's fees, must be reversed. It appears that the presiding judge acted under the authority of an order entered in term as follows:

"By agreement of counsel in the above-stated case, it is ordered that the demurrers in said case be heard at Americus, Ga., on November 6, 1915. It is further ordered that both parties, plaintiff and defendant, shall have the right to file any amendments that will be allowed according to law, and to file and make any objections to the amendments. It is further ordered that the court shall have authority to pass upon all demurrers and amendments at said hearing, as if in term time, and to enter up all necessary judgments in vacation in said cause as if said judgments were entered in term time, and either party shall have the right to file exceptions to any of the rulings and judgments of said court, as if in term time. It is further ordered that, if said hearing is not had at the time stated, the court shall have authority to pass necessary orders continuing said hearing to a future date."

We do not think this agreement authorized the judge to hear and determine this case in vacation. It is to be noted that the judgment rendered by the court was for principal, interest, and attorney's fees.

It is contended that the judge of the city court of Americus has the same power as judges of the superior courts of this state to hear and determine causes and render judgments in vacation. It is not insisted that he has any greater authority. Conceding that he is clothed with the same power as the judges of the superior courts in respect to the matter in question, he was without authority to enter the final judgment in vacation.

"Judges of the superior courts 'cannot exercise any power out of term time, except the authority is expressly granted; but they may,

by order granted in term, render a judgment in vacation." Civil Code 1910, § 4854." Tucker, Sheriff, v. Huson Ice & Machine Works, 142 Ga. 83, 82 S. E. 496.

Under the order recited above, the presiding judge had authority to determine the demurrers, to pass upon and allow amendments, and to pass any necessary judgment with respect to the same. Only by implication is he given the authority to finally hear and determine this case on its merits. This power, by implication, is denied, when he undertakes to exercise the authority under the law of the state; and the parties, by agreement, did not confer upon him the right to enter a final judgment in this case in vacation.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 184)

J. A. CLEARY & CO. v. FAWCETT.
(No. 7617.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. ASSIGNMENTS — 10 — VALIDITY — INDEBTEDNESS.

Under the evidence submitted, the written assignment by one Sipple to the defendant in error of all moneys, debts, claims, or demands then due or thereafter to become due to him by the Georgia-Carolina Lumber Company was a valid assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 17, 18; Dec. Dig. — 10.]

2. ASSIGNMENTS — 103 — RIGHTS — WAIVER.

The evidence authorized a finding that the defendant in error did not waive or abandon his rights under the assignment, and that although he allowed Sipple from time to time, after the making of the assignment, to collect moneys from the lumber company, Sipple in so doing was acting merely as the agent of the defendant in error, and that he turned over the moneys so collected to the defendant in error.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 179; Dec. Dig. — 103.]

3. SUFFICIENCY OF EVIDENCE.

The court, exercising by consent the functions of both judge and jury, did not err in rendering a judgment in favor of the defendant in error.

Error from City Court of Savannah; Davis Freeman, Judge.

Action between George Fawcett and J. A. Cleary & Co. Judgment for Fawcett, and Cleary & Co. bring error. Affirmed.

Shelby Myrick, of Savannah, for plaintiffs in error. J. R. Fawcett and Edwin A. Cohen, both of Savannah, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 124)

PALACE MARKET CO. v. MIDLAND CITY HOTEL CO. (No. 7542.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

CORPORATIONS — 90(6) — SUBSCRIPTION TO STOCK — ACTION — EVIDENCE.

The evidence is sufficient to support the finding of the presiding judge, who by consent tried the case without a jury, and no error of law appears.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 411-416; Dec. Dig. — 90(6).]

Error from City Court of Macon; Robt. Hodges, Judge.

Suit by the Midland City Hotel Company against the Palace Market Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Ryals & Anderson, of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

GEORGE, J. The Midland City Hotel Company filed suit in the city court of Macon against the Palace Market Company upon a written subscription to capital stock in the plaintiff corporation. The case, on all questions of law and fact, was submitted by agreement to the presiding judge, sitting without a jury. The court rendered a judgment against the defendant for the full amount sued for. Three mixed questions of fact and law were involved in the case, to wit:

(1) Did the secretary and treasurer of the Market Company, on the facts in this case, have authority to execute the contract of subscription?

(2) Is the Market Company, on the facts of this case, released from liability on its subscription, if in the first instance binding, because of the decision of the court releasing certain subscribers whose subscriptions were necessary to make up the minimum stock authorized by the charter of the plaintiff corporation, and because certain other subscribers were resisting payment of subscriptions to the capital stock in the plaintiff corporation, and because one subscription was payable in material?

(3) Did the presiding judge err in sustaining the demurrer to the allegations of the amended answer of the Palace Market Company, setting up that its subscription was a donation and not an investment.

The presiding judge found in favor of the plaintiff upon each of the controlling issues stated in questions 1 and 2, and there is evidence to support his finding, and the same is not contrary to law.

The assignment of error on the ruling of the trial judge in sustaining the demurrer to the defendant's answer, set out in the third question, is not presented by exception pen-

dente life, or by direct exception timely made, and cannot be considered. *Hawkins v. Studdard*, 132 Ga. 265 (1), 63 S. E. 852. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 123)

WILLIAMS v. STOCKS. (No. 7517.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

CERTIORARI \S 69 — NATURE OF REMEDY — FINAL JUDGMENT.

Where no error of law is complained of which must finally govern the case, no final judgment can be rendered on a petition for certiorari, except in a case in which the evidence is undisputed, and where there can be but one legal verdict or judgment, under the evidence. Section 5201, Civ. Code 1910. The judge of the superior court did not err in remanding this case for a new trial, and in refusing to render a final judgment, the evidence being in dispute.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. \S 185-194; Dec. Dig. \S 69.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by R. S. Williams against F. M. Stocks in the municipal court of Atlanta, which resulted in a judgment for the defendant. The plaintiff's oral motion for a new trial was overruled, and on certiorari the superior court granted him a new trial. His petition for certiorari contained the usual general grounds and the ground that the evidence demanded a judgment in his favor for the full amount sued for. In his bill of exceptions it is contended that a final judgment in the case should have been rendered in his favor by the judge of the superior court in sustaining the certiorari. The evidence was conflicting as to the liability of the defendant and the correctness of the account. Plaintiff brings error. Affirmed.

W. P. Coles and Moore & Pomeroy, all of Atlanta, for plaintiff in error. Lamar Hill, of Atlanta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 127)

FULTON v. METROPOLITAN CASUALTY INS. CO. OF NEW YORK. (No. 7582.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 127(3) — HEARSAY — EXCEPTIONS—STATUTE.

The court did not err in excluding testimony as to sayings of the plaintiff's husband regarding the probable cause of his pains or illness, these sayings not being within the exception to the hearsay rule as declared by Civ. Code 1910, \S 5766. They were not a part of the

occurrence to which they related, but rather a narrative concerning something which had taken place in the past.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 380; Dec. Dig. \S 127(3).]

2. INSURANCE \S 455—ACCIDENTAL INSURANCE—RECOVERY—PROOF—"ACCIDENTAL MEANS."

Where an accident policy insured against "the effects of bodily injuries sustained directly, solely, and exclusively through accidental means," resulting in the death of the assured, it was necessary, in an action thereon, to show that in the act which preceded the injury alleged to have caused the death of the assured something unforeseen, unexpected, or unusual occurred.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. \S 1166-1169; Dec. Dig. \S 455.

For other definitions, see *Words and Phrases*, First and Second Series, *Accidental Means*.]

3. INSURANCE \S 665(5), 668(11)—ACCIDENTAL INSURANCE—CAUSE OF DEATH—ALLEGATION—PROOF.

While in such case the allegation that the insured met his death "solely and exclusively through accidental means, to wit, by the accidental straining of his physical body through the exertion of pulling and pushing a boat from dry land into water, * * * and from the result of which straining a blood vessel in the stomach became ruptured and death ensued," may be sustained by proof of circumstances, as well as by direct evidence, the proved facts in this case, considered in connection with the defensive facts developed upon cross-examination, were not sufficient to make a jury question. Accordingly the court did not err in directing a verdict. *Evans v. Josephine Mills*, 119 Ga. 448, 46 S. E. 674 (2).

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. \S 1719, 1721, 1722, 1745, 1763, 1764; Dec. Dig. \S 665(5), 668(11).]

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by Mrs. Fannie J. Fulton against the Metropolitan Casualty Insurance Company of New York. Plaintiff nonsuited, and she brings error. Affirmed.

Mrs. Fannie J. Fulton filed suit in the city court of Savannah, and alleged that she was the widow of Abraham J. Fulton; that said Abraham J. Fulton died on September 12, 1915; that the Metropolitan Casualty Insurance Company of New York issued to the said Abraham J. Fulton an accident policy, under the terms and stipulations of which the said Abraham J. Fulton was insured in the principal sum of \$3,000 against the effects of bodily injury sustained directly, wholly, and exclusively through accidental means, and for loss of life so resulting the said defendant company contracted and obligated itself to pay the beneficiary named in the policy, the plaintiff in this action, said principal sum.

The plaintiff's petition contains the following allegation:

"Your petitioner shows that Abraham J. Fulton, her husband and the assured in said policy, died on September 12, 1915, directly, solely, and exclusively through accidental means, to wit, by the accidental straining of his physical body through the exertion of pushing and pulling a boat from dry land into water, and also from

the accidental straining due to the casting of a seine net, from the result of which straining a blood vessel in the stomach became ruptured, and death ensued."

The defendant filed an answer to the suit and denied the paragraph of the petition above quoted. Other defenses were set up in the answer not material to this decision. At the conclusion of the plaintiff's evidence the presiding judge sustained a motion to nonsuit.

Twiggs & Gazan, of Savannah, for plaintiff in error. Bryan, Jordan & Middlebrooks, and W. R. Tichenor, all of Atlanta, and David S. Atkinson, of Savannah, for defendant in error.

GEORGE, J. [1] 1. During the progress of the case the plaintiff sought to prove by three witnesses certain statements made by the deceased as to his physical condition and as to the cause thereof, and in each instance the court excluded the testimony offered. The plaintiff excepts to these rulings. These exceptions are treated together. The evidence ruled out involves an identical principal of law. The answers excluded may be stated as follows:

"I hurt myself in getting the boat out of the mud to go casting; I strained myself in lifting the boat out of the mud."

These statements were made some 16 hours after the occurrence to which they related. There was no error in excluding this testimony. *W. & A. R. R. Co. v. Beason*, 112 Ga. 553, 37 S. E. 863.

[2] 2. The policy in this case insured against the effects of bodily injury sustained "directly, wholly, and exclusively" through accidental means. There is an apparent and perhaps actual conflict in the decided cases, both English and American, in construing the clause contained in this policy and quoted above. Many of the courts have distinguished between a clause insuring against death by accident and a death occasioned by accidental means. There is a line of decisions holding that an injury may be "accidental in character" where it results from an intentional and voluntary act, performed in the usual, ordinary, and intended manner, by the insured, while there is another line of decisions to the effect that, where the act itself was foreseen and intended, and performed in the ordinary and usual manner by the insured, the act cannot be considered as an "accidental means."

This court is bound by the construction given the above-quoted clause by the Supreme Court of Georgia. Such a provision in an accident policy was considered by that court in *Cobb v. Preferred Mutual Accident Association of N. Y.*, and vice versa, 96 Ga. 818, 22 S. E. 976, and it was there ruled:

"Where an accident insurance policy insured the person to whom it was issued 'against bodily injuries effected through external, violent, and accidental means,' and on the trial of an

action thereon, predicated upon the loss of an eye, it appeared from the evidence that the plaintiff, while in an emaciated and feeble condition, after safely alighting from a train, carried his baggage, weighing from 60 to 80 pounds, a distance of about 50 yards, and 'injured himself in some way or other' in so doing, so that soon after putting the baggage down a defect in the vision of one of his eyes became apparent, which finally resulted in a total loss of sight as to that eye, and it also appeared that the plaintiff had not fallen, nor received a blow, or jar, or shock of any kind, and that there was nothing unusual in his manner of carrying the baggage or in his locomotion while so doing, no case for a recovery was made. Even if the plaintiff's injury was attributable to the carrying of the baggage, it was not effected by 'external,' 'violent,' or 'accidental' means in the sense in which these words are used in the policy."

Counsel for the plaintiff in error insist that the words "external" and "violent," in the policy in that case, distinguish it from the case now under consideration, but it is to be noted that the decision in that case declares that the means alleged to have produced the injury to the plaintiff were not effected by external, violent, or accidental means in the sense in which those words were used in the policy. The Supreme Court, in *Atlanta Accident Association v. Alexander*, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188, again construes the same provision involved in the *Cobb Case*, supra. It is to be noted that in both cases the decision was announced by Chief Justice Simmons. In the course of his opinion in the *Alexander Case* he said:

"We think the evidence in the present case was sufficient to authorize the jury to infer that the plaintiff's husband was injured in the manner described in the policy. It appears from the record that he was a hale, hearty man; his occupation was that of a blacksmith; it was his duty upon this occasion to use a heavy sledge hammer; he had used it many times before in the course of his business; on this particular occasion, in striking a slanting blow, he suddenly felt a severe pain in the lower part of his abdomen; the injury proved to be a rupture producing hernia, which injury resulted, in a few days, in death. Taking all the facts together, the fact of his previous good health, the fact that he had many times before used the hammer, the sudden pain after the blow of the hammer, and other facts which appeared, the jury could properly infer that the act which preceded the injury was something unforeseen, unexpected, and unusual, and that the injury resulted directly and immediately from such act, and was therefore produced by external, violent, and accidental means."

Attention is called to the concluding sentence in this quotation. This sentence states the rule as announced in the *Cobb Case*, and as set forth in the second headnote in the present case. Again, in the case of the *Continental Casualty Co. v. Pittman*, 145 Ga. 641, 89 S. E. 716, the Supreme Court decided as follows:

"It appearing from the evidence, on the trial of an action upon a policy of accident insurance, that the insured died from sunstroke which overcame him as he was performing his ordinary duties as fireman on a locomotive engine on a hot summer day, and nothing appearing to show that the sunstroke was due to 'external, violent, and accidental means,' within the mean-

ing of those terms as used in the policy, the verdict in favor of the beneficiary therein was unauthorized."

One clause in the policy under construction in the case last cited provides for the payments of indemnities set forth "for bodily injuries caused through external, violent, and accidental means," and another clause reads as follows:

"If sunstroke, freezing, or hydrophobia, due in either case to external, violent, and accidental means, shall result, independently of all other causes, in the death of the insured within 90 days from date of exposure or infection, the company will pay said principal sum."

The person insured in that case was a railroad fireman, and occupied a position on the sunny side of the cab of his engine. The weather was very hot, and he was exposed to the sun and to the heat of the engine. He became overheated, was taken with a high fever, and suffered a sunstroke which had been produced by the extremely high heat to which he had been subjected in the performance of his duties. To quote from the opinion of the court in that case:

"The death of the insured was from sunstroke, which overcame the decedent while he was performing his ordinary duties in the ordinary way upon a hot summer day; and there is nothing in the evidence to show that the sunstroke was due to 'external, violent, and accidental means,' within the meaning of those terms as employed in the policy sued upon."

It will be seen that, if there is a seeming conflict between the Cobb Case and the Alexander Case, *supra*, the Pittman Case, *supra*, decided by the Supreme Court on August 18, 1916, recognizes the rule which we have adopted in the second headnote in the instant case. The rule which seems to reconcile the cases involving a construction of this, or a similar clause, in an accident policy of insurance, is: That when the facts show that no unforeseen, unexpected, unusual, unintentional, or involuntary muscular effort or exertion occurred in the doing of the act which preceded the injury, the injury cannot be regarded as resulting from accidental means; but where the circumstances under which the injury was sustained were such as to call for a severe effort or exertion, in the course of which the assured may have been placed in a position where some unforeseen, unexpected, unusual, unintentional, or involuntary movement produced a physical injury, it is a question of fact for the jury whether the injury was caused by such involuntary strain, in which case the means are accidental.

It is not suggested that all of the decisions of the American courts can be harmonized upon the rule stated, but, applying the same to the Cobb Case, *supra*, it will be seen that the facts precluded the reasonable probability that any unintentional or involuntary strain or demand was made upon the plaintiff, while in the Alexander Case, *supra*, the insured was using a hammer which he intended to use, and in a way in

which he intended to use it, and in a way in which he many times before, in the course of his business, had used the same; yet in striking a slanting blow he suddenly felt a severe pain in the lower part of his abdomen. These facts, coupled with his previous good health, do not preclude the reasonable probability that on the occasion of his injury he may have unexpectedly and unintentionally placed himself in a position which called for the unusual strain upon the muscles of his abdomen and produced the injury from which he died. The question to be determined is whether, in the doing of the act, intentionally and purposely undertaken, anything occurs, or any facts or circumstances are shown from which the jury may reasonably infer that something did occur, to call for an unintentional and involuntary physical exertion on the part of the insured. The insured may have attempted in an ordinary and accustomed way to perform a particular act, and if he does so, and if there are no facts from which it can legally be found by the jury that anything unforeseen or unexpected occurred to require of the insured unintentional or involuntary physical exertion, his death cannot be considered as resulting from accidental means, within the meaning of the terms of the policy involved in the instant case.

[3] 3. The conclusion stated in the third headnote requires no elaboration. The plaintiff relied entirely on circumstances to prove the cause or means of injury alleged to have been sustained by the insured, and the proved facts do not meet the requirements of the rule of circumstantial evidence as applied to civil cases. The judge did not err in granting a nonsuit.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 120)

DANIEL v. AMERICAN AGRICULTURAL CHEMICAL CO. (No. 7405.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917. Motion for Rehearing
Denied Feb. 2, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ~~655~~(2)—EXCEPTIONS, BILL OF—DISMISSAL.

The defendant's answer was stricken on demurrer on the 15th day of December, 1915, and a judgment for the plaintiff rendered. Timely exceptions pendente lite were taken to the order sustaining the demurrer and striking the answer. A bill of exceptions was tendered to and certified by the presiding judge on the 4th day of April, 1916. No motion for new trial was made, and no exception taken to the rendition of the final judgment. *Held*, the motion to dismiss the bill of exceptions must be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. ~~655~~(2).]

Error from City Court of Millen; Wm. H. Davis, Judge.

Action between E. P. Daniel and the American Agricultural Chemical Company. There was a judgment for the latter, and the former brings error. Writ dismissed.

A. S. Anderson, of Millen, for plaintiff in error. Brinson & Hatcher, of Waynesboro, for defendant in error.

GEORGE, J. Writ of error dismissed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 141)

PEEK v. CITY OF ATLANTA. (No. 7910.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS \S 642(4) — CERTIORARI TO RECORDER.

No error of law is complained of; and the evidence is ample to support the judgment of the recorder finding the defendant guilty. Accordingly the judge of the superior court did not err in overruling the petition for certiorari.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 1415; Dec. Dig. \S 642(4).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Proceedings by the City of Atlanta against J. I. Peek. Certiorari to review a judgment of conviction by the recorder was denied, and defendant brings error. Affirmed.

C. G. Battle, of Atlanta, for plaintiff in error. J. L. Mayson and S. D. Hewlett, both of Atlanta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 145)

CLARK v. STATE. (No. 7976.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1160—QUESTION OF FACT—VERDICT.

The evidence in this case, though circumstantial, is sufficient to exclude every other reasonable hypothesis than that of the guilt of the accused. Therefore the verdict finding him guilty of sheep stealing, which has the approval of the trial judge, will not be disturbed, although it does appear, as counsel for the plaintiff in error insist, that the stolen sheep came back, as was true in the case of "Bo-Peep," which is respectfully submitted to us as authority. While the sheep came back, it does not appear that this act on the part of the sheep is in any wise conclusive that they had not been in fact taken and carried away, as alleged in the indictment; it being entirely for the jury to say whether or not an extended search by

the prosecutor, armed with a search warrant, made some three weeks before the home-coming of the sheep, of which the accused had actual notice, may not have influenced the return of the sheep.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3084; Dec. Dig. \S 1160.]

Error from Superior Court, Mitchell County; E. E. Cox, Judge.

Rufus Clark was convicted of sheep stealing, and he brings error. Affirmed.

Johnson & Warren, of Camilla, for plaintiff in error. R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper & Son, of Atlanta, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 147)

HARPER v. STATE. (No. 7987.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1160—INTOXICATING LIQUORS \S 140 — OFFENSES — APPEAL — EVIDENCE.

The defendant was convicted of the offense of keeping liquors on hand at his place of business. One witness testified that the defendant was in his place of business "all day, and was drinking from a bottle that was sitting on the counter," and also that the defendant was drunk, "was drinking in the morning, drinking in the afternoon, and drinking that night." From this and other testimony the jury were authorized to infer that the defendant was drinking from a bottle containing whisky, in his place of business, on the date charged. The quantity kept at a place of business being immaterial, this direct testimony itself would have authorized his conviction. There was, however, proof that a large package containing whisky was likewise stored in the defendant's place of business on the same date, and there were circumstances in proof sufficient to exclude the hypothesis that the accused had no knowledge of its presence. The verdict having been approved by the trial judge, and there being some evidence to support it, this court may not set it aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3084; Dec. Dig. \S 1160; Intoxicating Liquors, Cent. Dig. \S 150; Dec. Dig. \S 140.]

Error from City Court of Nashville; O. A. Christian, Judge.

J. S. Harper was convicted of keeping liquors on hand at his place of business, and he brings error. Affirmed.

J. D. Lovett, of Nashville, for plaintiff in error. J. H. Gary, Sol. of Nashville, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 198)

WEATHERLY v. HAYNES. (No. 7728.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***EXECUTION \S 324 — PROCEEDS OF SALE — RIGHTS OF CREDITORS—PRIORITIES.**

Where land conveyed by a security deed was levied on and sold under a judgment in favor of the holder of the security, and, on a rule to distribute the proceeds of the sale after payment of that judgment, the fund was claimed by the receiver of a bank to which, after the execution of the security deed, the defendant sold and conveyed his interest in the land, and this claim was contested and the fund claimed by the holder of a general judgment against the grantor, rendered after the execution of the latter conveyance, the court did not err in holding that the receiver of the bank was entitled to the fund in preference to the contesting creditor.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 960-965; Dec. Dig. \S 324.]

Error from City Court of Hazlehurst; W. C. Bryan, Judge.

Suit by F. M. Haynes, receiver of the Farmers' State Bank, against T. H. Weatherly. Judgment for plaintiff, and defendant brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error. Newton Gaskins, of Hazlehurst, for defendant in error.

BROYLES, P. J. 1. Haynes, as receiver of the Farmers' State Bank, filed a petition asking that the sheriff be ordered to pay over to him as such receiver funds held by the sheriff, realized from the sale under *fi. fa.* of certain land owned by one Frazier. The petition shows that Frazier procured a loan from the Union Savings Bank and executed a deed conveying the land to the bank as security for the payment of the debt, and the bank transferred the debt to Mrs. Annie Rusch and conveyed to her its interest in the land conveyed to it by Frazier. She obtained judgment against Frazier and executed and had recorded a deed to him in accordance with the laws of the state, and caused her *fi. fa.* against him to be levied and the land sold by the sheriff of the county; her deed to Frazier being made (as recited therein) for the sole purpose of having the land levied on and sold to satisfy the *fi. fa.* in her favor. It was further shown by the petition that, after obtaining the loan and executing the security deed, Frazier sold the same land to J. H. Gray, who paid a part of the purchase price, gave his notes for the balance, and took from Frazier a bond for title to the

land. Frazier transferred the unpaid notes of Gray to the Farmers' State Bank, and, the notes having matured and Gray being unable to pay them, the Farmers' State Bank, with the consent of Gray, paid to Frazier the balance of the purchase price of the property, and took a warranty deed thereto from Frazier, and executed a bond for title to Gray, and took from Gray promissory notes in lieu of the notes given to Frazier. Gray afterward died, but a judgment for the balance due by him to the Farmers' State Bank was taken against him before his death, and that judgment has never been paid.

The allegations of the petition show that at the time of the sale of this land by the sheriff no one had any claim to it except Mrs. Rusch, the Farmers' State Bank, and the estate of Gray. Mrs. Rusch held a deed to it to secure a debt, and a judgment based on that indebtedness, and therefore her lien dated back to the date of the execution of that deed, just as if the judgment had been rendered and the *fi. fa.* properly recorded on that date. She thus had a prior lien on the funds arising from the sale, and her rights were not questioned. The Farmers' State Bank, having paid Frazier the purchase money, less the amount Gray had paid and the indebtedness secured by the deed to Mrs. Rusch, and having, with the consent of Gray, taken a warranty deed thereto, became the owner of the land, subject to the rights of Mrs. Rusch and Gray. Under all the facts as shown by the petition, the claim of Mrs. Rusch having been fully paid, the receiver of the bank was entitled to the proceeds of the sale, and to maintain a rule to distribute the funds, and the court did not err in overruling the demurrer to the receiver's petition, interposed by the intervenor, who was the holder of a general judgment against Frazier, rendered after Frazier had executed his deed to the Farmers' State Bank, and who contended that the petitioner had no lien of any kind against Frazier. See *Crawford v. Williams*, 76 Ga. 792(2), 794.

2. Under all the facts of the case, as disclosed by the record, including the admission of the administrator of the estate of Gray that he did not claim any part of the funds as administrator or otherwise, the court, sitting by consent without the intervention of a jury, did not err in directing the sheriff to pay the money to Haynes, the receiver of the Farmers' State Bank.

Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 159)

WILSON v. OWEN. (No. 7360.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. SALES \S 479(7)—ACTIONS—EVIDENCE.**

There was ample evidence to support the verdict.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1427; Dec. Dig. \S 479(7).]

2. SALES \S 479(2) — REMEDIES OF SELLER — RETENTION OF TITLE.

"When personal property is sold, and the seller retains the title as security for his purchase money, and the indebtedness matures in installments, he may proceed to rescind the sale and to recover possession of the property as soon as any of the installments become due and remain unpaid." *Scott v. Glover & Co.*, 7 Ga. App. 182, 66 S. E. 380.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1420, 1424, 1425, 1437; Dec. Dig. \S 479(2).]

3. ESTOPPEL \S 68(6)—REMEDIES OF SELLER—ESTOPPEL—TROVER.

A vendor of personal property holding a note for the purchase price, in which title is retained in himself, is not estopped from bringing an action of trover for the property by the fact that he has previously sued out a purchase-money attachment.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. \S 165, 166; Dec. Dig. \S 68(6).]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by W. H. Owen against A. E. Wilson. There was a judgment for plaintiff, and, a new trial being denied, defendant brings error. Affirmed.

R. W. Crenshaw, of Atlanta, for plaintiff in error. Geo. B. Rusu, of Atlanta, for defendant in error.

BLOODWORTH, J. W. H. Owen, defendant in error, brought suit in the city court of Atlanta, alleging that A. E. Wilson, plaintiff in error, was in possession of certain property to which petitioner claimed title; that he had made demand on defendant for said property and "the profit thereon," both of which demands were refused. In his plea defendant admitted possession of the property described in the petition, but denied that plaintiff had any right or title therein. He also denied that plaintiff had made demand as alleged in his petition. Defendant amended his plea as follows:

"That on or about April 14, 1914, the plaintiff and the defendant settled their differences in the following manner: The plaintiff agreed that if the defendant should execute and deliver to him two promissory notes of \$50 each, indorsed in a manner satisfactory to said plaintiff, the said plaintiff would then render to the said defendant the note and contract outstanding between them, and mark same canceled; that on the date first named above it did, in pursuance of said offer, execute and deliver to the said plaintiff two notes representing the amount then owing by him, which said notes were indorsed satisfactory to the plaintiff; that the plaintiff never fulfilled his promise to deliver up to him his outstanding note and con-

tract, although he was repeatedly requested to do so, nor did he ever comply with his agreement to cancel said contract."

The evidence for the plaintiff showed that he sold the property described in the petition to defendant for \$235, \$100 of which was paid in cash and a note executed for \$135; that when said note fell due there was a payment of \$35 made thereon and a new note given for \$100; that when said note fell due, it was not paid, and plaintiff sued out purchase-money attachment; that this suit was settled by defendant executing two notes of \$50 each, bearing an indorser; and that on several occasions he demanded the property from defendant. The contract of sale in which title was reserved was introduced, and the two notes for \$50 each. Defendant swore that while the attachment proceedings were pending he executed and delivered to petitioner two notes for \$50 each, bearing an indorser, which plaintiff agreed to accept in settlement of said purchase-money attachment proceedings, and that plaintiff had never made demand for the possession of the property described in petition. In rebuttal plaintiff testified that he did not agree to accept the two notes of \$50 each and cancel the bill of sale, but accepted the two notes as additional security. The trial resulted in a verdict for the plaintiff in the sum of \$100 principal and \$12.67 interest. Thereupon the defendant (now plaintiff in error) moved for a new trial on the general grounds, and later amended this motion and alleged that:

"A new trial should be granted him (1) because the evidence adduced at the trial shows that the defendant abandoned whatever title he had to the property described in the petition when he accepted the two notes of \$50 each, indorsed as described in said brief of evidence, in settlement of the purchase-money attachment proceedings which were pending in the justice court for the 1234 district G. M. (2) Because it appears from the evidence that at the date said action in trover was filed by the plaintiff there was only one of the said \$50 notes due, and that, as to \$50 of the amount, said action was premature."

It will be noted that the first ground of the amended motion is simply an amplification of the general ground that the verdict is contrary to the evidence. The new trial was refused, and defendant excepted.

[1] 1. There was ample evidence to support the verdict. The contention of the plaintiff in error that there was no proof of the value of the property is without merit. "As between the original seller and the original purchaser, the agreed price as stated in the contract of sale is prima facie, but not conclusive, evidence of the actual value of the property." *Elder v. Woodruff Hardware Co.*, 9 Ga. App. 486, 71 S. E. 806. See, also, *Young v. Durham*, 15 Ga. App. 678, 84 S. E. 165. No effort was made to overcome the prima facie case made by the plaintiff when he introduced the contract of sale and note. "Where personalty was sold, and the vendor

retained the title until it was paid for, the amount of purchase money due, with interest, is the measure of damages recoverable in trover." *Horne v. Gulser Manufacturing Co.*, 74 Ga. 791; *Fussell v. Heard & Fullington*, 119 Ga. 527, 46 S. E. 621; *Jordan v. Jenkins*, 17 Ga. App. 58, 86 S. E. 278.

[2] 2. The second ground of the amended motion, as set out above, is without merit. "When the seller of personal property on credit takes notes payable in installments for the purchase price, and retains the legal title as security for his debt, he may rescind the conditional sale and recover the property in trover (doing equity as to any payments made), as soon as any part of the purchase-price becomes due and remains unpaid." *Scott v. Glover & Co.*, 7 Ga. App. 182, 66 S. E. 380. Besides, the jury found adversely to the contentions of the plaintiff in error, that defendant in error "abandoned whatever title he had to the property described in the petition when he accepted the two notes of \$50 each, indorsed as described in said brief of evidence, in settlement of the purchase-money attachment proceedings which were pending in the justice court."

[3] 3. There is nothing in the contention of the plaintiff in error that:

"When plaintiff sued out his purchase-money attachment for the property sold, and to which title was retained, he abandoned his title and waived his rights subsequently to institute trover proceedings for the same property." "The record does not disclose any allegation or proof that the attachment was ever levied, or that any legal notice of its pendency was served upon the defendant. It was neither alleged nor proved that the defendant either did or refrained from any act resulting in injury to him, or beneficial to the plaintiff, by reason of the previous attachment proceeding." *Jordan v. Jenkins*, 17 Ga. App. 58, 86 S. E. 278.

See, also, *Coley v. Dorch & Co.*, 139 Ga. 240, 77 S. E. 77(2).

Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 143)

PHILLIPS v. STATE. (No. 7926.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. GAMING § 98(5)—CONVICTION—NEW TRIAL—EVIDENCE.

The accusation charged that the defendant did, on a day named, "unlawfully and with force and arms by himself, servants, and agents, keep, have, use, and maintain a gaming house and room, and in a house, place, and room occupied by him, permit persons to come together with his knowledge, and play for money and other valuable things at games and devices for the hazarding of money and other things of value, contrary to the laws," etc. There was circumstantial evidence from which it might be inferred, to the exclusion of every other reasonable hypothesis, that a game played with cards and poker chips was in progress when the room of the defendant was entered by the police officers;

but there was no direct evidence, nor any circumstance in proof, from which it could be inferred, to the exclusion of every other reasonable hypothesis, that either money or other thing of value was placed at hazard in any game or that any bet or wager had ever been made at any time in the room controlled and occupied by the defendant. The defendant did not own or control the entire building, and the proof that certain persons known by common repute as gamblers had been often seen to enter and leave the building, though never seen in the room occupied by the defendant (while it was a circumstance which might furnish corroboration, if the fact of gaming in the room of the defendant had been otherwise shown), was not sufficient in itself to establish the character of the room or place used and maintained by the defendant. *Held*: The evidence did not support the inference of the defendant's guilt to the exclusion of every other reasonable hypothesis, and the trial judge therefore erred in overruling the motion for a new trial. See *Nix v. State*, 15 Ga. App. 470, 83 S. E. 876, and cases there cited. The case of *Dudley v. State*, 18 Ga. App. 509, 89 S. E. 599, is not in conflict with the above ruling as to the admissibility of testimony relating to the general reputation of a place, in a prosecution for keeping a gaming house.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 295; Dec. Dig. § 98(5).]

2. ASSIGNMENTS OF ERROR—CONSIDERATION.

The assignment of error not covered by the foregoing ruling relates to a matter not likely to recur on another trial, and therefore need not be passed upon.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Walter Phillips was convicted of maintaining a gaming house, and he brings error. Reversed.

McLaughlin & Shanks, of Columbus, for plaintiff in error. T. H. Fort, Sol., of Columbus, for the State.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 132)

WHITEHEAD v. ARNOLD. (No. 7589.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION § 36—EVIDENCE—RELEVANCY.

The exclusion of certain evidence relating to the number and amount of payments made upon the land of the plaintiff (upon which was grown the crop sued for in this trover action) was not error, it being admitted by the defendant that the bond for title and remaining notes for the purchase of the land had been surrendered by agreement between the parties in 1913, whereas this action related to the crops produced on the land in the year 1914.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 217-224; Dec. Dig. § 36.]

2. CHARGE OF COURT—ERROR.

No material error is shown in the excerpt from the charge of the court complained of.

3. APPEAL AND ERROR ⇨999(1)—VERDICT—CONCLUSIVENESS.

The issue of fact as to whether the defendant was farming the land under a bona fide claim of right as purchaser thereof, or whether he was a cropper under contract as testified to by the plaintiff, was settled by the verdict. There was evidence to authorize the verdict, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3915, 3917-3921; Dec. Dig. ⇨999(1).]

Error from Superior Court, Jasper County; J. B. Park, Judge.

Action between W. H. Arnold and Jack Whitehead. Judgment for Arnold, and Whitehead brings error. Affirmed.

E. M. Baynes, of Monticello, for plaintiff in error. Doyle Campbell, of Monticello, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 171)

NORWICH UNION FIRE INS. SOCIETY v. BAINBRIDGE GROCERY CO. et al.

(No. 7511.)

(Court of Appeals of Georgia, Division No. 2. Jan. 23, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1078(1)—EXCEPTIONS—ABANDONMENT.

The exceptions to the repelling of certain documentary evidence offered by the plaintiff in error, and the exception to the refusal of the court to allow the plaintiff in error to prove certain facts by the witness R. V. Custer, not being referred to in the brief of counsel for the plaintiff in error, are treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ⇨1078(1).]

2. TRIAL ⇨159—INVOLUNTARY NONSUIT.

Under the pleadings and the evidence admitted, no error appears in the award of a nonsuit; the prima facie case shown in the petition not being supported by the proof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-367; Dec. Dig. ⇨159.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action by the Norwich Union Fire Insurance Society against the Bainbridge Grocery Company and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

King & Spalding, of Atlanta, and E. M. Donalson, of Macon, for plaintiff in error. T. S. Hawes and W. V. Custer, both of Bainbridge, for defendants in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 148)

MCMILLAN v. HEARD NAT. BANK OF JACKSONVILLE. (No. 7236.)

(Court of Appeals of Georgia, Division No. 2. Jan. 23, 1917.)

(Syllabus by the Court.)

1. PLEADING ⇨64(2)—DUPLICITY—SEPARATE COUNTS.

In a suit on a promissory note a petition in two separate and distinct counts, one against the defendant as maker and the other against him as surety, is not duplicitous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 134-137; Dec. Dig. ⇨64(2).]

2. PRINCIPAL AND SURETY ⇨125—RELEASE OF SURETY—DISMISSAL AS AGAINST PRINCIPAL.

When a joint action is brought against the principal and the surety on a joint and several promissory note, and the plaintiff by amendment, voluntarily dismisses his action against the principal, the surety is not thereby, ipso facto, discharged from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 312-328; Dec. Dig. ⇨125.]

3. PRINCIPAL AND SURETY ⇨73—EXTENT OF LIABILITY—ATTORNEYS' FEES.

A surety on a promissory note providing for the payment of attorneys' fees is ordinarily liable therefor.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 114, 115, 455; Dec. Dig. ⇨73.]

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by the Heard National Bank of Jacksonville against the South Atlantic Blowpipe & Sheet Metal Company and T. H. McMillan. Judgment for plaintiff against defendant McMillan, and he brings error. Affirmed.

The Heard National Bank of Jacksonville brought suit against the South Atlantic Blowpipe & Sheet Metal Company as maker and T. H. McMillan as indorser, on the following writings:

"Jacksonville, Fla., Oct. 6, 1914.

"Sixty days after date we promise to pay to the order of the Heard National Bank of Jacksonville \$5,000.00, five thousand dollars, with interest after maturity at the rate of ten per cent. per annum until paid, for value received. Negotiable and payable at the Heard National Bank of Jacksonville; and if not paid at maturity this note may be placed in the hands of an attorney at law for collection, and in that event it is agreed and promised by the makers and indorsers severally to pay an additional sum of ten per cent. of the face hereof for attorneys' fees.

"South Atlantic Blowpipe & Sheet Metal Co. "By R. H. McMillan, Mgr. [Seal.]"

Indorsement on back:

"Presentment, protest, and notice of dishonor are hereby waived by each and every indorser hereon. T. H. McMillan.

"Pay to the order of Chase National Bank.

"The Heard National Bank.

"63-14 Jacksonville, Fla. 63-14.

"J. J. Heard, Pres.

"Indorsement canceled."

"Jacksonville, Fla., Nov. 5, 1914.

"Thirty days after date we promise to pay to the order of the Heard National Bank of Jack-

sonville \$1,250.00, twelve hundred and fifty dollars, with interest after maturity at the rate of ten per cent. per annum until paid, for value received. Negotiable and payable at the Heard National Bank of Jacksonville; and if not paid at maturity this note may be placed in the hands of an attorney at law for collection, and in that event it is agreed and promised by the makers and indorsers severally to pay an additional sum of ten per cent. of the face hereof for attorney's fees.

"South Atlantic Blowpipe & Sheet Metal Co.
"T. H. McMillan, Pres. [Seal]"

Indorsement on back:

"Presentment, protest, and notice of dishonor are hereby waived by each and every indorser hereon.
T. H. McMillan."

The defendant McMillan demurred both generally and specially and answered, the ground of the special demurrer being that the petition failed to set out any fact that constituted a contract of indorsement on his part. On July 10, 1915, the court sustained the special demurrer and allowed the plaintiff to amend the petition, which was done on July 16, 1915, by setting out that the defendant McMillan was surety instead of indorser on the notes sued on. By another amendment on the same day the plaintiff added to the petition a separate and distinct count, suing McMillan as maker on the notes jointly with the South Atlantic Blowpipe & Sheet Metal Company. McMillan renewed his general demurrer, and demurred specially to the petition as amended, on the ground that it was duplicitous, because the latter amendment makes equivocal allegations as to the right to recover, in that he is sued both as maker and surety. These demurrers were overruled, and exceptions pendente lite were allowed and filed by McMillan, and error is assigned thereon. By an amendment allowed on November 10, 1915, the plaintiff voluntarily dismissed its action against the South Atlantic Blowpipe & Sheet Metal Company, without prejudice to any rights it might have against that defendant, and proceeded solely against McMillan. To the petition as amended McMillan demurred, on the ground that, by reason of the fact that the suit had been dismissed against the principal or maker, the South Atlantic Blowpipe & Sheet Metal Company, he was discharged as surety; and on November 19th he moved the court, for this reason, to dismiss the action against him. The court denied this motion and overruled the demurrer, and he filed exceptions pendente lite to this judgment, and duly assigned error thereon.

On November 22d the defendant moved the court to be allowed to amend his defense by filing a plea to the effect that the plaintiff, by voluntarily dismissing its action against the principal or maker, the South Atlantic Blowpipe & Sheet Metal Company, released and discharged him as surety; and in the proposed amendment he sought to show that he had been deprived of a substantial right, in that the assets of the South Atlantic Blowpipe & Sheet Metal Company consisted of ac-

counts and notes owing to it on April 19, 1915, against which the statute of limitations was running, and that these assets were becoming less valuable and more difficult to collect, and, further, that the machinery and material owned and used by it on that date were deteriorating and becoming less valuable by wear and tear, and that the expense of keeping the said machinery and material was a constant source of expense, thereby reducing its assets. The proposed amendment further set forth that but for the dismissal of the suit against the principal McMillan would have had the right, if held and adjudged a surety, to have paid off and discharged the debt of the principal, to have had such act entered upon the execution, and to have controlled the same for the purpose of enforcing it against the principal debtor, and to have been subrogated to all the rights of the plaintiff for the purpose of reimbursing himself from his alleged principal. The court refused to allow this amendment, and the defendant filed his exceptions pendente lite to this ruling, and duly assigned error thereon. On November 22d McMillan further amended his original defense by filing a plea denying that he was indebted to the plaintiff for attorneys' fees, for the reason that he did not undertake or promise to pay the same.

On the trial the court, after hearing the evidence, directed a verdict against the defendant as surety, for principal, interest, and attorneys' fees as sued for.

Of the contentions made in the court below counsel for plaintiff in error insists upon only three propositions: First, that the petition as amended was duplicitous, and therefore should have been dismissed upon demurrer; second, that the voluntary dismissal of the suit against the principal, the South Atlantic Blowpipe & Sheet Metal Company, operated as a release and discharge of the surety, McMillan, and that the suit against him should have been dismissed upon demurrer on this ground, and his amendment, setting up this defense, should have been allowed; and, third, that his plea setting up his nonliability as a surety for attorney's fees should have been sustained.

The foregoing statement sets forth such of the pleadings and the proceedings thereon as are material to an understanding of the contentions insisted upon by counsel in this court.

P. W. Meldrim, of Savannah, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

JENKINS, J. (after stating the facts as above). [1] 1. The trial judge did not err in refusing to dismiss the plaintiff's amended petition on the ground of its being duplicitous. While the use of two or more inconsistent theories as to the right to recover in the same count would not be permissible,

the common-law rule against duplicity was, at an early date, evaded by setting out the different grounds for recovery for the same demand in separate and distinct counts. Our practice requires that the causes of action be of a similar nature, and that each count shall contain a complete cause of action in distinct and orderly paragraphs. 7 Encyclopedia Pleading & Practice, 236; Cooper v. Portner Brewing Co., 112 Ga. 895 (3), 38 S. E. 91.

[2] 2. The contention upon which the learned counsel for the plaintiff in error mainly insists is that the court below erred in refusing to sustain the demurrer, and to allow the amendment, setting up that the surety was released and discharged because the plaintiff voluntarily dismissed the suit against the principal, while maintaining it against the surety alone. While there may be, and in fact have been, instances in which such action would work such injury to the surety as to justify such a result, it cannot be stated as a rule that a surety is, ipso facto, discharged by such an act. Therefore the trial judge did not err in overruling this demurrer. The writings upon which suit is brought in the present case are joint and several obligations. Reid et al. v. Flippen, 47 Ga. 273; Booth v. Huff, 116 Ga. 8, 42 S. E. 381, 94 Am. St. Rep. 98. The liability on the notes being joint and several, it was the right of the holder to sue the principal and surety jointly, or, at his option, to sue either the principal or the surety alone. Civil Code, §§ 3553, 3559; Howard v. Brown, Adm'r, 3 Ga. 523; Reid et al. v. Flippen, 47 Ga. 273. Since the creditor thus has the right to bring his suit solely against the surety, a dismissal of the action against the maker in a joint action ordinarily works no injury to the surety, and he has no cause to complain thereof. In the case of Brooks & Tabor v. Thrasher, 116 Ga. 62, 42 S. E. 473, Justice Fish said:

"While a petition in an action against A. and B. upon a promissory note purporting to be an instrument which they had executed at the same time, A. by signing the paper on its face and B. by writing his name on the back thereof, may be amended by striking the name of A. as a defendant. * * * It was, however, in such a case, erroneous to dismiss the plaintiffs' petition upon the ground that B. appeared, from the petition, to be a surety upon the note, and the suit could not proceed against the surety after the same had been discontinued as to the principal: the note being in form a joint and several undertaking."

If, however, the particular facts and circumstances attending the dismissal of the suit against the principal in such a joint action are such as to work specific injury and damage to the surety by reason of such action, then and in such event the rule would be otherwise. In the case of Armstrong, Adm'r et al. v. Lewis, 61 Ga. 680, judgment was obtained against the maker and the accommodation indorser, and the maker appealed, giving bond and good security thereon. After judgment, and after appeal bond

with good security had been given, the creditor dismissed his appeal as to the maker, thus losing, both to the creditor and the indorser, the security and protection under the bond given by the maker on appeal. This act of the creditor necessarily harmed the surety on the note. Justice Bleckley laid down the proposition that such an act by the creditor himself would result in the discharge of the surety under the circumstances detailed in the record of that case. In the case of McCarter v. Turner, 49 Ga. 310, strongly relied upon by counsel for the plaintiff in error, there was no question of suretyship involved, and, as pointed out by Justice Cobb in Waldrop v. Wolff & Happ, 114 Ga. 617, 40 S. E. 830, and by Justice Lumpkin in Johnson v. Longley, 142 Ga. 819, 83 S. E. 952, the reasoning of Judge Trippe in that case upon the question of a surety's discharge is purely obiter. In McCarter v. Turner Judge Trippe used the following language:

"The true reason of our holding is that a creditor cannot, by voluntarily bringing suit, thus discharge the surety from the necessity of giving the notice, put him at ease and off his guard, and then, after the lapse of a considerable time, it may be after protracted litigation, suddenly, of his own motion, and without notice to the surety, dismiss the action as to the principal and claim the payment of the debt from the surety. It would be a legal cheat of the surety out of the protection the law gives to a favored class. Every right the law affords sureties it will strictly enforce. Their liability is stricti juris, and creditors must be astute not to infringe them."

The facts in the present case, however, do not bring it within the principle which the reasoning of Judge Trippe outlines. In that case, as pointed out by Justice Lumpkin in Johnson v. Longley, 142 Ga. 819, 83 S. E. 952, the right of the creditor to sue the principal had become barred, and the consequent right of the surety to require this to be done had been lost. In the present case none of the difficulties there enumerated exist. A considerable time has not elapsed; there has been no protracted litigation; the action taken by the creditor was not without notice to the surety, but done during the progress of the case where the surety had appeared and pleaded. The facts embraced in the proffered amendment by the defendant in the case at bar, as set forth above in the statement of facts, are not of such character as will take it out of the application of the general rule. The law looks with favor upon the rights of an indorser or surety, and his liability is one of strict law. However, there are statutory provisions whereby the surety may compel the creditor to bring action against his principal, or in default be, himself, discharged. Civil Code, § 3546. Civil Code, § 3544, provides as follows:

"Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk, or exposes him to greater liability, will discharge him; a mere failure by the creditor to sue as soon as the law allows, or negligence to pros-

ecute with vigor his legal remedies, unless for a consideration, will not release the surety."

The rule of law recognized in this state seems to be, as stated in the case of *Williams v. Kennedy*, 134 Ga. 345, 67 S. E. 821, that some positive act must be done by the creditor, either before or after judgment, which injures the surety in some way; mere failure or negligence on the part of the creditor will not relieve the surety, and the exceptions to this general rule will be found to be where the creditor omits to do something by which some collateral security in his hands is made unproductive, or where he is notified, under the statute, to proceed and he fails or refuses. Our courts by numerous decisions have upheld the principal that even gross acts of negligence, by way of omission, other than those mentioned, on the part of the creditor in failing to prosecute his remedies against the principal, will in no wise suffice to discharge the surety. The law, by its statutes, has given to the surety abundant remedies for his protection other than the one already mentioned, whereby he can compel suit by the creditor against the principal, by making the statutory demand upon the creditor.

"A surety or indorser is entitled to the process of attachment against his principal before payment of the debt, under the same circumstances as any other creditor." Civil Code, § 3551.

"Payment by a surety or indorser of a debt past due entitles him to proceed immediately against his principal for the sum paid, with interest thereon, and all legal costs to which he may have been subjected by the default of his principal." Civil Code, § 3552.

"If the payment was made under judgment, and the principal had notice of the pendency of the suit against the surety, the amount of such judgment shall be conclusive against the principal as to the amount for which the surety was bound. If the payment was not made under judgment, the principal may dispute the validity

of the payment as to the amount, or as to the competency of the person to whom it was paid." Civil Code, § 3553.

"If the surety has sued separately from his principal, on payment by him of the judgment against him he shall be entitled to control the judgment and execution against his principal in the same manner as if the judgment and execution were joint; and if he does not appear as surety in the judgment against him, he may give notice and make the proof and obtain the control in the same manner as pointed out in cases of joint judgment." Civil Code, § 3559.

"If the surety pay off the debt pending the action against the principal and himself, or against the principal alone, such payment shall operate only to cause the action to proceed for the benefit of such surety, and the judgment may be entered in the name of the original plaintiff for the use of such surety." Civil Code, § 3560.

These are remedies to which the surety can resort for his protection independently of any voluntary action by the creditor. The injury complained of by the surety is simply the discontinuance of a voluntary suit by the creditor, which, in the absence of a demand on the part of the surety, he was not obligated to bring. There appear to be no facts set forth in the record whereby the remedies granted the surety are rendered insufficient by reason of the plaintiff's dismissal, and thus the failure of the creditor to voluntarily provide the surety with a judgment against the principal does not, under the facts of this case, appear to have worked such injury to him as would result in his discharge.

[§] 3. The third headnote sets out the rule of liability of a surety for attorneys' fees. See *Clements, et al. v. National Bank of Tifton*, 4 Ga. App. 270, 61 S. E. 146; *Jones v. Findley*, 84 Ga. 53, 10 S. E. 541.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 156)

CORDRAY v. JAMES. (No. 7309.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. FRAUDS, STATUTE OF** \S 23(3) — **PROMISES WITHIN.**

Where a person tells another to let a third person have goods and that he will see that the debt is paid, and credit is accordingly given such promisor, the promise is an original and not a collateral undertaking, and is not within the statute of frauds. *Baldwin v. Hiers*, 73 Ga. 739; *Maddox v. Pierce*, 74 Ga. 838; *Cruse v. Foster & Estes*, 76 Ga. 723; *Ellis v. Murray & Word*, 77 Ga. 542; *Crowder v. Keys*, 91 Ga. 180, 16 S. E. 988; *Henderson et al. v. Hughes*, 4 Ga. App. 52, 60 S. E. 813.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. $\S\S$ 18, 19; Dec. Dig. \S 23(3).]

2. FRAUDS, STATUTE OF \S 26(1) — **AGREEMENTS—CREDIT.**

In all such cases, in order that the promisor shall become bound for the obligation, it is requisite that the credit shall be given exclusively to the promisor; for, if the effect of such an agreement between the promisor and the seller should be that such third person also is to be responsible, then, in such event, the contract would be merely one of suretyship, and not an original undertaking. *Reynolds, Assignee, v. Simpson & Ledbetter*, 74 Ga. 454; *Davis, Receiver, v. Tift*, 70 Ga. 52; 20 Cyc. 180, E.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. $\S\S$ 35, 42, 42½; Dec. Dig. \S 26(1).]

3. FRAUDS, STATUTE OF \S 26(1) — **AGREEMENTS—SALE.**

Where a promisor, by contract with the seller, thus renders himself solely responsible for the sale of goods furnished to another, and the seller so enters the sale and charges the items upon his books of account, a jury may find accordingly, even though the party to whom the goods were actually furnished was ignorant of such contract between the promisor and seller and regarded himself as the sole purchaser. *Cruse v. Foster & Estes*, 76 Ga. 723; 20 Cyc. 183; 15 L. R. A. (N. S.) 224, note.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. $\S\S$ 35, 42, 42½; Dec. Dig. \S 26(1).]

4. FRAUDS, STATUTE OF \S 158(2)—**ACTIONS—EVIDENCE.**

There was no error in ruling out testimony of the defendant in which he endeavored to explain his good faith in failing to pay the account in accordance with his alleged agreement, where it appeared that such agreement related to a date subsequent to that of the sale. Such an agreement being a nudum pactum, evidence upon this point is immaterial. The sole question in such an issue is whether or not the defendant made an original binding promise for the payment of the goods furnished, before the sale thereof.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. \S 374; Dec. Dig. \S 158(2).]

5. TRIAL \S 295(2)—**INSTRUCTIONS—PROPERT.**

The charge of the court, carved up as in the motion for a new trial, may possibly contain slight inaccuracies of statement; but the whole charge, taken together, is free from substantial error and correctly gave the rules of law govern-

ing the facts of this case. The verdict was authorized by the evidence.

[Ed. Note.—For other cases, see *Trial, Cent. Dig. \S 705; Dec. Dig. \S 295(2).*]

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action between T. F. Cordray and D. W. James. There was a judgment for the latter, and the former brings error. Affirmed.

Glessner & Collins, of Blakely, for plaintiff in error. Billie B. Bush, of Colquitt, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 177)

LITTLE ROCK FURNITURE MFG. CO. v. JONES & CO. (No. 7581.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 1005(2)—**VERDICT—CONCLUSIVENESS.**

While, under the pleadings and the evidence, a finding of some specific amount, either for the plaintiff or (by way of recoupment) for the defendants, was strongly authorized, it cannot be held that there was no evidence which authorized a general verdict for the defendants. The verdict returned, to wit, "We, the jury, find in favor of the defendants," having been approved by the trial judge this court has no authority to interfere.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. $\S\S$ 3860-3876; Dec. Dig. \S 1005(2).]

2. TRIAL \S 296(1) — **HARMLESS ERROR — INSTRUCTIONS.**

The excerpts from the charge of the court to which exception is taken are subject to some criticism, but, when considered in the light of the entire charge (which as a whole was a full, fair, and correct presentation of the contentions of the parties and of the law applicable thereto), do not require a new trial.

[Ed. Note.—For other cases, see *Trial, Cent. Dig. $\S\S$ 705-707; Dec. Dig. \S 296(1).*]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by the Little Rock Furniture Manufacturing Company against Jones & Co. Judgment for defendant, and plaintiff brings error. Affirmed.

W. D. McNeill, of Macon, for plaintiff in error. Robt. W. Barnes and Miller & Jones, all of Macon, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 155)

D. T. WILLIAMS VALVE CO. v. AMOROUS.
(No. 7287.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. PRINCIPAL AND SURETY — 59 — LIABILITY OF SURETY — CONSTRUCTION.**

The contract of a surety is one of strict law, and his liability will not be extended by implication or interpretation. Civ. Code 1910, § 3540.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 103, 103½; Dec. Dig. —59.]

2. GUARANTY — 36(1) — LIABILITY — LIMITATION.

A guarantor of any class may, by his contract, limit his liability according to his own pleasure, and stipulate for such diligence or preliminary action on the part of the creditor as he may choose to exact. Wright v. Shorter, 56 Ga. 72, 77.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 38; Dec. Dig. —36(1).]

3. GUARANTY — 34 — "CONDITIONAL GUARANTY" — "ABSOLUTE GUARANTY."

Where the liability of the promisor is fixed by the mere default of the principal, it is an "absolute guaranty," but if the promisor's liability depends upon any other event than the nonperformance of the principal, it is a "conditional guaranty." Stearns on Suretyship (2d Ed.) 73, § 61; 20 Cyc. 1398.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 36; Dec. Dig. —34.]

For other definitions, see Words and Phrases, First and Second Series, Absolute Guaranty; Conditional Guaranty.]

4. PRINCIPAL AND SURETY — 88 — LIABILITY OF SURETY — CONDITIONS PRECEDENT.

If the contract of suretyship expressly provides for giving information of specific acts, such information must be given, although the obligee considers such acts of no importance, else the surety will be discharged. Childs on Suretyship, 204. See, also, 1 Brandt on Suretyship (3d Ed.) §§ 2, 113.

(a) Where the contract of suretyship stipulates that notice shall be given to the surety of the principal's default, failure to give such notice within the time specified, or to give notice promptly if the contract provides for immediate notice, will prevent recovery from the surety. 32 Cyc. 176; Stearns on Suretyship, 89, 90, 163.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 135; Dec. Dig. —88.]

5. PRINCIPAL AND SURETY — 123(3) — SURETY'S LIABILITY — CONDITIONS PRECEDENT — NOTICE OF PRINCIPAL'S DEFAULT.

Where the intent of the parties is clearly expressed in the instrument, or has been fully ascertained from the circumstances, the rule of strict construction applies, and the guarantor may stand upon the precise terms of his contract. Stearns on Suretyship, 59, 60; Musgrove v. Suther Publishing Co., 5 Ga. App. 279, 284, 63 S. E. 52.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 311; Dec. Dig. —123(3).]

6. GUARANTY — 27 — CONSTRUCTION — INTENTION.

In a suit brought against a guarantor, performance by the plaintiff of a condition precedent to be performed by him must be averred in

the petition. Griswold v. Scott, 13 Ga. 210; 4 Enc. Pl. & Pr. 628.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. —27.]

7. GUARANTY — 85(1) — ACTION — PETITION — ALLEGATION OF NOTICE.

This suit was brought against a guarantor to enforce liability upon a written instrument called by the plaintiff in its amended petition a contract of guaranty. This contract, which was signed by the guarantor and accepted by the plaintiff, contained, among other things, a stipulation that "in case the said Englehart Heating Company defaults in the payment for said material and goods, according to the terms of their agreement with you, I further agree that upon notice from you to this effect by mail my agreement to pay therefor becomes absolutely unconditional." It does not appear from the petition as amended that the plaintiff ever gave the guarantor the notice required by the contract; and the court therefore did not err in dismissing the petition upon general demurrer.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 99; Dec. Dig. —85(1).]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by the D. T. Williams Valve Company against M. F. Amorous. Judgment for defendant dismissing petition upon general demurrer, and plaintiff brings error. Affirmed.

Dillon & Burress, of Atlanta, for plaintiff in error. A. A. & E. L. Meyer, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 175)

NASH v. SAVANNAH ELECTRIC CO.
(No. 7539.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***PLEADING — 218(4) — DEMURRER — DISMISSAL.**

Under the particular facts of the case, the petition, construed (as it must be) most strongly against the plaintiff, did not set forth a cause of action, and the court committed no error in sustaining the general demurrer and dismissing the suit.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. —218(4).]

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by Lena Nash against the Savannah Electric Company. General demurrer sustained, suit dismissed, and plaintiff brings error. Affirmed.

Oliver & Oliver, of Savannah, for plaintiff in error. Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 121)

FAIRES v. CENTRAL OF GEORGIA RY. CO. (No. 7430.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

*(Syllabus by the Court.)***APPEAL AND ERROR** \S 1064(1) — **REVIEW — VERDICT.**

The four excerpts from the charge of the court, assigned by plaintiff in error as hurtful to him because not warranted by the facts in the record, are not subject to the criticism made, and the verdict is not without evidence to support it. The controlling issues in the case were fairly submitted to the jury by the trial judge, and slight inaccuracies in statement should not disturb the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219; Dec. Dig. \S 1064(1); Trial, Cent. Dig. \S 525.]

Error from City Court of Polk County; J. K. Davis, Judge.

Action between A. F. Faires and the Central of Georgia Railway Company. There was a judgment for the latter, and the former brings error. Affirmed.

Wm. W. Mundy, of Cedartown, for plaintiff in error. J. Branham and Maddox & Doyal, all of Rome, and Fielder & Fielder, of Cedartown, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 121)

HINSON v. MUTUAL FERTILIZER CO. (No. 7473.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 272(1)—**EXCEPTIONS—DEMURRER—SUSTAINING.**

The third paragraph of the defendant's plea set up the only defense interposed. The court passed an order sustaining a special demurrer to this paragraph, unless the defendant should by amendment, on or before a specified date, cure the defects pointed out in the demurrer, and providing that "upon the defendant's filing amendment by said time, covering the defects pointed out in said answer, * * * said special demurrer be overruled." No exceptions pendente lite were filed, but, within the time fixed by the order, the defendant offered an amendment, which clearly failed to meet the objections raised by the demurrer, and the court rejected the amendment and thereafter directed a verdict in favor of the plaintiff. The bill of exceptions was certified more than 30 days after the judgment on the demurrer.

(a) The order sustaining the demurrer under the condition named therein, not being excepted to within the time and in the manner provided by law, fixed the law of the case to that extent; and since the amendment offered by the defendant did not comply with the terms of the order, the court did not err in rejecting the amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1611, 1612; Dec. Dig. \S 272(1).]

2. TRIAL \S 170—**DIRECTION OF VERDICT.**

The only real defense set up by the plea having been stricken, the court did not err in directing a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 390-394; Dec. Dig. \S 170.]

Error from City Court of Hazlehurst; J. R. Grant, Judge.

Action between Mrs. V. L. Hinson and the Mutual Fertilizer Company. There was a judgment for the latter, and the former brings error. Affirmed.

S. D. Dell, of Hazlehurst, for plaintiff in error. Chas. H. Parker, of Baxley, and Bennett & Swain, of Hazlehurst, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 133)

RHODES v. SAVANNAH GAS CO. (No. 7595.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

*(Syllabus by the Court.)***DISMISSAL AND NONSUIT** \S 58(4)—**MASTER AND SERVANT** \S 177—**MASTER'S LIABILITY — NEGLIGENCE OF FELLOW SERVANT.**

It clearly appears from the allegations in the petition that the proximate cause of the injury was the negligence of a fellow servant engaged with the plaintiff in performing the same work (Whitfield v. L. & N. Railroad Co., 7 Ga. App. 268, 270, 66 S. E. 973, and cases there cited; McDonald v. Eagle & Phenix Mfg. Co., 68 Ga. 844; Hamby v. Union Paper Mills Co., 110 Ga. 1, 35 S. E. 297; Moore v. Dublin Cotton Mills, 127 Ga. 624, 56 S. E. 839, 10 L. R. A. [N. S.] 772; Studevant v. Blue Springs Lumber Co., 16 Ga. App. 668, 85 S. E. 977); and since the proposed amendment set up no sufficient additional facts to make a cause of action, the trial court did not err in refusing to allow the amendment and in thereafter sustaining the oral motion to dismiss the petition (McCook v. Crawford, 114 Ga. 337, 40 S. E. 225; Kelly v. Strouse & Brothers, 116 Ga. 872, 43 S. E. 280; Ridgway v. Bowser & Co., 14 Ga. App. 300, 80 S. E. 692).

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 137; Dec. Dig. \S 58(4); Master and Servant, Cent. Dig. \S 852; Dec. Dig. \S 177.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Robert Rhodes against the Savannah Gas Company. Judgment for defendant, dismissing the petition, and plaintiff brings error. Affirmed.

Geo. H. Richter, of Savannah, for plaintiff in error. Adams & Adams, of Savannah, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 140)

E. E. LOWE CO. v. PATTERSON.

(No. 7691.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)*(Syllabus by the Court.)***APPEAL AND ERROR** \S 843(2)—**SALES** \S 398
—**ACTION FOR OVERPAYMENT** — **DIRECTED**
VERDICT—**EVIDENCE**—**REVIEW**.

The suit, as amended without objection, being obviously a suit to recover an amount of money alleged to have been overpaid to the defendant for certain shingles, together with expenses incurred in connection with the disposition thereof, and the undisputed evidence disclosing that the property realized upon sale more than the total amount advanced to the defendant and the expenses, the court did not err in directing a verdict generally for the defendant. As the verdict directed was demanded, the exceptions based upon the admission of certain testimony, which could not have affected the result under the above ruling, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3331; Dec. Dig. \S 843(2); Sales, Cent. Dig. \S 1137-1139; Dec. Dig. \S 398.]

Error from City Court of Nashville; W. C. Lankford, Judge.

Action between the E. E. Lowe Company and J. H. Patterson. Judgment for Patterson, and the E. E. Lowe Company brings error. Affirmed.

Hendricks, Mills & Hendricks, and Lewis A. Mills, Jr., all of Nashville, for plaintiff in error. Jos. A. Alexander, of Nashville, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur

(19 Ga. App. 172)

FOY-ADAMS CO. v. SMITH. (No. 7526.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***NOVATION** \S 4—**RENEWAL NOTE**—**DISCHARGE**
OF ORIGINAL LIEN—**CONDITION OF SALE**.

Where the payee of a promissory note for the purchase price of personal property, in which title is reserved in the vendor, takes a new note and cancels and surrenders the old note, the consideration of the new note being partly a renewal of the old note and partly the sale of additional property, and title to both the original and the additional property being reserved therein, these facts constitute such a novation of the first contract as will work a discharge of the original lien, in favor of an intervening purchaser for value of any part of the original property.

[Ed. Note.—For other cases, see Novation, Cent. Dig. \S 4; Dec. Dig. \S 4.

For other definitions, see Words and Phrases, First and Second Series, Novation.]

Error from City Court of Tifton; R. Eve, Judge.

Action of trover by the Foy-Adams Company against R. T. Tatum, in which Tatum gave a replevin bond with M. A. Howard as

surety, wherein plaintiff recovered judgment against Tatum as principal and Howard as surety, giving plaintiff a special lien against the property reopened. Execution issued on the judgment and was levied upon the property and wherein Eric Smith interposed a claim. Judgment finding the property not subject to levy, and plaintiff excepts and brings error. Affirmed.

On April 23, 1913, the Foy-Adams Company sold to R. T. Tatum, for the agreed price of \$244, certain property described in the purchase-money note as follows: One black mare mule, about six years old, known as the Marchant mule; also one gray mare, named "Bess"; also one 2½ White Hickory wagon. By the terms of the note, title to this property was to remain in the Foy-Adams Company until payment of the debt. The contract was duly recorded on April 26, 1913. On October 29, 1913, at which time this note was unpaid, the Foy-Adams Company sold the said Tatum additional personal property as follows: One top Norman buggy and harness, and one open stick seat Blount buggy and harness, and took from him a new note in the sum of \$390.37, the consideration of which was partly a renewal of the old note and partly the purchase of the additional property. The new note reserved title to both the original and the additional property purchased, and was duly recorded. At the time of the execution of the second note the Foy-Adams Company surrendered to Tatum the original note, and gave an order authorizing its cancellation on the record. In the agreed statement of facts it is set forth that after the surrender of the first note, the Foy-Adams Company no longer claimed any rights thereunder.

At the time the first note was taken, the mare "Bess," described therein, was with foal, and before the giving of the second note gave birth to the colt, mentioned in the second note, which colt is the sole subject-matter of this litigation. After its birth R. T. Tatum sold the colt to his brother, W. T. Tatum, and he in turn, and four months prior to the making of the second note, sold it to the claimant in this case, who, it is admitted, paid full value therefor. On September 10, 1914, the Foy-Adams Company instituted an action of trover against R. T. Tatum in the city court of Tifton, for the recovery of the property described in the second note, including the colt in dispute; the defendant gave a replevy bond, which was signed by M. A. Howard, as security, and, on January 14, 1914, the plaintiff recovered a judgment in said case against Tatum as principal and M. A. Howard, as security on the above-mentioned bond, which judgment provided that the plaintiff have a special lien against the property sued for. Execution issued on

the judgment and was levied on the property described in the second note, including finally the property in dispute. A claim was interposed by Eric Smith, the purchaser of the colt. Upon the issues thus formed (which were tried on an agreed statement of facts, before the judge of the city court of Tift county, without the intervention of a jury) judgment was rendered, finding the property in dispute not subject to the levy, to which judgment the plaintiff in execution excepted.

R. D. Smith, of Tifton, for plaintiff in error. J. S. Ridgill and O. C. Hall, both of Tifton, for defendant in error.

JENKINS, J. (after stating the facts as above). 1. It is granted by each of the parties litigant, that the mare being with foal at the time the first note was taken and the reservation of title made, that the increase, as a matter of law, followed the dam, and that up to the taking of the second note the lien attached to the colt under the reservation made in the first note in favor of the payee thereof. Therefore the sole question for this court to determine is whether the surrender of the first note and the taking of the new note, under the facts as stated, amounted to such a novation of the original contract as would divest the title, thereto held by plaintiff, in so far as the rights of claimant are concerned. We think that it did. The law is well recognized that a contract may be renewed between the same parties as to the same subject-matter, and upon the same consideration, without working a novation. Civil Code, § 4226.

In the case of Partridge v. Williams' Sons, 72 Ga. 807, the Supreme Court said:

"We think the mere renewal of a note at the same rate of interest is not a novation. No new party is added and no new consideration passes."

In Bonner v. Woodall, 51 Ga. 180, the court said:

"The renewed contract was to pay him the same amount, with the lawful interest due thereon, for the same consideration, and there is no pretense that there was any other consideration."

From Wofford v. Gaines, 53 Ga. 485, we quote as follows:

"If it be renewed, it is renewed with one of the parties to it, and the renewal is simply a contract fixing a new day as to the same matter and with no new or different consideration."

In the case of Farkas v. Third National Bank, 133 Ga. 755, 66 S. E. 926, 26 L. R. A. (N. S.) 496, this language is used:

"While it is the law that the mere taking of a new note and mortgage, the debt evidenced by

the former and the property embraced in the latter being the same, will not discharge or displace the lien of an existing mortgage, it is equally well-settled law that where the new transaction involves the payment and satisfaction of the first mortgage, the mortgagee's rights are dominated by the intervening liens of third persons, liens acquired subsequently to the execution of the first, and prior to the execution of the second mortgage."

Counsel for the plaintiff in error, in his thorough and painstaking brief, calls special attention to the rule announced in the case of Carlton Supply Co. v. Battle, 142 Ga. 606, 83 S. E. 225, L. R. A. 1916A, 926, as controlling the case at bar; but we do not think that there is any lack of harmony in the ruling there announced with the principle of law already recognized by our Supreme Court in the cases from which we have quoted. In Carlton Supply Co. v. Battle, supra, there were a number of notes executed and payable at different times, reserving title to different mules. Different payments had been made on different notes; the amounts of the unpaid notes were consolidated and one new contract was made, in which the title to all of the property described in the various notes was reserved. We do not think that the facts in that case are at all analogous to those of the case at bar. The renewal note in that case provided as follows:

"All the above property being the same property bought and mortgaged to J. J. Battle as described by Nos. 1 to 8, and this note is given to extend the old note only, and to stand in lieu of said note."

In the opinion in that case it was said:

"The taking of the second mortgage for the same debt upon the same property does not of itself extinguish the first debt."

The descriptions of the property embraced in the first and second notes, respectively, would indicate that a substitution was made as to the mule upon which the lien existed, and this, if true, would constitute an additional reason sufficient to operate a discharge of the lien under the original contract; but in the agreed statement of facts we find it stated that the property set forth in the two notes is the same, with the exception that the colt, born after the making of the first note, was included in the second, and we therefore consider that this point, if the facts be as they appear, is waived.

It is our opinion that the trial judge did not err in finding the property not subject; and the judgment of the court below is affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 158)

GILLESPIE v. FARKAS et al. (No. 7351.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. JUDGMENT \Leftrightarrow 386(1)—VACATION—MOTIONS.**

While, under the Code of this state, a judgment cannot ordinarily be set aside, except for defects appearing upon the face of the record, there are instances in which motions so designated have been granted, where based upon matters not so appearing. Whether such a petition be technically a motion to set aside a judgment, or denominated by other appropriate name under a proper proceeding, by petition with rule nisi or process and service thereon, whenever such a petition is predicated upon matters extraneous to the record, it must ordinarily be filed at the term during which the judgment was rendered; inasmuch as such a petition partakes of the nature of a motion for new trial. *Garfield Oil Mills v. Stephens*, 16 Ga. App. 655, 85 S. E. 983; *Ford, Administrator, v. Clark*, 129 Ga. 292, 58 S. E. 818; *Moore v. Moore & Cochran*, 139 Ga. 597, 77 S. E. 820; *Bourquin v. Bourquin*, 120 Ga. 115, 47 S. E. 639; *Union Compress Co. v. Leffler*, 122 Ga. 642, 50 S. E. 483.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735, 737, 738; Dec. Dig. \Leftrightarrow 380 (1).]

2. JUDGMENT \Leftrightarrow 379(1)—VACATION—FRAUD.

In order for such a motion to be entertained, at a term subsequent to that at which judgment was rendered, the movant must show a meritorious defense which he was prevented from making by the fraud of the prevailing party, and that he was not in laches; and he must show either that he had no notice of the judgment against him at the term of its rendition, or such other good cause as would excuse his failure to make such motion at that time. *Turner v. Jordan, Administrator*, 67 Ga. 604.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 717; Dec. Dig. \Leftrightarrow 379(1).]

3. JUDGMENT \Leftrightarrow 342(4) — VACATION — MOTIONS.

Where a motion to set aside a judgment obtained by fraud is presented to the trial judge in vacation, after the term of the court at which the verdict and judgment were entered, the court will not have jurisdiction to entertain the motion or grant a rule nisi thereon. *Code* 1910, § 4854; *Haskens v. State*, 114 Ga. 840, 40 S. E. 997; *Regopoulos v. State*, 116 Ga. 598, 42 S. E. 1014; *Garfield Oil Mills v. Stephens*, 16 Ga. App. 655, 85 S. E. 983; *Malsby v. Studstill*, 127 Ga. 728, 56 S. E. 988.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 670; Dec. Dig. \Leftrightarrow 342(4).]

4. APPEARANCE \Leftrightarrow 9(5)—JURISDICTION.

Where the approved bill of exceptions shows that the trial judge, in vacation, granted a rule nisi in such a motion, returnable for hearing to the next regular term of his court, and that the motion was continued from the date so set to the next regular term of the court, the fact that the opposite party appeared as cited, and moved to dismiss the petition, would not operate as a waiver on his part, nor operate to confer jurisdiction upon the court to hear and determine the same.

In dismissing the motion to set aside the judgment as made by the plaintiff in error, the trial judge committed no error, and his judgment in so doing is affirmed.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 47-49; Dec. Dig. \Leftrightarrow 9(5).]

Error from City Court of Albany; Clayton Jones, Judge.

Action between J. W. Gillespie and Mack Farkas and another, as executors. There was a judgment for the latter, and the former brings error. Affirmed.

Walters & Redfearn, of Albany, for plaintiff in error. Leonard Farkas, of Albany, for defendants in error.

JENKINS, J. Affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 199)

CITY OF GREENSBORO v. ROBINSON.
(No. 7764.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)

*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS \Leftrightarrow 797, 798—STREETS—LIGHTING—LIABILITY—EVIDENCE.**

In the absence of any statutory requirement, a municipal corporation is under no obligation to light its streets with lamps; and from the exercise of its discretion in regard to whether it will do so or not no liability will arise. But if a municipality allows a street to remain out of repair, or in a dangerous condition, the fact of the absence of lights or of safeguards of any character at the place may be considered, along with all the other evidence, in determining whether there is negligence in failing to keep the street in a reasonably safe condition for passage. *Williams v. Mayor, etc., of Washington*, 142 Ga. 281, 82 S. E. 656, L. R. A. 1915A, 325, Ann. Cas. 1916B, 196.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1656-1658; Dec. Dig. \Leftrightarrow 797, 798.]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 812(6)—PERSONAL INJURY—NOTICE—STATUTE.

The notice by the plaintiff to the governing authorities of the city, in regard to his claim for damages for personal injuries, given before the filing of his suit, was a substantial compliance with the provisions of section 910 of the Civil Code.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1701; Dec. Dig. \Leftrightarrow 812(6).]

3. DEMURRER TO PETITION.

The petition as amended was not subject to the demurrers interposed, and the court did not err in overruling them.

4. CHARGE OF COURT—MATERIAL ERROR.

The various excerpts from the charge of the court excepted to, when considered in connection with the entire charge, contain no material error.

5. MUNICIPAL CORPORATIONS \Leftrightarrow 818(12)—DEFECTIVE STREETS — PERSONAL INJURY — NOTICE—STATUTE.

Under the pleadings in the case it was not necessary for the plaintiff to show by the introduction of evidence that he had served the governing authorities of the city with the notice required by section 910 of the Civil Code of 1910.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1738; Dec. Dig. \Leftrightarrow 818(12).]

6. APPEAL AND ERROR \Leftrightarrow 1005(1)—**FINDING—APPROVAL BY TRIAL COURT—REVIEW—MUNICIPAL CORPORATIONS** \Leftrightarrow 821(3, 19, 20) — **DEFECTIVE STREET—ACTION—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

Under all the facts of the case, it was for the jury to say whether the city was negligent in constructing and maintaining the hole, four feet long (between the street and the sidewalk), in which the plaintiff fell; and, if they found that the city was negligent in this respect, to determine further whether such negligence was the proximate cause of the plaintiff's injuries. The jury heard all the evidence on the subject, and personally inspected the street and the hole, and their finding on the subject, approved by the trial judge, will not be disturbed. It was also for the jury to say whether the plaintiff, by the exercise of ordinary care, could have avoided being injured. Likewise it was a jury question as to whether the plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948; Dec. Dig. \Leftrightarrow 1005(1); Municipal Corporations, Cent. Dig. §§ 1747, 1753, 1754; Dec. Dig. \Leftrightarrow 821(3, 19, 20).]

7. VERDICT—EVIDENCE.

The verdict was supported by the evidence.

Error from City Court of Greensboro; S. H. Sibley, Judge.

Action by Phillip Robinson against the City of Greensboro. Judgment for plaintiff, and defendant brings error. Affirmed.

Noel P. Park, of Greensboro, for plaintiff in error. Lewis, Davidson & Lewis, of Greensboro, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 195)

WHITE CROWN FRUIT JAR CO. v. J. M. COX CO. (No. 7736.)

(Court of Appeals of Georgia, Division No. 2. Jan. 23, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \Leftrightarrow 121(9)—**RES GESTÆ—SALES.**

The substantive fact that numerous complaints had been made by wholesale and retail dealers, and by individual users, to the effect that the "White Crown" caps would not properly fit "Mason" fruit jars, was admissible in evidence. *Stewart v. Lanier House Co.*, 75 Ga. 582(4); *White v. East Lake Land Co.*, 96 Ga. 415, 23 S. E. 393, 51 Am. St. Rep. 141(4). Under this ruling there is no substantial merit in the fourth, fifth, sixth, seventh, eighth, and ninth grounds of the amendment to the motion for a new trial.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 320-325; Dec. Dig. \Leftrightarrow 121(9).]

2. TRIAL \Leftrightarrow 252(13) — **INSTRUCTIONS — EVIDENCE.**

The charge upon the subject of the statute of frauds, as set forth in the twelfth ground of the amendment to the motion for a new trial, was erroneous; it not being adjusted to the facts in the case. The defendant company, by the testimony of its president, Cox, admitted that it authorized the plaintiff's agent to sign its name to the order; and the issue raised by the defendant's plea of the statute of frauds was therefore eliminated. This plea was also ex-

pressly abandoned by the defendant. Further, a part of the instructions therein complained of, to wit, "if the defendant ordered these goods and gave any writing by which he was permitted to countermand the same," was unauthorized; there being no evidence whatever of any writing by which the defendant was permitted to countermand the order.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 604; Dec. Dig. \Leftrightarrow 252(13).]

3. TRIAL \Leftrightarrow 250 — **ACTION — INSTRUCTION — EVIDENCE.**

The following charge was error: "On the other hand, if the defendant did not give that order, as I have already outlined to you, containing all of the conditions with full knowledge of all of them, and did not authorize anybody to give it, and countermanded an oral order before the goods were shipped, as contended by it, then, if that is true, the plaintiff would not be entitled to recover." The record does not disclose any contention or any evidence that the defendant had countermanded an oral order before the goods were shipped.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. \Leftrightarrow 250.]

4. CHARGE OF COURT—ERROR.

There is no substantial merit in any of the other special grounds of the motion for a new trial which are based upon alleged errors in the charge of the court.

5. TRIAL \Leftrightarrow 257, 259(1)—**INSTRUCTIONS — REQUEST.**

It was not error for the court to fail to give in charge to the jury the provisions of section 5741 of the Civil Code of 1910, there having been no timely written request for such instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645, 648, 650; Dec. Dig. \Leftrightarrow 257, 259(1).]

6. APPEAL AND ERROR \Leftrightarrow 843(2) — **MISCONDUCT OF JURY — CONSIDERATION — NEW TRIAL.**

As there will be a new trial of the case, the complaint that the jury inadvertently took with them to the jury room, when they retired to make up their verdict, the interrogatories and answers of certain of the defendant's witnesses, along with the pleadings and the documentary evidence in the case, will not be passed upon, as it is very unlikely that such an irregularity will recur upon another trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3319, 3329; Dec. Dig. \Leftrightarrow 843(2).]

7. APPEAL AND ERROR \Leftrightarrow 843(2) — **QUESTION OF FACT—SUFFICIENCY OF EVIDENCE.**

A new trial being required by the errors already pointed out in the charge of the court, the sufficiency of the evidence to sustain the verdict will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3319, 3329; Dec. Dig. \Leftrightarrow 843(2).]

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by the White Crown Fruit Jar Company against the J. M. Cox Company. Judgment for defendant, and plaintiff brings error. Reversed.

Parks & Reed, of Waycross, for plaintiff in error. Parker & Parker, of Waycross, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 186)

McDEW v. HOLLINGSWORTH. (No. 7429.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)*1. EVIDENCE \S 384—PAROL EVIDENCE RULE—CONTRACTS.

All agreements, covenants, warranties, etc., made by parties to a contract are presumed to be written into the contract. A plea and answer showing that the statements and warranties alleged, if made, were made before the signing of the contract, and no sufficient allegation of fraud having been made, the written contract was in law the agreement of the parties.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. \S 384.]

2. CONTRACTS \S 342—CONSTRUCTION—FAILURE TO READ CONTRACT.

No sufficient allegation as to an emergency being made to excuse the defendant's failure to read the contract, the court did not err in striking that part of the plea.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1196, 1716; Dec. Dig. \S 342.]

3. SALES \S 277, 279 — WARRANTIES — CONSTRUCTION.

Where a written contract for the sale of a mule states that it is "about 10 years old," this will be regarded as an express warranty that the animal is about that age; and where the same contract contains an express warranty that the seller "does not warrant life, soundness nor works of said mule, only the title thereto," both warranties should be construed together; and if there is an apparent conflict between the two, they should be construed so as to reconcile all the parts of both warranties and permit the whole of the warranty of the contract to stand; and if this is impossible, the entire warranty should be construed most strongly against the party who prepared it and in whose favor it was made. Construing all the parts of the warranties together, it means that except as to the fact that the mule was about 10 years old, every other express warranty as to its kind or quality was excluded, as well as all implied warranties as to the soundness of the mule, etc. The distinct statement that the mule was "about 10 years old" cannot be excluded from the warranty. This is a material statement; the age of the mule being an important factor as to its value. The plea setting up the above warranty as to the age of the mule, and alleging that it was in reality about 25 years old can also be construed to be an attack upon the truth of this express warranty. *Mizell v. Banks*, 10 Ga. App. 362, 363, 364, 73 S. E. 410. For these reasons the court erred in striking the defendant's amended plea.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 780, 782-792, 795, 796; Dec. Dig. \S 277, 279.]

4. PLEA—STRIKING.

The error in striking the plea rendered all further proceedings in the case nugatory.

Error from City Court of Hazlehurst; Gordon Knox, Judge.

Action between A. G. McDew and A. Hollingsworth. There was a judgment for the latter, and the former brings error. Reversed.

Newton Gaskins and P. L. Smith, both of Hazlehurst, and J. W. Haygood and Eldridge Cutts, both of Fitzgerald, for plaintiff in er-

ror. Jno. Rogers, Jr., of Hazlehurst, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 185)

HANCOCK v. TIFTON GUANO CO.

(No. 7628.)

(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)*1. EXECUTION \S 166, 167 — AFFIDAVIT OF ILLEGALITY—STATUTE.

A ground of an affidavit of illegality that "the execution was issued, to the best of affiant's knowledge and belief, before the overruling of a motion for new trial in the case," is without merit. Civ. Code 1910, \S 6020. Besides, this ground is not verified positively, and was properly stricken. *Sprinz, Ex'r, v. Van-nucki*, 80 Ga. 774, 6 S. E. 816.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 485, 486, 489; Dec. Dig. \S 166, 167.]

2. EXECUTION \S 166 — AFFIDAVIT OF ILLEGALITY—STATUTE.

"If the defendant has had his day in court, he cannot go behind the judgment by an affidavit of illegality." Civ. Code 1910, \S 5311; *Tumlin v. O'Bryan & Bro.*, 68 Ga. 65; *Brantley, Adm'r, v. Greer, Guardian*, 71 Ga. 11.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 485, 486; Dec. Dig. \S 166.]

3. JUDGMENT \S 495(1) — PRESUMPTION — PLEADING AND EVIDENCE—JUDGMENT.

"Where a court has jurisdiction, it is to be presumed that it had before it pleadings and evidence authorizing the judgment rendered." *Bedingfield v. First National Bank*, 4 Ga. App. 197, 61 S. E. 30(3).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 549½, 933; Dec. Dig. \S 495(1).]

4. EXECUTION \S 168—AFFIDAVIT OF ILLEGALITY—DISMISSAL.

Where an affidavit of illegality is filed, the grounds of which are absolutely without merit, and at the trial term of the cause the defendant in *fi. fa.* is excused from the court for providential cause, it is not error requiring a reversal that afterwards, and during the term, the affidavit of illegality, on motion of plaintiff in *fi. fa.*, and over objection of the defendant in *fi. fa.*, who neither offered to amend nor made any other motion, is dismissed on the ground that the grounds of illegality are insufficient in law. Injury must result before there is error. *Goodman v. Brown*, 17 Ga. App. 778, 88 S. E. 593.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 487, 490-496; Dec. Dig. \S 168.]

5. COSTS \S 262—APPEAL—DELAY.

Not being fully convinced that this case was appealed for delay only, the request of the defendant in error that 10 per cent. damages be assessed against plaintiff in error is refused.

[Ed. Note.—For other cases, see Costs, Cent. Dig. \S 998-1000; Dec. Dig. \S 262.]

Error from City Court of Nashville; C. A. Christian, Judge.

Action between Mrs. M. C. Hancock and the Tifton Guano Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. W. Powell, of Nashville, for plaintiff in error. R. D. Smith, of Tifton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 104)

THOMAS v. STATE. (No. 6188.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW \S 398(1) — **EVIDENCE — SECONDARY EVIDENCE.**

There was testimony from which the court could have found that an original letter from the prosecutrix to the accused was in the possession of the latter; and, since he could not lawfully be compelled to produce it himself, the court did not err in admitting secondary evidence as to its contents. *Farmer v. State*, 100 Ga. 41, 28 S. E. 26; *Moore v. State*, 180 Ga. 322, 332, 60 S. E. 544; *Nalley v. State*, 11 Ga. App. 15, 19, 74 S. E. 567.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 879-881; Dec. Dig. \S 398(1).]

2. CRIMINAL LAW \S 1059(2) — **SEDUCTION** \S 40 — **EVIDENCE — ADMISSIBILITY.**

The court did not err in declining to admit testimony relative to the disposition of the bastard child, since such evidence could throw no light on the question at issue. Besides, the alleged error in the exclusion of this testimony is not precisely pointed out by the exception.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2671; Dec. Dig. \S 1059(2); *Seduction*, Cent. Dig. \S 72, 76, 79; Dec. Dig. \S 40.]

3. SEDUCTION \S 42 — **EVIDENCE — ADMISSIBILITY.**

No reversible error was committed in admitting testimony as to the general good character of two female associates of the prosecutrix; since proof of their good character tended to contradict evidence offered by the defendant to show intemperate, loose, and careless behavior on the part of the prosecutrix while she was in company with these persons and the defendant.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. \S 73-75; Dec. Dig. \S 42.]

4. CRIMINAL LAW \S 806(3), 823(15) — **TRIAL — INSTRUCTIONS.**

One distinct and unequivocal statement by the judge in his charge to the jury, that the jury must be satisfied beyond a reasonable doubt of the guilt of the accused of the offense charged in the criminal accusation upon which his trial is pending, is sufficient, and obviates the necessity of reiterating this instruction as to the various phases of the case developed by the evidence.

(a) The fact that the trial judge charged that the jury must be satisfied "beyond a reasonable doubt" that the accused was guilty of the offense of fornication, but instructed as to the offense of seduction that the jury must be satisfied of the guilt of the accused "to a moral and reasonable certainty," without making any specific reference in that immediate connection to the doctrine of reasonable doubt, is no ground for a new trial, as tending to suggest to the jury that a greater degree of certainty was necessary to warrant a conviction for the one offense than for the other (see *Austin v. State*, 6 Ga. App. 211, 64 S. E. 670; *Norman v. State*, 10 Ga.

App. 802, 74 S. E. 428), where the jury were generally instructed elsewhere in the charge that they could not convict the defendant unless they were satisfied of his guilt beyond a reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1973, 1991-1994, 3158; Dec. Dig. \S 806(3), 823(15).]

5. SEDUCTION \S 50(4) — **INSTRUCTIONS.**

"It was not reversible error, on the trial of one under an indictment charging him with the commission of the crime of seduction by 'persuasion and promises of marriage only,' for the court to give the jury the full definition of the crime of seduction as contained in Pen. Code 1910, \S 378, including the accomplishment of that crime, not only by 'persuasion and promises of marriage,' but also by 'other false and fraudulent means,' where the court subsequently instructed the jury, without specially retracting or explaining anything contained in the above instruction, in effect that the state relied for conviction upon proof of persuasion and promises of marriage." And, where the jury were so restricted to the evidence relating to "persuasion and promises of marriage" only, it was not error to omit any instruction as to what would constitute the "other false and fraudulent means" by which the crime could be accomplished. *Thomas v. State*, 146 Ga. 346, 91 S. E. 109.

[Ed. Note.—For other cases, see *Seduction*, Cent. Dig. \S 92; Dec. Dig. \S 50(4).]

6. CRIMINAL LAW \S 762(3) — **SEDUCTION** \S 50(3) — **INSTRUCTION — DEFENSE — CHARACTER OF FEMALE.**

In the trial of this defendant for the offense of seduction, under the evidence as a whole and considered in connection with the entire charge, the following instruction to the jury was reversible error: "The proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize the jury to infer actual guilt of the illicit act; but it is not a lawful defense for the accused to blacken or blackball the character of his alleged victim 'by proving loose declarations or showing imprudent or immodest conduct on the part of the woman he is accused of seducing.'" Considering the entire charge, the real defense relied upon, and the evidence offered in support thereof, this charge was harmful: (a) "Because it tended to discredit in the minds of the jury the defense, interposed by the prisoner, that the woman he was charged with seducing was not a virtuous female"; and (b) "because it contained an intimation by the court that the facts sought to be proved by the defendant constituted no lawful defense, but amounted only to an effort on his part to 'blacken and blackball the character of his alleged victim'; and also (c) because this language of the court was 'calculated to raise in the minds of the jury such a prejudice against the defendant and his defense as to require the setting aside of the verdict of guilty.'" *Thomas v. State*, supra.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1731, 1758, 1769; Dec. Dig. \S 762(3); *Seduction*, \S 50(3).]

7. ASSIGNMENTS OF ERRORS — SUFFICIENCY.

In view of the fact that there must be a new trial of this case, it is unnecessary to consider the grounds of the motion for a new trial based upon alleged newly discovered evidence; nor need the remaining assignments of error be passed upon, since they are either not sufficiently definite and complete to present any question for determination, or are without substantial merit, or else relate to alleged errors which can scarcely recur on another trial.

*(Additional Syllabus by Editorial Staff.)*8. SEDUCTION \S 32.—ELEMENTS—"VIRTUOUS FEMALE."

A woman is a "virtuous female" if her body be pure and if she has never had sexual intercourse with another, though both her mind and heart be impure.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. \S 54½–55½; Dec. Dig. \S 32.

For other definitions, see Words and Phrases, First and Second Series, Virtuous.]

Error from Superior Court, Laurens County; W. W. Larsen, Judge.

H. G. Thomas was convicted of seduction, and brings error. Reversed in conformity to answers to questions and certified to the Supreme Court. (91 S. E. 109.)

Jos. H. Hall, of Macon, Davis & Sturgis, of Dublin, C. A. Weddington, of Cochran, I. N. Eubanks and Jas. A. Thomas, both of Dublin, and Walter R. Brown, of Atlanta, for plaintiff in error. E. L. Stephens, Sol. Gen., of Wrightsville, and J. S. Adams, of Dublin, for the State.

WADE, C. J. It is unnecessary to discuss any ground of the motion for a new trial except the particular ground upon which the lower court is reversed, and no extended discussion of that ground is required, in view of the ruling made by the Supreme Court upon the abstract question decided by that court in this case, and left for application by the Court of Appeals.

[8] The precise question submitted to the Supreme Court, with the answer made thereto by a majority of that court, was as follows:

"In the trial of a case of seduction, was the following charge to the jury error because it tended to discredit in the minds of the jury the defense, interposed by the prisoner, that the woman he was charged with seducing was not a virtuous female, or because it contained an intimation by the court that the facts sought to be proved by the defendant constituted no lawful defense, but amounted only to an effort on his part to 'blacken and blackball the character of his alleged victim?' Or was this language of the court calculated to raise in the minds of the jury such a prejudice against the defendant and his defense as to require the setting aside of the verdict of guilty: 'The proof of lascivious indulgences and wanton dalliances, with other evidence short of direct proof of the overt act, may authorize the jury to infer actual guilt of the illicit act; but it is not a lawful defense for the accused to blacken or blackball the character of his alleged victim by proving loose declarations or showing imprudent or immodest conduct on the part of the woman he is accused of seducing?' The Court of Appeals is instructed that the excerpt from the charge quoted in the above question is erroneous for the reasons stated; but whether the error was cured, or the evidence was such as to avoid the necessity of a new trial, depends upon an entire review of the case, which can be done only by the Court of Appeals."

It will appear, from an examination of the foregoing question and answer, that the Supreme Court ruled upon the abstract point involved, and held definitely "that the excerpt from the charge quoted in the above question

is erroneous for the reasons stated," which includes all the reasons stated or suggested in the question; but left it open for this court to determine whether or not the error was cured elsewhere in the charge, or whether the evidence as a whole was such as to avoid the necessity of a new trial on account of this error—or, in other words, whether under a review of the entire case the error was harmful to the accused.

Elsewhere the court charged the jury as follows:

"That a virtuous unmarried female in the meaning of the law is one who at the time of the alleged seduction has never previously had unlawful sexual intercourse with a man. An unmarried female who is a virgin is virtuous, but if she with her consent unlawfully parted with her virginity she is not virtuous. The test by which a jury are to determine whether the female alleged to have been seduced was virtuous at the time of the alleged seduction is physical purity and not moral chastity. In the present case you are to consider and determine whether or not Ruby Green [the woman alleged to have been seduced] had parted with her virginity: that is, whether she had had sexual intercourse with any man prior to the alleged seduction."

The court further charged that:

"The presumption of the law in this case is that Ruby Green prior to the date of the alleged seduction by the defendant was a virtuous woman. The presumption may be overcome by evidence, either direct or circumstantial. In determining whether or not the prosecutrix, Miss Ruby Green, was or was not virtuous prior to the date of the alleged seduction, you may consider any evidence, direct or circumstantial, which shows the want of previous chastity, either mental or physical, a debauched mind, lewd or lascivious conduct anterior to the date of the alleged seduction, if such be shown by the evidence."

While the above-quoted excerpts in a general way authorized the jury to consider any evidence showing immodest, lewd, or lascivious conduct on the part of the prosecutrix in determining whether or not she was in fact, at the time of the alleged seduction, a physically chaste woman, the court followed up these general references to the circumstantial evidence which the jury might consider in arriving at such a conclusion (in the absence of direct proof of physical unchastity on her part before the time of the alleged seduction), with the following specific instruction directly relating to what was virtually the only defense interposed by the accused, to wit:

"The proof of lascivious indulgences and wanton dalliances with other evidence short of direct proof of the overt act may authorize the jury to infer actual guilt of the illicit act, but it is not a lawful defense for the accused to blacken or blackball the character of his alleged victim by proving loose declarations or showing imprudent or immodest conduct on the part of the woman he is accused of seducing. (Italics ours.) He must go further and prove that she had lost her personal chastity prior to his alleged seduction of her, or he must prove such facts as, under the law, would raise a *violent* (italics ours) presumption that she had done so: such facts as would, under the law, authorize

the jury to find that she had had sexual intercourse with a man before the alleged seduction."

The previous reference by the court to evidence which might tend to show immodest, lewd, or lascivious conduct on the part of the prosecutrix anterior to the date of the alleged seduction was general in its nature, as was also the particular instruction quoted above that "proof of lascivious indulgences and wanton dalliances with other evidence short of direct proof of the overt act may authorize the jury to infer actual guilt of the illicit act"; whereas, the further instruction, that "it is not a lawful defense for the accused to blacken or blackball the character of his alleged victim by proving alleged loose declarations on the part of the woman he is accused of seducing," tended to impress upon the jury that all the evidence offered by the accused for the purpose of showing by inference that the prosecutrix was, prior to the date of the alleged seduction, a woman of lewd character, constituted no defense which would itself authorize the jury to acquit the accused, even should they arrive at the conclusion, from any evidence of immodest or lascivious conduct, that she was not physically chaste when the alleged crime was committed. Not only did the charge as a whole fail to correct the error contained in this excerpt, but in the same connection the court further said that the defendant "must go further and prove that she had lost her personal chastity prior to his alleged seduction of her, or he must prove such facts as, under the law, would raise a violent presumption that she had done so; such facts as would under the law authorize the jury to find that she had had sexual intercourse with a man before the alleged seduction." The jury were not only advised in effect that none of the evidence introduced in behalf of the accused, to sustain the real defense interposed by him (that the woman was not at the time of the alleged seduction a virtuous unmarried female, because of behavior on her part which, measured by the ordinary rules of human conduct and experience, definitely authorized the contrary inference), made out a lawful defense, but were also instructed that the defendant must either prove that she had lost her personal chastity before the alleged seduction, or prove such facts as "would raise a violent presumption that she had done so"; the facts necessary to raise such a "presumption" being such as would authorize the jury "to find that she had had sexual intercourse with a man before the alleged seduction." When considered in connection with the positive statement by the court that it was not "a lawful defense for the accused to blacken or blackball the character of his alleged victim by proving loose declarations or showing imprudent or immodest conduct" on her part, the jury may well have understood, from the last instruction quoted above, that they were not authorized to conclude that the prose-

cutrix was a lewd woman unless there was either credible direct evidence of previous sexual intercourse on her part, or else there were circumstances in proof which, while falling short of such absolute proof of physical unchastity, nevertheless showed that the prosecutrix had been so situated with some man other than the defendant at a time and place prior to her alleged seduction by him that sexual intercourse must have followed as a natural and practically inevitable consequence.

It is clear therefore that the charge of the court did not correct the harmful error contained in this excerpt, which reflected on the value of the testimony offered by the accused as a foundation for the inference he sought to have the jury draw that the prosecutrix was physically unchaste at the time of her alleged seduction, because of previous sayings and conduct totally irreconcilable with the belief that she was even physically pure. No extended review of the evidence is necessary to demonstrate that the reference by the court to the testimony of the accused which was offered to show that the conduct of the prosecutrix was of such a character as to support a legitimate inference to be drawn by the jury that she was in fact a lewd woman could have been harmless to the accused, in the light of the entire record.

One charged with the offense of seduction is from the outset placed at a decided disadvantage, because the very nature of the crime usually precludes the possibility of knowledge on the part of any person, other than the accused and the prosecutrix, as to the time and manner of its consummation. Unless the defendant is so fortunate as to be able to show beyond all possibility of question that he was not in the society of the alleged victim at or about the time fixed by her, or else can show it was physically impossible for him to commit the crime charged, he must generally depend for any effectual defense upon direct proof that his alleged victim was not physically chaste at the time he was charged with seducing her, or proof that her acts and conduct had been so immodest and lascivious as to compel the inference (in the absence of direct proof of the fact) that she was in truth a lewd woman. It is well-nigh impossible as a rule to establish by direct proof that another man has had intercourse with the professed victim of the accused; for generally the other men involved are not easily to be discovered, nor are they ready to admit their own lascivious conduct or to assail the character of a woman who has bestowed her favors upon them, and seldom is it the case that a third person witnesses the performance of such an act. It is usually done in secrecy, and not openly or upon the house tops. The oath of the woman claiming to have been seduced is sufficient in most instances to establish the fact of the intercourse to the satisfaction of a jury (especially where, as in this case, she had given

birth to a bastard child), and where she testifies further that the intercourse was brought about by persuasion and promises of marriage, or by such other false and fraudulent means as are recognized by law, the accused may bitterly denounce her every statement which tends to criminate him, and boldly assert his innocence, and yet if he is unable to establish a difficult alibi, extending possibly over many months, and thus show that the crime could not possibly have been committed by him, or else conclusively demonstrate his sexual incapacity to commit this offense, he might be utterly unable to preserve his name from infamy and his person from the punishment awarded to the perpetrator of an infamous crime, notwithstanding his entire innocence, unless some other defense recognized by law be available. As already suggested, if the accused was exceedingly fortunate, he might perhaps obtain direct proof that the woman was not virtuous, or, if she was a notoriously lewd character, he might be able to establish this fact without special difficulty; but generally he must rely only upon testimony tending to show such conduct on the part of the woman prior to the time of the alleged seduction as would authorize the jury to infer that a woman guilty thereof was not in fact physically chaste. At best, the average juror would look with aversion upon a defense of this character, and, unless the proved conduct of the prosecutrix was so immodest or lascivious as almost to compel the conclusion that no woman guilty thereof could be physically chaste, a jury composed of average men, with natural chivalry towards the other sex, would be inclined to visit their disapproval upon an alleged seducer who attempted to set up such a defense. The defense being lawful, but nevertheless one difficult to sustain under ordinary conditions, it is vitally important that it be not discredited by any suggestion or intimation from the trial judge, and that the accused be allowed the full benefit thereof, especially where it is practically his sole defense.

Any comment on the evidence would be improper, in view of the fact that the case must be retried. It is enough to say that the defendant was charged with the commission of the crime by persuasion and promises of marriage only, and while he admitted the intercourse, but in his statement to the jury denied making any promises of marriage, his denial was unsupported, and he must have relied almost entirely upon the defense that the prosecutrix had lost her physical chastity before the date of her alleged seduction by him; and there was some proof of conduct on her part from which (if credited) the jury might have drawn this inference, irrespective of the accusing statements made by the defendant to the jury.

Under the ruling by the Supreme Court,

the excerpt from the charge of the court touching the value of the testimony under discussion must undoubtedly have conveyed to the jury an intimation that in the opinion of the trial judge the facts which the defendant sought to prove constituted no lawful defense, but amounted to an attempt by him to besmirch the character of his alleged victim, and the language of the court was calculated to strongly suggest to the minds of the jurors that the defendant was engaged in an unmanly attack on the reputation of a woman not shown to have parted with her virtue, thereby exciting their prejudices against the defendant and seriously discrediting the defense interposed by him.

[8] It is true, as held by this court in *Hays v. State*, 16 Ga. App. 21, 84 S. E. 497 (7), that:

"Under the law in Georgia a woman is a virtuous female if her body be pure; and, if she has never had sexual intercourse with another, he who first has sexual intercourse with her may be guilty of seduction, though both her mind and heart be impure."

But the particular instruction in this case, in the light of the evidence, and taking into consideration the charge as a whole, must undoubtedly have minimized the effect of the testimony relating to alleged improper conduct on the part of the prosecutrix which was presented to support an inference that she was not merely debauched in mind, but unchaste in body, and must have conveyed to the jury a very strong intimation that in the opinion of the trial judge the evidence referred to was wholly insufficient to support any such inference.

The judgment of the lower court overruling the motion for a new trial is therefore reversed.

Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 122)

DOUGHERTY-WARD-LITTLE CO. v.

JOINER. (No. 7485.)

(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR §—655(2)—DISMISSAL OF BILL OF EXCEPTIONS.

Section 6187 of the Civil Code of 1910 provides that "no bill of exceptions shall be dismissed upon the ground that the same was not certified by the judge in the time required by law for tendering and signing bills of exceptions; but if it shall appear from the bill of exceptions that the same was tendered to the judge within the time required by law, a mere failure on his part to sign the same within the time prescribed shall be no cause for dismissal, unless it should appear that the failure to sign and certify the same by the presiding judge within the time prescribed by law was caused by some act of the plaintiff in error or his counsel."

Where it affirmatively appears from the certificate of the presiding judge that, on the presentation of the bill of exceptions within 30 days

from the date of trial, the judge immediately returned it to counsel for the plaintiff in error, with the request to meet certain specific objections, and where the corrections were never in fact made, and the exceptions as originally tendered remained with the presiding judge, for the convenience of counsel for the plaintiff in error, for more than 17 months, the bill of exceptions should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. ☞ 655(2).]

Error from City Court of Nashville; W. C. Lankford, Judge.

Action between the Dougherty-Ward-Little Company and W. D. Jolner, administrator. There was a judgment for the latter, and the former brings error. Dismissed.

Lewis A. Mills, Jr., and Hendricks & Hendricks, all of Nashville, for plaintiff in error. W. D. Bule and Jos. A. Alexander, both of Nashville, for defendant in error.

GEORGE, J. Writ of error dismissed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 177)

BANK OF OMEGA v. WINGO, ELLETT & CRUMP SHOE CO. (No. 7586.)

(Court of Appeals of Georgia, Division No. 2. Jan. 23, 1917.)

(Syllabus by the Court.)

1. BANKS AND BANKING ☞105(½)—POWER OF OFFICERS—GUARANTY OR SURETY.

Neither the cashier nor any official or set of officials of a bank has authority to create a valid debt whereby it shall guarantee the payment of the obligation of another, or become surety thereon solely for the benefit of the debtor. This is true independently of any question as to the scope of authority of any such agent, for the reason that such an attempt on the part of the bank itself would be ultra vires, illegal, and void.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 249; Dec. Dig. ☞ 105(½).]

2. BANKS AND BANKING ☞99—DRAFT—RELEASE OF DRAVEE—"ORIGINAL UNDERTAKING"—"COLLATERAL UNDERTAKING."

Where a bank, holding for collection a draft with bill of lading attached, notifies the drawer, through its cashier, that it has sufficient collateral in its possession to pay the draft, and guarantees the payment thereof by a fixed day, and the bank has authority from the drawee to make such application, and where, on the faith of the representation thus made, the drawer no longer looks to the drawee for the payment of the obligation, but consents to the delivery of the bill of lading, and thereafter relies solely upon the bank for payment, such conduct on the part of the bank, despite its use of the word "guarantee," constitutes an original, and not a collateral undertaking, within the scope of its general business, and is enforceable as such.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 236; Dec. Dig. ☞99.

For other definitions, see Words and Phrases, Collateral Undertaking; Second Series, Original Undertaking.]

Error from City Court of Tifton; R. Eve, Judge.

Action by the Wingo, Ellett & Crump Shoe Company against the Bank of Omega. Demurrer to the petition as amended overruled, and defendant excepts and brings error. Affirmed.

The Wingo, Ellett & Crump Shoe Company sued the Bank of Omega, alleging an indebtedness in the principal sum of \$360. The ground of complaint, as set out in the petition, is substantially as follows: In October, 1915, Mitcham, who was engaged in the mercantile business in the town of Omega, purchased from plaintiff certain merchandise for the sum of \$362.20, which was shipped, with the bill of lading attached to a sight draft, drawn through the Bank of Omega. Mitcham failed to pay this draft, and while it, with the bill of lading attached, was being held by the bank, Ragsdale, its duly authorized agent and cashier, wrote a letter to the shippers as follows:

"Bank of Omega. Deposits Insured.

"Omega, Ga.

"Wingo, Ellett & Crump Shoe Co., Richmond, Va.—Gentlemen: With reference to your invoice to W. C. Mitcham of this place to the amount of approximately \$360.00 will say that they offer good security for a loan sufficient to take this up but owing to the fact that we are carrying a great deal of cotton at this time we are not in position to make them the loan, but we are willing to guarantee the payment of this amount by the 5th day of January, 1916. We have the security in our possession and hereby guarantee the payment of the amount of \$360.00 by the fifth day of January, 1916.

"Yours very truly,

"[Signed] H. E. Ragsdale, Cashier."

It was alleged that when the said bank did thereby assume said indebtedness, the plaintiff no longer looked to Mitcham for the payment thereof, but authorized the said bank to deliver said bill of lading, and thereafter looked solely to the bank on its obligation as an original undertaking. The plaintiff further showed, by its amended petition, that the representations as to the collateral held by the bank referred to in the said letter pertained to facts peculiarly within the knowledge of the defendant, and that the said bank had the right and the express authority from Mitcham to apply the money of the loan on said collateral to the indebtedness owing the plaintiff.

The defendant filed a general and a special demurrer to the petition, contending that the letter of the bank cashier was nothing more than an ultra vires undertaking to guarantee the payment of the account owing by Mitcham, and for which the bank could in no wise be held liable, and further contended that, even were it an attempt on the part of the bank, through its cashier, to obligate itself to pay for this merchandise as an original undertaking, the bank could not be bound therefor, because no authority existed on the part of the cashier to bind the bank by such an obligation.

The court overruled the demurrers, and it

is to this judgment that the plaintiff in error excepts.

R. D. Smith, of Tifton, for plaintiff in error. J. S. Ridgill and S. F. Mitchell, both of Tifton, for defendant in error.

JENKINS, J. (after stating the facts as above). [1] 1. The rule announced in the first headnote is a well-recognized principle, supported by abundant authority in this and other jurisdictions. See *First National Bank of Tallapoosa et al. v. Monroe et al.*, 135 Ga. 614, 69 S. E. 1123, 82 L. R. A. (N. S.) 550; 1 *Bolles on Law of Banking*, § 25; *McGee on Banks and Banking*, § 248; *Bolles National Bank Act, Annotated* (4th Ed.) 40, § 10.

[2] 2. Despite the fact that the cashier of the bank in his letter to the plaintiff agreed to "guarantee" the payment of the obligation, we think the legal effect of the facts of the case as alleged is to make out an original undertaking on its part, and the use of the word indicated must be treated as merely an inaccuracy of statement, inconsistent with the general purport of the bank's act and intent. A contract of suretyship exists where one pledges his credit for the benefit of another, and is distinguished from that of guaranty in that in the latter form of obligation the consideration is a benefit flowing to the guarantor. In either of such contracts, however, the person assuming the obligation of another must pledge his credit therefor. The contentions of the petition in this case, fairly construed, show that the bank had agreed to extend a loan to Mitcham in order that the obligation in question might be discharged, and that, in pursuance of that purpose, it had actually taken into its possession and held for its protection as security certain collateral belonging to Mitcham. The only condition of the loan was that the money would not need to be actually furnished until a later date, named in the letter to plaintiff. It is alleged that Mitcham had agreed that the proceeds of the agreed loan should be applied by the bank to the payment of plaintiff's debt. Thus, when the bank, by its agreement with the plaintiff, acted on by it, assumed, or, as called by the cashier, "guaranteed," the payment of this obligation, and thereby became liable therefor, the securities of Mitcham in the hands of the bank became subject to the purpose agreed on, and Mitcham himself had then no power to withdraw the same or apply the proceeds of such loan to any other purpose.

Counsel for the plaintiff in error, in his admirable brief and argument before this court, himself makes the statement, which, of course, is not subject to question, that the cashier might have extended a loan to Mitcham for the purpose of discharging his obligation to the plaintiff. Then, since the allegations of the petition show that such a loan had in effect been made, and the se-

curities therefor actually placed in the hands of the bank, to be held by it for the purpose named, it appears that the promise of the bank was one wherein it simply agreed with the plaintiff, by Mitcham's permission, to apply to the plaintiff's debt the funds of Mitcham so held by it. In so doing it in no wise pledged its own credit, nor in any way became liable for any possible default of him who had been the original debtor. Thus it is that, since no pledge of the bank's credit is involved, an essential element of a contract of guaranty is lacking; and, as the promise of the bank is founded on a good consideration to the bank by reason of its loan to Mitcham and by reason of the surrender by plaintiff of its bill of lading, we think its promise an original, and not a collateral one.

It is contended, however, by the defendant bank, that even had its cashier attempted to obligate it to the plaintiff as an original undertaking, and not as a guarantor, the same rule of nonliability would apply, because of the want of authority by the cashier to enter into such a contract. It is maintained that such an undertaking on the part of the cashier would be wholly beyond the scope of his authority, and, if so, the principal would not be bound by any such act of its agent. Dismissing now the question of acts which are ultra vires, and therefore illegal for the bank itself to perform, we can see no reason why we should hold that the executive officer of a bank could not act for it in arranging a loan to one of its customers, and, by his authority, agreeing with another to pay over to it the proceeds thereof. Indeed, our Supreme Court, in the case of *Bullard Bros. v. Bank of Madison*, 121 Ga. 527, 49 S. E. 615, seems to hold, at least by clear implication, that such an act would be neither illegal on the part of the bank nor unauthorized on the part of its cashier as the agent thereof. The principle announced in that case is as follows:

"A promise by the cashier of a bank, made without consideration to the drawer of a draft, to pay the same out of funds of a customer on whom the draft is drawn and who has been credited with the proceeds of negotiable paper which he as owner transferred to the bank, is not enforceable against the bank, unless the customer assents that the bank shall make such an application of the funds so placed to his credit."

This court is inclined to think that, even if the facts as alleged in the petition were to be so construed as to set up a contract in the nature of a guaranty on the part of the bank, there would be ground for holding it liable to the plaintiff in the present suit. While it is true that a bank can never be permitted to render itself liable under a contract of suretyship, whereby it would seek to pledge its credit for the benefit of another, still, as already indicated, a contract of guaranty differs from that of surety, in that the consideration in the former case is a benefit flowing to the guarantor. And

while it should be the settled policy of our courts to scan closely all contracts entered into by a bank, whereby it may seek in any way or for any purpose to become responsible for the obligation of another, still in the case of *First National Bank v. Monroe*, supra, the Supreme Court limited its ruling upon the prohibition of a guaranty to those cases in which the bank undertakes to do so solely for the benefit of another. Bearing constantly in mind that in the present case the defendant bank in effect holds funds belonging to Mitcham under an agreement with him that they are to be used in extinguishment of the plaintiff's debt, we think that the reasoning of the Supreme Court of the United States in the case of *Citizens' Central National Bank of New York v. Appleton*, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443, is pertinent to the case at bar. In that case the court spoke as follows:

"The plaintiff in error insists that the guaranty given by the Central National Bank to the Cooper Exchange Bank was beyond its power, was in violation of the national banking act, and therefore could not be made the foundation of an action against the guarantor bank. But this action need not be regarded as one on the written contract of guaranty, but as based on an implied contract between the Cooper Exchange Bank and the Central National Bank, whereby the latter * * * came under a duty to account to the former for the \$10,000 of the \$12,000 actually paid to Samuels at its request and on its guaranty. The law would be very impotent to do justice if it could not, under these circumstances and without violating * * * legal principles, compel the Central National Bank to recognize and discharge that duty. Samuels owed the Central National Bank \$10,000 and with knowledge, perhaps, of his financial condition, he was put forward by that bank to obtain \$12,000 from the Cooper Exchange Bank so that it could get \$10,000 out of that sum, for its own use. The circumstances show that the latter bank would not have loaned the money to Samuels except at the request and on the guaranty of the Central National Bank. * * * In short, the Central National Bank, by means of the device mentioned, got \$10,000 of the money of the Cooper Exchange Bank for its own use, and having used it for its own benefit, it now seeks to avoid liability therefor, upon the ground that it was not allowed by the law of its creation to execute the guaranty in question. We know of no adjudged case that stands in the way of relief being granted as asked by the plaintiff. * * * Whatever may be said as to the validity of the written guaranty now alleged to be illegal, the judgment can be supported as based wholly on the implied contract, which made it the duty of the Central National Bank, under the facts disclosed, to account to the Cooper Exchange Bank for the money obtained from the latter in execution of the agreement made by the former with the borrower."

In the case of *Aldrich v. Chemical National Bank*, 176 U. S. 618, 20 Sup. Ct. 498, 44 L. Ed. 611, Mr. Justice Harlan, speaking for the court, said:

"As the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity Bank, who assumed to represent it in the transaction and as the Fidelity Bank used the money so obtained in its banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York Bank, even if it were true, as contended, that the Fidelity Bank could not, consistently with the law of its creation, have itself borrowed money. * * * If the latter bank in this way used the money obtained from the Chemical Bank, it is under * * * obligation to pay it back or account for it to the New York bank. It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. * * * Suppose a national bank, in violation of the act of Congress, takes as security for a loan made by it a deed of trust of real estate, and subsequently causes the property to be sold and the proceeds applied in payment of its claim against the borrower, a surplus being left in its hands, which it uses in its business or in discharge of its obligations. If sued by the borrower for the amount of such surplus, could the bank successfully resist payment upon the ground that the statute forbade it to make a loan of money on real estate security? Common honesty requires this question to be answered in the negative. But it could not be so answered if it be true that the Fidelity Bank could use in its business and for its benefit money obtained by one of its officers from another bank, under the pretense of a loan, and be discharged from liability therefor upon the ground that it could not itself have * * * borrowed from the other bank the money so obtained and used. There is nothing in the acts of Congress authorizing or permitting a national bank to appropriate and use the money or property of others for its benefit without liability for so doing."

In the case of *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55, the court says:

"A contract ultra vires being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain an action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The ruling of this court in the present case, however, is based upon the principles announced in the headnotes thereof; and, for the reasons therein stated, the judgment of the court below overruling the demurrer is affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 133)

KIRKLAND v. CITIZENS' TRUST CO. OF UTICA, N. Y. (No. 7618.)(Court of Appeals of Georgia, Division No. 1.
Jan. 23, 1917.)*(Syllabus by Editorial Staff.)***1. PARTIES — 95(2) — AMENDMENT — ALLOWANCE.**

Where the petition alleged that notes were executed by defendant indorsed by plaintiffs, and payable to a named bank, but did not allege any transfer to plaintiffs, although alleging that defendant was indebted to plaintiffs on account of the notes, it was not error for the court to allow an amendment to the petition whereby the bank was joined as a party plaintiff suing for the use of plaintiffs; and this is so notwithstanding the absence of averment that plaintiffs had paid the notes.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 161; Dec. Dig. 95(2); Pleading, Cent. Dig. § 611.]

2. BILLS AND NOTES — 534 — ACTIONS — ATTORNEY'S FEES.

Where notices served upon defendant fully described the notes in suit, and expressly alleged that plaintiffs were the present holders and demanded attorney's fees, attorney's fees were properly allowed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. 534.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by the Citizens' Trust Company of Utica, N. Y., against E. E. Kirkland, for the use of Ferris, Lewis & Fuller. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Ferris, Lewis & Fuller brought suit against Kirkland on two notes, payable to the Citizens' Trust Company, of Utica, N. Y., or order, signed by Kirkland under seal, and indorsed by Ferris, Lewis & Fuller. There was no transfer of the notes or of either of them to the plaintiffs, nor is there any allegation in the original petition that the indorsers have paid off the notes, but it is alleged that the defendant is indebted to the petitioners upon the notes attached to the petition; and the notices served upon the defendant for the purpose of fixing liability for attorney's fees, and made a part of the petition, state that the petitioners are the "present holders" of the said notes. The notices claiming attorney's fees identify the notes, and demand payment thereof in the name of the plaintiffs. The defendant made a motion to dismiss the suit, on the grounds that the petition set forth no cause of action in favor of the plaintiffs, that it appeared that the title to the notes sued upon was in the Citizens' Trust Company, and that there was no assignment of the notes and no allegation that the plaintiffs had paid off the notes. On the hearing of the motion to dismiss the plaintiffs tendered an amendment making the Citizens' Trust Company a party plaintiff, suing for the use of Ferris, Lewis & Fuller. To this amendment Kirkland objected, on the grounds

that it added a new and distinct party plaintiff, and that there was nothing in the original petition to amend by. The court overruled the objection, allowed the amendment, and overruled the motion to dismiss the action, and rendered judgment for the full amount of principal, interest, and attorney's fees sued for, and the case was brought to this court for review.

M. B. Eubanks, of Rome, for plaintiff in error. Denny & Wright, of Rome, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] 1. The amendment was properly allowed by the court. *Neal Bank v. Bruce*, 137 Ga. 361, 73 S. E. 503 (1); *Gelders v. Kennedy et al., Executors, for the Use, etc.*, 9 Ga. App. 389, 71 S. E. 503; *Toole v. Cook, Adm'r, for the Use, etc.*, 15 Ga. App. 133, 82 S. E. 772 (1).

[2] 2. The court properly entered judgment for attorney's fees, the notices served upon the defendant fully describing the notes upon which suit was brought, and expressly alleging that Ferris et al. were the present holders of the same. This point is expressly ruled in *Gelders v. Kennedy*, and *Toole v. Cook*, supra. The amendment substituting the bank as party plaintiff, suing for use of Ferris and others, did not affect the right of plaintiff to attorney's fees.

There is a motion in this case to assess damages for delay, and we think that the motion is meritorious. Damages are therefore awarded in favor of the defendant in error and against the plaintiff in error in terms of the statute.

Judgment affirmed, with damages.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 186)

REALTY BOND & MORTGAGE CO. v. HARLEY. (No. 7644.)(Court of Appeals of Georgia, Division No. 2.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. LANDLORD AND TENANT — 169(6) — CONDITION OF PREMISES — INJURY TO TENANT — SUFFICIENCY OF EVIDENCE.**

The evidence authorized a finding for the plaintiff.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 645, 665, 683; Dec. Dig. 169(6).]

2. APPEAL AND ERROR — 1004(1) — REVIEW — AMOUNT OF RECOVERY — QUESTION FOR JURY.

The question of amount of damage is one for the jury, and the court should not interfere unless there is something in the record or in the size of the verdict to indicate that the verdict was the result of prejudice or bias on the part of the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3944; Dec. Dig. 1004(1).]

3. NEW TRIAL \Leftrightarrow 104(1), 105—NEWLY DISCOVERED EVIDENCE — CUMULATIVE AND IMPEACHING EVIDENCE.

The alleged newly discovered evidence is largely cumulative and impeaching, and is not sufficient to warrant the granting of a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 183, 218, 221-223, 228, 229; Dec. Dig. \Leftrightarrow 104(1), 105.]

4. COSTS \Leftrightarrow 260(1) — AFFIRMANCE — DAMAGES FOR DELAY.

"The motion of the defendant in error to assess damages for delay is denied. While there is no reason for the grant of a new trial, still the verdict is not so manifestly correct as to exclude a bona fide insistence on the part of the plaintiff in error that a new trial should be granted." *Atlantic Coast Line R. Co. v. Locklear*, 9 Ga. App. 344, 71 S. E. 683.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983, 986, 996; Dec. Dig. \Leftrightarrow 260(1).]

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by Lloyd Harley, a minor, by his father and next friend, P. L. Harley, against the Realty Bond & Mortgage Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wilson & Rogers, of Savannah, for plaintiff in error. Twiggs & Gazan, of Savannah, for defendant in error.

BLOODWORTH, J. Lloyd Harley, a minor, by his father and next friend, P. L. Harley, brought suit against the Realty Bond & Mortgage Company, alleging, that said company was the owner of a certain house and lot in the city of Savannah; that P. L. Harley rented an upstairs apartment, and after renting discovered that "the premises were in a fearful state of disrepair," that window panes were broken out, and that the railing of the upstairs balcony had several railings or rails missing, so as to leave open spaces two or three feet wide in the banister; that his father notified the defendant of the condition of the premises, and of the railing in particular; that this notice was given several times, but the company failed and neglected to repair same; that Lloyd Harley, a child of tender years, went through the space in the window where the pane was missing, out upon the balcony, and fell through the space in the railing to the street below, striking upon his head and thereby depressing the skull and affecting the brain; that the child was knocked unconscious and had to be taken to the hospital, where it remained for two weeks; that after leaving the hospital the said child remained at home in bed for three weeks; that there is a depression in the skull, and said child has been dull and stupid ever since; that said Lloyd Harley was of such tender years as to have been incapable of negligence; and that the injuries to said child were due solely and entirely to the negligence of the defendant company, its agents, servants, and employes. The special acts of negligence alleged were:

"(A) In not repairing said house and the windows and balcony thereof by putting in the necessary panes and railings so as to make the said house a safe one for the occupants. (B) In failing to put said house in a condition of good repair when notified by the tenant of the defects therein. (C) In maintaining said house in a dangerous and defective condition, to wit, the panes and glass missing and railings missing from the balcony banister, when the defendant knew, or ought to have known, that such condition created a dangerous place for children."

Petitioner sued for \$5,000 for the physical injuries, for deformity to his head, for mental pain and suffering, for injury to his mental faculties, and the permanent handicap which said weakness will entail. The Realty Bond & Mortgage Company denied all the averments referring to negligence and damage. Upon a trial of the issue, the jury returned a verdict for the plaintiff in the sum of \$1,000, and defendant made a motion for a new trial on the general grounds. This motion was subsequently amended by adding two additional grounds, one of which was that the verdict was excessive, and the other based upon alleged newly discovered evidence.

[1] 1. Did the evidence authorize the verdict for plaintiff? The allegations in the petition, which are paraphrased above, if true, make a good case. Practically every allegation is proven as stated in the petition. The allegata and probata are in unison. This being true, there is ample evidence to support the verdict.

"This court is a court for the correction of errors in law and in equity alone. It has no authority to entertain an assignment of error that the verdict is contrary to the evidence, if there is any evidence at all to support the verdict." *Bell Bros. v. Aiken*, 1 Ga. App. 36, 57 S. E. 1001.

"There is nothing in the evidence in the record to take the case out of the established rule that the verdict of the jury, approved by the trial judge, is conclusive as to all issues of fact." *Atlantic Coast Line R. Co. v. Locklear*, 9 Ga. App. 344, 71 S. E. 683.

[2] 2. Was the verdict so excessive as to clearly show prejudice or bias on the part of the jurors, and thus require this court to set it aside? There is no direct proof in the record of prejudice or bias, and nothing therein to indicate it, unless it be in the amount of damages awarded. Before the verdict will be set aside because it is excessive, where there is no direct proof of prejudice or bias, it must appear that the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear "exorbitant," "flagrantly outrageous," and "extravagant." "It must be monstrous indeed and such as all mankind must be ready to exclaim against at first blush." It must carry its death warrant upon its face. We find in this verdict no such inherent iniquity. The presiding judge, in the order refusing a new trial, said:

"There was ample evidence to support the verdict. * * * The strongest claim is that

concerning the size of the verdict. * * * I think the verdict is large, but I cannot say that it is so large as to justify me in granting a new trial on that ground."

It is presumed that when a judge refuses to grant a new trial he has exercised that discretion vested in him by law. In addition to this presumption, the above statement of the trial judge expressly shows that in this case he exercised his discretion; and when this is done, unless this discretion has been abused, the order refusing a new trial should be final on this point. The jurors who saw and heard the witnesses fixed the amount of the verdict, it was approved by the presiding judge, "and, if the court trying the case does not consider the damages excessive, any other court ought to be cautious in [doing] so." *Adkins v. Williams*, 23 Ga. 222 (2). If the verdict in this case does not speak its own doom, the fact that the amount of the verdict may appear large is no reason why it should be set aside. Even though we should consider the verdict in this case "large and generous," "courts will never, in the absence of the most satisfactory evidence that the verdict is erroneous, substitute their impressions for the opinion of the jury." *Lang v. Hopkins*, 10 Ga. 37 (3). In the case last cited, Judge Lumpkin said:

"As judges, we are not authorized to substitute our conjectures or apprehensions for the determination of that body on whom the law has devolved the duty of deciding, duly weighing all the circumstances of the case. * * * Judges should be very cautious, therefore, how they overthrow verdicts given by twelve men on their oaths, on the ground of excessive damages, upon a matter left so entirely to their discretion, especially when the presiding judge before whom the case is tried, and who is presumed to have been familiar with all the facts, has refused to interfere. For this court to order a rehearing, under such circumstances, it must be made manifest by the proof that the damages were 'flagrantly outrageous and extravagant.'"

This is quoted by Judge Powell in the case of *Holland v. Williams*, 3 Ga. App. 630, 60 S. E. 331:

"A verdict in one of that class of cases in which the amount of damages is left to the enlightened conscience of the jury is not to be declared by a reviewing court to be excessive, unless it is so large in amount as to justify the court in believing that it could not reasonably have resulted from any other cause than bias or gross mistake on the part of the jury." S.

A. L. Ry. Co. v. Miller, 5 Ga. App. 402, 403, 63 S. E. 299.

In discussing the method of proving prejudice or bias, Judge Powell, in the case last cited, said:

"The question is: How is this bias or this mistake to be shown? Sometimes it may be shown directly, but this is rarely so. Usually it is a matter of inference, and in that event the solution falls within the rule as to circumstantial evidence—there must be no reasonable hypothesis other than that the bias or the mistake did exist."

Is there "no reasonable hypothesis" other than that this verdict is the result of prejudice or bias? Assuredly there is. The presumption is that the jurors were impartial and understood their case. It is therefore a more "reasonable hypothesis" that their finding was based on the evidence considered impartially in connection with the charge. See *Georgia Ry. Banking Co. v. Keating*, 99 Ga. 308, 25 S. E. 669 (2); *Atlantic & Birmingham R. Co. v. Douglas*, 119 Ga. 658, 46 S. E. 867 (4).

"Upon naked questions of fact, where no error by the court in the progress of the trial is complained of, doubt in the appellate court is to be given in favor of verdicts, and not against them." *Brown v. Meador*, 83 Ga. 406, 9 S. E. 631.

[3] 3. Is there anything in the alleged newly discovered evidence to take it out of the general rule that "ordinarily circumstantial and impeaching evidence is not ground for a new trial"? No. The sole effect of the alleged newly discovered evidence would be to contradict, impeach, one of the witnesses for the plaintiff. *Civil Code*, § 6085; *Roy v. State*, 140 Ga. 223, 224, 78 S. E. 846 (3). Besides, this evidence was as to the location of the father of the child at the time of the accident, as related to the opening in the banister through which the child fell, and the location "where the child must have been lying unconscious after said fall," and based upon an inspection of the premises after the trial. Ordinary diligence requires that this inspection should have been made prior to the trial. *Civil Code*, § 6086; *Cadwalader v. Fendig*, 137 Ga. 140, 72 S. E. 903. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(106 S. C. 232)

**WATERLOO SCHOOL DIST. NO. 14 v.
CROSS HILL SCHOOL DIST. NO. 6.**
(No. 9584.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. SCHOOLS AND SCHOOL DISTRICTS — CHANGE OF BOUNDARIES.

Const. art. 11, § 5, provides that the General Assembly shall provide for the division of counties into suitable school districts, but that the present division shall remain until changed by the General Assembly. School Act 1896 (22 St. at Large, p. 161) § 31, provides that the county boards of education shall divide their counties into convenient school districts, but that the present division of the counties into school districts shall remain until changed by the county boards of education. Section 62 of that act provides that nothing in the act shall be construed to repeal the acts of the General Assembly creating special and graded school districts. In 1900 (23 St. at Large, p. 360), said section 31 was amended so as to authorize county boards of education to divide their counties into convenient school districts and to alter the lines thereof, and create additional school districts, etc. *Held*, that prior to the 1900 amendment of said section 31, the county boards of education could alter the lines of any school district that had not been created by act of the Legislature, and that after such amendment these county boards could alter the lines of any school district, whether or not created by act of the Legislature.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 59½; Dec. Dig. ¶ 36.]

2. CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWER — COUNTY BOARDS OF EDUCATION.

Const. art. 3, § 1, providing that the legislative power shall be vested in the Senate and House of Representatives, is not infringed by Act 1896, § 31, as amended in 1900, authorizing county boards of education to alter lines of school districts, such legislation not being an attempt to delegate legislative powers to the county boards of education, but merely to define their powers and duties, as authorized by Const. art. 11, § 3, providing that the General Assembly shall define the powers, duties, etc., of school officers; there being a marked distinction between the imposition of a duty and the delegation of a legislative power.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 110-112, 114; Dec. Dig. ¶ 63(3).]

3. CONSTITUTIONAL LAW — CONSTRUCTION — POWER OF GENERAL ASSEMBLY — GRANT OR LIMITATION.

The powers of the General Assembly are plenary as to all matters of legislation, unless limited by some provision of the Constitution.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 80; Dec. Dig. ¶ 26.]

4. SCHOOLS AND SCHOOL DISTRICTS — ALTERATION OF BOUNDARIES—REVIEW.

The decision of a county board of education, altering the lines between school districts, is appealable to the state board of education.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 68, 69; Dec. Dig. ¶ 39.]

Original application for certiorari by the Waterloo School District No. 14 against Cross Hill School District No. 6. Petition dismissed.

F. P. McGowan, of Laurens, for appellant.
Simpson, Cooper & Babb, of Laurens, for respondent.

GARY, C. J. This is an application to the court, in the exercise of its original jurisdiction, for a writ of certiorari, to review the judgment of the state board of education, reversing the decision of the county board of education of Laurens county, which was to the effect that the territory in question, formerly constituting a part of Waterloo school district and now claimed by Cross Hill school district should be restored to Waterloo school district. Cross Hill school district and Waterloo school district were created by acts of the Legislature, respectively, in 1893 (21 St. at Large, p. 651) and 1894 (21 St. at Large, p. 1076). About the year 1901 the county board of education of Laurens county altered the dividing line between said school districts, so as to take from Waterloo school district a part of its territory, and place it in Cross Hill school district. In 1915 Waterloo school district filed a petition with the county board of education, alleging that the action of the former county board of education in transferring the said territory from Waterloo school district to Cross Hill school district was in excess of its powers, and therefore null and void, and prayed that said territory be restored to it. The county board of education rendered its decision, in favor of Waterloo school district, and Cross Hill School District appealed to the state board of education.

The main question raised by the proceedings in certiorari is whether the action of the county board of education was in excess of its powers, when it took the territory in question, and gave it to Cross Hill school district. Section 5, art. 11, of the Constitution is as follows:

"The General Assembly shall provide for a liberal system of free public schools, * * * and for the division of the counties, into suitable school districts, * * * Provided, * * * that nothing in this article contained shall be construed as a repeal of the laws under which the several graded school districts of this state are organized. The present division of the counties into school districts, and the provisions of law now governing the same shall remain until changed by the General Assembly."

Section 31 of the act adopted in 1896 (22 St. at Large, p. 161) contains the following provisions:

"The county boards of education shall divide their counties into convenient school districts. * * * The present division of the counties into school districts shall remain until changed by the county boards of education."

Section 62 thereof provides that:

"Nothing contained in this act shall be construed to repeal the acts of the General Assembly creating special and graded school districts, and the provisions of said acts shall apply to said school districts. * * *"

In 1900 (23 St. at Large, p. 360) section 31 of said act, was amended, so as to read as follows:

"The county boards of education shall divide their counties into convenient school districts * * * and shall alter the lines thereof, and create additional school districts, from time to time," as the interests of the schools, may, in their judgment, demand."

Section 5, art. 11, of the Constitution imposed upon the General Assembly the duty of providing for a liberal system of free public schools and the division of the counties into suitable school districts. That section also provided that the division of the counties into school districts then existing, and the laws governing the same, at that time should remain of force until changed by the General Assembly, but no longer. Therefore, when the act of 1896 was passed by the General Assembly, the proviso in section 5, art. 11, of the Constitution became inoperative, as its purpose had been subserved. Sections 31 and 62 of the act of 1896, when construed together, show that it was the intention of the General Assembly to impose upon the county boards of education the duty of dividing their counties into convenient school districts, but prohibiting them from changing the boundary lines of those school districts, that had been created by acts of the General Assembly.

[1] After giving that system a trial, no doubt it was found that the provision prohibiting the county boards of education from interfering with the boundary lines of the school districts which had been formed by acts of the Legislature was disappointing in its results, and hampered the county boards of education, in the discharge of their duties. Accordingly the General Assembly passed an act in 1900, amending the act of 1896, in the manner hereinbefore stated. Before the passage of that amendment, the county boards of education were vested with the power to alter the lines of any school district that had not been created by act of the Legislature. The only reason that can be assigned for its enactment is that it was intended to empower the county boards of education to alter the lines of school districts that had been created by acts of the Legislature; otherwise it would be without any force and effect whatever.

[2] It is contended by the petitioner's attorney that the act of 1896 was unconstitutional on the ground that the General Assembly could not delegate to the county boards of education the power to divide the counties into school districts. Section 1, art. 3, of the Constitution is as follows:

"The legislative power of this state shall be vested in two distinct branches, the one to be styled the 'Senate' and the other the 'House of Representatives,' and both together the 'General Assembly of the State of South Carolina.'"

Section 3, art. 11, of the Constitution is as follows:

"The General Assembly shall make provision for the election or appointment of all other necessary school officers, and shall define their qualifications, powers, duties, compensation and terms of office."

[3] The principle is well established that the powers of the General Assembly are plenary, as to all matters of legislation, unless limited by some provision of the Constitution. Not only is there no provision in the Constitution prohibiting the General Assembly from vesting the county boards of education with authority to divide the counties into convenient school districts and alter the lines thereof whenever in their judgment it would be for the best interests of the public schools, but section 3, art. 11, of the Constitution in express language confers upon the General Assembly the power to define the qualifications, powers, duties, compensation and terms of office of the county school officers. The General Assembly has not attempted to delegate its powers to the county boards of education, but merely to define their powers and duties. The distinction is marked between the imposition of a duty and the delegation of a legislative power.

[4] Our conclusion is that the county board of education was acting within the scope of its authority when it altered the lines between Waterloo and Cross Hill school districts in the first instance, and that it also had the power to restore the territory which it had taken from Waterloo school district and given to Cross Hill school district, but that their decision was appealable to the state board of education.

It is the judgment of this court that the petition be dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(79 W. Va. 432)

NORTON v. KANAWHA COUNTY COURT.
(No. 3318.)

(Supreme Court of Appeals of West Virginia.
Jan. 17, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 102—MATERIALITY.

In a proceeding to ascertain the identity of the person voted for in an election, it is competent, when necessary, to show by proof the facts and circumstances pertaining to the election, including the nominating convention or primary, the correct name of the candidate, his eligibility and residence within the territorial division or subdivision in which, if elected, he will perform the duties of the office, whether on the ballots to be used therein his name appears as certified to the printer as required by law, and whether any other person of the same or a similar name was nominated or voted for, for the same office, and possesses the requisite constitutional or legislative official qualifications to hold such office. This proof is admissible only to the extent it tends to establish the identity of the candidate and with substantial accuracy the preference of the voter as indicated by the ballot he casts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 155, 156; Dec. Dig. \S 102.]

2. ELECTIONS \S 188—BALLOTS—INTENTION OF VOTER.

Where such identity and intention may so be ascertained, the ballot cannot be ignored or disregarded merely because of the unauthorized or inadvertent substitution of a false for the true initial letter of the candidate's surname, or the wrong initial of his Christian name, or of other slight alterations therein, unless thereby the ballot fails to reveal with reasonable certainty the real intention of the voter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 162; Dec. Dig. \S 188.]

3. ELECTIONS \S 186—BALLOTS—DISREGARDING.

Slight errors or irregularities on the part of one charged with the duty of preparing official election ballots will not be permitted to defeat the real intention of the voter, if such intention may be determined with reasonable certainty from the ballot cast by him in the light of the surrounding circumstances.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 159; Dec. Dig. \S 186.]

4. ELECTIONS \S 188—BALLOTS—REJECTION.

The mere inadvertent alteration in the name of a candidate cannot so operate, unless the alteration renders doubtful or ineffectual the designation of the candidate intended by the voter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 162; Dec. Dig. \S 188.]

Original petition by E. B. Norton for writ of mandamus against the County Court of Kanawha County. Writ awarded.

Donald O. Blagg, of Charleston, for petitioner.

LYNCH, P. Upon the facts alleged in the petition, supported by affidavits and not controverted, the question for determination is whether the county court, or the several members thereof, may, by mandamus, be compelled to permit the petitioner to qualify as justice of the peace of Cabin Creek district under the certificate of election issued to him as the person elected to that office.

[1] At the time of and since the June primary, E. B. Norton was and still is a resident of Cabin Creek district, and as such eligible and qualified to discharge the duties of the office, and was nominated as one of the two candidates of the Democratic party in the primary; and although his name was properly certified to the board of ballot commissioners, and by that board to the printer selected to print the ballots to be used by the electors in the general election, his name by inadvertence was printed on the ballot as E. B. Morton instead of his true name. According to the affidavits filed, many of the voters observed this defect; but, fearing lest their votes might not be counted for any candidate if they should change the name as printed on the ballot to express their intention, they voted for E. B. Norton under the name as it appeared thereon. By that name he claims he was elected as one of such justices. No other person having the same or a similar name, or known as E. B. Norton, resided in the district, or was nominated, or eligible or qualified to fill the position of jus-

tice therein at or near the time of the primary or the general election, or before or since such elections; nor did any other person of that name receive a certificate of election issued by the county court, or by the individual members thereof, acting as a board of canvassers pursuant to the provisions of chapter 3 of the Code, or claim the right to qualify before the court as such officer.

On the canvas of the returns of the election by the county court, the candidates of the Democratic party, Brennan and Norton (the latter by the erroneous name Morton), received a majority of the votes cast for justices of the district, and certificates of election therefor accordingly were issued and delivered, one to P. L. Brennan, the other to E. B. Norton, although his name appeared misspelled on the ballots polled in the general election. But E. B. Norton alleges the certificate of election so issued to him, together with an oath of office duly executed by him, and the bond required by law were presented by him to the county court, with a request that they be accepted, and that he be permitted to enter upon the lawful discharge of the duties of the office. This motion and request the county court denied, basing its refusal solely upon the ground that the voters had not cast their votes for him. Neither the court nor any of its members raised any objection to the form or sufficiency of the oath or bond so tendered.

To the alternative writ no return has been made by the county court or by any of its members, all of whom are parties to the petition and were duly served with the alternative writ, wherefore the relator moves this court to award the peremptory writ to compel the defendant county court, Grant Copenhaver as its president, and M. P. Malcolm and Lawrence Christy as commissioners thereof, to approve the official bond presented by the petitioner as justice of the peace of Cabin Creek district, and to permit him to qualify as such justice and enter upon the discharge of the duties of said office.

In determining the propriety of awarding the compulsory process, it is competent to ascertain by proof, when controverted, whether the relator was a candidate regularly nominated by his party for the position to which he alleges he was elected; and, if so, whether any other person of the same or a similar name resided within the territory and was a candidate for the same office, and, if so, whether he was eligible to fill the office or had also been nominated therefor within the district; and if a ballot had been printed imperfectly or inadvertently, or changed so as to be defective. This proof is admissible to show the circumstances surrounding the election, for the purpose of ascertaining with substantial certainty the intent of the elector in casting his ballot. Cooley, Const. Lim. 919; 9 R. C. L. 1123.

[2] Where such intention may be ascertained with reasonable accuracy, by the application of the rule stated, that intention ought not to be defeated merely by the unauthorized substitution of a false for the true letter in the name of a candidate, or a wrong initial of his name, or some other slightly different appellation, unless it more nearly approximates or represents the name of another candidate for the same office. *Brown v. McCollum*, 76 Iowa, 479, 41 N. W. 197, 14 Am. St. Rep. 228. The ballots polled in an election should be accepted in view of all the facts and circumstances involved in the preliminary and subsequent proceedings, including the nominating convention or primary, for the sole purpose of ascertaining, so far as may be with accuracy, the intention of the voter, and, when ascertained, to give effect to that intention. The rule of liberal interpretation is especially applicable in cases of this character, whatever may be the nature of the contest, in order to render effective rather than ineffectual the preference of a voter when expressed or indicated by the ballot he casts. *McCrary on Elections*, 393; *Gumm v. Hubbard*, 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312.

[3, 4] Mere irregularities or slight errors on the part of an officer charged with the preparation of official ballots will not destroy the efficacy of the ballots, nor invalidate the election. 15 Cyc. 352. The negligent or unauthorized act of the officer whose duty requires him to print the ballots as they are certified to him by the proper authority will not deprive the elector of the right to cast his ballot and to have the same counted for the candidate of his choice, nor the successful candidate to enjoy the benefits and perform the duties of the office. The mere inadvertent alteration of a letter in the name of a candidate cannot have that effect, unless the printed or substituted name so materially differs from the true name as to render the ballot wholly ineffectual, or so defective as a designation of the candidate nominated and intended by the voter. Such diversity between the name certified and the one printed on the official ballot is not sufficient to defeat the right of E. B. Norton to qualify as a justice and enter upon the discharge of the duties of the office, under the rule announced by Judge Cooley, re-enforced in *Attorney General v. Ely*, 4 Wla. 420, and reiterated in *Gumm v. Hubbard*, supra. Such an irregularity on the part of election officers, or their omission to observe some merely directory provision of law, or the failure of the printer to print the ballots as they are certified to him, ought not to vitiate the polls and deprive the elector of the right to express his preference between candidates for any office, except where the defect is such that it cannot be determined for whom the elector intended to cast his ballot. *Anderson v. Win-*

free, 85 Ky. 507, 4 S. W. 351, 11 S. W. 307. But it must be made to appear, by those claiming the benefit of the election, that such irregular conduct or departure from legal requirements has not prevented an honest and fair election as between contesting candidates. *Fowler v. State*, 68 Tex. 30, 3 S. W. 255.

These legal principles, when applied to the uncontroverted facts of this case, make it clear that no person named or known as E. B. Morton resided in the same district, or was a candidate for the office of justice of the peace therein, or aspired to that position, or was eligible or qualified to fill the office, or claimed to qualify as such; and that E. B. Norton was known and recognized as the candidate of his party for that position in the district, actively canvassed the district in his behalf, and that the board of canvassers, who issued the certificate of election to E. B. Morton, delivered it to E. B. Norton. Their failure to make return to the rule awarded and duly executed on them, and the proof taken in support of the averments of the petition, lead to the conviction that E. B. Norton was the candidate duly elected to discharge the duties of the office, and justify the award of the writ to require the county court to permit him to qualify as such officer, in obedience to the expressed will of the legal voters voting upon that subject.

The writ prayed for is awarded.

(79 W. Va. 463)

KINNEY v. TOWN OF WEST UNION.

(No. 3094.)

(Supreme Court of Appeals of West Virginia.
Jan. 23, 1917.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL §52—SURVIVAL OF CAUSES OF ACTION.

Causes of action that survive, and may be prosecuted by or against the personal representative of a decedent, primarily and generally are such as affect property or property rights; the wrong to the person being merely incidental.

[Ed. Note.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 248-254; Dec. Dig. §52.]

2. LIMITATION OF ACTIONS §32(1) — RUNNING OF STATUTE — ALTERATION OF STREET GRADE.

Five years is the limitation period prescribed for actions to recover damages to real estate occasioned by the alteration of a street grade or by an improvement in the street of a municipality.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 143, 145; Dec. Dig. §32(1).]

3. MUNICIPAL CORPORATIONS §400—CHANGE OF GRADE OF STREET—LIABILITY.

A municipal corporation is chargeable with the consequential damage to real estate resulting from the construction of an approach to a public bridge in a street under its control, although the structure extends across the corporate boundary and was built under the authority of a county court, the town and county jointly contribut-

ing to the cost of the improvement, the town alone changing the grade of the street and erecting one of the approaches to the bridge.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 962-964; Dec. Dig. § 400.]

4. MUNICIPAL CORPORATIONS § 404(5) — DAMAGES—EVIDENCE.

In an action to recover damages for injuries to real estate due to a public improvement, it is error to admit testimony to show an unsanitary condition produced by the accumulation of water, or injury to a private sewer, caused by the improvement, where the declaration fails to aver such injuries as elements of the cause of action.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 993-995; Dec. Dig. § 404(5).]

5. TRIAL § 136(1) — PROVINCE OF COURT — OPINION OF FACTS.

A well-recognized rule of practice general in its application, based on the theory of an absolute impartiality, requires a judge to refrain from indicating, in terms or by conduct, an opinion upon the facts detailed to a jury upon the trial of an action, or upon defects of construction in a public improvement when viewed by the jury at the instance of the litigants.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 318, 320, 321, 323-325; Dec. Dig. § 136(1).]

Error to Circuit Court, Doddridge County.

Action by J. Ed Kinney against the Town of West Union. There was a judgment for plaintiff, and defendant brings error. Reversed, and remanded for new trial.

A. F. McCue, of West Union, for plaintiff in error. W. S. Stuart, of West Union, for defendant in error.

LYNCH, P. Conceiving himself aggrieved by the diminution in the value of his property resulting from the alteration of the grade of Neely avenue in front of his house and lot and the appropriation of the major part of the avenue at that point to the construction of the abutment and approach to a bridge, approximately half of which is within the limits of the defendant corporation, plaintiff brought this action, and obtained the judgment which defendant charges is infected with error. Apart from the approaches, steel and cement entered into the construction of the piers, abutments, supports, girders, flooring and guard rails, and lumber into the approaches, except as to the cement footers for the platform supports. The county court of Doddridge county, as the active agency in the erection of the bridge, assumed the liability for the cost of the improvement, upon the condition that it was to be reimbursed to the extent of one-half of the expense incurred, the town of West Union, the sole defendant, to permit the appropriation of Neely avenue, within its corporate limits, to consummation of the improvement. While the record does not clearly disclose the method by which the reimbursement was to be effected in the proportion required, it is conceded in argument by counsel representing each litigant that two-thirds of the fund

necessary for that purpose was raised by public subscription, the town contributing the other third thereof out of its annual revenues, and that it furnished the material and performed the work required to construct one of the approaches necessary to render the entire structure available for public travel when completed, and, further, that these conditions were performed fully and satisfactorily as contemplated by the parties at the inception of the work.

This concurrence in the expense of the improvement is accounted for only on the theory of the joint interest of the court representing the county and council representing the town and lack of the authority or power of either of them, acting alone, to cause the bridge to be built or of sufficient funds under the control of either to complete the bridge. With the motive prompting the joint action or the correctness of either theory or the propriety of the enterprise we are not now concerned. As to none of these matters is there any question raised or doubt cast by either of the parties. The bridge was completed and the structure opened for the use of the public, and now is used by it.

[2] By the first assignment defendant challenges the correctness of the ruling on its demurrer to the declaration. It is charged to be insufficient solely because it shows on its face that the action was commenced after the lapse of one year from the date the cause of action accrued; hence barred by the statute. That provision, however, does not apply. The cause of action would, under the statute, have survived the death of the plaintiff at any time within five years after the right to sue had accrued to him, whether he had brought or failed to bring the action while living. The right to sue in the first instance, or to prosecute in the second, would not have abated by death except after the expiration of five years.

[3] In part the injury averred consists of an obstruction to the free use and enjoyment of a public street in its original condition, a use interrupted by the change of grade and by the superimposition of an additional servitude due to the abutment and approach created by the defendant itself within the corporation boundary. An action for such obstruction survives to the personal representative. *Fleming v. Railroad Co.*, 51 W. Va. 60, 41 S. E. 168.

[1] Causes of action ex delicto that survive and may be prosecuted by or against a personal representative primarily and generally are those which affect property or property rights; the wrong to the person being merely incidental. 1 C. J. § 803, *Woodford v. McDaniel*, 73 W. Va. 736, 81 S. E. 544, 52 L. R. A. (N. S.) 1215, and *Gawthrop v. Coal Co.*, 74 W. Va. 39, 81 S. E. 560, point out the line of demarcation between causes of action which survive to or against the

representative of a decedent and those that finally abate by his death. Generally, tort actions for wrong to property rights survive, while actions for wrongs done to the person abate, except, among others, that the right to maintain actions for statutory penalties dies with the person. *Gawthrop v. Coal Co.*, supra. Clearly the declaration is not defective in that particular; and it sufficiently states a good cause of action.

On the theory that, as the bridge, although in part within the town limits, was constructed under the direction and control of the county court, that court alone is liable to respond in damages for any pecuniary loss occasioned thereby to the property of the plaintiff; also is relied on to exonerate defendant from the liability sued for. That burden cannot so be shifted, nor defendant thereby relieved from responsibility for the injury resulting from an act in the consummation and maintenance of which it participated, and the benefit of which it has since enjoyed. So far as the structure is within its territorial jurisdiction, the municipality is liable for the consequences of the original construction and its location in the thoroughfare under its control, and for injuries due to lack of proper maintenance and repairs. The bridge when completed became part of the streets of the town, and, as such, subject to its dominion and control. *Curry v. Man-nington*, 23 W. Va. 14; *Cavender v. Charleston*, 62 W. Va. 654, 59 S. E. 732. If its maintenance creates a nuisance, it is subject to municipal correction; if it wrongfully inflicts injury upon the person or property of another, the town must respond to the injury. These principles are so well settled in this state as not to require further discussion or citation of authority. In Maine the court, in *Perkins v. Oxford*, 66 Me. 545, held defendant liable for injuries caused by defects in an interurban bridge jointly constructed by defendant and another municipal corporation, where the injury occurred within the jurisdiction of the defendant, although due to the failure of the other corporation to repair its part of the structure. A similar holding will be found in *Peckham v. Burlington*, *Bray*. (Vt.) 134.

[4] Defendant assigns as erroneous the admission over its objection of testimony introduced by plaintiff in support of his right to a recovery that in the process of the erection of the necessary piers the contractors caused an interruption of the flow of a sewer connecting the property alleged to be damaged with Middle Island creek, whereby his cellar became flooded with water, inflicting physical injury to his property. The correlation of this proof with the cause of action averred in the declaration is not apparent. Indeed, it is inconsistent with the permanent injury claimed by the plaintiff. The defect so introduced is readily remediable; it has been remedied by the repair of the breach in the sewer line. For the expenditure so oc-

casioned the defendant may or may not be liable, but surely not in this action. This proof should not have been admitted.

Without any averment in his declaration to impart to defendant information of an intention to offer proof on that phase of the case, plaintiff was permitted to introduce testimony tending to show the accumulation of water on the approach and its escape through the flooring to the ground below in front of his house and lot, thereby creating an unsanitary condition which injuriously affected the value of his property. Without such averment for the purpose of notice, this proof ought not to have been admitted. The purpose of a declaration is fully to state the essential elements of the cause of action averred as the basis of the recovery demanded, to enable the defendant to prepare his defense to meet the different important phases of the claim preferred against him.

[5] Again, defendant complains of the undue activity of the presiding judge during the progress of the trial, and especially while the jury was engaged in viewing the premises at the request of the plaintiff. While a judge is sitting at the trial of a case before a jury, he occupies an exalted position and exercises important legal functions. Ordinarily he does and properly ought to refrain from any undue participation in the examination of witnesses in lieu of counsel engaged in the conduct of the trial, except where he seeks special enlightenment upon the statement of a witness misunderstood by him or upon some phase of the case necessary for a just decision of the matters involved and overlooked by counsel. Even then the ethics and proprieties of the office forbid resort to any demonstrative language, artifice, or device, whether intended or dissembled, or any manner of expression the effect of which is to impart to the jury trying the case or readily lead them to adopt the views so indicated by language or action, instead of a conclusion reached in the ordinary mode in an effort to arrive at just results unaided by judicial influence. A judge, it is true, is clothed with an authority and charged with the performance of functions other than those of a mere presiding officer of an indiscriminate assemblage convened for the accomplishment of some public purpose. He is not a mere figurehead to put motions and decide points of order. But the importance and dignity generally conceded to the position and the fact that he is presumed to be wholly impartial as between litigants emphasize the necessity for avoiding, in so far as the exercise of his legitimate functions will permit, any act or conduct that would indicate to the triers of the facts the views of the judge upon any matter to be submitted to them for determination. It is to their judgment, not the judgment of the court, that parties submit their cases in the first instance. Sound principles deny the right of a judge actively to point

out, and by pointing out indicate, the seriousness of the defects or imperfections of construction in property viewed by them at the instance of counsel to enable them to understand and weigh with accuracy the testimony later detailed to them by the witnesses. It is a rule of practice well recognized and general in its application that a judge should refrain from indicating an opinion as to the facts of a case on trial by a jury. And it is just as much a violation of this wholesome rule to do by innuendo or other indirect means what it forbids him to do directly or specifically. 1 Thomp. Trials, §§ 218, 219; 38 Cyc. 1316. What effect upon the jury, if any, resulted in this case from the remarks so made in their presence no one can know, perhaps not even the members thereof; and although doubtless what was said was not intended to influence them in ascertaining the true facts, yet it is a matter of common observation that jurors are alert always to hear and interpret the remarks directed to them from the bench; and, while we might not be disposed to reverse the judgment for this reason alone, we cannot wholly ignore what seems to be an unconscious and doubtless unintentional infraction of these sound and well-authenticated principles and rules of procedure.

The troublesome questions arise out of the instructions given at the instance of the plaintiff upon the measure of damages in cases of this character. Many of them present mere abstract legal principles, usually the embodiment of points of the syllabus of decided cases involving cases similar to the one before us. Upon the use of these this court has frequently animadverted, not because of any doubt of the correctness of the principles announced, but because when delivered to a jury not trained in legal discrimination there is danger of a misapplication to the facts of the case before them. Indeed, many of the witnesses examined upon the trial, who seem to have been men possessed of more than an ordinary degree of intelligence and acumen, confessed their inability to comprehend without assistance from the court or counsel the distinction between general and special benefits to the property involved, when applied to inquiries of this nature. Yet to aid the jury there were propounded upon this vital inquiry instructions abstract in form, which have been differently interpreted almost, if not altogether, as frequently as any other subject considered by courts and authors of law text-books. Concededly the statement and application of the doctrine of special benefits is inextricably involved in confusion. Besides, a correct understanding of the principle embodied in the instructions does not always assure its correct application by the jury. What properties are "similarly situated"—an expression sometimes used in the decisions—is a question as to which exist

grave doubts in the minds of ordinary men. The mere location on the street of property benefitted, perhaps benefited, by a public improvement, does not necessarily exclude the idea of general or special benefits to other properties not on, but near, such street; and yet the rule obtaining in this state does exclude the benefits accruing to properties in the same community, although other jurisdictions extend the doctrine so as to include them. Again, the measure of damages prescribed in the instructions requires the jury to ascertain as best they can the difference in value immediately before and immediately after the improvement is made, ignoring general benefits and deducting special benefits, when benefits of each character doubtless had theretofore accrued in contemplation of the projected improvement and before work thereon began. These difficulties are pointed out, not for the purpose of disturbing the measure prescribed with more or less exactness in many of our decisions, but to illustrate the improbability of a jury of laymen possessing the capacity to absorb and apply that standard of measurement supplied to guide their deliberation when presented in an abstract form without any attempt to assist them in the proper application of the standard to the facts before them. But, to avoid any misapprehension, it is proper to observe that one of the earliest and perhaps an accurate abstract definition of peculiar benefits, applicable alike to this case and to condemnation proceedings, is: Such benefits as particularly and exclusively affect the particular tract of land damaged, and not advantages of a general character which may be or are derived in common by the owners of land along the line of improvement or benefits derived by the community at large. *Railroad Co. v. Foreman*, 24 W. Va. 662; *James River Co. v. Turner*, 9 Leigh (36 Va.) 313. See, also, *Harman v. Bluefield*, 70 W. Va. 135, 73 S. E. 296.

Apart from the irregularity noted, which may be cured upon the second trial, the instructions given are not erroneous, except No. 5 requested by plaintiff, which is unintelligible as it appears in the record, and except No. 5 given for defendant, which is erroneous in principle, if not misleading. Plaintiff's instruction No. 1, we think, is not subject to the criticism urged against it. It does not foreclose inquiry into the question of liability, as defendant contends. What has been said as to the broken sewer and accumulation of water indicates the impropriety of the instructions requested upon these matters. As the evidence upon another trial may be materially different, it is not proper now to indicate our views upon the criticism urged against the amount of the verdict and judgment.

We therefore reverse the judgment, set aside the verdict, and remand the action for a new trial.

(79 W. Va. 445)

SHUMAN v. SHUMAN. (No. 3012.)(Supreme Court of Appeals of West Virginia.
Jan. 23, 1917.)*(Syllabus by the Court.)***1. PLEADING \S 143—RECoupMENT—NOTICE—SUFFICIENCY.**

Notice only being necessary to entitle a defendant to recoup damages for a breach of the contract on which plaintiff sues, a special plea filed in such case, although unnecessary as a plea, should be treated as notice, and, if sufficient as such, should not be stricken from the record.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 292; Dec. Dig. \S 143.]

2. PAYMENT \S 63(3)—PLEADING—NECESSITY.

Payment, unless partial only, may be proven under the general issue in assumpsit.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 158, 159; Dec. Dig. \S 63(3).]

3. PAYMENT \S 5—MODE—EFFECT.

Payment of a debt to a third person, with the approval, or at the request of the creditor, is, in legal effect, a payment to the creditor.

[Ed. Note.—For other cases, see Payment, Cent. Dig. \S 7, 8; Dec. Dig. \S 5.]

4. WITNESSES \S 129—COMPETENCY—TRANSACTIONS WITH DECEASED PERSON.

Where plaintiff's action is based on defendant's personal promise to him, defendant is a competent witness to prove a discharge thereof by payment made by him to plaintiff's mother, notwithstanding her decease at the time such testimony is offered. The testimony, in such case, not being against the plaintiff in his capacity of administrator, heir at law, distributee, legatee, or assignee of the deceased, section 23, c. 130, Code 1913 (section 4879), makes defendant a competent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 556-560; Dec. Dig. \S 129.]

5. WITNESSES \S 414(1)—CORROBORATION—COMPETENCY OF EVIDENCE.

Where the defense is payment, made to a third person at the request of plaintiff, evidence tending to prove that plaintiff, as administrator of such third person, in whose estate both he and defendant were jointly interested, paid to defendant his share of the proceeds thereof, after the debt sued for was payable, and without then making any claim therefor or reference thereto, is admissible, as corroborative of defendant's testimony concerning payment.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1287; Dec. Dig. \S 414(1).]

Error to Circuit Court, Wetzel County.

Action by Sylvester M. Shuman against T. A. Shuman. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Larrick & Lemon, of New Martinsville, for plaintiff in error. Thos. P. Jacobs and F. V. Iams, both of New Martinsville, for defendant in error.

WILLIAMS, J. In February, 1907, Jesse Shuman died seised of a tract of 247 acres of land, leaving to survive him a widow, Massa Shuman, and five children as his only heirs, two of whom are the plaintiff and the defendant. On the 17th of June, 1907, S. M. Shuman, the plaintiff, sold his one-fifth un-

divided interest in the Pittsburg seam of coal underlying said tract of land to his brother T. A. Shuman, the defendant, at the price of \$1,235, payable in 10 days thereafter. Within the 10 days defendant paid to plaintiff \$823.32, two-thirds of the price, and thereupon a deed was immediately made by all five of the joint owners, in which the widow joined, conveying the entire Pittsburg vein of coal underlying the land, together with certain mining privileges, to H. C. Babb.

This action of assumpsit is brought to recover the balance claimed by plaintiff to be due on the contract of sale to his brother. Defendant pleaded the general issue, and also tendered and was permitted to file five special pleas, all of which however were, on motion of plaintiff made at a subsequent term, stricken out over defendant's objection. The case was then tried on the general issue, resulting in a verdict for plaintiff at the direction of the court. The defendant's motion to set the verdict aside was overruled and judgment entered thereon for \$635.33.

[1] Striking out defendant's special pleas is assigned as error. The first plea avers plaintiff agreed to sell and convey to defendant the one-fifth interest in the coal, free from all incumbrances, and that, pursuant to that agreement, plaintiff, at the request of defendant, executed a deed with covenants of general warranty of title to H. C. Babb; that Massa Shuman, widow of Jesse Shuman, deceased, was then entitled to dower in the coal, which was an existing incumbrance, and therefore constituted a breach of plaintiff's warranty; that defendant was compelled to pay her the sum of \$411.67 in order to procure a release of her dower right in the coal; and that he has thereby sustained damages equal to the amount of plaintiff's claim. By this plea defendant seeks to recoup damages growing out of the transaction which forms the basis of plaintiff's suit, which he may do. But a special plea setting up this defense was not necessary. A defendant may recoup under the general issue, by giving notice of his purpose to do so. *Organ Co. v. House*, 25 W. Va. 64, and *Franklin v. Lumber Co.*, 66 W. Va. 164, 66 S. E. 225. But, although not necessary as a plea, it should have been regarded as a notice of recoupment and not have been stricken from the record. *McClanahan v. Caul*, 63 W. Va. 418, 60 S. E. 382.

[2] Plea No. 2 avers that payment of the sum sued for was made to Massa Shuman, the widow, at the special request and instance of plaintiff. Payment by the debtor to a third person, by direction of the creditor, is as valid as if made to the creditor in person. *Exchange Bank v. Cookman*, 1 W. Va. 69; 30 Cyc. 1183; *Hurst v. Whitley*, 47 Ga. 366; and *Baughan v. Brown*, Adm'r, 122 Ind. 115, 23 N. E. 695. And the defense of payment need not be specially pleaded, but may be proven under the general issue. *Shore v. Powell*, 71 W. Va. 61, 76 S. E. 126. However, the

rule is different, requiring plea of payment and bill of particulars, if the payment is partial only. *Shanklin v. Crisamore*, 4 W. Va. 131; *Simmons v. Trumbo*, 9 W. Va. 358; and *Lawson v. Zinn*, 48 W. Va. 312, 37 S. E. 612. Hence this plea was unnecessary, and therefore properly stricken from the record.

Pleas Nos. 3, 4, and 5 set up, in varying form, the same defenses averred in the first two special pleas, and were therefore properly rejected.

[3] It is admitted that defendant paid two-thirds of the amount for which the note was given within the time specified, and defendant offered to prove that he paid the remaining third to Massa Shuman, the widow, at plaintiff's request; but the court refused to admit this testimony. Payment to a third person by direction of the creditor being a legal discharge of the debt, this testimony was admissible. It tended to prove a fact which should have been submitted to the jury, and which, if proven to their satisfaction, was a complete defense.

[4] Although defendant's competency to prove payment to his mother, she being dead at the time of the trial, is not mentioned in brief of counsel, nevertheless we think it proper to pass upon that question, as it is likely to arise on a new trial. The exception in section 23, c. 130, Code (section 4879), excluding parties to a suit and persons interested in its result from testifying concerning personal transactions with persons deceased at the time such testimony is offered, does not apply in this case, for the reason that plaintiff is not asserting a claim in his official capacity as administrator of his mother, nor as her heir at law, distributee, legatee, or assignee. His cause of action grows out of the personal contract between himself and defendant. It established the relation of debtor and creditor between them, and plaintiff's relationship to the deceased party, to whom defendant claims to have made payment, does not render him incompetent to prove the fact. The testimony offered is not against him in any one of the capacities enumerated in the statute, the purpose of which was to remove the incompetency, as witnesses, of parties to suits and persons interested in the results thereof, which existed at the common law, except in so far as the testimony of such witness related to personal transactions between himself and a person deceased or insane at the time the testimony is offered, and only then is such witness incompetent when the testimony is against a person whose claim or interest in the suit is derived by virtue of his relation to the deceased as personal representative, heir at law, distributee, legatee, or assignee.

[5] Defendant offered to prove that plaintiff, as administrator of their mother, disbursed to him his distributive share of the proceeds of her estate, long after the note sued on was payable, and did not then mention the

debt now sued for; but the court refused to admit this testimony. This testimony, while not direct, is nevertheless corroborative of defendant's testimony tending to prove payment to his mother and should have been admitted.

Plaintiff requested two instructions to be given to the jury, both of which were refused. The first one was to the effect that, if the jury believed from the evidence plaintiff and defendant agreed that one-third of the money due on the contract should be paid to their mother and defendant did thereafter pay that amount to her, they should find for the defendant. The second would have told the jury that, if they believed from the evidence defendant paid said sum to his mother, and plaintiff thereafter ratified and confirmed said payment, they should find for defendant.

The court's refusal to give these instructions was consistent with its rulings on the evidence, which rulings we have determined were erroneous. Defendant's testimony being excluded, there was no basis for the instructions. But they should be given, if again requested on a new trial, provided defendant's evidence, which was erroneously excluded, is offered on such trial.

For the reasons already given, it was error for the court to direct a verdict for plaintiff. The conflicting testimony presents a fact which the jury should determine.

The judgment is reversed, the verdict set aside, and the cause remanded for a new trial.

(19 Ga. App. 242)

JONES et al. v. WRIGHT et al. (No. 8121.)
(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. ATTORNEY AND CLIENT — 129(2) — MUTUAL RIGHTS AND LIABILITIES — NEGLIGENCE OF ATTORNEY.

In an action against an attorney at law to recover the amount of a claim, alleged to have been lost because of his negligence or misconduct, it is necessary to allege not only that the claim was a valid one, but that the debtor was solvent. In such case the attorney is liable only for the actual injury his client has received, and not for the mere nominal amount involved in the litigation.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 288, 289; Dec. Dig. ¶ 129(2).]

2. PLEADING — 218(4) — DEMURRER — STRIKING PETITION.

The petition against an attorney for the recovery of actual and punitive damages for negligent advice and conduct in the management of a case, alleged to have resulted in the loss of the plaintiff's claim, was properly stricken on demurrer, in the absence of an allegation that the claim was a valid one, and that the debtor was solvent.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ¶ 218(4).]

Error from Superior Court, Floyd County;
W. J. Nunnally, Judge.

Action by Mrs. M. C. Jones and others against Seaborn Wright and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

J. P. Jones, of Rome, and Jones & Chambers, of Atlanta, for plaintiffs in error. J. E. Dean and G. E. Maddox, both of Rome, and Little, Powell, Smith & Goldstein, of Atlanta, for defendants in error.

GEORGE, J. Mrs. Jones and her two children brought suit against Seaborn and Barry Wright. The petition alleged that the plaintiffs were legatees under the will of J. P. Jones, deceased, and that one T. R. Jones, of Bartow county, was the executor of said will, and that, as such legatees, they had a cause of action against the executor for failure to execute the provisions of the will; that the defendants, attorneys at law, were employed by the petitioners to represent them in the prosecution of their claim against the executor, and accepted the employment and undertook to perform the legal services necessary in their behalf. The petition is voluminous. Counsel for the plaintiffs have, however, in the main, properly construed the petition, and, according to the construction placed upon the petition by counsel themselves, all of the damage claimed against the defendants arose by reason of the following:

"First, erroneous legal advice rendered by said attorneys negligently during their employment, and in the conduct of litigation, as more particularly described in said original and amended petition; second, the negligent handling, management, and conduct of said litigation entrusted to them by the plaintiffs; third, the violation by said attorneys of express, direct, and material instructions given to them by the plaintiffs during their employment, and with reference to the institution, conduct, and management of said litigation; fourth, the fraudulent conduct of said attorneys in continuing to advise plaintiffs erroneously, and in permitting plaintiffs to act on judgments and decrees negligently entered and taken by said defendants, and in thereby permitting said plaintiffs to become bound by said judgments or decrees, and to lose all rights to move to set aside said judgments or decrees, notwithstanding and after said defendant attorneys had knowledge of and knew of the legal effect of such previously entered decrees so negligently taken by them; fifth, fraudulently concealing from their clients, the plaintiffs, the afore-mentioned violation of and disobedience to instructions given by said plaintiffs with reference to and during the conduct of said litigation."

[1, 2] To the petition as amended the defendants filed demurrers, both general and special, and, on argument, the court sustained the demurrers generally and dismissed the petition. The petition is based upon alleged negligence of the attorneys in giving erroneous advice to the petitioners, and in the conduct and management of the litigation. The whole case is predicated upon this ground. It is true that fraud is alleged, but all of the allegations of fraud made in the petition were added by amendment to prevent the bar of the statute of limitations; the

original petition disclosing that all the matters and things complained of occurred more than four years prior to the commencement of the action. Construed, as pleadings must be, most strongly against the pleader, this is the whole purpose of the fraud alleged in the petition. The petition does not allege that the executor, against whom the original action was brought, was solvent, but, on the contrary, the allegations show that the executor filed his petition in bankruptcy before, or during the pendency of, the litigation, and the inference is that he was insolvent. It is true that the petitioners claimed the benefit of a certain mortgage executed by the executor upon his home, but it is further true that the petitioners, through the services of the defendant attorneys, successfully sustained their lien on the property of the executor, over adverse claimants, and had a decree against the property to satisfy a judgment in excess of \$5,000. It is neither charged nor shown by any allegation in the petition that any additional sum could legally have been recovered by the petitioners out of the security of the mortgage alleged to have been executed by the executor for the benefit of petitioners, if proper advice had been given and diligent service rendered by the defendant attorneys.

There was no error in sustaining the demurrer to the petition as amended. A discussion of the several grounds of the demurrer is, in our view of this case, unnecessary. In an action against an attorney to recover the amount of a claim, alleged to have been lost because of his negligence or misconduct, it is necessary that the petition against him show that the lost claim was a valid one under the law, and that the debtor was solvent. An action for the negligence of the attorney in the unskillful conduct and management of litigation is for the value of the claim lost through such negligence. The claim must be valid, and every fact essential to its validity, when called for by special demurrer, must appear, and it must further appear that the party against whom the claim was asserted was solvent. 5 Thompson on Negligence, § 6698; 6 Corpus Juris, 710; Pennington v. Yell, 11 Ark. 212, 52 Am. Dec. 262; Staples v. Staples, 85 Va. 76, 7 S. E. 199; Civil Code of Georgia, § 4390. The foregoing is simply an application of the doctrine, everywhere recognized, that a party claiming damages must prove not only the wrong, but the amount of his damage as well. In this case the petitioners' damage, if any, was the loss sustained by them of a claim against the executor; and it is necessary that the petitioners aver and affirmatively show that they held a valid claim against the executor, and that the executor was able to pay the claim or some part thereof. If the claim against the executor is not enforceable, or if the executor is not able to respond thereto, there can be no basis for a recovery of the attorneys for the negligent manage-

ment of the litigation against the executor. If it is true that nominal damages may be recovered for actionable negligence of an attorney, either in the giving of erroneous advice or in the unskillful management of a cause, the petitioners in this case did not claim nominal damages, but, on the contrary, asked for substantial, actual, and punitive damages. *Sparks Milling Co. v. Western Union Telegraph Co.*, 9 Ga. App. 728, 72 S. E. 179 (2).

Judgment affirmed.

WADDE, C. J., and LUKE, J., concur.

(19 Ga. App. 219)

GEORGIA REALTY CO. v. BANK OF COVINGTON et al. (No. 7680.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. MORTGAGES — 566 — LIEN — PRIORITIES.

In the absence of an agreement or a special equity to the contrary, the assignees and holders of several separate notes secured by a mortgage or otherwise are entitled to share pro rata, and without any preference, in the proceeds arising from the sale of the security, when insufficient to satisfy them all; and this is true, although the notes mature on different dates and the assignments are made to different persons and at different times.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1630; Dec. Dig. ¶ 566.]

2. MORTGAGES — 566 — LIEN — PRIORITIES.

Where several notes are secured by a mortgage or otherwise, and the holder of the security transfers one of the notes and retains the others, the transferee has a preference over the assignor, if the security is insufficient to pay all the notes. The equity existing in favor of the assignee and against the assignor in such case is considered sufficient to create a preference in favor of the assignee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1630; Dec. Dig. ¶ 566.]

(Additional Syllabus by Editorial Staff.)

3. JUDGMENT — 678(2) — CONCLUSIVENESS — PERSONS CONCLUDED — PERSONS NOT PARTIES.

A judgment in favor of the holder of one of several notes secured by mortgage, declaring a special lien on the land, is not binding upon the holder of other notes, who was not a party to the suit.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1196; Dec. Dig. ¶ 678(2).]

4. MORTGAGES — 566 — LIEN — PRIORITY.

A deed made as additional security to the assignee of notes secured by a former mortgage of the same land, reciting the existence of two other notes secured by the same mortgage and previously assigned, and requiring production of such other notes, marked "Paid," as a condition precedent to the delivery of an escrow deed of the land, does not give the prior assignee a preference claim over the subsequent assignee to the proceeds of sale under the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1630; Dec. Dig. ¶ 566.]

5. MORTGAGES — 568 — FORECLOSURE — PROCEEDING TO DISTRIBUTE PROCEEDS.

A proceeding by a junior mortgagee to distribute money in the hands of a sheriff in fore-

closure proceedings by a rule against the sheriff is essentially an equitable proceeding, and resort to a court of equity need not be had, though the petitioner for the rule had not sued its notes to judgment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1639-1646; Dec. Dig. ¶ 568.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Suit by E. V. Carter, guardian, against J. S. C. Callaway and another, in which the Georgia Realty Company and the Bank of Covington intervene. From a judgment in favor of the Bank of Covington, the Georgia Realty Company brings error. Reversed.

Smith, Hammond & Smith, of Atlanta, for plaintiff in error. R. W. Milner, of Covington, and Dorsey, Shelton & Dorsey, of Atlanta, for defendant in error.

GEORGE, J. S. C. and T. M. Callaway held title to land. On July 2, 1912, they conveyed this land by deed to E. V. Carter, guardian, to secure a loan of \$8,000. All legal title was thereby conveyed. On September 30, 1912, the Callaways made a deed conveying this land to the Southern Finance Corporation, now the Southern Trust Company, subject to the said loan; title being still in E. V. Carter, guardian, as security for the loan. On September 1, 1914, the Southern Trust Company executed its bond for title to the said land to J. T. Daves, subject to the said loan; title being still in E. V. Carter, guardian, as security for the loan. Daves assumed payment of the loan, made a cash payment upon the land, and executed four notes, of \$3,000 each, maturing September 1, 1915, 1916, 1917, and 1918, respectively, for the balance of the purchase money. On October 27, 1914, the Southern Trust Company sold the two notes maturing September 1, 1915 and 1916, to the Bank of Covington; the bank buying bona fide, for value, and before maturity. On December 16, 1914, the Southern Trust Company sold the two remaining purchase-money notes, maturing September 1, 1917 and 1918, to the Georgia Realty Company, which also bought bona fide, for value, before maturity. The Southern Trust Company made a deed to the Georgia Realty Company as additional security, conveying its equity in the said land and containing the following recital:

"This deed is made to secure payment of two purchase-money notes for \$3,000, each dated September 1, 1914, and maturing September 1, 1917, and September 1, 1918, respectively, and being Nos. 3 and 4, respectively, said notes having been given by said Joel T. Daves as part purchase money for above-described property under bond for title above mentioned, notes 1 and 2 of the series having previously been sold to the Bank of Covington. An escrow deed in compliance with the aforesaid bond has this day been executed and deposited with the notes this day sold to the grantee. Wherefore, upon payment of the notes this day sold to the grantee herein and the production of notes Nos. 1 and 2 (sold to the Bank of Covington as afore-

said) marked 'Paid,' the escrow deed aforesaid shall be delivered to Joel T. Daves, or his assignee, whereupon this deed shall be void and of no further force or effect."

On February 9, 1915, the deed from the Southern Trust Company to the Georgia Realty Company was duly recorded. In January, 1916, in the city court of Atlanta, judgment was rendered in the suit of the Bank of Covington against J. T. Daves (no other party defendant) for the amounts due on the two notes owned by it, and declaring a special lien on the land. In March, 1916, in the city court of Atlanta, judgment was rendered in the suit of E. V. Carter, guardian, against S. C. and T. M. Callaway, for \$8,000 principal, etc., secured by the fee-simple title to the land, and superior to all claims. The sheriff of the city court of Atlanta, under the Carter *fi. fa.*, sold the entire legal title to the land for \$10,000. Out of this fund the Carter *fi. fa.* was satisfied in full, and the sheriff retained the sum of \$356.29. The Georgia Realty Company filed a petition for a rule against the sheriff, in the city court of Atlanta, claiming half of the fund. The Bank of Covington intervened, claiming the entire fund. The judge of the city court, by agreement, considered the case on the facts herein stated, and awarded the whole sum in the hands of the sheriff to the Bank of Covington; and to this judgment the Georgia Realty Company excepted.

[3] 1. The intervener, the defendant in error, insists that it had obtained priority by its judgment against Daves, with a special lien upon the land. We do not think so. Its judgment gives the bank no added security whatever. This judgment was not a judgment against the Callaways, the defendants in *fi. fa.* from the sale of whose property the funds in court for distribution was derived. Moreover, the judgment is in no way binding on the plaintiff in error, because the plaintiff in error was not a party to the suit in which the judgment was rendered. *Strickland et al. v. Bank of Cartersville*, 141 Ga. 565, 81 S. E. 886; *Marshall v. Charland*, Adm'x, 109 Ga. 306, 34 S. E. 671; *Sims et al. v. Albea et al.*, 72 Ga. 751.

[4] 2. The recital in the deed from the Southern Trust Company to the Georgia Realty Company does not, within itself, create any priority in favor of the intervener against the Georgia Realty Company. Manifestly this deed was given as security. It discloses that an escrow deed was deposited with the Georgia Realty Company at the same time. While it may have been unnecessary, it was certainly proper, to provide that the escrow deed should not be delivered until, not only the two notes owned by the Georgia Realty Company were paid, but also until the notes assigned to the Bank of Covington, were produced and marked "Satisfied." It very clearly appears that this recital contained in the deed from the Southern Trust Company to the Georgia Realty Com-

pany was to accomplish nothing more than what the Southern Trust Company had, by its assignment of the notes to the contesting parties in this case, already done.

[5] 3. The proceeding to distribute money in the hands of the sheriff by a rule against the sheriff is essentially an equitable proceeding. Resort to a court of equity need not be had. *Rucker v. Tabor & Almand et al.*, 133 Ga. 720, 66 S. E. 917; *National Bank of Athens v. Exchange Bank of Athens*, 110 Ga. 692, 36 S. E. 265; *Berrie, Sheriff, v. Smith*, 97 Ga. 782, 25 S. E. 757; *Field v. Armstrong*, 69 Ga. 179. The fact that the petition for the rule was filed in the city court of Atlanta does not alter the principle. *Wright et al. v. Brown, Sheriff*, 7 Ga. App. 389, 63 S. E. 1034. The fact that the Georgia Realty Company had not sued its notes to judgment cannot alter the principle. *Smith et al. v. Bowne et al.*, 60 Ga. 485.

[1] 4. Since the judge of the city court of Atlanta in this proceeding had the authority to determine the respective rights of the parties to the funds remaining in the hands of the sheriff after the payment of the Carter judgment, and since no priority in favor of either party against the other was created or obtained by the deed from the Southern Trust Company to the Georgia Realty Company, or by the judgment of the Bank of Covington against Daves, the judgment awarding the fund to the bank can be sustained only upon the theory that, the security being insufficient to pay all the notes, the assignment to the bank of the notes first maturing being first made, the bank was entitled to priority over the subsequent assignee of the remaining purchase-money notes. This question is one of primary importance. Mortgages are daily executed and delivered, securing a series of notes. Lands are daily conveyed as security for debt evidenced by more than one note, and both personal and real property are sold, reserving title, or creating a lien, for the purpose of securing the purchase money, evidenced by many notes. These notes find their way into the channels of commerce. It is assumed for the purposes of this case, that the priority of notes secured by the same mortgage, or the purchase-money notes given for land, title to which is retained by the vendor, may be made the subject of contract between the parties interested, and that a general rule fixing such priority, in a case where the security is insufficient to pay the whole debt, applies only in the absence of contract.

There are three general rules, any one of which may govern the priority of notes secured by the same mortgage and in the possession of different holders: (1) The notes may have no priority, and share pro rata the insufficient proceeds of the mortgaged property. (2) The notes may have priority in the order in which they fall due, without regard to the date of assignment. (3) The notes may have priority in the order in

which they have been assigned, without regard to the date of maturity. In 27 Cyc. 1304 (c), these rules are referred to:

"The rule as laid down in many cases is that, in the absence of an agreement or special equities to the contrary, the assignees and holders of the several separate notes of debts secured by a mortgage are entitled to share pro rata and without any preferences in the proceeds of the mortgage, when insufficient to satisfy them all; and it makes no difference that some of the debts matured earlier than the others or that the assignments were made at different times.

"*Priority of Assignment.*—According to a few cases the rule is that the holders of the notes, in such a case, are to be paid in the order in which their assignments were made, unless the mortgage or deed of trust which is the common security expressly prescribes a different order; but if all are assigned concurrently, all will share pro rata."

"*Distribution According to Order of Maturity.*—And there are still other cases holding that the assignment of one of such notes is an equitable transfer of the mortgage pro tanto, and the proceeds of a foreclosure, if not sufficient to pay all the obligations, should be applied to the notes in the order of their maturity, the holder of the note first falling due being entitled to satisfaction in full and then the others in their order."

The intimation here is that the pro rata rule is supported by the weight of authority. In 2 Jones on Mortgages (7th Ed.) § 822, this statement occurs:

"When there is no implication of an intention to give priority to the note assigned, the indorsement and delivery of it carries with it a pro rata portion of the security and nothing more. The generally received doctrine is that, in the absence of agreement or special equities to the contrary, the assignees of the separate notes or debts secured by a mortgage are entitled to share pro rata in the proceeds of the mortgage, without preference or regard to the order of assignment or maturity of the debts. Since the transfer of one of several notes secured by the same mortgage carries with it a proportionate share of the security, it has been held that the mortgagee thereafter holds the mortgage in trust for the assignee to the extent of his interest."

In the editor's note to Lawson, Receiver, v. Warren, 42 L. R. A. (N. S.) 133 (an Oklahoma case), these three general rules are discussed at length, and it is there concluded that the courts of final resort in a majority of the states adhere to the pro rata rule, with varying qualifications. The decisions of New York, Massachusetts, Pennsylvania, California, Connecticut, Louisiana, Vermont, and a number of other states follow this rule. According to this note, the courts in Georgia hold to the pro rata rule, but this statement is open to question. The earlier maturity rule finds support in decisions of the following states: Florida, Illinois, Indiana, Iowa, Kansas, Missouri, Ohio, and Wisconsin, and the reason of this rule is strongly stated in the case of Horn v. Bennett, 135 Ind. 158, 34 N. E. 321, 24 L. R. A. 800, from the Supreme Court of Indiana, from which we quote:

"When a series of notes falling due at various dates are secured by a mortgage, * * * in case of an assignment of the notes to various persons, they will be treated as several mort-

gages, and the persons holding the notes maturing first will have a prior lien to those holding notes maturing subsequently thereto."

The rule there stated is that:

"The assignment of the notes first maturing carries with it a pro tanto interest in the mortgage security—pro tanto, and not pro rata."

The prior assignment rule is supported by decisions of the courts of Alabama, Virginia, and West Virginia, according to the editor's note to the Oklahoma case in the 42 L. R. A. (N. S.) supra.

Considering these general rules, it must be admitted that few courts have applied them rigidly. Generally they have been modified, abandoned or reversed where the intervening equities demanded it. For instance, under the pro rata rule, if it were applied rigidly, the assignee of some of the series of notes secured by one mortgage would have no priority over the assignor or mortgagee; but many of the courts adhering to this rule have considered the intervening equity existing between the assignor and assignee, the indorsement by the assignor, or at least the sale of the note to the assignee, as sufficient to work an exception to the general rule. The application of the earlier maturity rule, if adhered to without exception, would operate in some cases to give the assignor or mortgagee a priority over his assignee, while the prior assignment rule would in every instance give the assignee priority over the mortgagee, without the necessity of introducing an exception to the general rule. It is to be observed that the pro rata rule is the only one capable of universal application. The earlier maturity rule presupposes that the notes secured by one mortgage mature at different dates, and the prior assignment rule presupposes different dates of assignment.

Let us examine the decisions of the Supreme Court of this state. It is taken as settled in Wellborn et al. v. Williams et al., 9 Ga. 86, 52 Am. Dec. 427, that the assignment of a note secured by a mortgage carries with it the lien of the mortgage as an incident thereto. In Roberts v. Mansfield, 32 Ga. 228, this general principle is recognized, and it is there said:

"When one holds two notes, secured by mortgage, and transfers the one, retaining the other, the mortgage lien accompanies the transfer of the note as an incident, and it would seem that, in case the security falls short of paying both notes, the holder of the transferred note has a preference over the mortgagee, who retains the other."

That decision and the decision in Crowder v. Dunbar, 74 Ga. 109, recognizing the same principle, are the basis for section 4276 of the Civil Code of 1910, which first appeared in the Code of 1896. This section declares:

"The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security. If more than one note is secured, and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee if the security is insufficient to pay all the notes."

For later cases bearing upon the general doctrine incorporated in this Code section, see *Berrie, Sheriff, v. Smith*, 97 Ga. 782, 25 S. E. 757; *Willingham v. Huguenin*, 129 Ga. 835, 60 S. E. 186 (2); *Setze v. First National Bank of Pensacola*, 140 Ga. 603, 79 S. E. 540. From these decisions and others dealing with the same question, it is deducible that the assignment of a note secured by mortgage or otherwise conveys to the transferee the benefit of the security. This is the doctrine of the first sentence of section 4276, *supra*. This is the general doctrine. This statement of the doctrine does not suggest that the whole security accompanies the note as an incident thereto, if the mortgage secures more than one note. It is clear that, while the transfer of one of a series of notes secured by the same mortgage transfers the benefit of the security to the assignee, such transfer does not have the effect of divesting out of the mortgagee or assignor all interest in the security. The general rule is that, while the transfer of one of several notes secured by the same mortgage conveys to the transferee the benefit of the security, it conveys to him only a pro rata interest in the property covered by the mortgage. In the event the security is insufficient to pay all the notes the equity existing between the mortgagee, who retains some of the notes, and his assignee of one or more of the notes, is considered sufficient to vary the general rule and to give the assignee preference over the mortgagee. In *Smith et al. v. Bowne*, 60 Ga. 485, the Supreme Court of this state held:

"A mortgage upon land having been made to secure several negotiable notes, and the notes having been passed to several different holders, and one of the holders having obtained a general judgment, and another having foreclosed the mortgage in the name of the mortgagee for his use, a sale of the premises under the general judgment passed the title free from the mortgage lien, the attorney representing the judgment of foreclosure having placed the execution founded thereon in the hands of the officer of the law making the sale, and caused the title, unincumbered, to be sold, and there being no fraud in the sale, and the premises having brought full value, or an amount approximating thereto. The notes not covered by either judgment cannot be enforced against the land, but are thrown, in equity, upon the fund produced by the sale, for their pro rata share thereof."

In that case a bill in equity, made substantially the case presented in the headnote quoted, and prayed that the lands be resold under the mortgage lien and the proceeds be appropriated to the satisfaction of the notes held by the complainants. The chancellor to whom the case was submitted decreed that the sale already made had—

"divested the lien of the mortgage as to all the notes, and that the purchasers acquired an unincumbered title; that the lien of the mortgage attached to the proceeds of the sale, and that complainants might have leave to enter a rule absolute to enable them to proceed against such proceeds."

Bleckley, J., in his opinion sustaining the chancellor, does not set forth the facts of this case in detail, but upon an examination of the original record it appears that certain lands were mortgaged for the purpose of securing 12 promissory notes, half of which matured upon one date and half upon a later date. Six of the notes were for \$366.66 each, and 6 were for \$266.66 each. The complainants were the purchasers of 7 of the notes; one Truluck was the purchaser of 1 of the notes, and one Varner was the purchaser of 4 of the notes. All of the assignees purchased in good faith and for value. Truluck obtained a common-law judgment on his note, and an execution, issued thereon, was levied upon the property covered by the mortgage. Before the date of sale Varner foreclosed the mortgage and placed the mortgage *fi. fa.* in the hands of the sheriff. The complainants were not parties to either of these proceedings. The mortgaged property brought at the sale by the sheriff \$1,505. This amount was insufficient to pay all of the notes. While that case differs upon its facts from the instant case, it is held that the complainants in that case were "thrown, in equity, upon the fund produced by the sale, for their pro rata share thereof." According to the opinion of Judge Bleckley in the case last cited, it is apparent that the policy of the law is against repeated foreclosures of the same mortgage, and that, in harmony with this policy, provision is made for a single foreclosure where the debt secured thereby falls due in installments. See sections 3272, 3285, Code of 1910.

[2] It is urged by counsel for the defendant in error that the Southern Trust Company could transfer to the Georgia Realty Company only the rights it had at the time of the transfer, and that when the trust company sold the two notes to the bank, and thereby transferred to it as a necessary incident the security of the mortgage, the rights of the parties became fixed and the priorities established, and nothing that the trust company could thereafter do could change those rights. If the mortgagee assigns one of the two notes secured by the mortgage, he does not thereby divest himself of all interest in the security, but retains his pro rata interest therein, subject to this exception: If the security prove insufficient to satisfy both notes, by reason of the equities existing between the parties, the assignee has a preference over the mortgagee in the distribution of the proceeds arising from the sale of the security. He conveys only the pro rata interest in the security to the assignee, and it is only in the event the security proves insufficient to pay the whole debt secured by the mortgage that the assignee is given a preference over the assignor, and that is by virtue of an exception to the general rule arising under the special equities in the case. When all of the notes

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secured by a mortgage are transferred, although upon different dates to different transferees, the whole interest in the security passes as an incident to the notes transferred; but there exists, in the absence of contract to the contrary or special reason, no equity giving the first assignee the preference over a subsequent assignee. The mortgagee must be considered as the trustee holding title to the mortgage for the benefit of his assignees, and if he assign all the notes secured by the mortgage, each assignee is entitled to prorate in a fund derived from a sale of the mortgaged property. This conclusion of the matter will prevent a multiplicity of suits, and will prevent the splitting of the mortgage or lien. The earlier maturity rule and the prior assignment rule both have the effect of dividing the lien or splitting the mortgage. This, as we understand it, is against the settled policy of the law of this state. The sounder view is to consider the mortgage as securing one debt, evidenced by any number of notes, and that the security is spread out over the whole debt, although evidenced by many notes. The earlier maturity rule necessarily considers the mortgage as a separate mortgage for each note after the first, as has expressly been declared in the decisions of the Supreme Courts of both Indiana and Iowa, where this doctrine is clearly defined. The prior assignment rule, in effect, does the same thing. Under this rule the date of the assignment, rather than the date of the maturity of the note, fixes the priority between contesting assignees. The logic of this rule is that the act of assignment divides the mortgage and converts the lien, in effect, into a first and second, or third, mortgage, according to the number of assignments.

It is urged that one who buys some of the notes secured by a mortgage, with knowledge that the mortgagee is then the owner of the remaining notes secured by the mortgage, should be entitled to a preference over a subsequent assignee of the remaining notes; that he is presumed to have given greater value for the notes. A sufficient reply to this contention is that the purchaser of one or more of a series of notes secured by mortgage or otherwise may always fully protect himself by a contract with the assignor, and if he fail to do so, and if there be no special equities in the case, the holder of each note secured by the mortgage or other form of lien is entitled to prorate with him in the distribution of the security, regardless of the date of the maturity of the notes or of the date of the assignment of the same.

For the foregoing reasons the judgment of the lower court is reversed.

WADE, C. J., and LUKE, J., concur.

STOKES v. STATE. (No. 7932.)

(Court of Appeals of Georgia, Division No. 1
Feb. 1, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 511(2)—ACCOMPLICE TESTIMONY—CORROBORATION.

To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which, in themselves and independently of the testimony of the accomplice, directly connect the defendant with the crime, or lead to the inference that he is guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1129; Dec. Dig. \S 511(2).]

Error from Superior Court, Spalding County; W. E. H. Searcy, Jr., Judge.

Charlie Stokes was convicted of robbery, and he brings error. Reversed.

Cleveland & Goodrich, of Griffin, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

WADE, C. J. Mattie Williams, Snet Banks, and Charlie Stokes were jointly indicted for the offense of robbery. The indictment alleged that the defendants did on a certain date, "with force and arms and unlawfully, wrongfully, fraudulently and violently, take and carry away from the person of T. N. Harris, and without his consent, \$35 in paper money and of the value of \$35, the same consisting of two \$10 bills, one \$5 bill, one \$2 bill, and eight \$1 bills, said money being in the possession of and the property of the said T. N. Harris, contrary to the laws," etc. Mattie Williams entered a plea of guilty, and the jury returned a verdict of guilty against Banks and Stokes. Stokes made a motion for a new trial, based upon the general grounds, and also upon two special grounds.

On the trial the prosecutor, Harris, testified that when on his way home at night and while passing under some trees, which shaded the sidewalk close to an unoccupied hotel and rendered that locality dark, he was "held up" and robbed by two men and a woman; two \$10 bills, one \$5 bill, one \$2 bill, and several \$1 bills, aggregating in all \$35, being taken from his person. He testified that each of the two men caught one of his arms and pulled it behind his back and held him securely, and the woman then took his pocketbook out of his pocket, removed the money, put the pocketbook back in his pocket, and ran away; that the men then "slung" him around, turned him loose, and ran, and when they ran he "turned around and looked at them the best" he could; that the men did not face him but came up on each side and jumped behind him and held his arms, one holding one arm and the other holding the other arm; that nothing was said to him before the money was taken, and not one word was spoken by any of the three persons; that he had never before met the two

defendants on trial (Banks and Stokes), but the two men who engaged in the robbery would "compare with the size of these two men all right," and in his opinion they would "fill the bill all right," from what he saw of the robbers that night, and he was "satisfied" that these men were the parties. On cross-examination he repeated his testimony that neither of the two men on trial ever got in front of him, but that they stood behind, pulling his hands back, while the woman removed the money from his pocket, and further said that he recognized the woman as the defendant Mattie Williams, but as it was dark at the time of the robbery, and the men had their backs to him when they turned and ran, he could not swear positively that the defendants on trial were the men that committed the robbery; that he could not tell whether the men who held him were black or were mulattoes, as he did not see their faces, but "only saw their sizes"; that "any man can tell what he imagines, if he was in the dark," and that what he imagined was "all of it except what [he] could see" he "could not see anything but the size"; he "could not see whether they were black or yellow," he "could not see whether they had a mustache," as he never saw the faces of either of the men, but "only had a glimpse, though not enough to say positively they were the parties"; that he did not tell the sheriff that he "could not tell whether they were the two men or not," but he would not say positively now that they were the men, as his attention was then fixed on the woman more particularly, in order that he might know some of the parties if he saw them again, and he was looking at her for that purpose; that his sight was not good, as one eye was gone, and the sight of the other was poor.

Mattie Williams testified against the two defendants on trial, and said that they were in fact the two men who robbed the prosecutor, Harris, with her help, detailing the circumstances of the robbery very much as did the prosecutor in his evidence.

The sheriff, Hudson, testified that he arrested the defendants Stokes and Banks on Tuesday or Wednesday following the robbery; that he found Stokes at one Ola Lester's house, where both Stokes and Mattie Williams lived; that Banks lived about 100 or 150 yards from that house, at the house of a sister of Ola Lester; that he found Banks near one John Taylor's store, going down the street when he went to arrest Stokes, and that "he [referring to Banks and not to Stokes] ran and hid in a ditch and in some weeds and bushes; that it was about 50 or 75 yards from the house," where the witness found him; that Monday before the arrest, and after the prosecutor, Harris, had told him of the robbery, the defendant Stokes came to him and told him that the woman Mattie Williams was "at their house drunk, and that she had robbed an old man, two or

three nights before that, and wanted [him] to go down and get her"; that Stokes came to his house and told him this freely and voluntarily, without any threats on his part; that Harris described the woman, and identified her after the arrest, but told him that he "could not identify the men"; that Charlie Stokes told him that he had pawned a suit of clothes to John Taylor, and went there Monday and got them, and in response to his inquiry said that the woman Ola Lester had furnished him the necessary money, \$2 or \$3, had given him a \$10 bill, and got the change back, and this was the next morning after the robbery. It was admitted that John Taylor would testify, if present, that Charlie Stokes came to his store and got a \$10 bill changed, but there was no testimony tending to identify the bill as one of the bills taken from the prosecutor.

There is perhaps no better settled principle of criminal law in this state than that elaborated in *Childers v. State*, 52 Ga. 106, and adhered to without exception from that time to the present, that:

"To sustain a conviction upon the testimony of an accomplice, there must be corroborating circumstances which in themselves and independently of the testimony of the accomplice directly connect the defendant with the crime, or lead to the inference that he is guilty." *Baker v. State*, 14 Ga. App. 578, 81 S. E. 805 (4).

See, also, *Butts v. State*, 14 Ga. App. 821, 82 S. E. 375; *Taylor v. State*, 110 Ga. 150, 35 S. E. 161, and cases cited. It has been several times said that facts which create merely a grave suspicion of guilt are insufficient to furnish the necessary corroboration. *McCalla v. State*, 66 Ga. 346. Even where the facts in proof so far agree with the evidence of the accomplice as well-nigh to convert a grave suspicion against the accused into a moral conviction of his guilt, yet if these facts, when considered entirely apart from and independently of the evidence of the accomplice, fail in themselves, and without regard to the testimony of the accomplice, to connect the accused with the commission of the crime, a conviction is unauthorized. The practical test appears to be that if the facts and circumstances proved by testimony other than that of the professed accomplice could be as well applied, without the aid of the testimony of the accomplice, to some person or persons other than the person accused by the accomplice and pointed out by the evidence of the accomplice, the necessary connection between the defendant and the crime is not independently shown or established. In the case of *Baker v. State*, supra, many of the circumstances detailed by the accomplice were clearly established by other testimony, yet every circumstance thus proved could have been admitted and no connection between the accused and the commission of the crime would be established unless the testimony of the accomplice be brought to its aid. It is true that the weight

of corroboration is generally for the jury, but nevertheless the inflexible rule already referred to demands that there shall be some circumstances in proof, or some direct evidence from a witness other than the accomplice, which, entirely apart from and independently of the testimony of the accomplice, directly connects the defendant with the crime or leads to the inference that he is guilty. In this case, leaving out of consideration the evidence of the accomplice, there is absolutely nothing that tends to connect Stokes with the commission of the robbery with which he was charged. The prosecutor could not identify him any further than to say that one of the actual robbers was about the same size; and this description might fit 10,000 men as well as the defendant, and certainly was insufficient of itself to identify him as one of the perpetrators of the crime, especially in view of his disclaimer of recognition. Testimony that two \$10 bills were taken from the prosecutor, and that the defendant Stokes changed a \$10 bill the day after the robbery, while perhaps calculated to excite suspicion, could not of itself be sufficient to connect Stokes with the commission of the crime, as the bill changed was not in any way identified as one of the two bills of that denomination lost by the prosecutor, and it appears, further, that the defendant, with apparent frankness, alleged that he had procured the money from another person, and this statement was not denied.

It seems, from the evidence of the sheriff, that Banks fled at his approach; but, even if this evidence referred to Stokes, whose trial is now under review, it is enough to say that proof of flight alone is not an incriminatory circumstance of sufficient probative value to authorize conviction of crime (Smith v. State, 16 Ga. App. 291, 293, 85 S. E. 281), and certainly in this case it did not tend to connect either Banks or Stokes directly with the commission of the robbery for which they were tried. See Griffin v. State, 2 Ga. App. 534, 58 S. E. 781. As was said in Huey v. State, 7 Ga. App. 398, 406, 66 S. E. 1023, 1027:

"Flight may be a slight circumstance tending to show conscious guilt of some offense, but certainly it cannot be sufficient proof of the particular crime charged. There must be other evidence of the particular crime, before flight becomes specially significant. Flight is but a confession implied by conduct, and can have no greater weight than actual confession by words."

The fact that the accomplice testified that the accused said he had pawned his clothes with one Taylor and proposed to get them out of pawn the next morning after the robbery, and proof that the accused had in fact paid Taylor \$2 or \$3 and took certain clothes out of pawn on that date would not show, or tend to show, that Stokes was one of the parties who committed the robbery, or had knowingly employed money obtained from the prosecutor for that purpose, for,

even accepting the testimony of the accomplice as true, this evidence would neither authorize an inference of his guilt nor connect him with the crime. There was no definite evidence in the entire record, excluding the testimony of the accomplice, from which the guilt of the accused could be inferred; and, in the absence of any definite or positive identification of the accused as one of the robbers, all the circumstances in proof, whether considered separately or together, are insufficient, when weighed apart from the testimony of the alleged accomplice, to connect Stokes with the robbery; and while perhaps the circumstances in proof, when taken in connection with the evidence of the alleged accomplice, may tend to cast upon the defendant a suspicion of guilt, nevertheless, under the rule laid down in the Childers Case, supra, the evidence as a whole did not authorize the conviction of the accused. We must therefore hold that the trial judge erred in overruling the motion for a new trial, since the sole question for determination by us is whether the accused was convicted in accordance with law, and not whether he may possibly be guilty or innocent of the charge preferred against him.

It is contended that the court erred in charging the jury that:

"A corroboration as to the identity of these defendants, or one of them, as the party or parties who committed the crime, if you find a crime was committed"

—would sufficiently corroborate the testimony of the alleged accomplice. It is contended that this charge was error and prejudicial to the movant, because there were two defendants on trial, and the charge in effect authorized the jury to find them both guilty if the evidence of the accomplice, Mattie Williams, was corroborated as to the identity of either of them. The excerpt complained of is somewhat inapt, and may possibly have been confusing to the jury, but the evident purpose of the court was to instruct the jury that they might find either defendant guilty upon other proof of his identity as one of the two persons named by the accomplice, and it is unnecessary to comment further on this excerpt, since its lack of precision will doubtless be corrected on another trial.

The only remaining special ground of the motion for a new trial alleges error because the court instructed the jury as follows:

"You take the law from the court, and you find the facts from the evidence in the case, including defendants' statement."

This excerpt from the charge is complained of because the court referred to the defendant's statement, when in fact no statement was made by either defendant to the jury. This reference was doubtless made through inadvertence, and hence could scarcely recur on another trial; and since a new trial must be granted on the general grounds, it is unnecessary to determine definitely whether

this slight reference to the defendant's statement was sufficient error to require a reversal. If comment by State's counsel on the fact that the accused failed to make a statement to the jury was improper and tended to injure the accused, it appears that such a reference by the court to the defendant's statement as might call the attention of the jury to his omission to make any statement would be perhaps even more injurious; but whether the reference was sufficient to draw the attention of the jury to the fact that the defendant had made no statement need not be determined.

If the evidence were sufficient to support the verdict returned, it would be necessary to decide whether there was such harmful error as to require a reversal in the excerpt from the charge complained of in the special grounds of the motion, but since the particular instructions complained of could hardly be presented in the same form on another trial, and the judgment must be reversed on the general grounds, nothing more need be considered as to the special grounds.

Judgment reversed.

GEORGE and LUKE, JJ., concur.

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YESBIK v. CENTRAL OF GEORGIA RY. CO. (No. 7443.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. PLEADING \S 248(10)—AMENDMENT—COMPLAINT—NEW CAUSE OF ACTION.

Where an action is against a carrier for damage to goods, under section 2752 of the Civil Code of 1910, an amendment setting up such a claim as a common-law liability cannot be allowed. The effect of such an amendment would be to add a new and distinct cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 693, 694, 696; Dec. Dig. \S 248(10).]

2. CARRIERS \S 177(4)—CARRIAGE OF GOODS—ACTION FOR LOSS OR INJURY—STATUTORY PROVISIONS.

Such a statutory action, under the section named, against the last of several connecting carriers in an interstate shipment of freight, is not prohibited by Act Cong. June 29, 1906, c. 3591, \S 7, para. 11, 12, 34 Stat. 593 (U. S. Comp. St. 1913, \S 8592), known as the Carmack Amendment to the Hepburn Act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 791-803; Dec. Dig. \S 177(4).]

Error from City Court of Albany; Clayton Jones, Judge.

Action by Joe Yesbik against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

John Henry Pool, of Albany, for plaintiff in error. Pottle & Hofmayer, of Albany, for defendant in error.

JENKINS, J. The suit was against the Central of Georgia Railway Company, as the last connecting carrier, for damage caused by delay in the delivery of a shipment of bananas received by it in good condition. The petition did not allege by whose negligence the delay was occasioned, but the plaintiff undertook, by amendment, to charge it to the fault of the defendant. The transaction being an interstate shipment, the defendant moved to dismiss the petition, on the ground that such action, based upon the provisions of section 2752 of the Civil Code, was prohibited by the terms of the Carmack Amendment to the Hepburn Interstate Commerce Act; whereupon the plaintiff offered to amend his suit as already indicated. The amendment was disallowed, the petition was dismissed, and the plaintiff excepted. It is contended in the brief of his counsel that the suit as originally brought was not based upon the statutory remedy given by the Code, but was an action good at common law.

[1] 1. It is true, as seems to have been recognized by each of the litigants in the court below, that had the plaintiff based his suit upon the shipper's common-law liability, his right of action would not have been affected by the provisions of the Carmack Amendment referred to. See *C. & D. Ry. Co. v. Quincey*, 91 S. E. 220, decided at the present term of this court. And while it will be observed that the status of the case is in fact controlled by the rule announced in the second headnote above, in making such disposition it has been found necessary to determine the question raised by the record and which constituted the sole issue of contention in the court below: Was the action, as brought, based upon the common-law or the statutory remedy? Despite the reasoning of counsel for the plaintiff, we think this suit comes clearly within the provisions of section 2752 of the Code, and therefore could not be changed by amendment into a common-law action.

In one of the cases cited by counsel for the plaintiff, *Philadelphia & Reading Railway Co. v. Venable Bros.*, 117 Ga. 142, 43 S. E. 407, it was held that:

"In a suit against a railroad company for damages alleged to have been sustained to goods shipped by the plaintiff over its line, where the petition sets forth a good common-law action, the fact that it also alleges that the defendant 'received [the goods] as in good order at * * *, a station upon its line, and transported same to' their destination, does not make the action one brought solely under the terms of Civil Code [1895] \S 2298 [Civil Code 1910, \S 2752]."

But it will be observed that the plaintiff in that case set up a good and complete common-law right of action; the declaration distinctly alleging that the damage to the goods was caused by the negligence of the defendant to that suit. In *Southern Railway Co. v. Gardner*, 127 Ga. 320, 56 S. E. 454, it was

held that under the original pleadings neither the common-law nor the statutory liability was set forth. In that case the petition alleged:

"That the goods of the plaintiff had been delivered to another carrier, who, in turn, delivered them to the defendant, and that the time consumed in the transportation from the initial point to destination was so unreasonable that the goods were damaged in consequence of the delay," and "in effect alleged that the defendant company was the last of a line of connecting carriers, but did not allege that the delay occurred upon the line of the defendant, or that the goods were received by it in good order."

The plaintiff was there permitted, however, to amend his suit by alleging that the defendant was the last of a line of connecting carriers, and the petition when so amended was held to set out a good statutory liability. In the present case the allegations are substantially those of the petition in that case as amended. In this case, as in that, there is no allegation that the delay was occasioned by the negligence of the defendant; and therefore the petition fails here, as it failed there, to show liability under the rule of the common law; but in this case it is alleged that the goods were received by the terminal carrier in good order, and therefore a good statutory action is set out; and, this being the case, the court did not err in refusing to allow such an amendment as would set up a cause of action at common law, as the effect of such an amendment would have been to add a new and distinct cause of action. *Exposition Cotton Mills v. Western & Atlantic Railroad Co.*, 83 Ga. 441, 10 S. E. 113; *Hartwell Railway Co. v. Kidd*, 10 Ga. App. 771, 74 S. E. 310.

[2] 2. Since the filing of the original briefs in this case, this court, in the case of *Central of Georgia Railway Co. v. Waxelbaum Produce Co.*, 18 Ga. App. 489, 89 S. E. 635, reverted to the rule set forth in the second headnote above, thereby overruling the decision in *Southern Railway Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418; and counsel for the defendant ask that the ruling in the *Waxelbaum Produce Co. Case*, supra, be now reviewed. It is not deemed profitable by us to again enter into a full discussion of the reason for the rule announced in the *Waxelbaum Produce Co. Case*, as, in the original pronouncement of this court upon this subject, in the case of *A. C. L. Ry. Co. v. Thomasville Live Stock Co.*, 13 Ga. App. 102, 78 S. E. 1019, the question was ably and exhaustively discussed. We will merely add that since the rendition of the decision in the *Bennett Case*, supra, the Supreme Court of the United States, in the case of *Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, has announced an opinion which appears to fortify the correctness of the rule now followed by this court, and to strengthen the reasoning as set forth in the *Thomasville Live*

Stock Co. Case, supra. Upon review the ruling in the case of *Cent. of Ga. Ry. Co. v. Waxelbaum Produce Co.*, supra, is therefore adhered to, and, under that ruling, the dismissal of this suit was erroneous.

Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 255)

BAILEY v. WARE & HARPER. (No. 7566.)
(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1194(1) — CERTIORARI \S 70(9)—CERTIORARI BOND—REMAND—EFFECT.

When this case was here before (17 Ga. App. 492, 87 S. E. 712), the court decided that the judge "erred in allowing exceptions to the answer to be filed after the hearing was begun, and in sustaining them," and also erred in allowing "an additional answer of the trial judge to become a part of the record in the case." For these special reasons the judgment of the court below was reversed, without considering the other assignments of error in the petition, except to decide that the trial court properly overruled the demurrer to the original petition. *Held*: (1) The effect of the said decision was to send the case back to the superior court to be heard on the original petition and answer, except that the said court would not consider assignments of error as to the overruling of the demurrer. (2) The certiorari was properly overruled, thus precluding the possibility of another trial under this proceeding, the plaintiff in error had given a certiorari bond upon which judgment was to be entered as in cases of appeal, and the judge did not err in making a final disposition of the case. Civ. Code 1910, §§ 5205, 5937.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4648-4650, 4656, 4660; Dec. Dig. \S 1194(1); *Certiorari*, Cent. Dig. § 208; Dec. Dig. \S 70(9).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by Ware & Harper against O. P. Bailey. Judgment for plaintiffs, certiorari overruled, and defendant brings error. Affirmed.

Nalley & Scott and Albert Kemper, all of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 201)

MITCHELL v. J. S. SCHOFIELD'S SONS CO. (No. 7346.)
(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1058(1)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE. Exceptions to the rejection of evidence are without merit, where it appears from the ap-

proved brief of evidence that the rejected evidence was later during the progress of the trial admitted for consideration by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200; Dec. Dig. ☞ 1058(1).]

2. MASTER AND SERVANT ☞270(7) — EVIDENCE—PRECAUTIONS AFTER INJURY.

Evidence that, after the collapse of a scaffold, resulting in the death of the plaintiff's son, the defendant took additional precautions in the rebuilding of the scaffold to prevent others from being likewise injured was properly rejected by the court, although offered in rebuttal of the defendant's contention that it had provided the plaintiff's son with a scaffold "equal to those in general use and reasonably safe." Such evidence cannot logically be considered as an admission on the part of the defendant that it was negligent in not sooner observing such precautions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. ☞ 270(7).]

3. MASTER AND SERVANT ☞288(15) — INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

In a suit against a master (other than a railway company) for the negligent homicide of the servant, where the evidence showed that the servant knew of a defect in a scaffold, complained thereof to the master, and was assured by the master that the place was safe, the following charge to the jury was harmful error: "If you believe this scaffold was negligently built, and you also believe Mitchell was ordered to go in and upon this scaffold to work, with assurance from Stanley that it was safe, and such assurance on the part of Stanley was a negligent assurance or order or invitation to do the work, still if you believe that Mitchell knew of the defects in the scaffold, or if he had equal means with Schofield's Sons Company of knowing, or if by the exercise of ordinary care he might have known of the defects, if there were any then I charge you Mrs. Mitchell could not have a verdict at your hands." This instruction was not expressly withdrawn modified, or limited; and it was error to overrule the motion for new trial, in which error was assigned thereon.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1085; Dec. Dig. ☞288(15).]

4. MASTER AND SERVANT ☞285(5)—INJURIES TO SERVANT—ACTIONS—RES IPSA LOQUITUR.

The rule of *res ipsa loquitur* is not applicable in this case, and the request to give it in charge to the jury was properly refused.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898, 955; Dec. Dig. ☞285(5).]

Error from City Court of Macon; Robt. Hodges, Judge.

Action by Mrs. M. E. Mitchell against the J. S. Schofield's Sons Company. Judgment for defendant, and plaintiff brings error. Reversed.

R. S. Wimberly, of Macon, for plaintiff in error. Miller & Jones, of Macon, for defendant in error.

GEORGE, J. This case was before this court at the March term, 1915; and the character of the action is sufficiently shown, and the material facts of the case clearly stated in the opinion there delivered by Judge Broyles. 16 Ga. App. 686, 85 S. E. 978. It is proper to add that the plaintiff predicated

her action upon the theory that, although her son, for the value of whose life she sued, believed that the scaffold in question was not substantial enough to carry the weight of the top of the creosote tank, this fact was suggested by the deceased and a fellow servant to Stanley, the vice principal of the defendant, who answered that he had built more towers and tanks than the servants ever saw, and knew more about it than they ever would know, and directed them to go ahead and do what he said to, as long as he was foreman of the job. The second trial of the case resulted in a verdict for the defendant, the plaintiff's motion for a new trial was overruled, and she brought the case to this court for review.

[1] 1. The rejection of certain evidence is complained of in grounds 1, 2, 3, and 4 of the amendment to the motion for a new trial, but these exceptions are not of sufficient merit to require especial notice, and particularly since the rejected evidence was, in substance, admitted by the court, as will appear from a close reading of the brief.

[2] 2. In ground 5 it is complained that the court refused, on cross-examination of the vice principal of the defendant, to allow the following question:

"When you rebuilt this scaffold, didn't you rebuild it with braces to the outside scaffold, with uprights down the middle, on the side, and with an upright in the middle of the scaffold to support the cone of the roof?"

It is insisted that this question, to which an affirmative answer was expected, should have been allowed on cross-examination and in rebuttal of one of the contentions made by the defendant in error, to wit, that the scaffold was equal to those in general use and was reasonably safe. We think that this evidence was properly rejected, and that the same considerations of public policy stated by the Supreme Court of this state in the case of *G. S. & F. Ry. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405, 59 L. R. A. 118, apply with equal force, whether such evidence be offered in chief, or in rebuttal of one of the contentions made by the defendant in the trial of the case. *Central Railway Co. v. Price*, 121 Ga. 658, 49 S. E. 683.

[3] 3. In grounds numbered 6 to 19, inclusive, exceptions are taken to instructions to the jury. Many of these exceptions go merely to the form of expression used by the court, and are of no moment. Certain of the instructions do go to the very substance of the plaintiff's case. In ground 17 complaint is made of the following charge:

"If you believe this scaffold was negligently built, and you also believe Mitchell was ordered to go in and upon this scaffold to work, with assurance from Stanley that it was safe, and such assurance on the part of Stanley was a negligent assurance or order or invitation to do the work, still if you believe that Mitchell knew of the defects in the scaffold, or if he had equal means with Schofield's Sons Company of knowing, or if by the exercise of ordinary care he

might have known of the defects, if there were any, then I charge you Mrs. Mitchell could not have a verdict at your hands."

Was this charge the law of the case? It will be conceded that it is the master's primary nondelegable duty to furnish the servant a safe place in which to work, and the servant has a right to rely, without inspection, on the assumption that the master has performed this duty. If at any time the place seems unsafe, it is his duty to inform the master of that fact, and if the master assures him that he, the master, knows his business, and that it is safe, he would have the right to rely on that assurance, unless the danger was so obvious that no man of ordinary prudence would have taken the risk. On principle, it would seem that the question for solution would be: Did the servant exercise ordinary care in continuing at the work? If he did, then he should be allowed to recover. To hold otherwise would, in effect, preclude all claims where the servant relied on the assurance of the master after he (the servant) had complained that the place or appliance was in a dangerous condition. The very fact of the complaint shows that in the servant's judgment the place or appliance was dangerous. The substantial fact to be determined in such case, and that by the jury, is: Did the servant exercise ordinary care and prudence in continuing in the employment and in the use of the scaffold in question? We, of course, exclude that class of cases where the danger of remaining at work is so hazardous that ordinary minds would not differ in saying that the servant should not have so remained, but if it is a question about which reasonable minds might differ, then it should be determined by the jury. This charge, of which complaint is made, amounts to the direction of a verdict for the defendant, because it must be remembered that the plaintiff's case is predicated upon the proposition that her son knew of the defect in the scaffold, complained of it, and was assured by the master that the master knew his business and that the scaffold was safe.

How does the statement embraced in the excerpt quoted from the charge stand upon authority? In *Bush v. West Yellow Pine Co.*, 2 Ga. App. 295, 58 S. E. 529, it was held:

"While ordinarily the law reads into contracts of employment an agreement on the servant's part to assume the known risks of the employment, so far as he has the capacity to realize and comprehend them, yet this implication may be abrogated by an express or implied contract to the contrary; if the servant complains to the master that the instrumentality appears to be dangerous, and thereupon the master commands him to proceed with the work and assures him there is no danger, the law implies a quasi new agreement, whereby the master relieves the servant of his former assumption of risk and places responsibility for resulting injuries upon the master."

In *Smith, by Next Friend, v. Southern Railway Co.*, 8 Ga. App. 822, 70 S. E. 192, it was declared:

"The agreement of the servant to assume the risks incident to his employment, which may ordinarily be implied as one of the stipulations of the contract of employment, may be abrogated by an express or implied contract to the contrary. If the servant states to his master that the performance of a duty in a certain way is likely to be dangerous and to render the place where he is working unsafe, and thereupon the master assures him that the act which he requires him to do is not attended with danger, and the servant, upon this assurance and the implicit command of the master, attempts to do the act which the master suggested could safely be done, and in doing it is injured, the master is liable, because the law implies a new agreement, superseding the agreement to assume the risk, whereby the master relieves the servant of his former assumption of the risk, and places the responsibility for the results of his command upon himself."

In *Massee & Velton Lumber Co. v. Ivey*, 12 Ga. App. 583, 77 S. E. 1130, it was held:

"Under the allegations of the petition, the servant's implied assumption of risk was abrogated by the assurance of the defendant's foreman that he was in a safe place to work, and the foreman's command that he continue to work with the instrumentalities which had been furnished by the master."

The court declared that case to be controlled by the rulings in *Bush v. West Yellow Pine Co.* and *Smith v. Southern Railway Co.*, supra, and declined to overrule the decisions in those cases. The same principle is ruled in *Cherokee Brick Co. v. Hampton*, 16 Ga. App. 53, 84 S. E. 328. Thompson, in his *Commentaries on the Law of Negligence*, vol. 4, § 4664, says:

"It may be collected from the almost unanimous current of judicial authority that, if the servant complains of or directs attention to a defect or danger in the place where he is required to work, or in the tools, machinery, or appliances with which he is required to work, and thereupon the master, or his representative, assures him that he can proceed without danger, and requests or commands him to continue his work, the servant will not, as matter of law, be put in the position of having accepted the risk, or of having been guilty of contributory negligence, because of relying upon the presumed superior knowledge of his master or of his master's representative, and continuing the work. The servant will not be imputable with wrong for thus acting upon the advice or assurance of the master or his vice principal, nor will it lie in the mouth of the master to impute blame to the servant for so doing. So, it has been held that a servant has a right to rely on the superior judgment of the master in directing certain work to be done in a particular way, although the servant knows the dangerous character of the work, unless the danger is so manifest that no reasonably prudent man would undertake it in the same situation. A possible exception to the rule arises where, notwithstanding the advice, assurance, or command, the danger is imminent and glaring, or at least so obvious that an ordinarily prudent man would not, even under the circumstances, encounter it."

In a case of this character the master may plead: (1) That the servant assumed the risk incident to the work; and (2) that he was guilty of negligence in continuing in the work, and that this negligence, either partially or entirely, caused his injury. These defenses are distinct, although in actual practice they often merge. While the servant ordinarily assumes the risk incident to his

employment, yet if the servant complains of a defect in the place or appliance, and is expressly assured by the master that the place or appliance is safe, the servant cannot be held, as matter of law, to have assumed the risk incident to the work, but it then becomes a question whether he has brought about, by his own negligence, the injury of which he complains. It is clear that, where he knows of the defect in the place, and complains of it to the master, and is by the master assured that the place is safe, and relies on such assurance, his contributory negligence in remaining in the work will defeat his action only when ordinary minds would not differ in saying that his act in remaining was so obviously dangerous that no prudent man would continue in the work.

In the instant case, if the jury should find that Mitchell complained of a defect in the scaffold, and if they should find that the master negligently assured him that the scaffold was safe for the purposes intended, the plaintiff may recover unless the defect was so obviously dangerous that no ordinarily prudent person would continue to use the scaffold. While the defenses referred to above, under these facts, practically merge, it cannot be stated, as a matter of law, on the facts in this record, that the servant did assume the risk of going upon the scaffold; nor can it be said, as a matter of law, as the court in this case did say, that his act in going upon the scaffold, with knowledge of the defect, was such contributory negligence as would bar a recovery. Of course, the plaintiff cannot recover if her son failed to exercise ordinary care in the premises, notwithstanding the express command and assurance of the master. Every one is bound to exercise ordinary care for his own protection, and what is ordinary care must necessarily depend in every case upon all the facts and attendant circumstances of the case. If no ordinarily prudent person would go upon the scaffold with knowledge of the defects therein, then the plaintiff in this case cannot recover, even though the jury should find that there was an express command negligently given, by the master to go upon the scaffold, coupled with an express assurance that the scaffold was a safe place for the purposes intended.

Since the excerpt from the charge of the court, herein considered, was nowhere in the charge expressly withdrawn, limited, or modified, a new trial must be granted the plaintiff. We are loath to disturb this, the second, verdict for the defendant, but the plaintiff is entitled to have her case submitted to the jury with proper and correct instructions on the law; and until this has been done, it is the duty of this court to interfere in her behalf. The learned trial judge, who at the time of his death was a member of this court, with the commendable frankness ap-

parent throughout his judicial career, impressed upon the jury the controlling principles of the law applicable to this case, as he understood them. We simply differ, with all due deference to the views of our departed brother, in the application of the substantive principles of law to the facts in this case.

[4] 4. The plaintiff excepts to the refusal of the court to give in charge certain requests applying in effect the rule of *res ipsa loquitur*. The charge requested is not applicable to the facts in this case, and is not applicable in any case between a master and a servant where the evidence accounts for and explains the cause of the occurrence or accident. *Labatt on Master and Servant* (2d Ed.) vol. 4, § 1361 et seq.

The judgment overruling the motion for a new trial is reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 259)

COVIN v. WILLIE, Judge. (No. 8010.)

(Court of Appeals of Georgia, Division No. 2
Feb. 1, 1917.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF \S 51—SIGNING AND CERTIFYING—DUTY OF TRIAL JUDGE.

When a bill of exceptions complies with the law, conforms to the truth, contains (or specifies) all of the evidence, and specifies all of the record material to a clear understanding of the errors complained of, and is presented to the presiding judge within the time prescribed by the statute, it is the duty of the judge to sign and certify it.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 74, 78; Dec. Dig. \S 51.]

2. EXCEPTIONS, BILL OF \S 53(5) — SIGNING AND CERTIFYING—MANDAMUS.

When a bill of exceptions is presented to a judge and he refuses to certify it because it does not contain "relevant matters transpiring before him on the hearing which may legitimately serve to explain the ruling made or the facts transpiring in connection therewith which will throw light upon it" and he returns the bill of exceptions to counsel with his objection to it in writing, it is the duty of counsel to correct the bill of exceptions, and when counsel refuses to do this, the judge will not be required by mandamus to sign and certify the bill of exceptions.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. \S 53(5).]

Mandamus by L. B. Covin against W. J. Willie, Judge. Mandamus refused.

P. C. Andrews, of Cairo, and S. P. Cain, of Whigham, for petitioner.

BLOODWORTH, J. L. B. Covin brought suit against Cairo Banking Company and against O. T. Davis and J. W. Nicholson. All of these defendants appeared and filed demurrers and answers. The court sustained the demurrers to the extent of striking all allegations of tort from the plaintiff's petition and requiring him to proceed ex con-

tractu. After this time J. W. Nicholson filed a demurrer, on the ground that there was a misjoinder of parties, and this demurrer was sustained and an order entered striking J. W. Nicholson as a party defendant. Afterwards, on the same day, the trial judge sustained a general demurrer to the plaintiff's petition and dismissed the same. On the 15th of November, and within 30 days from the judgment of dismissal, L. B. Covin tendered to the trial judge, Hon. W. J. Willie, his bill of exceptions, and asked that it be signed and certified. The presiding judge refused to sign and certify the bill of exceptions, for the following reasons, as stated by him and indorsed on the bill of exceptions:

"After argument by counsel for defendant in error on the demurrer striking J. W. Nicholson from the suit, and before judgment was entered on same, counsel for plaintiff in error was asked by the court, what, if anything, he had to say regarding the demurrer, and replied that they had contemplated striking J. W. Nicholson from the suit. I think this should be incorporated in the bill of exceptions, and, if done, I will certify the same to be true."

On refusal of counsel to insert the above in the bill of exceptions the presiding judge refused to sign and certify the bill of exceptions, and mandamus was brought.

[1] Under the above statement of facts as shown by the petition for mandamus, should the judge be required to sign and certify the bill of exceptions as tendered?

"The rule now seems to be well settled in this state that after final judgment the losing party—other than the state in a criminal case—is entitled to one bill of exceptions as a matter of right; and if the judge refuses to sign and certify the bill of exceptions when presented to him, if it truly states the facts, an application for mandamus will be granted. * * * compelling the judge to sign and certify the bill of exceptions, irrespective of the merit of the exceptions taken." *Seaboard Air Line Ry. v. Reid*, 6 Ga. App. 20, 63 S. E. 1130.

[2] The final test is: Does the bill of exceptions "truly state the facts?" In the instant case a bill of exceptions was tendered in due time to the judge, and he refused to sign and certify, and indorsed on it his reason therefor as stated above. When the papers were returned to counsel he refused to change the bill of exceptions to conform to the suggestion of the judge, and brought mandamus. Did the judge err in refusing to sign and certify the bill of exceptions as presented? The law requires the judge to inspect the bill of exceptions and the burden of determining if it speaks the truth is upon him.

"The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of." Civil Code, § 6140(3).

"If the judge shall determine that the bill of exceptions is not true or does not contain all of the necessary facts, he shall return the same, within ten days, to the party or his attorney, with his objections to the same in writing. If those objections are met and removed, the judge may then certify, specifying in his certificate the cause of the delay. If the judge sees proper,

he may order notice to the opposite party of the fact and time of tendering the exceptions, and may hear evidence as to the truth thereof." Civil Code, § 6158.

"It is competent for the judge to certify as to relevant matters transpiring before him on the hearing, which may legitimately serve to explain the ruling made or the facts transpiring in connection therewith which will throw light upon it." *Petty v. Patterson*, Judge, 144 Ga. 340(2), 87 S. E. 19.

Was the above statement of counsel, which the judge suggested should be in the bill of exceptions, material? Copies of the pleadings in the original case are not attached, and the petition for mandamus is not full enough for this court to pass upon this issue. Although the contrary is insisted on in brief of the plaintiff in error, yet if the statement amounted to a consent of counsel to sustaining the demurrer and striking the name of J. W. Nicholson from the petition, it would be material in explaining the ruling and throwing light upon it. Under this view of the case, "consensus tollit errorem" would apply. But apart from this, in the case of *Brinson v. Callaway*, judge pro hac vice, 112 Ga. 163, 37 S. E. 177, Justice Cobb says:

"This court cannot undertake to determine an issue between the judge and counsel as to what parts of the record are material to a proper consideration of the case. The judge who tried the case must decide this question, the law requiring him to certify that the bill of exceptions 'specifies all of the record material to a clear understanding of the errors complained of.' Civil Code, §§ 5532, 5528(4). The decision of the judge in this matter is conclusive on counsel tendering the bill of exceptions. It is the duty of counsel tendering a bill of exceptions to specify such portions of the record as are material to a clear understanding of the errors complained of. Civil Code [of 1895], §§ 5528, 5530 [Civil Code of 1910, §§ 6140, 6142]. While the judge to whom a bill of exceptions is tendered is authorized to change the same so as to make it refer to all the record necessary, he is certainly not required to do this in a case where counsel tendering the bill of exceptions not only does not request him so to do, but expressly refuses to have incorporated in the bill of exceptions parts of the record which the judge claims are material, and makes a direct issue with the judge as to the materiality of the same and the right of the judge to require the parts of the record claimed by him to be material to be transmitted to this court."

In the case of *Campbell v. Foute*, 6 Ga. App. 113, 64 S. E. 292, the court said:

"The determination of what is true and what is not true as to matters occurring on the trial of a case, when it is sought to review the trial by a bill of exceptions, addresses itself exclusively to the presiding judge; and this court is compelled by law to take his statement as true. If the judge says that certain corrections are necessary, to make the bill of exceptions speak the truth, we have no power to allow counsel to take issue with him, nor can we take issue with him ourselves. It is the duty of counsel to make these corrections and tender to the trial judge the bill of exceptions as corrected."

In the case of *Pelham Manufacturing Co. v. Scaife*, 7 Ga. App. 448, 67 S. E. 112, in stating the reason which will justify the trial judge in declining to certify a bill of exceptions, Judge Russell said:

"It must be either because the bill of exceptions is presented too late, or because the statements of fact relating to the proceeding it is sought to review are untrue, or because the counsel has declined to correct the bill of exceptions in accordance with the direction of the court, or some such similar matter, which does not in any wise relate to the sufficiency or merit of the exceptions which the application for the writ of error seeks to present to the higher court."

Counsel did not deny, that the statement which the judge wished incorporated in the bill of exceptions was true, the judge thought it material and offered to sign the bill of exceptions if the statement of counsel was written into it, but counsel refused. The judge having said that the above statement should be incorporated in the bill of exceptions in order to make it speak the truth, "we have no power to allow counsel to take issue with him, nor can we take issue with him ourselves." Counsel having declined to correct the bill of exceptions as directed, the judge properly refused to sign and certify the same. Mandamus refused.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 246)

JAMES v. DAVIS. (No. 8195.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

OVERRULING OF CERTIORARI—PROPRIETY.

Upon the petition for certiorari and the answer of the ordinary, the court did not err in overruling the certiorari.

Error from Superior Court, Dougherty County; E. E. Cox, Judge.

Action between Juby James and A. H. Davis, begun before the ordinary. His petition for certiorari being overruled, the former brings error. Affirmed.

Leonard Farkas and Pope & Bennet, all of Albany, for plaintiff in error. R. J. Bacon and R. H. Ferrell, both of Albany, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 268)

JOHNSON v. BUCKEYE COTTON OIL CO.
(No. 8248.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917.)

(Syllabus by the Court.)

DEATH §103(2) — ACTION FOR CAUSING DEATH—NONSUIT.

This was a suit for negligent homicide of the plaintiff's son. The evidence adduced by the plaintiff, together with the admissions in the defendant's answer, failed to show that the homicide was caused by the defendant's negligence;

and a nonsuit was properly awarded by the court.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. §103(2).]

Error from City Court of Fulton County; W. D. Ellis, Judge.

Action by Susie Johnson against the Buckeye Cotton Oil Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Chas. M. Moon, Paul S. Etheridge and Chas. B. Shelton, all of Atlanta, for plaintiff in error. E. V. Carter and Frank Carter, both of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 230)

WHITE v. STATE. (No. 7892.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. LARCENY §30(1)—INDICTMENT—DESCRIPTION OF PROPERTY.

The indictment charged the accused with "the offense of larceny after trust delegated, for that the said Green White did on the 28th day of October in the year of our Lord 1915, in the county aforesaid, after being intrusted by J. C. Sheppard with two bales of lint cotton, weighing about 500 pounds each, then and there the property of said J. C. Sheppard and of the value of \$80 each, for the purpose of selling same and paying the proceeds of said sale to said J. C. Sheppard, did fraudulently convert said two bales of cotton to his own use, to the injury and without the consent of the said J. C. Sheppard, and without paying to the said J. C. Sheppard the full value or market price thereof, contrary to the laws," etc. The court properly overruled the demurrer based upon the ground that the property alleged to have been converted was not described with sufficient definiteness and particularity to put the defendant on notice. *Cody v. State*, 100 Ga. 105, 28 S. E. 106(2); *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058(3); *Alderman v. State*, 57 Ga. 367(2); *Keys v. State*, 112 Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63. The case of *Bright v. State*, 10 Ga. App. 17, 72 S. E. 519, relating to an indictment for simple larceny, is not in point or in conflict with this ruling.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 64, 65; Dec. Dig. §30(1).]

2. CRIMINAL LAW §729—HARMLESS ERROR—REMARKS OF SOLICITOR GENERAL.

The harmful effect of the remarks made by the solicitor general in his concluding argument to the jury, complained of in the only special ground of the motion for a new trial, was not such as to require the grant of a mistrial. The injury, if any, was sufficiently removed by the action of the court in directing the solicitor general to desist from such references and in ruling out the remarks complained of, and by the withdrawal of the remarks by the solicitor general and his apologies therefor to the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. §729.]

3. LARCENY §40(4)—LARCENY BY TRUST—INDICTMENT—VARIANCE.

The indictment alleged a trust for the purpose therein set forth, and the proof showed a

trust for an entirely different purpose. "The indictment being for larceny after a trust had been delegated, in order to convict the accused it was necessary to prove the creation of the trust described in the indictment, and a fraudulent breach of it in the manner alleged. To charge one trust and prove another would not suffice. *Carter v. State*, 53 Ga. 326; *McCrory v. State*, 81 Ga. 334 [8 S. E. 588];" *McNish v. State*, 88 Ga. 499, 500, 14 S. E. 865. The evidence failing to support the particular allegations made in the indictment, the conviction of the accused was unauthorized, and the court erred in overruling the motion for a new trial based upon the general grounds.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 102; Dec. Dig. ¶40(4).]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Green White was convicted of larceny, and he brings error. Reversed.

W. B. Mebane and Sharp & Sharp, all of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, for defendant in error.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 256)

FINCH v. J. M. COX CO. (No. 7693.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. PAYMENT ¶87(1)—RECOVERY OF PAYMENT—GROUNDS—"DURESS."

A payment can be recovered back where it is made under an urgent and immediate necessity therefor, or where it is made to release property from detention. Civ. Code 1910, § 4317. This Code section should be construed together with section 4116, which is as follows: "Duress consists in any illegal imprisonment, or legal imprisonment used for an illegal purpose, or threats of bodily or other harm, or other means amounting to or tending to coerce the will of another, and actually inducing him to do an act contrary to his free will." *Fenwick Shipping Co. v. Clarke Bros.*, 133 Ga. 43, 44, 65 S. E. 140, 141.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 283; Dec. Dig. ¶87(1).]

For other definitions, see *Words and Phrases*, First and Second Series, *Duress*.]

2. PAYMENT ¶87(5)—RECOVERY OF PAYMENT—VOLUNTARY PAYMENT.

As shown by the record, the payment made by the plaintiff was not a voluntary payment, but was made under an urgent and immediate necessity therefor, and to secure the release of her personal property from detention; and, under the particular facts of the case, the defendant could not in equity and good conscience retain it.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 287; Dec. Dig. ¶87(5).]

3. VERDICT CONTRARY TO LAW AND EVIDENCE—REFUSAL OF NEW TRIAL ERRONEOUS.

The verdict for the defendant was contrary to law and the evidence, and the court erred in refusing to grant a new trial.

Error from City Court of Waycross; Jno. C. McDonald, Judge.

Action by Mrs. G. S. Finch against the J. M. Cox Company. Judgment for defendant, and plaintiff brings error. Reversed.

Parks & Reed, H. W. Wilson, and J. E. English, all of Waycross, for plaintiff in error. J. L. Sweat and C. L. Redding, both of Waycross, for defendant in error.

BROYLES, P. J. Under the evidence adduced in this case, the following findings of fact were demanded: G. S. Finch, the husband of the plaintiff, was a retail grocer in Waycross, Ga., and owed the defendant, a wholesale grocery company, in the same city, \$1,408.57. Mrs. Finch, the plaintiff, was not indebted to the defendant in any amount. On January 11, 1913, Finch made a general assignment for the benefit of his creditors, and on the same day he left, with his wife and children, for Atlanta, and on the same date shipped to his wife, to Atlanta, a car containing household goods, clothing, and some canned groceries. On January 15, 1913, Cox, the president of the defendant company, sued out an attachment before a justice of the peace at Waycross, alleging that Finch owed the defendant \$1,408.57 and had absconded. Cox and a deputy sheriff of Ware county went to Atlanta, located the car consigned to Mrs. Finch in the railroad yards, and the deputy levied the attachment upon it. All the property in the car belonged to Mrs. Finch, and her husband had no title thereto. Among the property in this car was clothing for herself and her minor children. Mrs. Finch, with her children and husband, was stopping at a hotel, and their intention was to rent a house and make Atlanta their permanent home. On learning of the attachment, Mrs. Finch employed a lawyer, who endeavored to have Cox release the property. Cox refused to do so unless the full amount of Finch's debt was paid to him, stating that otherwise he was going to return the car to Waycross; and he had the deputy secure a bill of lading for the car to that destination. Cox finally agreed to release the car on the payment to him of \$800 in cash. The plaintiff in error was unable to make the statutory bond required to release her property, and her lawyer paid to Cox \$800, and Cox released the property and gave to the lawyer the following receipt:

"Received from Mrs. G. S. Finch the sum of \$800, which is paid to me in consideration of the release of levy on car No. 20671, marked A. B. & A., and contents, now attached in yards of A. B. & A. R. R. at Atlanta, Ga. J. M. Cox Co., by J. M. Cox, President."

Mr. Cox returned to Waycross with the \$800, and credited the amount on his books to "merchandise account." Shortly thereafter involuntary bankruptcy proceedings were filed against Finch, and he effected a composition of 50 per cent. The claim of Cox's company was proved in the bankruptcy proceedings, for the full amount of the debt,

to wit, \$1,408.57, and 50 per cent. of that amount was paid on it. This sum and the \$800 which the defendant company had secured from Mrs. Finch amounted to \$1,504; Cox himself admitting upon cross-examination:

"If you put it so, directly and indirectly, I got \$1,504 out of our claim of \$1,400, or \$100 more than the claim."

Mrs. Finch brought her suit to recover the \$800 which she had paid to secure the release of her property, alleging that it was paid under an urgent and immediate necessity therefor, and to secure the release from detention of her property which had been wrongfully levied upon under the attachment, and that, whether it was collected on her husband's debt or not, it was paid under duress and without consideration, and that the defendant was not entitled to retain it. Two mistrials of the case resulted, and the third trial resulted in a verdict for the defendant, and the plaintiff excepted.

[1-3] A payment made to prevent a levy is not under duress where the party had an immediate and adequate remedy at law. *Hoke v. City of Atlanta*, 107 Ga. 416, 33 S. E. 412; *Strange v. Franklin*, 126 Ga. 715, 55 S. E. 943. In both of the cases here cited the party making the payment had a complete and easily available legal remedy to prevent the levy, and, in addition, the payment was made to one who in good conscience could retain it. In the instant case Mrs. Finch was at a hotel in a strange city, to which she had just removed from a distant part of the state. Among her property which was levied upon was her household furniture and wearing apparel of herself and her little children. She was unable to make the statutory bond necessary to secure the release of the attachment. If she had filed a claim to the property and made a "pauper's affidavit" in lieu of bond, her property would not have been released, but would have been taken back to Waycross, Ga., and she would have been obliged to return there and there fight out her claim in the courts. The defendant company had no claim against her; its claim being against her husband only. It is unmistakable from the evidence that the \$800 which the defendant received from Mrs. Finch was in fact and in truth received as a credit on her husband's debt, notwithstanding the testimony of Cox that he had credited this payment on the books of his company to "merchandise account," and although the defendant company, in the bankruptcy proceedings against Finch, proved its claim for the entire amount originally owed by him, to wit, \$1,408.57. If the \$800 was not received as a payment on Finch's account, then its retention by the defendant company would be unconscionable, as it otherwise had no claim whatever on the property levied upon, or upon the \$800 given to secure the release of that property.

"Whenever the plaintiff could recover in a court of equity, he can recover in an action for money had and received. *Chitty on Con.* 474; 2 T. R. 153; 1 Cowper R. 372; [Smith v. Bell] 6 Pet. 88 [8 L. Ed. 822]." *Phillips v. Crews*, 65 Ga. 275, 278; *Culbreath v. Culbreath*, 7 Ga. 64, 68, 69, 50 Am. Dec. 375.

Under the facts shown by the record it is clear to us that the payment by Mrs. Finch to the defendant was made under an urgent and immediate necessity therefor, and to secure the release of her personal property which had been wrongfully levied upon under an attachment sued out by the defendant, that sections 4317 and 4116 of the Civil Code of 1910 are applicable to her suit, and that the defendant cannot in equity and good conscience retain the money so paid for it. Mrs. Finch is entitled to recover back her money.

Under the above rulings it is unnecessary to pass specifically upon the various grounds of the amendment to the motion for a new trial. As complained of therein, there were errors in the admission and the repelling of evidence, and in the charge of the court. These errors, however, in the light of this decision, will doubtless be eliminated upon the next trial of the case.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 255)

CENTRAL OF GEORGIA RY. CO. v. GARMON. (No. 7462.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

There is evidence to support the verdict.

2. NEW TRIAL ~~§~~99—GROUNDS—NEWLY DISCOVERED EVIDENCE.

The alleged newly discovered evidence of a civil engineer who states in his affidavit that about the year 1907 he made a survey of this land, and that he, "at the instance of defendant in the above case, has since said trial made another survey of said tract of land," is cumulative. Ordinary diligence would require that this last survey should have been made before the trial. Civ. Code, 1910, § 6086. "A judgment of the trial court refusing a motion for new trial on the ground of newly discovered evidence will not be disturbed when the motion fails to show, by affidavit of the movant and each of his counsel, that they did not know of the existence of such evidence before the trial, and that the same could not have been discovered by the exercise of ordinary diligence." *Pharr v. Davis*, 133 Ga. 759, 66 S. E. 917.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. ~~§~~99.]

Error from City Court of Polk County; John K. Davis, Judge.

Action by W. G. Garmon against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. Branham and Maddox & Doyal, all of Rome, and Fielder & Fielder, of Cedartown, for plaintiff in error. Wm. W. Mundy, of Cedartown, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 264)

PRICE-EVANS FOUNDRY CO. v. SOUTHERN BELL TELEPHONE & TELEGRAPH CO. (No. 8241.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT \S 145(1) — UNDISCLOSED PRINCIPAL — RIGHT OF THIRD PERSON.

A third person dealing with an agent of an undisclosed principal, cannot hold the principal liable under the contract, where the principal has previously accounted and settled with the agent. Civ. Code 1910, § 3596.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 513, 518-520; Dec. Dig. \S 145(1).]

2. AGREED STATEMENT OF FACTS—APPLICATION OF STATUTES.

Under the agreed statement of facts, section 3601 of the Civil Code, cited by counsel for the plaintiff in error, is not applicable.

3. DIRECTED VERDICT—ERROR.

The court did not err in directing a verdict for the defendant.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between the Price-Evans Foundry Company and the Southern Bell Telephone & Telegraph Company. Judgment for the latter, and the former brings error. Affirmed.

Dodd & Dodd, of Atlanta, for plaintiff in error. McDaniel & Black, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 263)

WILLIAMS v. DAVIS. (No. 8181.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence.

2. APPEAL AND ERROR \S 1078(6)—REVIEW—ABANDONMENT OF ERROR.

The grounds of the amendment to the motion for a new trial, not being referred to in the brief of counsel for the plaintiff in error, are treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261; Dec. Dig. \S 1078(6).]

Error from Superior Court, Dooly County; W. F. George, Judge.

Action between W. L. Williams and J. M. Davis. From the judgment, Williams brings error. Affirmed.

Powell & Lumsden, of Vienna, and J. T. Hill, of Cordele, for plaintiff in error. Jule Felton, of Montezuma, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 246)

LAURENS COUNTY v. McLENDON. (No. 8221.)

(Court of Appeals of Georgia, Division No. 1. Feb. 1, 1917.)

(Syllabus by the Court.)

1. BRIDGES \S 37—USE FOR TRAVEL—LIABILITY OF COUNTY.

The provision of Pol. Code 1910, § 748, making counties primarily liable for injuries caused by any defective bridges, whether erected by contractors or by county authorities, is not applicable to a bridge erected over a water course which divides one county from another. To bridges of the latter class sections 419 to 423 of the Political Code of 1910 are applicable; and liability attaches only in accordance with section 768, supra—that is, upon failure of the county to take a sufficient bond from the contractor. Brooks County v. Carrington, 7 Ga. App. 225, 66 S. E. 625; Cook v. County of De Kalb, 95 Ga. 218, 22 S. E. 151; Willingham v. Elbert County, 113 Ga. 15, 38 S. E. 348; Forsyth County v. Gwinnett County, 108 Ga. 510, 33 S. E. 892.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. \S 37.]

2. BRIDGES \S 37—COUNTIES \S 208 — USE FOR TRAVEL—LIABILITIES FOR INJURIES.

Counties are not liable to suit for any cause of action unless made so by statute. Pol. Code, 1910, § 384. There is no statute authorizing suit against a county for failure to repair a bridge after seven years have elapsed from the date of its construction, when no bond was required of the contractor by the county. A failure by the county to require a bond from the contractor places the county in the same position as the contractor. The liability of the county extends no further, and exists no longer, than the contractor's. County of Monroe v. Flynt, 80 Ga. 489, 6 S. E. 173; Arnold v. Henry County, 81 Ga. 730, 8 S. E. 606; Helvingston v. Macon County, 103 Ga. 106, 29 S. E. 596; Dougherty County v. Newson, 107 Ga. 811, 33 S. E. 660.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 96, 103-105, 109; Dec. Dig. \S 37; Counties, Cent. Dig. § 338; Dec. Dig. \S 208.]

3. BRIDGES \S 46(3) — USE FOR TRAVEL — ACTIONS FOR INJURIES—PLEADING.

While the principles announced in the foregoing headnotes are well settled, it appears from the petition in this case, as amended, that, within seven years preceding the injury and damage complained of, the county expended more than \$500 in the repairing and rebuilding of the bridge, originally constructed more than seven years prior to the date of the alleged injury, and in fact "renewed and rebuilt" the bridge; and the allegations are sufficient to withstand a general demurrer. The judge, therefore, did not err in overruling the general demurrer to the peti-

tion as amended. It is a question of fact for the jury whether the bridge was, within seven years preceding the date of the injury, "rebuilt," or only "repaired," the county having failed to require a bond for this work upon the bridge. *Warren County v. Evans*, 118 Ga. 200, 44 S. E. 986; *Helvington v. Macon County*, 103 Ga. 106, 29 S. E. 596, *supra*.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 110-114; Dec. Dig. § 46(3).]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by H. R. McLendon against Laurens County. Judgment for plaintiff, and defendant brings error. Affirmed.

M. H. Blackshear, of Dublin, for plaintiff in error. Geo. B. Davis and S. P. New, both of Dublin, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur

(19 Ga. App. 234)

WATKINS v. STATE. (No. 7930.)

(Court of Appeals of Georgia. Division No. 1. Feb. 1, 1917.)

(Syllabus by the Court.)

1. WITNESSES § 40(1), 41—COMPETENCY—STATUTE.

Persons who have not the use of reason, as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses. Civ. Code 1910, § 5862.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 97, 99; Dec. Dig. § 40(1), 41.]

2. WITNESSES § 79(3)—COMPETENCY—EXAMINATION BY COURT.

The court must, by examination, decide upon the capacity of one alleged to be incompetent from idiocy, lunacy, or insanity or drunkenness or childhood. Civ. Code 1910, § 5865. The objection to competency, if known, must be taken before the witness is examined at all. Civ. Code 1910, § 5866; *Brunswick & Western Railway Co. v. Clem*, 80 Ga. 534, 7 S. E. 84 (3).

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 203; Dec. Dig. § 79(3).]

3. CRIMINAL LAW § 696(3, 5)—EXCLUSION OF EVIDENCE—OBJECTION.

Accordingly a motion to exclude the testimony of a witness upon the ground that the witness was an idiot was properly overruled, where no objection to the competency of the witness was made before examination, the moving party having knowledge of such ground, and where it appeared that the witness had "sufficient understanding to apprehend the obligations of an oath and to be capable of giving a correct account of the matters he has seen or heard in reference to the questions at issue." *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983 (3); *Pittsburgh & W. Ry. Co. v. Thompson*, 82 Fed. 726, 27 C. C. A. 333.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1640; Dec. Dig. § 696(3, 5).]

4. CRIMINAL LAW § 824(10), 829(16)—HARMLESS ERROR—RULING ON COMPETENCY OF WITNESS.

An exception that the court "failed to instruct the jury as to the law relating to idiots and lunatics as witnesses, and gave the jury no rule or instructions for guiding them in weighing and considering the evidence of idiots and luna-

tics," will not require a reversal, where no request was made for such a charge, and where the court charged the jury as follows: "The court cannot tell you what any witness swore or what any testimony in the case is. The court cannot tell you what weight or what credibility you will give to the testimony that is introduced. You have the right, in passing upon the evidence in the case, to observe the witness' manner on the stand; the witness' interest or want of interest, bias, or prejudice, if any; the witness' intelligence or want of intelligence; the witness' knowledge or want of knowledge; as well as every circumstance that has occurred during the trial and in your presence, you have a right to consider, in passing not only upon the weight and credibility of the testimony of the witness, but upon the case itself."

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1999, 2011; Dec. Dig. § 824(10), 829(16).]

5. CRIMINAL LAW § 939(1), 941(1), 942(1)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE OR IMPEACHING EVIDENCE—DILIGENCE.

The court did not err in refusing to grant a new trial on the ground of the alleged newly discovered evidence, as it was merely cumulative and impeaching in character; and, besides, it appears that the affiant to this evidence was subpoenaed as a witness by the state, sworn, put under the rule, but not examined, and it further appears that the affiant was the half-brother of the defendant, and was present at the time of the homicide, and this fact must have been known to the defendant, who upon his trial admitted the killing, but contended that it was done in self-defense. *Bowers v. State*, 135 Ga. 310, 69 S. E. 536 (1).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2318, 2321-2323, 2328, 2330, 2331; Dec. Dig. § 939(1), 941(1), 942(1).]

6. CONVICTION—SUFFICIENCY OF EVIDENCE.

The evidence warranted the verdict, and the alleged errors of law complained of and dealt with above do not require a new trial.

Error from Superior Court, Dawson County; J. B. Jones, Judge.

Charlie Watkins was convicted of homicide, and he brings error. Affirmed.

B. P. Gaillard, Jr., and Wm. M. Johnson, both of Gainesville, for plaintiff in error. Robert McMillan, Sol. Gen., of Clarksville, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 248)

AMERICAN SEWER PIPE CO. v. MATH-
EWS. (No. 7188.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT § 21—EMPLOYMENT—NOTICE OF TERMINATION.

Where, in a written contract of employment, it is stipulated that the "arrangement may be terminated at the end of any month by either party giving written notice to the other party," such notice is not complied with on the part of the employer by his sending to the employé a letter in which the making of a new and different contract with him is clearly contemplated, and in which the employer states that in his opinion "it would be advisable to

proceed on the old contract for thirty days longer," the import of such communication being thus clearly predicated upon the making of the new arrangement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. ☞ 21.]

2. MASTER AND SERVANT ☞ 21—EMPLOYMENT—NOTICE OF TERMINATION.

Where, on a later date, the employer notifies the employé that the intention of the former notice was to terminate the contract, but afterwards continues to treat the recipient of the communication as his employé and to hold him out as such to others, and with the knowledge and under the direction of the employer, he continues to perform his duties as such, and the employer continues to accept the benefit of the services so rendered, the latter notice cannot, under the circumstances, be held as binding upon the employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 20, 21; Dec. Dig. ☞ 21.]

3. MASTER AND SERVANT ☞ 7—EMPLOYMENT—MODIFICATION.

In order that an existing contract shall be discharged by the making of a new and inconsistent agreement by the parties thereto, the new contract must be so complete in all of its terms as to bind each of the contracting parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 7; Dec. Dig. ☞ 7.]

4. MASTER AND SERVANT ☞ 6—CONTRACT OF EMPLOYMENT—MODIFICATION—EVIDENCE.

There was no error in admitting the testimony complained of in the ninth ground of the motion for a new trial, wherein a witness for the plaintiff testified that the defendant employer denied the existence of such a new and inconsistent contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 6; Dec. Dig. ☞ 6.]

5. PRINCIPAL AND AGENT ☞ 85 — EMPLOYMENT—EXPENSES—LIABILITY.

Prior to the legal termination of such a contract the employer was liable, according to its provisions, for expenses incurred by the employé in the taking of orders, even though the employé may have been orally informed by the employer that his territory was so disposed of to another as inferentially to prevent the filling of such orders; it also appearing that after such oral notice the employer still continued to direct the employé in the further taking of orders by him, and part, at least, of such expenses being thus specifically authorized, and the bill of exceptions not clearly pointing out the alleged unauthorized expenses complained of as allowed. *Smith et al. v. Georgia Loan, Savings & Banking Co.*, 113 Ga. 975, 39 S. E. 410; *Higgins v. Cherokee Railroad*, 73 Ga. 149; *Baxter & Co. v. Camp et al.*, 126 Ga. 354, 54 S. E. 1036.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 224-228; Dec. Dig. ☞ 85.]

6. NEW TRIAL ☞ 128(1) — MOTION—SPECIFICATION OF GROUNDS.

In the motion for new trial, it is complained that the judge erred in not construing the letters in evidence in which, it was contended by the defendant, a notice of the termination of the contract was given. It appears that there were in evidence about 80 letters between the plaintiff and the defendant, introduced as throwing light upon the alleged termination of this contract, of which number approximately half were written by the defendant. Such a motion is not sufficiently specific when it fails to set forth which letters or portions thereof it is contended should have been so construed, although it

may clearly show in what manner the court left to the jury the construction complained of. *Kehoe v. Hanley*, 95 Ga. 321, 22 S. E. 539; *Smith et al. v. Georgia Warehouse Co. et al.*, 90 Ga. 181, 24 S. E. 875.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 257; Dec. Dig. ☞ 128(1).]

7. HARMLESS ERROR—CHARGE OF COURT.

The jury having found against the contention of the defendant as to the alleged termination of the contract, there was no harmful error in the charge of the trial judge complained of in the tenth ground of the motion for a new trial.

8. MOTION FOR NEW TRIAL.

The verdict was authorized by the evidence, and, the rules of law having been properly submitted in the charge of the court, the motion for new trial was properly refused.

Error from City Court of Macon; H. A. Mathews, Judge.

Action by A. J. Mathews against the American Sewer Pipe Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error. *Miller & Jones* and *P. F. Brock*, all of Macon, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J. concur.

(19 Ga. App. 245)

PASCHAL v. MORGAN. (No. 8152.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ☞ 637, 653(2) — EXCEPTIONS, BILL OF ☞ 24 — CONSOLIDATION OF CASES—SINGLE BILL OF ERROR—JURISDICTION.

An agreement between counsel that two cases be submitted at the same time to one jury did not amount to a consolidation of the cases, and did not authorize the losing party, who was a party to both cases, to file one bill of exceptions, attempting to bring both of the cases to this court, for decision here, there being a separate judgment in each case. This court has no jurisdiction to entertain such a bill of exceptions, and therefore the writ of error must be dismissed. This court being without jurisdiction, the bill of exceptions cannot be amended by striking one of the cases. *Dickey v. State*, 101 Ga. 572, 28 S. E. 980; *Erwin v. Ennis*, *Adm'r*, 104 Ga. 861, 31 S. E. 444; *Hicks v. Walker*, *Assignee*, 105 Ga. 480, 30 S. E. 333; *Walker v. Conn & Co.*, 112 Ga. 314, 37 S. E. 403; *Wells v. Coker Banking Co.*, 113 Ga. 857, 39 S. E. 298; *Purvis v. Ferst Sons & Co.*, 114 Ga. 689, 40 S. E. 723; *Brown v. L. & N. R. R. Co.*, 117 Ga. 222, 43 S. E. 498; *Center v. Fickett Paper Co.*, 117 Ga. 222, 43 S. E. 498; *Harris, Ex'r, v. Gano & Jennings*, 117 Ga. 950, 44 S. E. 8; *Cole v. Stanley, Ex'r*, 118 Ga. 259, 45 S. E. 282; and *Valdosta Guano Co. v. Hart et al.*, 119 Ga. 909, 47 S. E. 212(2).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2818, 2829; Dec. Dig. ☞ 637, 653(2); Exceptions, Bill of, Cent. Dig. § 31; Dec. Dig. ☞ 24.]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Suit between Jency Paschal and J. H. Morgan, executor. Decree for the latter, and the former brings error. Writ of error dismissed.

M. C. Few, of Madison, for plaintiff in error. Williford & Lambert, of Madison, for defendant in error.

LUKE, J. Writ of error dismissed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 250)

COUNCIL v. STEVENS. (No. 7318.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. EXECUTION \S 181—CLAIM—DISCONTINUANCE.

When an execution is levied and a claim filed, the claimant has the legal right to withdraw or discontinue his claim once, "without the consent of the plaintiff in execution, or some person duly authorized to represent such plaintiff." Civ. Code 1910, \S 5171; American Investment Co. v. Cable Co., 4 Ga. App. 106, 60 S. E. 1037 [4].

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 544-546, 557; Dec. Dig. \S 181.]

2. EXECUTION \S 185—CLAIMS—STATUTE.

Sections 5625 and 5626 of the Civil Code of 1910 do not apply to claim cases.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 552-556, 558; Dec. Dig. \S 185.]

3. PLEADING \S 111—PLEA IN ABATEMENT—ERROR—EFFECT.

The court erred in overruling the demurrer to the plea in abatement, and all proceedings thereafter are nugatory.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 234-236; Dec. Dig. \S 111.]

Error from City Court of Leesburg; W. G. Martin, Judge.

Action between L. G. Council, receiver, and M. J. Stevens. Judgment for the latter, and the former brings error. Reversed.

Ellis, Webb & Ellis, of Americus, for plaintiff in error. J. B. Hoyl, of Leesburg, and Wallis & Fort and O. R. Winchester, all of Americus, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 269)

STONE MOUNTAIN GRANITE CORP. v. PATRICK. (No. 8276.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF \S 129(2)—CONTRACT NOT TO BE PERFORMED WITHIN YEAR.

The statute of frauds does not apply to a contract which is not to be performed within one year from the making thereof, where there has been such part performance of the contract

as would render it a fraud of the party refusing to comply, if the court did not compel a performance. Civ. Code 1910, \S 3223 (3). Under this ruling the contract in this case was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 288; Dec. Dig. \S 129(2).]

2. EVIDENCE \S 142(5)—VALUE OF SERVICES.

The court did not err in refusing to require the plaintiff, while being examined as a witness, to state how much salary he had been paid by a former employer. Such evidence was not material to the issues in this case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 422; Dec. Dig. \S 142(5).]

3. CHARGE OF COURT—CONTENTIONS OF PARTIES.

The contentions of the two parties were substantially given in the charge of the court, and the statement as to them was fully as favorable to the defendant as it was to the plaintiff.

4. MASTER AND SERVANT \S 7, 41(1) — CONTRACT OF EMPLOYMENT—COMPROMISE—LIABILITY FOR BREACH.

Under the facts of the case the agreement entered into between the defendant and the plaintiff, after the defendant had notified the latter of his discharge, that the plaintiff would be given 30 days' notice and allowed to work another month before he was discharged, did not amount to a novation of the original contract, but was in the nature of a compromise; and where (as is shown by the plaintiff's evidence) the defendant afterwards refused, without good and sufficient cause, to carry out this agreement, and wrongfully discharged the plaintiff before the expiration of the 30 days, and without paying him his salary for that month, the plaintiff was entitled to hold the defendant to his original contract, and, the contract being for one year, to recover his whole year's salary, less whatever amount had been paid him by the defendant, and whatever amount he had been able to earn after his discharge, exercising ordinary diligence to find employment. And the court did not err in so instructing the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 7, 12, 50, 52; Dec. Dig. \S 7, 41(1).]

5. CHARGE OF COURT—MATERIAL ERROR.

None of the other instructions excepted to, when considered in connection with the evidence and the charge as a whole, contain material error.

6. APPEAL AND ERROR \S 999(1)—VERDICT—CONCLUSIVENESS.

The defendant's plea, supported by some proof, was that he discharged the plaintiff because the latter was incompetent and failed to perform his duties under the contract. On the other hand, the plaintiff's evidence tended to show that he was competent to perform the duties for which he was hired, and that he did perform such duties satisfactorily and to the best of his ability. This issue of fact was finally settled by the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3912-3915, 3917-3921; Dec. Dig. \S 999(1).]

7. APPEAL AND ERROR \S 1005(1) — MOTION FOR NEW TRIAL.

There was ample evidence to support the verdict, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3860-3876, 3948; Dec. Dig. \S 1005(1).]

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action by J. L. Patrick against the Stone Mountain Granite Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Alonzo Field, of Atlanta, for plaintiff in error. A. M. Brand, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 242)

THOMAS v. STATE. (No. 7964.)

(Court of Appeals of Georgia, Division No. 1. Feb. 1, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 938(1), 1156(3) — DISCRETION OF TRIAL COURT—MOTION FOR NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Whether an extraordinary motion for a new trial, based upon the ground of newly discovered testimony, should be granted or refused, rests largely in the sound discretion of the trial court; and this court is not inclined to interfere with the exercise of that discretion, where the newly discovered evidence is largely, if not entirely, impeaching and cumulative in character. Rogers v. State, 129 Ga. 539, 59 S. E. 288(4).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317, 3069; Dec. Dig. \S 938(1), 1156(3).]

Error from Superior Court, Polk County; A. L. Bartlett, Judge.

Sherman Thomas was convicted of larceny from the house, and he brings error. Affirmed.

See, also, 88 S. E. 917.

Bunn & Trawick, of Cedartown, for plaintiff in error. J. R. Hutcheson, Sol. Gen., of Douglasville, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 251)

KLECKLEY & ENGLISH v. BANK OF OGLETHORPE. (No. 7412.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. VERDICT—SUFFICIENCY OF EVIDENCE.

There is ample evidence to support the verdict.

2. TRIAL \S 295(1) — HARMLESS ERROR — CHARGE OF COURT.

When considered in connection with the entire charge of the court, there is not sufficient error in the excerpts therefrom complained of in the motion for new trial to authorize a reversal. Mere inaccuracies of expression or slight errors, which are not likely to obscure the meaning of the court or mislead the jury, will not authorize this court to set aside a verdict, where the charge is otherwise comprehensive and correct.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717; Dec. Dig. \S 295(1).]

3. APPEAL AND ERROR \S 981—DISCRETION OF TRIAL JUDGE—REFUSAL OF NEW TRIAL.

"The showing as to diligence in reference to the alleged newly discovered evidence not being at all satisfactory, and there being no affidavit as to the character and credibility of the alleged new witness, the discretion of the trial judge in refusing to grant a new trial will not be controlled." Atwater v. Hannah & Co., 116 Ga. 745, 42 S. E. 1007.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. \S 981.]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action between Kleckley & English and the Bank of Oglethorpe. Judgment for the latter, and the former brings error. Affirmed.

W. W. Dykes, of Americus, for plaintiff in error. Jule Felton, of Montezuma, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 118)

JORDAN v. FIRST NATIONAL BANK OF ROME et al. (No. 7370.)

(Court of Appeals of Georgia, Division No. 1. Jan. 23, 1917.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 170—"NEGOTIABLE INSTRUMENT"—WHAT IS.

A promissory note, payable to the order of the maker thereof and properly indorsed by him, is a "negotiable instrument."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 368; Dec. Dig. \S 170.]

For other definitions, see Words and Phrases, First and Second Series, Negotiable Instrument.]

2. BILLS AND NOTES \S 170—PRINCIPAL AND SURETY \S 33 — CONSIDERATION — NEGOTIABLE INSTRUMENT—VALIDITY OF NOTE.

Where one signs as maker a note payable to himself, and another signs it as security only, the maker's indorsement of the note converts the paper into a negotiable instrument, and his transfer thereof binds the security, notwithstanding the absence of an indorsement by the surety.

(a) The benefit given to or obtained by the maker or principal upon his transfer of the note with his indorsement supplies a consideration sufficient to bind the surety.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 368; Dec. Dig. \S 170; Principal and Surety, Cent. Dig. §§ 65, 66; Dec. Dig. \S 33.]

3. BILLS AND NOTES \S 540—ACTIONS—JUDGMENT.

The default judgment rendered should have been against one of the signers of the note as principal and against the other as surety; and the judgment of the trial court is therefore affirmed, with direction that the judgment be reformed accordingly.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1918-1934; Dec. Dig. \S 540.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by the First National Bank of Rome against L. C. Jordan and others. There was a judgment for plaintiff, and defendant Jordan brings error. Affirmed, with directions.

Nathan Harris, of Rome, for plaintiff in error. Maddox & Doyal, of Rome, for defendants in error.

WADE, C. J. [1] 1. "A note payable to the order of the maker is negotiable." 3 R. C. L. § 62, pp. 877, 878. Bills or notes payable to the drawer or maker himself are valid negotiable instruments when indorsed by the maker or drawer. *Id.* § 65, p. 880, and cases there cited. "A promissory note, payable to the order of the maker thereof and properly indorsed by him, is a negotiable instrument." *Pryor v. American Trust & Banking Co.*, 15 Ga. App. 822, 84 S. E. 312. Such an instrument, after indorsement by the maker, "becomes a valid promissory note, of which the indorsee is the payee." 4 Am. & Eng. Enc. of Law (2d Ed.) p. 120.

[2] 2. The suit in this case was based on a promissory note payable to "myself or order," signed by "John R. Jones" and "L. C. Jordan, Security." This instrument, according to the recitals in the plaintiff's petition, and as appears from the alleged copy of the note attached to the petition, was indorsed by the maker, John R. Jones, and, before maturity, was duly transferred to the holder, who instituted the suit. There was no appearance by either the maker or the security, and a default judgment was rendered against both as makers, over oral objection by the security, though it does not appear that the maker or the security at any time offered to file a plea. The note sued upon itself indicates that Jordan was security only, and he states in his bill of exceptions, and also contends in his brief, that he was security only, and that therefore no judgment could be rendered against him, since it was not made to appear that he likewise indorsed the note and thus gave it currency as against himself. Civil Code, § 3538, declares that:

"The contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, the principal remaining bound therefor."

It is therefore clear that, under the provisions of the statute law of this state, no consideration moving the security other than the credit extended to his principal is necessary to support an obligation of suretyship. When, therefore, the maker of the note, which was payable to his own order, and which was signed by another as security, converted it into a negotiable instrument, or gave it currency, by indorsing his own name thereon and transferring it for value, the note became a good and valid negotiable instrument, notwithstanding the security failed to indorse it; and it was not without consideration as to him,

since the benefit received by his principal, in return for the transfer of the instrument, furnished a sufficient legal consideration. It was not necessary that any personal benefit should flow to the surety or that any other consideration should exist, to support his obligation to pay the note.

[3] 3. It being alleged in the petition that the maker of the note indorsed it, and a negotiable undertaking being thereby created on his part to pay the amount stipulated in the instrument, and the note itself indicating that the other party signed it as security, judgment should have been rendered against Jones as principal and Jordan as security; and we therefore affirm the judgment of the trial court, with direction that the judgment be reformed to that extent.

4. The case was in default and hence there was no plea setting up the fact, if it be a fact, that the original maker had been adjudicated a bankrupt. Therefore we cannot consider any question involving the bankruptcy of the maker. Other points suggested by the brief of counsel for the plaintiff in error, or which he seeks to raise in the bill of exceptions, are without merit, and are in effect controlled by the above rulings.

Judgment affirmed, with direction.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 259)

LEVY v. NATHAN. (No. 7701.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. DEMURRER TO ANSWER.

There was no error in sustaining the plaintiff's demurrer to the ninth, thirteenth, fourteenth, fifteenth, and sixteenth paragraphs of the defendant's cross-petition as embodied in his answer, and in striking them from the answer.

2. DIRECTION OF VERDICT.

Under the facts of the case the trial judge did not err in directing a verdict in favor of the plaintiff for \$101.41 principal and \$21.90 interest.

3. REFUSAL OF NEW TRIAL.

The court did not err in refusing to grant a new trial.

Error from City Court of Tifton; R. Eve, Judge.

Action by H. Nathan against M. E. Levy. Judgment for plaintiff, and defendant brings error. Affirmed.

Ira S. Clary and Hendricks, Mills & Hendricks, all of Nashville, for plaintiff in error. R. S. Foy, of Sylvester, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(106 S. C. 381)

MIMS v. GARVIN et al. (No. 9611.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. ATTACHMENT —1—NATURE OF REMEDY—DISTINCTION FROM PRINCIPAL SUIT.

The right of plaintiff to recover judgment on the alleged indebtedness and his right to attach the property of defendant are entirely separate and distinct.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1-5; Dec. Dig. —1.]

2. JUSTICES OF THE PEACE —86(8)—ATTACHMENT—DISSOLUTION.

Formerly an action could be commenced by attachment, but now it is only a provisional remedy in aid of the action, and if the attachment proceedings should be set aside for irregularity or other ground, it would not deprive the magistrate of jurisdiction to try the case on its merits, but if the plaintiff should fail to recover judgment, the attachment proceedings would become inoperative.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 290; Dec. Dig. —86(8).]

3. JUSTICES OF THE PEACE —84(1)—GENERAL APPEARANCE—MOTION TO DISMISS.

In an action in which attachment was procured, a motion to dismiss on the ground that the allegations of the complaint were not sufficient to constitute a cause of action, in that they failed to show where plaintiff obtained his information that defendant was disposing of his property with intent to defraud his creditors, though not denominated a demurrer, constituted a general appearance conferring jurisdiction on the magistrate to hear the case.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 266, 267, 276; Dec. Dig. —84(1).]

Appeal from Common Pleas Circuit Court of Barnwell County; H. F. Rice, Judge.

Action by R. L. Mims against R. S. Garvin and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial granted.

The exceptions of plaintiff referred to in the opinion are as follows:

(1) Because the court below erred in sustaining the demurrer of the defendants, in this:

(a) A demurrer can only go to the complaint, and the complaint in this case, having alleged that the defendant Garvin was owing plaintiff \$61 for hauling lumber, stated a cause of action irrespective of any irregularity of the attachment proceedings, and his honor erred in holding that the magistrate was without jurisdiction.

(2) Because an attachment can only be vacated for irregularity, or for being improvidently issued, and a demurrer will not suffice to get rid of it, but the proper and only way is by motion, and any irregularity of the attachment (even though it be void) will not oust the trial court of jurisdiction, and the court erred in holding that the magistrate was without jurisdiction.

(3) The court erred in holding that the facts were before it, whereas nothing but the so-called demurrer was before the court, and the order sustaining the appeal is erroneous.

(4) An attorney is not entitled to appeal costs in the circuit court, and in allowing A. H. Ninestein, plaintiff's (meaning defendant) attorney, \$10 motion costs, the court erred.

(5) The court erred in holding that the court

of magistrate had no jurisdiction for the reasons stated in the demurrer:

(a) The absence of an affidavit under section 281 of the Code can only affect the attachment proceedings, and not the summons and complaint.

(b) The fact that there was no affidavit served with the complaint or filed with the magistrate within the time required by law does not affect the jurisdiction and right of the magistrate to proceed to hear and determine plaintiff's right to judgment against the defendant Garvin.

(c) The fact that the property attached is not the property of the defendant is an issuable fact, and not demurrable.

(d) The fact that the complaint failed to state the source of plaintiff's information as to how he knows the defendant Garvin is disposing of his property with intent to defraud his creditors is not demurrable, but is ground to vacate on motion an attachment, and cannot affect the jurisdictional question raised by the demurrer, and his honor erred in holding otherwise.

James E. Davis, of Barnwell, for appellant. A. H. Ninestein, of Blackville, for respondents.

GARY, C. J. This action was commenced in a magistrate's court. The plaintiff, after alleging in his complaint that the defendant Garvin was indebted to him in the sum of \$61, further alleged:

"That plaintiff claims a lien on said property of the defendant to the amount of \$61, and he is informed and believes that the defendant is about to secrete, dispose of, and ship out of the state the said property, with intent to defraud his creditors, to wit, loading lumber on Southern Railway cars. This plaintiff demands judgment in the sum of \$61, and for the costs of this action."

Upon the above complaint a summons was issued in the usual form, and also a warrant of attachment was issued to attach the lumber on the cars of the defendant railroad company. There was, however, no affidavit accompanying the attachment proceedings.

The defendant appeared in response to the summons and complaint, and demurred to the proceedings, in the following manner:

"Now comes the defendant by and through his attorney, A. H. Ninestein, solely and only for the purpose of pleading to the jurisdiction of the court, and prays that the proceedings be dismissed on the following grounds:

"(1) That there is no affidavit as is provided by section 281 of the Code, vol. 2; hence the proceedings fall for lack of the affidavit.

"(2) Because there was no affidavit served with the complaint or filed with the magistrate within the time prescribed by law.

"(3) Because the complaint was not sworn to or used or intended to be used as an affidavit.

"(4) Because the property sought to be attached is not the property of the defendant.

"(5) Because the alleged complaint fails to give or state a cause of action, in that it fails to allege a cause of action by stating where the plaintiff obtained his information that the defendant was disposing of his property with intent to defraud his creditors."

Upon the hearing of the cause before the magistrate, he overruled the demurrer, and

the defendants appealed upon the same grounds as these, upon which they relied in the magistrate's court, and upon the further ground that the magistrate erred in not dismissing said case for want of jurisdiction upon the record filed with the magistrate.

On hearing the appeal his honor the circuit judge granted an order:

"That the appeal be sustained, and the complaint and the proceedings be dismissed, as the magistrate had no jurisdiction of said case, for the reasons set forth in the demurrer."

The plaintiff appealed from said order on exceptions which will be reported.

[1] The right of the plaintiff to recover judgment against the defendants on the alleged indebtedness and his right to attach the property in question are entirely separate and distinct.

[2] Formerly an action could be commenced by attachment, but now it is only a provisional remedy in aid of the action. *Central R. R. v. Georgia Co.*, 32 S. C. 319, 11 S. E. 192. Therefore, even if the attachment proceedings should be set aside for irregularity, or other ground, such fact would not deprive the magistrate of jurisdiction to try the case upon its merits. If, however, the plaintiff should fail to recover judgment against the defendants, the attachment proceedings would become inoperative and ineffectual as an aid to the action.

[3] One of the grounds upon which the defendants relied was that the allegations of the complaint were not sufficient to constitute a cause of action, in that they failed to show where the plaintiff obtained his information that the defendant was disposing of his property with intent to defraud his creditors.

In the case of *Brewton v. Shirley*, 93 S. C. 365, 76 S. E. 988, it was held that the action of the court in sustaining a demurrer was a final judgment, and that the questions thereby determined became *res judicata*. It is true that the ground upon which the defendants relied was not denominated a demurrer; nevertheless it was intended to have the effect of a demurrer. The demurrer involved the merits to the extent of conferring jurisdiction upon the magistrate.

In the case of *Fitzgerald v. Case Co.*, 94 S. C. 54, 77 S. E. 739, it was held that the appearance of the defendant was not special, but general, when it made a motion for an order allowing it further time within which to answer the complaint. In that case this court quoted with approval the following language from 8 Cyc. 507, 508:

"A defendant is considered to make a general appearance, when he applies for or obtains leave to answer, or when he applies for and obtains an extension of time to answer."

Judgment reversed, and new trial granted.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 317)

STALLINGS v. ATLANTIC LIFE INS. CO. (No. 9593.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. INSURANCE \S 668(8) — ACTION ON LIFE POLICY—SUFFICIENCY OF EVIDENCE.

In action by beneficiary to recover on life policy, where insurer claimed premium received by it was paid and applied upon another policy, evidence held sufficient to submit the case to the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1737-1740, 1742, 1758-1760; Dec. Dig. \S 668(8).]

2. APPEAL AND ERROR \S 856(3)—REVIEW—DIRECTED VERDICT.

Where there was sufficient evidence to submit case to the jury, no additional grounds for sustaining a directed verdict can be considered on appeal unless shown that plaintiff could not in any event succeed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3408, 3410, 3417; Dec. Dig. \S 856(3).]

Appeal from Common Pleas Circuit Court of Lexington County; T. S. Sease, Judge.

Action by Thealus V. Stallings against the Atlantic Life Insurance Company. Judgment for defendant, and plaintiff appeals. Reversed.

Wm. W. Hawes and Melton & Sturkie, all of Columbia, for appellant. Lyles & Lyles, of Columbia, and C. M. Efrid, of Lexington, for respondent.

FRASER, J. This is an action on a policy of life insurance on the life of Phillip H. Stallings. Mr. Stallings took out two policies of insurance—one on his own life in favor of his wife; the other on the life of his wife. Mr. Stallings went to the agent of the defendant to pay premiums on a policy, and did arrange and pay it. The plaintiff claims that her husband directed the application of the payment to the policy sued on, and the defendant claims the payment was on the other policy. Mr. Stallings died. The defendant refused payment, and this suit was brought. On the trial of the cause the presiding judge directed a verdict for the defendant and from this ruling this appeal is taken.

[1] I. There was sufficient evidence to carry the case to the jury. The exceptions practically raise one question, as stated by the appellant in her argument. The reason for sustaining appellant's contention is that there was sufficient evidence to carry the case to the jury. It would be manifestly unfair for this court to comment on the facts further than to say there was some evidence to carry the case to the jury.

[2] The respondent gives notice of additional grounds for sustaining the direction of the verdict. These grounds cannot be considered in a case tried by a jury, unless it is shown thereby that the plaintiff could not in any event succeed. This is not such a case.

See **Bonham v. Bishop**, 23 S. C. page 96. This holding has been reaffirmed in many decisions recorded in subsequent reports.

The judgment is reversed.

GARY, C. J., and HYDRICK, WATTS, and
GAGE, JJ., concur.

(106 S. C. 261)

WRIGHT v. SEALE. (No. 9559.)

(Supreme Court of South Carolina. Nov. 29, 1916.)


1. DEEDS 118—ACREAGE CONVEYED—SUFFICIENCY OF EVIDENCE.

In an action to foreclose a purchase-money mortgage on a parcel of land alleged to contain a certain number of acres, evidence held insufficient to establish defendant's contention that the parcel did not contain such number of acres when plaintiff conveyed.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. §118.]

2. MORTGAGES **581(5)—FORECLOSURE—ATTORNEY'S FEE.**

In an action to foreclose a purchase-money mortgage, an attorney's fee of 10 per cent. was reasonable.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1674, 1675; Dec. Dig.  581(5).]

Appeal from Common Pleas Circuit Court
of Sumter County; I. W. Bowman, Judge.

Action by R. L. Wright against Mary Alice Seale in her own right and as executrix of the last will and testament of W. H. Seale. From a decree for plaintiff, defendant appeals. Decree affirmed.

**John H. Clifton, of Sumter, for appellant.
Lee & Moise, of Sumter, for respondent.**

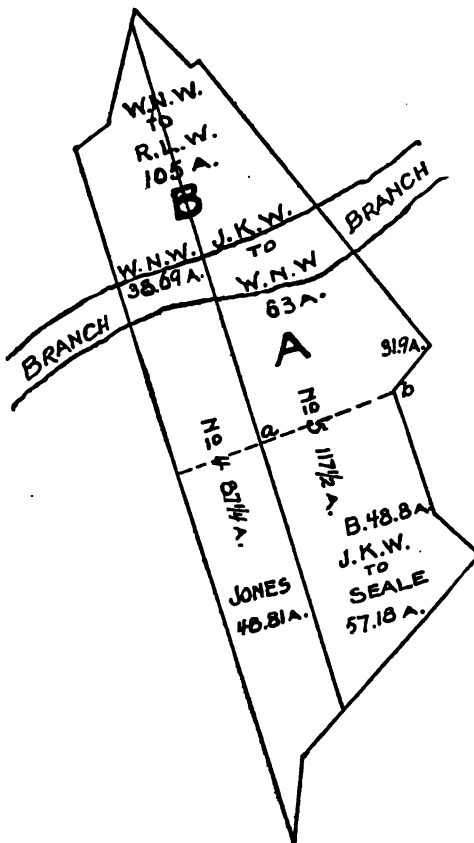
GAGE, J. Action to foreclose a purchase-money mortgage on a parcel of land alleged in the complaint to contain 31.9 acres. Answer that the parcel did not contain so many acres, but only 22.53 acres, and that the mortgage debt ought therefore to be abated by so much at \$40 per acre. But in the seventh exception, the defendant contends only for a credit of \$228, that is, for a shortage of 5.7 acres at \$40 per acre. So that the only issue of fact is, Did the tract of land so conveyed by Wright to Seale contain 31.9 acres, or a less number of acres? As now sketched on the plat hereinafter described the tract confessedly now measures 31.9 acres; but the contention is that the line a, b, on the plat hereinafter described is put too far to the south, and onto other lands of the mortgagor.

The circuit court found that Wright conveyed to Seale 31.9 acres, and took back a mortgage thereon, and adjudged foreclosure for the full debt, and attorney's fee; the court found also that there had been no tender by the defendant of the sum of money due by Seale's estate, and that the plaintiff's attorneys were entitled to the fee claimed.

There are seven exceptions to the decree; but the appellant has argued the first five exceptions together and as one; the sixth exception is general, and the seventh hinges upon a determination of the first five exceptions. So that there are only two questions: (1) What is the acreage of the mortgaged premises? and (2) was there a tender of the right amount due and are the plaintiff's counsel entitled to 10 per cent. attorney's fees?

The locus is represented by the following plat, which shows the issue:

HAYNESWORTH PLAT.



Note by the Court: No. 4 is the full length western tract of 87 acres; of which the White sons conveyed the southern part to Jones for 48.81 acres, and the northern part to W. N. White for 38.69 acres, aggregate 87.50 acres. No. 5 is the full length eastern tract of 117½ acres, and was partitioned off to J. K. White. Of tract 5, J. K. White conveyed the northern part of 63 acres to W. N. White, so that W. N. White thus came to own the northern parts of both tracts; and these two (38.69 and 63) he conveyed to R. L. Wright for 106 acres. Of tract 5, J. K. White also conveyed "the remainder" of it, being the southern part, to W. H. Seale, marked B on the sketch, and expressed in the deed to be 57.18 acres. Of the parts of 4 and 5, 106 acres, which Wright got from W. N. White, Wright conveyed to Seale 31.9, marked A on the sketch, being so much of the northern part of No. 5 as lay south of the branch. That is the parcel of land in issue.

This is the Haynesworth plat; it is conceded to be correct, except the dotted line a, b, run across it; that plat is the basis of all the rights in issue; it was made in 1902 to represent the lands of J. K. White, who was the father of J. K. W., W. N., and L. P. White; it was made to effect a partition of the lands betwixt the sons. Parcels Nos. 1, 2, and 3 are irrelevant, and are not set out; the issue here arises out of parcels 4 and 5, copied above. The note at the foot of the plat represents the devolutions of title.

As above stated, the dotted line a, b, was not drawn by Haynesworth; it was made under the following circumstances, as testified to by W. Loring Lee, a civil engineer:

"About 1903, after the White estate had been partitioned and divided among the heirs, there was a disposition on the part of some of them to sell off some of their lands. Mr. John Haynesworth had made a survey of the entire tract, and partitioned it, and they wanted to know approximately the area they would have from the line running east and west across this tract. That line was located across there by Messrs. Willie, Johnson, and Purvis White, and the area north of it was approximated for the purpose of making a sale to Mr. H. L. B. Wells, for Mr. Britton, and I ran the line and laid it down upon the plat by Mr. Haynesworth, and gave them the approximate area of that line. * * *

The line marked a, b, line did not terminate at the point 'a'; it went on across the next tract. This line was established by me at the instance of several of the Whites, Johnson, Willie, and Purvis, but no land was sold at all. I went over this land about a year ago and made a survey of the land between this line, which was located, and the branch, which runs generally speaking, parallel with this line, and north of it. The original line, just marked 'a', was observed there. There was a hedgerow along that line; it may not have been all the way, but there were indications of it. It was not in the middle of the field, but there were indications of it at the ends of the line. * * *

We made a survey of that tract, running the outside lines and running the line a, b, on these other plats according to its bearing and distances, and also according to my recollection of the line when it was first located. In making our survey of tract A, as shown by Exhibit C, we did not change the location of the line dividing tract A from tract B in any way, but it might have been a few inches out of the way, but not appreciably. * * *

I made a complete survey of nothing except tract A; I only located that line, and gave it the proper markings to locate the land lines. In making the survey shown as Exhibit G about one year ago, I did not find that stake, but I found the pine tree corner, and some indications of a hedgerow, but I knew where the line was. I have never surveyed separately the parcels of land known as B and C, but the plat correctly delineates the parcel known as lot A. I won't say that there has been no change. I think Mr. Seale owns both of those tracts, and I think the areas run across the line, but there are indications of where the line had been. Tracts A and B are both owned by Seale at this time, and it is one piece of property, and it is planted as if there were no line there. When I located the a, b, line originally Seale and Wright had nothing to do with it; it was owned by the Whites. * * *

The land conveyed by the Whites to John W. Jones lay immediately to the west of tract B, and northern boundary of it was a projection of the same a, b, line on plat C. I never surveyed the land sold by the Whites to John W. Jones,

but I made several plats like this for the Messrs. Whites, for the purpose of showing the general shape of the land, but with no certified area put on them. I surveyed the tract of land carefully, and carefully calculated the number of acres, and it contained 31.9 acres, and it is there."

This testimony corroborated by the engineer McLellan makes it plain that the line a, b, was first improvised by Lee on the Haynesworth plat, and that he some years thereafter laid it down upon the ground starting at a pine tree on the east, and going south of west by the remnants of a hedgerow, across tract 5, and across tract 4 as well.

There is a circumstance which corroborates the witness; the White boys conveyed to Jones the southern part of tract 4 for 48.81, and the northern line was in fact the westward projection of the line a, b, though not expressed in the deed to be so; the northern part of tract 4 was afterwards partitioned to W. N. White at 38.69 acres; the aggregate of these two parcels make practically, and almost exactly, the total acreage of No. 4.

Looking now to the expressed aggregate areas of tract 5, in the devolution of titles, they do not exactly equal the total expressed area of tract 5; when partitioned off to J. K. White that total in the partition deed is expressed at 117½ acres; but J. K. White conveyed the northern part of tract 5 to W. N. White for 63 acres, and the southern part of tract 5 to Seale for 57.18 acres, the aggregate of which two parcels is 120.18 acres, as against the total of 117½ acres supra, a difference of 2.68 acres. But it is not at all manifest how this discrepancy comes about.

It is true the son of W. H. Seale testified, as is the fact, that his father purchased that parcel marked B on the sketch in 1904, and that parcel marked A in 1910, and that his father cultivated parcel B, in those years, north of the dotted line; and he also testified that there were no signs of a hedgerow along that line, and that the dotted line put down on the ground runs into the parcel his father first bought from J. K. White. But the deed from Wright to Seale of parcel A is expressly for 31.9 acres, and Seale held under it until his death two years afterwards. It is true that Seale did, before his death, question the acreage expressed in the deed.

[1] But there is no ground to conclude that the circuit court has erred; the testimony rather preponderates to the court's view; and we conclude that the defendant has not established her contention, to wit, that parcel A does not contain 31.9 acres, and did not so contain it when Wright conveyed to Seale; and that the plaintiff is entitled to a judgment for foreclosure and sale. The issue of tender is thus dissipated, for the defendant did not offer to pay the mortgage debt, but only that debt reduced by \$288.

[2] The total debt was reported by the master to be \$736. The exception to \$73.60 for an attorney's fee cannot be sustained; the amount is reasonable, and that in the light

of our recent decision on like questions, from which we do not recede in the least.

The decree below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

On Petition for Rehearing.

PER CURIAM. The defendant pleads a shortage in acreage. The defendant did not prove it to the satisfaction of the circuit court, or to our satisfaction. Oral argument could not elucidate an issue so dependent upon the examination of record proof.

The motion for a rehearing is refused.

(106 S. C. 346)

BYRD et al. v. O'NEAL et al. (No. 9601.)
(Supreme Court of South Carolina. Feb. 10, 1917.)

1. REFORMATION OF INSTRUMENTS ¶45(6)— MISTAKE—SUFFICIENCY OF EVIDENCE.

In an action by heirs of a grantee against the heirs of a grantor to reform a deed to conform to the intention of the parties, evidence held to show proof of a mutual mistake in omitting the word "heirs" in the habendum.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 163.]

2. REFORMATION OF INSTRUMENTS ¶32— "LACHES."

In such action, where there was no evidence that the defect was discovered until after the sale in a partition suit by grantee's heirs, and where their action for the reformation of the deed on that ground was brought with all convenient speed, it was not barred by "laches," which connotes not only undue lapse of time, but also negligence and opportunity to have acted sooner.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121.

For other definitions, see Words and Phrases, First and Second Series, Laches.]

Appeal from Common Pleas Circuit Court of Darlington County; T. H. Spain, Judge.

Action by Harriet Ford Byrd and others against George O'Neal and others. From a judgment reversing the findings of master in favor of the plaintiffs, and dismissing the complaint, plaintiffs appeal. Reversed, and cause remanded.

Miller & Lawson and Jas. R. Coggeshall, all of Darlington, for appellants. E. C. Dennis, of Darlington, and W. P. Pollock, of Cheraw, for respondents.

FRASER, J. In 1859, Evander Byrd, Jr., married a daughter of Griffin O'Nails. Mr. Byrd and his wife lived for a time with Mr. O'Nails. In 1860, Mr. O'Nails bought a tract of land near him and sold a part to his son-in-law, Byrd. Byrd moved on the land, built houses, cleared it up, and planted it to the time of his death in 1914. Before he died, Mr. Byrd made his will disposing of the land, but only two witnesses signed as witnesses and the will failed. The heirs of Mr. Byrd brought suit for partition and one

tract was ordered to be sold. When the title was examined, it was found that the deed did not convey a fee. This action was then brought by the heirs of Mr. Byrd against the heirs of Griffin O'Nails to reform the deed to conform to the intention of the parties. The trouble in the deed is in the habendum. The word "heirs" is not used. The warranty is to the grantee and his heirs, and against the grantor, his heirs and assigns, and all other persons lawfully claiming and to claim the same or any part thereof. The case was referred to a special referee, who found both law and facts in favor of the plaintiffs. From this finding the defendants appealed. The appeal was heard in the court of common pleas, and the findings of the master were reversed and the complaint dismissed. From this judgment the plaintiffs have brought this appeal.

There are fourteen exceptions but only two questions, to wit: (1) Is there sufficient proof of mutual mistake? (2) Are the plaintiffs barred by laches?

[1] I. There is abundant proof of mutual mistake. The habendum is inartificial and complicated with extraneous matter. It reads as follows:

"To have and to hold all and singular the premises before mentioned, except the reservations of wood, lightwood, timber and right of way to Mrs. Lovedy Griggs for life contained and set forth in the will of John H. Griggs aforesaid, and subject also to any and all claims and no more which may have been upon the same in the hands of said John H. Griggs, all the right which he had therein with the exception above in his will."

Mr. O'Nails had recently bought from the Griggs estate a larger tract of which the land hereby conveyed was a part.

It seems to this court clear, from the habendum itself, that O'Nails intended to convey to Byrd just exactly the estate he (O'Nails) had just bought from the estate of Griggs, to wit, a fee. When that is followed by "I do hereby warrant and forever defend unto the said Evander Byrd Junior his heirs and assigns against myself and my heirs and against all persons lawfully claiming the same and any part thereof" the conclusion is irresistible that it appears on the face of the deed that the grantor intended to convey to the grantee the entire estate in the land conveyed, subject only to the incumbrances that were on the land when the grantor bought it. The word "heirs" being omitted in the habendum, it is evident that the deed did not grant a fee; but the intention to grant a fee is clear on the face of the deed itself. When the surrounding circumstances are taken into consideration, the conclusion is strengthened.

Mr. Byrd was a man of thrift and, though uneducated, was a good man of considerable force. One of the defendants said of him:

"He was as smart a man as that country ever had. He was well thought of, and a man that

I liked. Him and me served four years in the army, and he was as good a man as ever lived."

It is hard to believe that a man, of whom one opposed in interest would speak like that, would have been content to spend his whole life and his extraordinary energy and ability upon property which he expected to consume only upon himself, and leave his wife and child or children to come with no provision for their support. Nor is it probable that the grantor should have been so unmindful of the interest of his daughter, the wife of the grantee, as to permit this condition which would inure to his own benefit and the undoing of his daughter and her children. If only a life estate was intended, it is difficult to understand how it is that no suspicion of the true condition was known in the family of the grantor. They never suspected any rights in this land until they were informed by the plaintiffs, after their father's death. Neither the grantor nor the grantee could read, and the deed was drawn by one not skilled in conveyancing.

There is evidence that impresses this court that the grantor had a previous agreement with the grantee to sell him a part of the Griggs land, if he should buy it. This previous agreement is considered improbable by the circuit judge, for two reasons: (1) Because the witness is old; and (2) because it is not probable that there should have been an agreement to buy just 191 acres. The witness is old, but at the time of the transaction she was young and the wife of the grantee. It was a transaction which affected her future home. One of the well-known signs of advancing age is that we forget the things of yesterday and remember with clearness the things of half a century ago. There are some little inaccuracies in her testimony that may have been slips of the tongue, but on the whole she is clear in her statements, remarkably so, as to recent events. There can be little doubt that Mrs. Byrd remembers those transactions. There is happily nothing to impeach her integrity. It is no more wonderful that the grantor should have agreed to buy 191 acres before the sale than afterwards.

It is said that the case of *Jones v. Kelly*, 94 S. C. 349, 78 S. E. 17, is exactly this case and conclusively supports the circuit judge. The cases are very different. In *Jones v. Kelly*, the habendum was to the grantee:

"Him to have and to hold from this day forward the above-named land against myself, and I, Charles McAllister, of the aforesaid county and state, do further bind myself to warrant and defend against my heirs, executors and administrators, and all other persons lawfully claiming the same or any part thereof."

In that case there was no hint as to the estate conveyed, nor a warranty to heirs.

There are many other things that might be said, but these are conclusive.

[2] II. This suit is not barred by laches. In *Brock v. Kirkpatrick*, 72 S. C. 503, 504, 52 S. E. 597, it is said, affirming *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277:

"Laches connotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete."

The grantor and grantee made their marks. They were unlearned. There is not the slightest evidence that the defect was discovered until after the sale for partition, and this suit was brought "with all convenient speed."

The judgment is reversed, and the case remanded to the court of common pleas for Darlington county for such administrative order as will secure to plaintiffs a proper deed to their land.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 304)

SANDFORD et al. v. SANDFORD et al.

(No. 9587.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. DEEDS \S 124(3)—CONSTRUCTION—ESTATES CREATED.

A deed granting land, "to have and to hold unto G. F. S., his heirs and assigns, forever, the conditions of said sale being: That said G. F. S. is not to mortgage or in any wise dispose of said land. And after his death it is to go to his wife and his and her children"—grants a fee simple.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 439.]

2. DEEDS \S 124(3)—CONSTRUCTION—ESTATES CREATED.

The condition following the grant therein is void, since a remainder after a fee is void, and an attempt to convey a fee and deprive the grantee of an incident of ownership is void.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 439.]

3. DEEDS \S 93—CONSTRUCTION—ESTATES CREATED—"INTENTION."

While the intention of the grantor should govern, it cannot violate a rule of law; "intention" being a word of art, and signifying the meaning of the writing.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 231, 232.

For other definitions, see Words and Phrases, First and Second Series, Intention.]

Appeal from Common Pleas Circuit Court of Orangeburg County; J. W. Bowman, Judge.

Suit by Sylvanus Sandford and others against Govan F. Sandford and others. Decree for defendant Govan F. Sandford, and plaintiffs and certain other defendants appeal. Affirmed.

R. E. Copes and W. B. Martin, both of Orangeburg, for appellants. Raysor & Summers and Wolfe & Berry, all of Orangeburg, for respondents.

FRASER, J. Jesse Sandford conveyed to Govan Sandford a certain tract of land for

a valuable consideration. The clause of the deed that is before us for construction reads as follows:

"To have and to hold all and singular the said premises before mentioned unto the said G. F. Sandford, his heirs and assigns, forever. The conditions of sale of the within piece of land are as follows: That the said G. F. Sandford is not to mortgage or in any wise dispose of said land. And after his death it is to go to his wife and his and her children."

The wife is dead, leaving no children, so it is now impossible for the remainder to take effect, even if valid. G. F. Sandford mortgaged the land. The mortgage was foreclosed and the land purchased at the foreclosure sale by George W. Binniker.

Appellant says:

"The only questions submitted to the court under this statement of agreed facts are as follows: (1) Did the written instrument, Exhibit A, convey to the defendant Govan F. Sandford said real estate in fee simple? (2) If said written instrument did not convey said real estate to Govan F. Sandford, in fee simple, what estate therein was thereby granted to him, if any?"

[1, 2] I. The deed conveyed to Govan F. Sandford a fee simple. There can be no doubt about that. There can be no doubt that a remainder, after a fee simple, is void in a deed. It is equally clear (and no citation of authorities is necessary) that an attempt to convey an estate in fee simple and deprive the purchaser of the incident of ownership is not effective in law. When Jesse Sandford conveyed the land to Govan F. Sandford, and "his heirs and assigns, forever," the entire estate was gone from Jesse Sandford, and he had nothing to limit. A grantor may add to the estate conveyed by subsequent clauses, because he may make a new grant of additional rights. The grantor cannot restrict the grant, because the thing granted is gone. It may be said that this statement will give many trust estates absolutely to the trustees. This is not the result, because as soon as a court of equity finds either from the deed itself, or competent testimony, that there is a trust, the court of equity will preserve and enforce the trust, and it matters not what may be the form of the instrument.

[3] Appellant claims that the "intention" of the parties must govern. "Intention" is a term of art, and signifies the meaning of the writing. Even the intention will not be allowed to violate a rule of law. The law does not allow the limitation of a remainder, after a fee in a deed, nor the granting of an estate stripped of its incidents. The exception that claims that the deed did not convey a fee simple to Govan F. Sandford is overruled.

II. The second question has been answered. The judgment is affirmed.

HYDRICK, WATTS, and GAGE, JJ., concur. GARY, C. J., concurs in the result.

PATRICK v. ENGLISH. (No. 9478.)

(Supreme Court of South Carolina. July 20, 1918.)

1. WITNESSES \S 144(5) — COMPETENCY — TRANSACTIONS WITH DECEDENT — STATUTE.

Under Code Civ. Proc. \S 438, limiting the right of a living party to testify about a transaction between himself and another, since deceased, plaintiff, in an action on a note, was incompetent to testify that an indorser, since deceased, made payments and promises to him, and in what the last payment consisted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 631; Dec. Dig. \S 144(5).]

2. WITNESSES \S 164(8) — COMPETENCY — ACTS OF DECEDENT.

In an action upon a note indorsed by defendant's intestate, it was competent for plaintiff to testify that, when he got possession of the note, it had the intestate's name on the back of it, and that intestate did not put his name on the back after plaintiff got it.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 692; Dec. Dig. \S 164(8).]

3. TRIAL \S 140(1) — QUESTION FOR JURY — CREDIBILITY OF WITNESSES.

The force of the testimony of witnesses is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 334; Dec. Dig. \S 140(1).]

Appeal from Common Pleas Circuit Court of Fairfield County; H. F. Rice, Judge.

Action by T. G. Patrick, trading under the firm name and style of T. G. Patrick & Co., against Beverly M. English, as administrator cum testamento annexo of the estate of John G. Mobley, deceased. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

G. W. Ragsdale, of Winnsboro, for appellant. McCants & McCants, of Winnsboro, for respondent.

GAGE, J. This action is upon a note alleged to have been made to Patrick by Mrs. Fanny C. Wallace, and alleged to have been indorsed by Mobley before it came into the hands of Patrick. Mrs. Wallace is now dead, and so is Mobley, who was her son. But Mobley was sued before his death, and answered, denying his own liability to pay, and that of his intestate, Wallace, as well. English is administrator cum testamento annexo of the will of Mobley. Mobley became bankrupt in his lifetime, and thereby this note was barred payment. This action is on the new promise to pay, alleged to have been made after bankruptcy. The court below, at the conclusion of the plaintiff's testimony, the defendant offering no testimony, directed a verdict for the plaintiff, and that is the appellant's real offense.

The exceptions are seven in number, but they make only four practical issues of law, to wit: (1) Was it competent for the plaintiff to testify that when the note was delivered to him by John G. Mobley it had the name of John G. Mobley indorsed on the back of it? (2) Was it competent for the

plaintiff to testify that Mobley made to him all the payments indorsed on the back of the note save the last, and to testify what was the medium of the last payment? (3) Was the testimony tending to show Mobley made a new promise of such character as to require its submission to a jury? (4) Was the testimony tending to prove the signature of Mrs. Wallace of such a character as to require its submission to a jury?

[1, 2] The issues marked 1 and 2 involve the application of the much-discussed statute which limits the right of a living party to testify about a transaction betwixt him and another party then dead. Section 438, Code of Procedure. It was manifestly incompetent for Patrick to testify that Mobley made payments and promises to him and in what the last payment consisted. Those were plainly transactions betwixt the two men, and the statute closes Patrick's mouth thereabout. But he was competent for Patrick to testify that when he got possession of the note it had the name of Mobley across the back of it. It is true Patrick testified he got the note from Mobley, but that was not the essence of the matter; the essence lay in the fact that when Patrick got the note, it had Mobley's name of it. It would have been competent for Patrick to have testified that Mobley did not put his name on the note after Patrick got it. The testimony Patrick did give amounts to the same thing.

Upon the issues marked 3 and 4, we have concluded they ought to have been submitted to a jury.

[3] Upon the question of a new promise by Mobley, and upon the question of the genuineness of Mrs. Wallace's signature, a court may not differentiate the witnesses K. H. Patrick and J. G. McCants from the common run of witnesses. The force of the testimony of those witnesses was for the jury. The rule in such a case is perhaps stated with sufficient fullness in our decided cases; they are *Chartrand v. Railroad*, 85 S. C. 481, 67 S. E. 741; *Gadsden v. Fertilizer Co.*, 89 S. C. 484, 72 S. E. 15; *McLeod v. Railroad*, 93 S. C. 71, 76 S. E. 19, 705.

The judgment is reversed, and a new trial is ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 386)

BANK OF WILLISTON v. ALDERMAN et al. (No. 9612.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. JURY §14(2)—RIGHT TO TRIAL BY JURY—ACTION FOR RECOVERY OF MONEY ONLY.

Where plaintiff bank mistook certificate number of a \$15 draft for the amount and paid defendant \$528.20, and, upon his refusal to surrender surplus, brought suit, alleging mistake and fraud and asking injunction and recovery,

this was an equity action, and Code Civ. Proc. § 312, providing trial by jury in action for "recovery of money only," did not apply.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 67.]

2. BANKS AND BANKING §189—OVERPAYMENT OF DRAFT—DUTY OF PAYEE.

Where plaintiff bank mistook the certificate number of a draft for the amount and overpaid defendant, it was the latter's duty to give notice of the mistake as soon as he discovered it, and refusal to return it after demand was a conversion and fraud upon the bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 729-732, 736.]

3. TRUSTS §91—"CONSTRUCTIVE TRUST"—NATURE OF.

A "constructive trust" arises whenever one party has obtained money which does not equitably belong to him, and it is not essential that there be an actual fiduciary relation existing, or that there be actual fraud.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 139.

For other definitions, see Words and Phrases, First and Second Series, Constructive Trust.]

Appeal from Common Pleas Circuit Court of Aiken County; H. F. Rice, Judge.

Action by the Bank of Williston against Owen Alderman and another. Defendants appeal from an order of reference granted upon plaintiff's motion, on the ground that he is entitled to a jury trial. Appeal dismissed.

Croft & Croft, of Aiken, for appellants. Hendersons, of Aiken, for respondent.

GARY, C. J. This is an appeal from an order of reference, on the ground that the appellant was entitled to a trial by jury.

The second paragraph of the complaint is as follows:

"That on the 24th day of July, 1915, the defendant, Owen Alderman, presented to the plaintiff, at its banking house, a certain check or draft, or warrant, drawn by the superintendent of the Atlantic Coast Line Relief Department, upon the treasurer of the Atlantic Coast Line Railroad Company, at Wilmington, N. C., in favor of Ina E. Alderman, for the sum of fifteen dollars (\$15.00). That said draft bore certificate number 52820 and had been duly indorsed by Ina E. Alderman and thereby assigned and transferred unto the bearer thereof, who was the said defendant, Owen Alderman. That upon the presentation of said draft, the plaintiff, acting through its cashier, through error and mistake, mistook the certificate number 52820 for the amount of the draft, and considered that the said draft was for the sum of five hundred and twenty-eight and $\frac{20}{100}$ dollars (\$528.20), and forthwith and immediately paid in good and lawful currency of the United States of America, unto Owen Alderman, for said draft, the sum of five hundred and twenty-eight and $\frac{20}{100}$ dollars (\$528.20), instead of paying him the amount of the draft, which was fifteen dollars (\$15.00)."

The complaint likewise alleges that the defendant Alderman, although a demand was made upon him, refused to return said fund, well knowing that it was not his property, and thereby committed a fraud upon the rights of the plaintiff; that \$290 of the fund so received was deposited by the defendant Alderman in the defendant First National

Bank of Aiken, and that he has converted the other portion of the fund to his own use; that the defendant Alderman is insolvent, and it is necessary for the protection of the plaintiff's rights that he be enjoined, pendente lite, from disposing of so much of the fund as is now on deposit in the First National Bank of Aiken.

The defendant denied each and every allegation of the complaint, except those specifically admitted. He admitted the corporate existence of the banks, and so much of paragraph 2 as alleges that on or about the 24th of July, 1915, he presented to the plaintiff a certain check, draft, or warrant of the Atlantic Coast Line Relief Department for the sum of \$15; but that he does not know the number of the certificate, as alleged in the complaint. He further admits that the said draft was assigned to him by the original payee, and that he was the lawful owner thereof.

The defendant Alderman made a motion to dissolve the temporary order of injunction, which had been granted. The motion was refused, and there is no appeal from that order.

[1] The plaintiff made a motion for an order of reference, which was granted, and Alderman appealed, on the ground that he was entitled to a trial by jury.

Section 312 of the Code provides that an issue of fact for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless a jury trial be waived.

In the case of *Ex parte Landrum*, 69 S. C. 136, 48 S. E. 47, there was a proceeding in the probate court to fix the amount of the fees to which the attorneys representing the executor were entitled, and to determine the fund out of which they should be paid. The Supreme Court said:

"This renders it necessary to invoke the aid of the court in the exercise of its chancery powers. The facts are therefore reviewable by this court."

That case is cited with approval in *Mobley Co. v. McLucas*, 99 S. C. 99, 82 S. E. 986.

If the plaintiff had based his action simply upon the ground of mistake, the defendant would have been entitled to a trial by jury, as that would have been an action for the recovery of money only. But there are other allegations appropriate to an action seeking the aid of the court in the exercise of its chancery powers. There are allegations to the effect that the defendant Alderman is attempting to deprive the plaintiff of its rights by fraudulently converting the fund to his own use.

The appellant's attorneys cite the case of *Campbell v. Kinlock*, 9 Rich. 300, to sustain the proposition that:

"Mere silence as to a material fact is not necessarily, as matter of law, equivalent to a false representation, and therefore, in the absence of any duty to speak, it is not, of itself, ground for an action of deceit."

The facts in that case were as follows: The owner of a certain negro was about to offer him for sale, and her agent certified in writing that the negro was an excellent bread and cake baker, that he was sold to change the investment, and that his lowest price was \$800. The plaintiff therein became the purchaser. The negro was unsound at the time, within the knowledge of the agent, and died shortly afterwards. It was held that the omission to state in the certificate that the negro was sound was not equivalent to a suggestion of his soundness; and, before the plaintiff could recover, it must be made to appear that the circumstances rendered it obligatory on the agent to disclose the unsoundness, known to him at the time. The court said:

"Of these propositions, there is manifest error in that one which makes the suppression of truth always equivalent to the suggestion of falsehood. Falsehood suggested, by which a plaintiff is misled and hurt, gives no action unless it be accompanied by moral wrong. * * * It is always so accompanied, when it is known at the time by him who utters it to be false. * * * But omission to state a known truth is not usually willful concealment, and, even when it is, is often both prudent and praiseworthy. To make the suppression of truth wrong, it must be not only willful but immoral. It is only when duty requires the utterance of truth that its suppression is a moral wrong. If the rights of the inquirer, the relations of the speaker to the subject and parties concerned, time, place, and other circumstances impose the duty of speaking, silence is wrong; and, if such silence is calculated to deceive, * * * it may, without any purpose of selfish gain or malicious mischief, sustain an action for the loss it occasions. In such case it is fraudulent, because it is dishonest and deceives."

[2] The facts in that case and this are materially different. While the facts in that case were not such as to require the agent to make known the unsoundness, it was unquestionably the duty of Alderman to give notice of the mistake as soon as he discovered it, and his failure to give notice of the mistake was a moral wrong. But, in any event, the refusal to return the money, after the demand was made, was a conversion thereof, to his own use, and a fraud upon the rights of the plaintiff, if he knew that it was paid to him by mistake, and that he had absolutely no right, title, or interest in it whatever.

There are other allegations in the complaint, showing the necessity for the court, in the exercise of its chancery powers, to aid the plaintiff in following the fund, and subjecting it to the plaintiff's claim, on account of the insolvency of Alderman and the inadequacy of the legal remedies.

[3] "By the well-settled doctrines of equity, a constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another, who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or

has been acquired through a breach of trust, or violation of fiduciary duty, and the like. It is true that the beneficial owner can often recover the money due to him, by a legal action upon an implied assumpsit, but in many instances a resort to the equitable jurisdiction is proper and even necessary." 3 Pom. Eq. Jur. § 1047. "It is not essential for the application of this doctrine that an actual trust or fiduciary relation should exist between the original wrongdoer and the beneficial owner. Whenever one person had wrongfully taken the property of another, and converted it into a new form, or transferred it, the trust arises and follows the property or its proceeds." Id. § 1051.

"Constructive trusts do not arise by agreement or from intention, but by operation of law; and fraud, actual or constructive, is their essential element. Actual fraud is not necessary, but such trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title. Constructive trusts have been said to arise through the application of the doctrine of equitable estoppel, or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done. Such trusts are also known as trusts ex maleficio, or ex delicto, or involuntary trusts, and their forms and varieties are practically without limit, being raised by courts of equity, whenever it becomes necessary to prevent a failure of justice." 39 Cyc. 169, 170.

See, also, *Knobeloch v. Bank*, 43 S. C. 233, 21 S. E. 13.

These authorities show that this is an action on the equity side of the court.

Appeal dismissed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 425)

HEYWARD-WILLIAMS CO. v. ZEIGLER et al. (No. 9620.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. TRIAL \S 168—MOTION TO DIRECT VERDICT —IN EFFECT A DEMURRER.

A motion to direct a verdict for the reason that defense "is not sound" is in effect a demurrer because allegations are not sufficient to constitute a defense.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376-380; Dec. Dig. \S 168.]

2. PAYMENT \S 76(6) — APPLICATION — QUESTION FOR JURY.

In action on defendant's notes given plaintiff in payment under contract for fertilizer sold by defendant to planters, where defendant shipped to plaintiff cotton received from planters without direction on what debt to apply it, and plaintiff claimed this was to be applied on another indebtedness, evidence held sufficient to submit case to jury.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 248; Dec. Dig. \S 76(6).]

3. PAYMENT \S 41(1)—APPLICATION OF PAYMENT.

Where defendant received cotton from planters in payment for fertilizer sold by defendant and furnished by plaintiff under contract, held, that defendant took the cotton as trustee for plaintiff, to be applied on planters' notes, and hence when plaintiff received it from defendant, it could be applied only on defendant's contract indebtedness.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 115, 117, 120; Dec. Dig. \S 41(1).]

4. SALES \S 239 — BONA FIDE PURCHASER — CONSIDERATION.

Past indebtedness is not a sufficient consideration to constitute the relation of a purchaser for valuable consideration without notice.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 688-691; Dec. Dig. \S 239.]

Appeal from Common Pleas Circuit Court of Barnwell County; Wayne F. Rice, Judge.

Action by the Heyward-Williams Company against P. J. Zeigler and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded for a new trial.

Jas. M. Patterson and R. P. Searson, Jr., both of Allendale, for appellants. C. B. Searson and J. W. Vincent, both of Hampton, and Jas. A. Willis, of Barnwell, for respondent.

GARY, C. J. This is an action on three promissory notes executed by the defendants, on the 9th day of March, 1914, in the respective sums of \$801.90, \$1,055, and \$1,000, payable to the plaintiff. On the same day the plaintiff addressed to the defendants a proposed contract, which was accepted by them, as appears by the following indorsement thereon:

"Your offer is hereby accepted upon the terms and conditions in this contract.

"Mrs. Virginia S. Zeigler.
"P. J. Zeigler."

The contract contains the following provisions:

(1) "For the season ending May 1, 1914, we will ship to you upon the terms and conditions stated herein * * * the following specifically named amounts and kinds of fertilizer * * * to be settled for, by your note or notes, as sent you. * * *

(2) "On May 1st, next, or prior thereto, on demand, you agree to deliver to us or upon your order, notes of the planters or other purchasers to whom you may have sold these goods or any of them, for the gross amount of the sale of same, to be held by us as collateral security, for the payment of your obligations, as above stated; in the meanwhile, all said goods, notes or proceeds thereof are to be held in trust by you as collateral security for the payment of your notes to us, until all your obligations have been settled, and are to be subject at all times to our order; it is expressly agreed that all cash proceeds, from any of said notes or goods as collected, shall be immediately applied to your obligations to us, whether same shall have matured or not. * * *

(11) "This contract, written and printed, constitutes the entire agreement, and no verbal understanding will be recognized, and this contract

is made subject to approval indorsed thereon, at our office in Savannah, Ga."

The contract shows that the plaintiff's approval was accordingly indorsed thereon. The defendants rely upon the following facts as a defense: That the notes in suit were executed by them in compliance with the terms of said contract. That in accordance with the second clause of the contract, the defendants sent to the plaintiff the notes and mortgage on the cotton crops of those planters, who purchased fertilizers from them. That during the latter part of August, and up to the 15th of September, 1914, said planters delivered to these defendants 53 bales of cotton, covered by said mortgages, to be applied to the notes and mortgages of said planters; and, by agreement, said cotton was sold by the plaintiff on the 14th of September, 1914, for \$2,030, which cotton, they allege, the plaintiff well knew belonged to said planters, whose notes and mortgages were then held by the plaintiff as collateral security for the payment of the notes in question. That the said cotton was by operation of law applicable to the payment of said mortgages, and was by the terms of the contract applicable to the notes in suit instead of the individual indebtedness of P. J. Zeigler.

[1] At the close of the testimony the plaintiff made a motion for the direction of a verdict on the following ground:

"That the defense attempted to set up, by the defendants, based upon the contention that the proceeds of the sales of the cotton should have been applied to the notes sued on, in this action is not sound, and the said proceeds have been credited on one of the notes of P. J. Zeigler, which credit the plaintiff had the right to make."

His honor, the presiding judge, granted the plaintiff's motion, and the defendants appealed. The motion to direct a verdict on the ground therein stated was, in effect, a demurrer on the ground that the allegations of the answer were not sufficient to constitute a defense. The respondent's attorneys say:

"The evidence, we submit, shows that the cotton was shipped by P. J. Zeigler, as an individual, and as he owed the plaintiff on other notes the plaintiff had the right, in the absence of direction from him, to apply the credit for the cotton to whichever note the plaintiff saw fit."

Their proposition is thus stated in a different form:

"The defendant P. J. Zeigler is a maker of the notes. He owed another note to the plaintiff, which was his note alone, without any directions, and without any connection with Virginia S. Zeigler, the plaintiff had the right to assume that the cotton was the individual cotton of P. J. Zeigler, and to credit any debt owing by him with the proceeds of sale."

The provision in the contract that "it is expressly agreed that all cash proceeds from any of said notes or goods as collected shall be immediately applied to the payment of your obligations to us whether same shall have matured or not" shows that the cotton

in question was applicable to the joint indebtedness of Virginia S. Zeigler and P. J. Zeigler. Therefore it could not be applied to the individual debt of P. J. Zeigler, unless all parties to the contract consented to such application, of which fact there is no testimony whatever.

P. J. Zeigler testified as follows:

"Q. Mr. Zeigler, did you in compliance with that contract send down these farmers' notes to the plaintiff? A. We did. Q. Now, Mr. Zeigler, I will ask you this: State as a matter of fact whether or not that 53 bales of cotton was shipped in compliance with and to be applied on that contract. A. It was shipped in compliance with the contract. Q. State whether or not the 53 bales of cotton was covered by the farmers' notes and shipped in compliance with those notes. A. It was covered by the farmers' notes and shipped under those notes. Q. Was that cotton marked with the farmers' marks? State how the cotton was marked. A. The cotton was all marked with a private mark, showing how the cotton was received by me."

[2] This testimony shows that in any view of the case the facts should have been submitted to the jury, especially as it was admitted that there were no directions as to the manner in which the cotton was to be applied when it was shipped to the plaintiff; and the contract provided that it should be applied to the notes in suit.

The respondent's attorneys also rely upon the following proposition:

"If it be conceded that the proceeds of the sale of mortgaged property must be applied to the mortgage debt, in the absence of instruction or direction as to application, this does not affect the matter at bar. As between the mortgagor and Zeigler, this law might be pertinent, but only the makers of those mortgages could raise this question. When the cotton reached Zeigler's hands without this question being raised the cotton became the property of Zeigler just as if he had purchased same, with cash. He could then make such disposition of such cotton as appeared to him best. When the cotton reached plaintiff it was divested of any such character as it had when it came into the hands of Zeigler."

When the defendants sold the fertilizers, under said contract, the purchaser executed mortgages on their cotton crops, and these mortgages were delivered by the defendants to the plaintiff in accordance with said contract. The 53 bales of cotton in question were covered by said mortgages. When the cotton was delivered to the defendants their only authority under the contract was to ship it to the plaintiff, to be credited on their joint indebtedness. If the proposition for which the respondent's attorneys contend is sound, then Zeigler had the right, not only to apply the cotton to his individual indebtedness to the plaintiff, but also to convert it to his own use in any other manner he saw fit, and thereby destroy the plaintiff's collateral securities.

[3] When the cotton was delivered by the mortgagors to the defendants, they did not come into possession of it in their own right, but as trustees for the plaintiff under the terms of the contract. Therefore it cannot

be successfully contended that when the cotton came into the hands of Zeigler the effect was the same as if he had purchased it with cash; nor that it was divested of the lien created by the mortgages when he received it. The delivery of the cotton to the plaintiff had a double effect: Under the terms of the contract, the plaintiff, as we have said, was required to apply it to the notes in question; and the respective shares of the mortgagors in the cotton were, by operation of law, applied to the satisfaction of the several mortgages in full or pro tanto. *McSween v. Windham*, 104 S. C. 509, 89 S. E. 500.

[4] There is yet another reason why there was error in directing the verdict. Even if it should be conceded that the delivery of the cotton to the plaintiff constituted it a purchaser, it was not, however, entitled to the rights of a purchaser for valuable consideration without notice, as it did not part with anything of value at the time the cotton was delivered to it, nor was there any agreement between P. J. Zeigler and the plaintiff that any consideration whatever was to be paid. There was not even an agreement that the cotton was to be credited on the previous indebtedness of P. J. Zeigler; but if there had been such an agreement it would have been of no avail to the plaintiff, as past indebtedness is not a sufficient consideration to constitute the relation of purchaser for valuable consideration without notice. *Pittman v. Raysor*, 49 S. C. 469, 27 S. E. 475.

On the 9th of March, 1914, the defendants executed a mortgage in favor of the plaintiff on certain personal property. We do not now, however, deem it necessary to consider the provisions of that mortgage, as none of them are inconsistent with the views we have expressed.

Judgment reversed, and case remanded for a new trial.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 289)

STATE v. PERRY et al. (No. 9583.)
(Supreme Court of South Carolina. Feb. 8, 1917.)

1. CRIMINAL LAW §539(2)—ADMISSIONS OR CONFESSIONS—TESTIMONY AT CORONER'S INQUEST.

Testimony of one when examined before a coroner's jury cannot be used against him on a subsequent prosecution for the homicide, as this would be to require him to furnish testimony against himself; any admission or confession in such testimony not being free and voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1230.]

2. CRIMINAL LAW §1169(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admission against defendant in homicide of his testimony at the coroner's in-

quest is not harmless because of evidence of a similar declaration by him elsewhere.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3130, 3137.]

Appeal from General Sessions Circuit Court of Sumter County; T. J. Mauldin, Judge.

Lorenza Perry, Jr., indicted and tried with another, was convicted, and appeals. Reversed and remanded for new trial.

John H. Clifton, of Sumter, for appellant.
L. D. Jennings, of Sumter, for the State.

WATTS, J. The defendant was indicted and convicted of murder with a recommendation to mercy before his honor, Judge Mauldin, and a jury at the November term of court, 1915. After sentence, the defendant appeals, and by 18 exceptions imputes error on the part of his honor. At the hearing in this court, exception 3 was abandoned. Exceptions 5 and 10 raise the same question.

Exception 5 is:

His honor erred in allowing the witness J. B. Britton, when first on the stand, to testify as to a statement made by the defendant Perry, after he had been sworn and examined at the coroner's inquest, as to when he had gone to bed on the night of the killing, in that, if permissible at all, the coroner's testimony would have been the best evidence, and further that the defendant being charged that any statement made under oath by him was not voluntary and could not be used against him.

Exception 10 is:

That his honor erred in permitting the state to cross-examine the defendant Perry, over the objection of defendant's counsel, as to what he had said before the coroner, under oath, he being subsequently charged by the coroner's jury, his testimony there having not been free and voluntary, but he having been called and put under oath and made to testify.

[1, 2] These exceptions must be sustained under the authority of *State v. Senn*, 32 S. C. 392, 402, 11 S. E. 292, and *State v. Tapp*, 104 S. C. 576, 89 S. E. 394 (Sept. 26, 1916). In the latter case, Chief Justice Gary in his opinion says:

"The first exception, assigning the admission of this testimony as error, must be sustained under the authority of *State v. Senn*, 32 S. C. 392, 402, 11 S. E. 292, 297. In that case, Justice McIver, speaking for the majority of the court, said: 'It is essential to the admissibility of the admissions or confessions of a party charged with crime that they should be free and voluntary. Now, when a person, though not at the time charged, or even suspected, of the crime, is summoned before a coroner's inquest and compelled to testify (for the law does compel persons so summoned to testify), I do not see how such testimony can be regarded as such a free and voluntary statement as would justify receiving it in evidence, when the person so testifying is afterwards charged with the crime. It is true that, when examined as a witness, he may decline to make any statement tending to criminate himself, but the moment he does so he at once excites suspicion of his guilt, or he may not know at the time what effect his testimony may afterwards have. It seems to me, therefore, that the only way to preserve in its integrity the well-settled rule, that a person can-

not be required to furnish testimony against himself, is to hold that, if examined before a coroner's jury or a committing magistrate, the testimony which he is then required to give cannot be used against him in a prosecution subsequently brought against him.

"The state contends that the error was harmless, because the state proved substantially the same declarations made by the defendants to other witnesses before they were examined at the inquest. While such declarations made to others, freely and voluntarily, before or after examination at the inquest, are admissible, we cannot say that the error was not prejudicial, because the jury may have given greater weight to that testimony which was taken down in writing, and signed by the defendants under oath, than to their statements preserved only by the memory of witnesses. Besides, their statements as testified to by the state's witnesses were not precisely the same as those made under oath at the inquest. There are differences which might have appeared to the jury as material; especially as the state relied on circumstantial evidence in part to secure a conviction."

There must be a new trial on these exceptions, and it is unnecessary to consider the other exceptions.

Judgment reversed, and case remanded for a new trial.

GARY, C. J., and FRASER and GAGE, JJ., concur. HYDRICK, J., was absent and did not participate.

(106 S. C. 377)

VANN et al. v. TYLER et al. (No. 9610.)
(Supreme Court of South Carolina. Feb. 10, 1917.)

1. DAMAGES ¶142 — PLEADING — GENERAL DAMAGES.

As general damages both naturally and necessarily flow from the wrongful act, the party whose rights are invaded need not allege general damages, but is entitled to recover such damages as follow the natural, necessary, and proximate result of the act of wrongful invasion which fixes his right of action.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 413.]

2. DAMAGES ¶142 — PLEADING — SPECIAL DAMAGES.

As special damages naturally but not necessarily flow from the act of wrongful invasion, although they are recoverable, although the wrongdoer could not have anticipated the particular result, it is necessary to allege and prove special damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 413.]

3. APPEAL AND ERROR ¶197(6), 253 — EXCEPTIONS AND OBJECTIONS—NECESSITY.

In an action of claim and delivery, where no exceptions were reserved or proper objections made to the admission of evidence of special damages, on the ground that special damages were not alleged, as the trial court did not have an opportunity to rule on the question, it cannot be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1485, 1488, 1491-1498; *Pleading*, Cent. Dig. §§ 1428, 1431.]

Appeal from Common Pleas Circuit Court of Aiken County; Geo. E. Prince, Judge.

Action by W. C. Vann and another against

J. A. Tyler and another, trading under the firm name and style of Tyler Bros. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. B. Salley, of Aiken, for appellants. Wm. M. Smoak, of Aiken, for respondents.

WATTS, J. This was an action in claim and delivery for two mules alleged to have been unlawfully and wrongfully taken by the defendants from the plaintiffs, and for damages for taking and detention. After issue joined the case was tried before his honor, Judge Prince, and a jury at the April term of court, 1916, for Aiken county, and resulted in a verdict in favor of the plaintiffs for the return of the mules or the value thereof, \$350, and \$300 actual damages, and \$200 punitive damages.

After entry of judgment defendants appeal, and by 11 exceptions question the correctness of his honor's rulings and complain of error. At the hearing the appellants' counsel stated that the exceptions raise only the question as to the \$300 actual damages. The appellant conceded that the recovery of the mules and punitive damages are settled by the verdict of the jury, and must stand. The contention of the appellants is that there is no allegation in the complaint of actual damages, and no allegation of special damages, and that his honor was in error in admitting in evidence over objection the evidence to make out a case of actual damages—that there was no competent evidence of actual damages.

[1, 2] The difference between actual damages and special damages are from the act done; damages naturally flow in general damages; they both naturally and necessarily flow. In special damages they naturally flow, but not necessarily flow. In general damages the wrongful act done of necessity requires damage to be done and flow from the act and suffered by the party whose rights have been invaded, and the damages must be the legitimate consequence of the wrong done, and follow as a natural, necessary, and proximate result. When this is the case the act of wrongful invasion fixes the right of action of the party whose rights have thus been wrongfully invaded, and he is entitled to recover such damages and follow the natural, necessary, and proximate result. But if the original and wrongful act of the defendants complained of gives rise to any damage other than the general damage that would of necessity naturally follow from the wrongful act, and party injured was specially damaged, that is, injured in any other way than would naturally flow from the wrongful but not necessarily flow, then it would be necessary for the plaintiffs to allege facts sufficient to show a cause of action wherein he was entitled to special damages.

If the result of the wrong done is unusual

and extraordinary under the circumstances, but if it flowed from the act wrongfully done, then upon sufficient allegation first and proof afterward if it flowed proximately from the wrongful act done the party injured could recover, although the wrongdoer could not have anticipated the particular result that followed. Here the result would be not the natural and necessary sequence of the act done, but something that did not of necessity follow. Under this state of facts it would be necessary to allege and prove special damages. But in the case at bar no such objection was made before the circuit court on the ground urged here.

[3] The exceptions complain of error on the part of his honor in admitting evidence as to special damages when no such objection was interposed before his honor, and his attention was not called to this view of the evidence, and he had no chance to rule on this question. The first time this objection was made was when one witness was examined, and no exception is taken to the ruling of his honor as to the admission of the evidence by this witness where the objection was properly made and ruled upon by his honor as to the witnesses whose evidence is excepted to by the exceptions urged here. No objections were properly interposed or made in the circuit court; the objections made are insufficient, and they stated no grounds upon which his honor was asked to exclude the testimony or to base his ruling.

We see no merits in the exceptions. It is held in *Levi v. Legg & Bell*, 23 S. C. 282, that the jury can find actual damages without allegation or proof. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 272)

STATE v. STEVENS. (No. 9576.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. CRIMINAL LAW §823(6)—INSTRUCTIONS—CURE OF ERROR BY OTHER INSTRUCTIONS.

In a prosecution for murder, error in the charge that, to have a right to kill in self-defense, defendant must find himself in a condition of circumstances without such fault on his part as induces him to believe he is in imminent danger of being killed or suffering serious bodily harm if he does not take the life of his assailant and there is no other reasonable means of escape except taking his life, was cured by the following statement that the danger must be real or apparent, and by adding, in response to a request to charge, that a man of ordinary reason and firmness ought to have found such belief, and if defendant desired a clearer statement, he should have requested it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902-1904, 3153.]

2. CRIMINAL LAW §761(2)—TRIAL—CHARGE ON EVIDENCE.

In a prosecution for murder, a charge, stating the law in case the defendant had renewed the initial difficulty, was not erroneous as intimating that defendant did renew the difficulty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1731.]

3. HOMICIDE §300(13)—INSTRUCTIONS—CHARGING LAW APPLICABLE TO CASE.

In a prosecution for homicide, where there was evidence tending to show that defendant renewed the initial difficulty, it was necessary for the trial judge to charge the law applicable to the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 628.]

4. HOMICIDE §295(3)—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, where the only defense was self-defense, but there was evidence of provocation, a charge that accused, having admitted the killing, had the burden to excuse his acts as self-defense was not erroneous, as tending to mislead the jury into disregarding provocation which might reduce the offense to manslaughter, the court charging as to manslaughter, and telling the jury they could find defendant guilty of manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 609.]

5. CRIMINAL LAW §885—FIXING PENALTY—RECOMMENDATION TO MERCY.

The statute fixes the penalty for murder, but, in a prosecution for homicide, if the jury finds a verdict of guilty of murder, they have the right to add, if they see proper, a recommendation to mercy, which will reduce the punishment to imprisonment in the state penitentiary for life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2108.]

Appeal from General Sessions Circuit Court of Greenwood County.

Will Stevens was convicted of murder, and he appeals. Judgment affirmed, and case remanded to have a new day assigned for execution.

D. H. Magill, of Greenwood, for appellant.
R. A. Cooper, Sol., of Laurens, for the State.

FRASER, J. The appellant was convicted of murder, and appealed.

There are seven exceptions, but only three questions argued.

[1] I. "It was error to charge the jury as follows: 'In order to have a right to kill in self-defense the defendant must find himself in a condition of circumstances without such fault on his part as induces him to believe he is in imminent danger of being killed or suffering serious bodily harm if he does not take the life of his assailant and there is no other reasonable means of escape except taking his life.'"

In the next sentence the error was cured by the statement "the danger must be so real or apparent." In response to defendant's third request to charge, his honor added "that a man of ordinary reason and firmness ought to have found such belief." If the defendant desired a clearer statement, he

should have requested it. This position cannot be sustained.

[2, 3] II. "The fourth exception should be sustained because it shows that the charge excepted to tells the jury that the defendant had renewed the difficulty, and therefore could not plead self-defense, thus commenting on the facts. The jury may have been misled and may have understood the court to mean that, having admitted the killing, defendant was guilty of murder if he failed to prove that he killed deceased in self-defense. *State v. Rish*, 104 S. C. 250, 88 S. E. 531.

The charge did not intimate that the defendant did renew the difficulty, but merely stated the law in a case in which the defendant did renew the difficulty. There was evidence tending to show that the defendant renewed the difficulty and, under the case of *State v. Rish*, 104 S. C. 250, 88 S. E. 531, it was necessary for the trial judge to charge the law applicable to that sort of a case. This position cannot be sustained.

[4] III. "In a prosecution for homicide, where the only defense was self-defense, but there was evidence of provocation, a charge that accused, having admitted he killed, had the burden of excusing his act as self-defense is erroneous as tending to mislead the jury into disregarding provocation which might reduce the offense to manslaughter. *State v. Rish*, 104 S. C. 250, 88 S. E. 531."

We fail to see any portion of the charge that confined the defense to self-defense. His honor charged the law as to manslaughter, and told the jury they could find the defendant guilty of manslaughter. This position cannot be sustained.

[5] IV. The sixth exception reads: "Because the jury was not instructed about its full power to fix the penalty by their verdict." In this state the statute fixes the penalty. The jury does not. His honor complied with the law when he charged: "If you find a verdict of guilty of murder upon the first count of this indictment, you have the right to add, if you see proper, a recommendation to mercy, which will have the effect of reducing the punishment to imprisonment in the state penitentiary for life."

The judgment is affirmed, and the case is remanded to the circuit court for the purpose of having a new day assigned for the execution.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 416)

AUGHTREY v. WILES et al. (No. 9617.)
(Supreme Court of South Carolina. Feb. 10, 1917.)

THEATERS AND SHOWS — INJURY TO "TRESPASSER"—NONSUIT.

Where plaintiff knowingly entered an area reserved for those who paid admission to see an automobile race at a place where the fence

was down, without paying admission, and within 20 minutes after his entry, before there was time to acquiesce in his presence, he was hurt by an automobile which "flew the track at a curve," he was a trespasser, and defendants, who owed him no duty except to abstain from willful injury, were properly granted a nonsuit.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 7.

For other definitions, see Words and Phrases, First and Second Series, Trespasser.]

Appeal from Common Pleas Circuit Court of Richland County; Mendel L. Smith, Judge.

Action by W. H. Aughtrey against William A. Wiles and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Plaintiff's exceptions are:

(1) That his honor, the presiding judge, erred in granting defendants' motion for a nonsuit on the ground that plaintiff was a trespasser; the testimony showing that he entered upon the premises in question through an implied invitation from the defendants, and was therefore a licensee.

(2) That his honor, the presiding judge, erred in holding plaintiff to be a trespasser, for even if he was such at the time he entered upon the defendant's premises, when he was allowed to remain there for a period of 20 minutes, his presence was condoned and acquiesced in by them, and he became a licensee and entitled to a reasonable degree of care.

W. Hampton Cobb and Blackwell & Thomas, all of Columbia, for appellant. Nelson & Gettys and J. O. Townsend, all of Columbia, for respondents.

GAGE, J. Action for tort to the person; nonsuit; appeal by the plaintiff.

There are two exceptions, let them be reported. The court was clearly right to grant the nonsuit. It was granted on the ground that the testimony totally failed to show any invitation, express or implied, by the defendants to the plaintiff to go upon the premises; and that the plaintiff was therefore a trespasser, to whom the defendants owed no duty except to abstain from a willful injury to him.

The action of the court thereabout is the sole offense. The transaction arose out of these circumstances: On the 4th July, 1913, the defendant the State Agricultural & Mechanical Society of South Carolina leased the fair ground race track in Columbia to Cantey to conduct an automobile race. The defendant Graham entered an automobile. The defendant Wiles drove the machine. The race was on. The plaintiff was only by chance in the vicinity. He was attracted by the crowd and concluded he would go in.

The plaintiff may tell in his own way how he got in. He testified:

"Q. You knew an entrance gate had been provided, you had been there before? A. Yes, sir. Q. You knew that tickets were required, admission charged? A. I had no idea of going in there when I left. Q. Nobody asked you in? A. No, sir; nobody didn't tell me to stay out, either. Q. You crossed the fence? A. Yes, sir;

it was down. Q. You knew that was the State Fair Grounds? A. Yes, sir. Q. And that fence that you say was down about 90 or 100 feet from the track—it was a good way from the track? A. Yes, sir; about 60 feet, I suppose. Q. What kind of a fence was that? A. Wire fence. Q. Heavy woven wire fence? A. I disremember what kind of wire. Q. Did it have barbed wire strand on top? A. I could not tell you. Q. Was the fence broken or mashed down? A. It fell down. One post was rotten, fell down. Q. And the wire was holding together? A. Yes, sir; the wire was together. Q. The post had fallen. You walked over that wire to get into the grounds? A. Yes, sir. Q. You knew the fence was put there to keep people out? A. Post down; I did not see objection. Q. You knew the object of the fence was to keep people out and inclose the land? A. Yes, sir; but they ought to have kept it up. Q. The fence—you walked over the wire on the ground? A. Yes, sir. Q. Nobody invited you to come, that is correct? A. Yes, sir; and nobody didn't tell me to stay out."

The plaintiff was plainly a trespasser. He knowingly entered an area reserved for those who paid an admission fee and without paying. It is true the inclosure was down, but an invisible and an intangible line is supposed to separate a man mindful of his duty in such a case. Within 20 minutes after his entry into the area, and before there was time to acquiesce in his presence there, he was hurt. The auto flew the track at a curve and hit the plaintiff. He must suffer the consequence uncompensated.

The order below is affirmed.

(106 S. C. 410)

J. W. DILLON & SON CO. v. OLIVER et al.
(No. 9616.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. DEEDS ⇐79—REGISTRY—PURPOSE.

The registry of a deed is a matter entirely different from its proof; the principal object being to affect third parties with notice.

2. ACKNOWLEDGMENT ⇐1—MORTGAGES ⇐59—STATUTE.

The requirement of Civ. Code 1912, § 1352, that a deed or mortgage be probated before it is recorded is to secure the authenticity of the instrument.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 1, 2; Mortgages, Cent. Dig. §§ 155-159.]

3. CHATTEL MORTGAGES ⇐150(1)—RECORD—INTEREST OF WITNESS.

Under Civ. Code 1912, § 1352, providing that before any deed or other instrument in writing can be recorded the execution shall be proved by the affidavit of a subscribing witness and the proof recorded with the instrument, the fact that the subscribing witness to a chattel mortgage who made the affidavit for record was a member of the mortgagee firm does not affect the operation of the record as notice, where the interest of the witness does not appear on the face of the record.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246-248, 252.]

Appeal from Common Pleas Circuit Court of Dillon County; S. W. G. Shipp, Judge.

Action by the J. W. Dillon & Son Company against J. S. Oliver and another, trading as

J. S. Oliver & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

Sellers & Moore, of Dillon, for appellant.
J. P. Lane, of Dillon, for respondents.

GARY, C. J. The question herein arises under the recording statutes. On the 7th day of February, 1914, H. C. Cook executed a mortgage on certain personal property in favor of the J. S. Oliver Company, a partnership composed of J. S. Oliver and L. M. Oliver, doing a general mercantile business. L. M. Oliver was the managing partner, and he subscribed his name as a witness to the execution of said mortgage, which was recorded on the 16th day of March, 1914. On the 30th day of March, 1914, H. C. Cook executed another mortgage on said personal property in favor of the plaintiff, J. W. Dillon & Son Company, which was recorded on the 4th day of April, 1914. For the purpose of recording the mortgage of J. S. Oliver & Co., L. M. Oliver made an affidavit as to its execution. It does not appear upon the face of the mortgage that L. M. Oliver was a partner, or that he had any interest whatever in the partnership.

His honor the circuit judge ruled that, where the defect is not apparent upon the face of the paper, it is entitled to be recorded, and, when so recorded, is constructive notice to those dealing with the property. In accordance with this ruling, he rendered judgment in favor of J. S. Oliver & Co., and the plaintiff appealed. The sole question is whether said ruling was erroneous.

Section 1352 of the Code of Laws of 1912, provides, that:

"Before any deed or other instrument in writing can be recorded in this state, the execution thereof shall be first proved by the affidavit of a subscribing witness to said instrument, taken before some officer within this state competent to administer an oath; * * * the proof in every case to be recorded with the instrument."

[1] The registry of a deed is a matter entirely different from its proof; the principal object being to affect third parties with notice. *Woolfolk v. Graniteville Man. Co.*, 22 S. C. 332.

[2, 3] The requirement that the deed or mortgage should be probated is for the purpose of securing the authenticity of the instrument before it is recorded. *8 M. A. L. 324.*

"Undoubtedly it is unwise and contrary to public policy, for an officer to take an acknowledgment to any instrument to which he is a party, or in which he is interested directly or indirectly. In any event he should be disinterested and entirely impartial as between the parties. But arbitrarily to declare his act ipso facto void is repugnant to sound principles of the law of evidence, and in many cases must be productive of great hardship and injury. A more salutary rule declares that, where there is no imputation or charge of improper conduct or bad faith or undue advantage, the mere fact that the acknowledgment was taken before an interested officer will not vitiate the ceremony or render it

void, if otherwise it is free from objection or criticism. The fact of interest, however, ought to be regarded with suspicion and should provoke vigilance to detect the presence of unfair dealing, the slightest appearance of which the party seeking to uphold the acknowledgment should be required to clear away. Nor is this view inharmonious with the theory that the officer acts judicially, inasmuch as the acts of interested judges are not nullities and per se void." 1 R. C. L. 270; Ex parte Hilton, 64 S. C. 201, 41 S. E. 978, 92 Am. St. Rep. 800.

"Where it does not appear from the face of the instrument or otherwise that the officer taking the acknowledgment is disqualified to act by reason of interest, the instrument, according to the better rule, is entitled to be recorded, and such record becomes effectual as constructive notice to subsequent purchasers, creditors, or incumbrancers, although authority to the contrary is not wholly lacking. The acknowledgment being regular and fair on its face, no hidden interest of the officer should be permitted to impeach its validity. This is in accord with the policy of the registry acts, inasmuch as the public records would be rendered unreliable if extraneous proof of undisclosed interest were admissible to avoid acknowledgments. It is safe to say that less injury can flow from this rule than from the contrary doctrine." 1 R. C. L. 273, 274; 1 Corpus Juris, 773, 803.

The same doctrine is applicable when the defect in the probate of the instrument arises from the fact that the subscribing witness is incompetent by reason of interest.

The foregoing principles are fully sustained by reason and the weight of authority. The appellant, however, contends that such is not the rule in this state, and relies principally upon the cases of Woolfolk v. Graniteville Man. Co., 22 S. C. 332, and Watts v. Whetstone, 79 S. C. 357, 60 S. E. 703.

In the first-mentioned case it was held that a deed executed in South Carolina and probated before a magistrate in Georgia was not properly probated, and that its record did not operate as constructive notice. That case, however, is not decisive of the question under consideration, for the reason that the defect appeared upon the face of the record.

In the other case the court ruled that the affidavit of a subscribing witness to the deed was defective in form, and did not entitle the deed to record, for the reason that the witness made the affidavit before the grantor as a notary public. The defect in the last-mentioned case also appeared upon the face of the record, and therefore does not control the present question.

In the case of Brayton v. Beall, 73 S. C. 308, 53 S. E. 641, it was held that the record of a chattel mortgage executed by the real owner under a name by which he is known and recognized in the community is constructive notice to a subsequent mortgagee from the same person on the same property under another name by which the owner is also known and recognized in the community. After stating the facts Mr. Chief Justice Jones, who delivered the opinion of the court, said:

"The real question of law * * * is whether under such circumstances the record of Brayton's mortgage given by R. C. McKenzie was constructive notice to Beall when he took a subsequent mortgage from the same individual on the same property under another name by which he was known in the community, to wit, W. A. McKenzie. The rule as to constructive notice is thus stated in Black v. Childs, 14 S. C. 312: 'If there are circumstances sufficient to put a party upon the inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose; but constructive notice goes no further. It stands upon the principle that the party is bound to the exercise of due diligence, and is assumed to have the knowledge to which that diligence would lead him; but he is not held to have notice of matter which lies beyond the range of that inquiry, and which that diligence might not disclose. "There must appear to be, in the nature of the case, such a connection between the facts disclosed and the further facts to be discovered that the former could justly be viewed as furnishing a clue to the latter."'

It will be observed that the record in that case was more or less misleading by reason of the fact that the mortgagor signed a different name in executing the two mortgages; yet the court held that the record of the first mortgage was constructive notice to the second mortgagee.

In the case now under consideration there is a stronger reason, why the record should be held to be constructive notice, to wit, the fact that the record appeared upon its face to be free from defects of every kind.

In the case of Timber Co. v. Holden, 90 S. C. 470, 73 S. E. 869, it was said:

"Even between the parties to the deed, the fact that one of the subscribing witnesses had an indirect interest in the transaction, such as the commissions due a real estate agent, * * * would not make him incompetent, as he had no interest in the land itself."

It would lead to indeterminable confusion if a record which appeared upon its face to be free from any defect whatever should be prevented from operating as constructive notice, by reason of the fact that the interest of a subscribing witness might be construed to be direct instead of indirect.

Judgment affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 374)

SANDERS v. YORK COUNTY. (No. 9608.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. BRIDGES ~~§~~ 38—LIABILITY FOR INJURIES—DEFECTIVE BRIDGE—"ANY PERSON."

Civ. Code 1912, § 1972, authorizing a right of action against the county for damages for injuries sustained by "any person" by reason of defect in or negligent repair of a bridge, etc., includes a county employé working upon the bridge.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 97, 109; Dec. Dig. ~~§~~ 38.

For other definitions, see Words and Phrases, First and Second Series, Any Person.]

2. PLEADING ~~63~~—ACTION FOR INJURIES — COMPLAINT.

Under Civ. Code 1912, § 1972, which provides that damage from defective bridges shall not be recovered by a person injured "if his load exceeded the ordinary weight," in an action for injuries received by a county employé while working on a bridge, as the complaint showed that plaintiff did not have a load, he was not required to allege in his complaint that his load did not exceed the ordinary weight.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 10, 133; Dec. Dig. ~~63~~.]

3. APPEAL AND ERROR ~~232~~(1½)—RESERVATION OF GROUNDS OF REVIEW—DEMURRER.

Grounds to support an order sustaining a demurrer to the complaint which were not presented to the circuit court cannot be passed upon in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1426; Dec. Dig. ~~232~~(1½).]

Appeal from Common Pleas Circuit Court of York County; I. W. Bowman, Judge.

Action by Joseph H. Sanders against York County. From an order sustaining defendant's demurrer to the complaint, plaintiff appeals. Order overruled, and case remanded for trial.

Wilson & Wilson and Oran S. Crawford, all of Rock Hill, for appellant. J. S. Brice, of York, and Dunlap, Dunlap & Hollis, of Rock Hill, for respondent.

FRASER, J. The case states:

"This is an appeal by the plaintiff from an order made herein at York, S. C., by the circuit judge, on February 11, 1916, sustaining defendant's demurrer in the above-entitled case on the ground that the complaint did not state facts sufficient to constitute a cause of action. Plaintiff's action was for personal injuries sustained by reason of the collapse and fall of the bridge over the Catawba river, part of the public highway of York county, upon which he was working as a laborer, making repairs thereon at the time of the injury. Defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, in that the complaint showed on its face that the plaintiff was a laborer engaged in governmental work repairing the Catawba river bridge, a public highway of York county; and that the complaint did not allege that the plaintiff was a pedestrian or traveler on said highway."

The grounds of demurrer are:

"(1) The complaint alleges that the plaintiff was a laborer engaged in governmental work repairing the Catawba bridge, a public highway of said county.

"(2) That the complaint herein does not allege that the plaintiff herein was a pedestrian or traveler on said highway.

"(3) That the complaint does not allege that the plaintiff's load did not exceed the ordinary weight."

[1] The statute does not say pedestrian or traveler. It says "any person."

In *Strait v. City of Rock Hill*, 104 S. O. 116, 88 S. E. 469, this court says "any person" includes an employé. If there are de-

fects in the statute, the Legislature, and not the courts, must amend the statute.

The two statutes are:

1972 (County).

2053 (City).

"Any person who shall receive bodily injury or damage in his person or property through a defect or in the negligent repair of a highway, causeway, or bridge, may recover, in an action against the county, the amount of actual damage sustained by him by reason thereof: Provided, such person has not in any way brought about such injury or damage by his own act, or negligently contributed thereto. If such defect in any road, causeway, or bridge existed before such injury or damage occurred, such damage shall not be recovered by the person so injured, if his load exceeded the ordinary weight: Provided, further, that such county shall not be liable unless such defect was occasioned by its neglect or mismanagement."

"Any person who shall receive bodily injury, or damages in his person or property, through a defect in any street, causeway, bridge or public way, or by reason of defect or mismanagement of anything under control of the corporation within the limits of any town or city," etc.

The Strait Case is conclusive of this point and this ground of demurrer is overruled and the exception based upon it sustained.

[2] II. The complaint shows that the plaintiff did not have a load, and there can be no possible reason why he should be required to allege that the load he did not have did not exceed the ordinary weight.

[3] III. The additional grounds to sustain the order were not presented to the circuit court and cannot be passed upon here.

The order sustaining the demurrer is overruled, and the case remanded for trial.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

100 S. C. 340)

ELLIS v. JENKINS. (No. 9599.)

(Supreme Court of South Carolina. Feb. 9, 1917.)

APPEAL AND ERROR ~~1092~~—REVIEW—VERDICT.

Where there was evidence sufficient to support the finding of circuit court, reversing on appeal, a judgment of a magistrate, the determination will not be disturbed because it might have been better had the circuit court in exercise of its discretion recommitted the case to the magistrate for a clearer statement of the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4312-4321; Dec. Dig. ~~1092~~.]

Appeal from Common Pleas Circuit Court of Cherokee County; H. F. Rice, Judge.

Action by R. C. Ellis against James L.

Jenkins, begun in magistrate's court and appealed by defendant to circuit court. From an order there reversing the judgment giving judgment for defendant, plaintiff appeals. Affirmed.

N. W. Hardin, of Blacksburg, for appellant.
G. W. Speer, of Gaffney, for respondent.

WATTS, J. This is an appeal from an order of his honor Judge Rice, reversing a judgment in magistrate's court and giving judgment for the defendant. The plaintiff brought his action in magistrate's court, claiming he had a mortgage over the crop of a subtenant on defendant's land for advances, and that defendant had collected cotton in excess of his rent which should be applied to plaintiff's mortgage, and refused to pay over the same. The evidence in the case reported as taken before the magistrate is vague, meager, and unsatisfactory. It is admitted that the landlord, Jenkins, the defendant herein, rented his place to Cloniger for 7 bales of cotton, each to weigh 500 pounds, and Cloniger sublet part of the place to Curry for 1,000 pounds lint cotton. The plaintiff contends that the defendant received 14 bales of cotton instead of 7, and defendant denies that he received any cotton in excess of his rent. It might have been better if his honor in the exercise of his power had re-committed the case to the magistrate to have clarified this issue, and had it made clear just how much cotton was made and turned over to and received by the landlord, but his honor did not see fit to do so, and we cannot say that it was erroneous on his part. He had enough before him to determine this issue, and by his order he decided in favor of the defendant and adverse to the contention of the plaintiff, and his finding has sufficient evidence to sustain it.

Exceptions overruled, and judgment affirmed.

(106 S. C. 280)

STATE v. GRICE et al. (No. 9679.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

WITNESSES §350 — CROSS-EXAMINATION — DISCRETION OF COURT.

In a prosecution for selling liquor, the action of the court, in refusing to allow a state's witness to be asked on cross-examination "if he had not been indicted for nonsupport of his family," was not an abuse of the court's discretion to limit the extent to which an attorney shall be permitted to cross-examine a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1140-1149; Dec. Dig. §350.]

Appeal from General Sessions Circuit Court of Richland County; Mendel L. Smith, Judge.

J. N. Grice and Calvin E. McCravy were each convicted of selling liquor, and each appeals. Judgments affirmed.

A. W. Holman, of Columbia, for appellants.
W. Hampton Cobb, Sol., of Columbia, for the State.

FRASER, J. These cases were heard together, as the same question is involved.

The appellant was indicted for selling liquor. On the trial, the appellant's attorney asked the state's witness on the cross-examination if he had not been indicted for nonsupport of his family. The solicitor objected, and the question was ruled out as irrelevant.

In State v. Crosby, 88 S. C. 105, 70 S. E. 440, this court said:

"In the first place, we fail to see the relevancy of the testimony which the defendant's attorneys sought to elicit from the witness; and, in the second place, the extent to which an attorney shall be permitted to cross-examine a witness is limited by the presiding judge, and his ruling in this respect is not appealable, unless there has been an abuse of discretion, which does not appear in this case."

No abuse of discretion appears here. This is the only question.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 319)

WHEELER et al. v. CORLEY et al.
(No. 9595.)

(Supreme Court of South Carolina. Feb. 9, 1917.)

1. NOTICE §15—QUESTION OF FACT.

Notice is always largely a question of fact, dependent upon all the circumstances of the particular case.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 41; Dec. Dig. §15.]

2. MARSHALING ASSETS AND SECURITIES §5—CONSTRUCTIVE NOTICE—"NOTICE."

"Notice" that land owned by another was also liable on a first mortgage debt, etc., held sufficient to put subsequent mortgagees on inquiry amounting to notice that the other person was a mere surety, so that they were not bona fide creditors without notice, entitled to have the first mortgage satisfied from the sale of the other land under the two fund doctrine.

[Ed. Note.—For other cases, see Marshaling Assets and Securities, Cent. Dig. § 10; Dec. Dig. §5.]

For other definitions, see Words and Phrases, First and Second Series, Notice.]

Appeal from Common Pleas Circuit Court of Saluda County; Ernest Moore, Judge.

Suit by George O. Wheeler and others against E. M. Corley and others. From a decree, defendants Batesburg Cotton Oil Company and another appeal. Affirmed.

Thurmond & Timmerman, of Lexington, and Hendersons, of Aiken, for appellants.
E. W. Able, B. W. Crouch, and R. H. Etheredge, all of Saluda, for respondents.

GAGE, J. The questions made by the appeal are raised betwixt the defendants Jones

Company and the Batesburg Cotton Oil Company on the one side, and the defendants Corley and Long on the other side. On these questions the circuit court went with Corley and Long, and the oil company has appealed.

The questions arise out of these facts: One Trotter sold Corley 208 acres of land on a credit for \$3,000; and to evidence the debt Corley made Trotter a note payable in eight equal yearly installments, and Long signed this note with Corley; and, to secure the payment of the note, Corley gave Trotter a mortgage on the same land, and Long gave Trotter (in the same instrument) a mortgage on Long's 150 acres of land. In this mortgage it was recited that Corley had the same day bought the land from Trotter; that Long's land was the same on which he resided; that Corley was the fee-simple owner of the first tract and Long was like owner of the second tract. Corley had married Long's daughter. Five years thereafter, Corley became indebted to Jones Company in the sum of \$4,500 for a lot of goods and merchandise that Jones Company had sold him, and to secure that debt Corley gave to the Jones Company a mortgage on the 208 acres of land. That mortgage is now held by the oil mill. In that mortgage it was recited that the land is the same bought from Trotter about four years before, and that the only incumbrance on it is a mortgage of \$1,875 and interest, balance on the purchase price of the land. The deed from Trotter to Corley is not fully printed in the case; but it does appear that the instrument stated the purchase price of the land to be \$3,000.

The oil company contends that Trotter has two funds out of which to pay himself this balance of the purchase price due to him, to wit, the 208 acres he sold Corley and the 150 acres Long gave him a mortgage on; that the oil company has only one fund to pay itself for the goods sold Corley, to wit, a second mortgage on the 208 acres of land of Corley; that the oil company had no notice of the relationship of Long to the transaction; and the oil company asks that Trotter shall be required to go first on Long's 150 acres, before he resorts to Corley's 208 acres.

The circuit court seemed to apply the two fund doctrine to the facts; at least, such application was not denied by the court, so that no question is now made to sustain or to overthrow that view. We pass no judgment therefore upon that question.

Proceeding further, however, the court found, as a matter of fact and law, that the circumstances of the case carried to Jones notice of the relationship of Long to the transaction betwixt him and Corley, to wit, that Long was only a surety upon Corley's obligation to Trotter. The sole question made by the appeal is from that conclusion,

and, while there are eight exceptions, there is only one issue.

[1] So the issue we now take up is: Did the Jones have notice of the relationship of Corley and Long towards the Trotter debt? That is always largely a question of fact, dependent upon all the circumstances, and one case does not much help the decision of another case. "Notice" is generally a subtle thing, evidenced as often by what was not done as what was done. It sometimes crops out in testimony given to prove it did not exist. It is elusive, and rests in silence as well as in speech. Like a thief in the night, it sometimes goes equipped with weapons of offense, and when detected uses those weapons in alleged self-defense.

[2] In the instant case, there were three Jones brothers in interest and to testify, one of them five times; they are all the sons of an old merchant named E. Jones. The Joneses, including the father, had lived and done business at Batesburg for 30 years. The three sons, C. E., A. S., and A. O. Jones, owned the store in the instant case; and they also owned the oil mill; and one of them, A. C. Jones, is cashier of a Batesburg bank; and one of them, C. E. Jones, is secretary and treasurer of the oil mill, and one of them, A. S. Jones, had charge of the store. Corley and Long live in the distant vicinity of Batesburg at Denny's Cross Roads, some 18 miles away, and Corley was postmaster there, and the testimony shows that Corley was often at Batesburg. The likelihood, then, is that the three Joneses had a fairly good notion of credits and relationships in the trading country round about Batesburg; though C. E. Jones alone testified he had no knowledge of Corley's affairs until the transaction in issue. There is no question but that Corley bought the 208 acres from Trotter; that the purchase price was \$3,000, or about \$15 per acre; that none of it was paid down; and that Corley made to Trotter his note for the whole purchase price for \$3,000, payable in eight yearly installments; that Long signed the note with Corley; and that to secure the payment of the note a mortgage was made to Trotter on the same 208 acres and on 150 acres owned by Long and upon which he lived; that Long's relationship to the transaction was only that of guarantor. The only question is: Did the Joneses have notice of these things actually or constructively when they sold out their stock of goods to Corley on May 17, 1910, for \$4,500 on a credit and for security took a mortgage thereon and on the 208 acres of land?

Corley distinctly testified that when he made the mortgage to the Joneses he told them of Long's true relationship to the transaction. That was actual notice; and, if it be true, then the Joneses were not bona fide creditors without notice. The Jones brothers all denied any such revelation by Corley,

and their testimony is generally a denial, though some of it went further than that. The sale of the goods was made by A. S. Jones. The papers, including the mortgage, were drawn under the direction of A. C. Jones and in his bank. C. E. Jones was not at Batesburg the day the papers were made, but he carried them to Saluda for record, and at that time had counsel to examine the record as to Corley's title. The goods had not then been delivered to Corley.

About the sale of the goods and the execution of the real estate mortgage, A. S. Jones testified: Corley offered as security a mortgage on 208 acres which he owned, and upon which he owed some \$1,800. Corley told him that there was more land to go with this 208 acres; that he also said that there was another piece of land in the \$1,800 mortgage which was for the same debt; and that if it came to a show-down the other tract could take care of the \$1,800; and that the witness supposed the records were looked up. He did not testify that Corley told him who it was that owned the other land, nor what its acreage was, nor what it was worth, nor who held the \$1,800 mortgage, nor what that debt was for.

A. C. Jones testified: That Corley told him, when the mortgage was made, that he owned a place worth \$5,000 he could give papers on; that one paper was on it for about \$1,800; that there was another place up to secure the same debt; that if necessary the other place could be sold first; that he was not sure Corley said who the other place belonged to, though he said it belonged to another gentleman; but he did not say who the other man was; that if it became necessary the other man's place could be sold first; that Corley did not tell him the \$1,800 mortgage was for purchase money; that he denied any knowledge of the relationship of principal and surety between Corley and Long. Like A. S. Jones, he did not testify that Corley told him who owned the other tract, nor about the area of it, nor about the value of it, nor who held the \$1,800 mortgage, nor what that mortgage was given for.

C. E. Jones testified: That after the mortgage was made, and before the stock of goods were delivered, Corley told him that he owed about \$1,800 on the 208 acres; that another place was in the mortgage with the 208 acres, and the witness had already consulted counsel about the effect of that situation; that the witness had no notice, prior to the sale of goods and making of the mortgage, of the fact that Long was only a surety for Corley. Like his brothers, he did not testify to the important matters above recited, and about which they failed to testify.

This testimony sounds much like the three Joneses and Corley too, were all well acquainted at the outstart with the two fund doc-

trine, and the equitable remedies of marshaling and subrogation. If the Joneses understood that the 208-acre tract was, in effect, to be held liable for the debt due to them, and that the land of the "other gentleman" was to be liable for the \$1,800 due to Trotter, it is a potent circumstance that they did not know who owned the other land, how many acres were in it, and what it was worth. If the Joneses knew that the \$1,800 debt was the debt of Corley, and they say so, then they ought to have asked themselves how "another gentleman's" land came to be mortgaged to pay that debt? When the Joneses knew that two parcels of land were up to pay the \$1,800 debt, and that such debt was due by Corley, they ought in prudence to have made some inquiry about the relationship of the "other gentleman" to the \$1,800 debt. So far as the testimony shows, they did not ask Corley a word about it, although by their testimony Corley opened the door for such inquiry.

We come now to the notice which the Joneses got by construction, from the deed by Trotter to Corley, from the mortgage by Corley and Long to Trotter, from the mortgage by Corley to Jones, from the records in the clerk's office at Saluda, and from the advice of counsel to the Joneses. All these circumstances were before the Joneses before the goods were delivered by them to Corley; they examined the records at Saluda with counsel; they saw them all, and were there advised by counsel. The deed from Trotter to Corley, and the mortgage back from Corley to Trotter, show that the whole of price was on a credit, and the mortgage was given for the purchase price. The recitation in the mortgage from Corley to Jones, before referred to, was a pointer to the Joneses to inquire how Long came to mortgage his home place to Trotter to secure the payment to Trotter of the purchase price of the 208 acres due by Corley. But the Joneses now say they consulted counsel before they let go the stock of goods. If they did, it is not in evidence what counsel told them. The implication is counsel told them that, if Trotter had two funds to pay the debt due to him, and they had only one fund to pay the debt due to them, then Trotter must first exhaust the singly charged fund before he went on the doubly charged fund. If that be so, and there is no other conclusion to draw from the testimony of C. E. Jones, then with this advice, and with the notice they got from Corley, and from the record, the Joneses ought to have ascertained exactly what Trotter's claim on the other tract was, and who the "other gentleman" was; they ought to have informed themselves of these facts necessary to be proven before an application of the two fund doctrine is made.

We have not cited any authority on the subject of actual and constructive notice. The cases, from our own reports, cited by

appellant, are not conclusive of the question here involved.

The law of notice is so plain that we conclude that the Joneses had notice in this case, and that they are not bona fide creditors without notice.

The decree below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 307)

BATSON et al. v. SOUTHERN RY. CO.
(No. 9589.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. MUNICIPAL CORPORATIONS ¶657(2) — STREETS—VACATION—POWERS.

Under the statute stating the charter powers and providing that the town council shall have full power to make regulations as to streets of the town necessary and proper for security, welfare, and convenience, the town council of West Greenville had power to close two streets across which a railroad was about to put eight or ten tracks, as a measure for safety within the town police power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 1429; Dec. Dig. ¶657(2).]

2. MUNICIPAL CORPORATIONS ¶57—POWERS.

While a town has only the power given it by the Legislature, that does not mean that the power to do each particular act must be specifically granted.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. ¶57.]

3. INJUNCTION ¶93 — RESTRAINING VACATION OF STREETS—POWERS OF COURT.

Though courts are open to award damages for invasion of private rights, they are not justified in keeping open a dangerous street while doubtful rights are being litigated.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 164; Dec. Dig. ¶93.]

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Injunction by A. C. Batson and others against the Southern Railway Company, existing under the laws of State of Virginia. From order refusing application for the injunction, plaintiffs appeal. Affirmed.

Wm. G. Sirrine, McCullough, Martin & Blythe, and R. G. Stone, all of Greenville, for appellants. Cothran, Dean & Cothran, of Greenville, for respondent.

FRASER, J. The appellants thus state their case:

"This is an appeal from an order of Hon. T. J. Mauldin, circuit judge, refusing an application for an injunction restraining Southern Railway Company from closing two highways which cross its tracks near the city of Greenville, Pendleton Road, and Woodside avenue. On one side of the railroad track where these highways cross is the incorporated town of West Greenville. The other side of the track is unincorporated territory, and therefore under the jurisdiction of the county supervisor of Greenville county.

"On May 12, 1916, without the knowledge of plaintiffs, who are residents and taxpayers of West Greenville, the town council, at a meeting held without notice or advertisement, passed an ordinance allowing Southern Railway Company to construct an underpass between Pendleton street or road and Woodside avenue, and closing the present roads. The effect of this ordinance is to make a cul-de-sac of each highway in question from the point of their intersection several hundred yards east of the railway track and on which the property of the plaintiffs face. The lands owned by plaintiffs are used and suited for stores, and, as stated in the complaint, most of it has been built upon already, and to take the traffic and trade from these stores would naturally render the property much less profitable. The extent of the damage is set forth in the complaint and will not be repeated here.

"Appellants admit the right of respondent to build an underpass at its own expense to serve the trolley line and any other traffic which wishes to use the underpass, but it disputes respondent's power to close Pendleton Road or Woodside avenue.

"The circuit judge held that the town council of West Greenville were within their rights in authorizing the closing of the streets. This appeal is from his decree."

The ordinance states:

"Whereas, Southern Railway Company proposes to utilize its present right of way through the town of West Greenville, S. C., by constructing thereon additional tracks, not less than ten where the same is now crossed by Woodside avenue and not less than eight where the same is now crossed by Pendleton street; and whereas, the use of said streets at the crossing mentioned, after such construction shall have been completed, would be attended with serious danger to the citizens of the said Town and others."

There is no claim that the railway is building beyond its right of way or imposing any additional burden upon the adjacent land. There is no attempt to show that a serious danger will not be avoided by the change. Judge Mauldin, held, in short, that the town of West Greenville had the right to close a dangerous street under its police power.

West Greenville has more than 1,000 inhabitants, and the statute that governs reads:

"Police Powers.—And the said city or town council shall have full power to make, ordain and establish all such rules, by-laws, regulations and ordinances, respecting its roads, streets, markets, police, health and order of said city or town as shall appear to them necessary and proper for the security, welfare and convenience of the said city or town, or for preserving the health, peace, order and good government within the same."

[1, 2] It appears by the ordinance that this action was necessary and proper for the security and welfare of the "citizens of said town and others." There is no showing to the contrary. It may be the town council did not have the general power to close streets, but to close up a dangerous street they have the power. It is true the town has only such power as is given by the Legislature, but that does not mean that each particular act must appear.

Appellants' citation from Blake v. Walker, 23 S. C. 517, says:

"A municipal corporation has no powers except such as are conferred by its charter in express terms, or such as are necessary to carry out the powers granted."

[3] It is not made to appear that the closing of this street is not necessary to the security of the travelers in the town. Of course, if private rights are invaded, the courts are open to award damages. Courts would not be justified in keeping open a dangerous place while doubtful rights are being litigated.

This practically decides all the questions that arise in this case, and the order appealed from is affirmed.

(106 S. C. 297)

STATE v. WALLER. (No. 9585.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

CRIMINAL LAW §255—TRIAL—SIGNING OF TESTIMONY—WAIVER OF OBJECTION.

Upon trial for illegal sale of liquor, defendant and his counsel, who were present and knew that the testimony was not signed by the witnesses as required by law and made no objection thereto, held to have waived such right.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 539-541; Dec. Dig. §255.]

Appeal from General Sessions Circuit Court of Greenwood County; Thos. F. McDow, Special Judge.

Gus Waller was convicted of illegal sale of liquor in mayor's court of the City of Greenwood, and appealed to the circuit court, where conviction was affirmed, and he appeals. Affirmed.

D. H. Magill, of Greenwood, for appellant. R. A. Cooper, of Laurens, for the State.

WATTS, J. The appellant was tried, convicted, and sentenced by the mayor's court of the city of Greenwood in two cases for selling liquor. He appealed to the circuit court, and after the cases were heard the Hon. Thomas F. McDow, special presiding judge, made an order in the cases affirming the judgment of the mayor's court. Thereupon the defendant appealed on the following grounds:

(1) Because there was a total failure of proof to convict the defendant, the witnesses being admittedly hired by the mayor, who offered them as witnesses for the purpose of securing evidence for the prosecution of the defendant and paying him therefor, and said witnesses displaying in the course of their testimony that they lied about matters material to the issues involved.

(2) Because it was error to find the defendant guilty upon the testimony in this case, when it appears from the statements and admission of said witnesses that, if there was any crime committed by defendant, he was induced and persuaded to commit it by said witnesses, and when the positive and uncontradicted proof of truthful and reliable testi-

mony is that defendant was not present at the time and place the alleged offense was committed.

(3) Because it was error to convict the defendant, when it is a fact, as shown by the admitted proof, that the court who tried and convicted the defendant induced and encouraged him to do the act for which he was tried and convicted according to the admissions of the prosecutors' witnesses, by paying its agent to do what he did and to swear that he was guilty of the offense charged, thereby becoming particeps criminis.

(4) Because that testimony was not taken down in writing and signed by the witnesses as required by law.

(5) Because the judgment and sentence is without support in fact and subverts justice, public policy, and common decency.

II. Because his honor, Thomas F. McDow, presiding judge, erred in holding that exceptions 1, 2, 3, and 5 are without merit, and that exception 4 cannot be sustained, on authority of *Lake City v. Gilliland*, 101 S. C. 152, 85 S. E. 312, since the testimony taken down as the testimony of the witness Garner was signed by the witness Melton, which shows that defendant's attorneys did not know that the testimony was so signed.

III. Because it was error in the presiding judge to affirm the judgment when it appears that the mayor and his attorney had concluded to convict the defendant regardless of the law and the evidence.

The exceptions are overruled, as they are without merit under the authorities of *City of Abbeville v. Goosely*, 93 S. C. 370, 76 S. E. 977; *Lake City v. Gilliland*, 101 S. C. 152, 85 S. E. 312; *City of Spartanburg v. Willis et al.* (*City of Spartanburg v. Wilson et al.*) 103 S. C. 332, 88 S. E. 16.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 287)

STATE v. RAYSOR et al. (No. 9582.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

CRIMINAL LAW §940—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — CONTRADICTORY STATEMENTS OF WITNESS.

Where defendants were convicted of larceny principally on the testimony of a small negro boy, who claimed to have seen the taking, motion for new trial, based on affidavit of another that the boy, after the trial, had stated he did not see and could not have seen the taking, was properly refused; the offered testimony being merely hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327; Dec. Dig. §940.]

Appeal from General Sessions Circuit Court of Barnwell County; Geo. E. Prince, Judge. Aquilla Raysor and another were convict-

ed of grand larceny, and appeal from order denying them new trial. Affirmed.

Jas. E. Davis, of Barnwell, for appellants.
R. L. Gunter, Solicitor, of Aiken, for respondent.

GAGE, J. The appeal is from an order of the circuit court, which refused a new trial to the defendants, convicted aforetime of grand larceny. The motion for a new trial was based upon alleged after-discovered testimony. The defendants were convicted at the fall term of Barnwell, and the motion for a new trial was made at the ensuing spring term. The court, after hearing the affidavits, and argument, simply refused the motion "on the authority of *State v. Rhodes*, 44 S. C. 328 [21 S. E. 807, 22 S. E. 306]."

There are five exceptions, but there is only one question, and the appellant argued only one question. That question is, Was there abuse of his discretion by the circuit judge? The defendants "were convicted principally on the testimony of Eddie Izlar, a small negro boy, who swore that he saw the defendants go to the buggy of * * * Atterberry and put their hand in the buggy and take something therefrom that looked like a satchel." This appears from the affidavit of the appellant's attorney.

The defendants offered before the circuit judge an affidavit of one Washington, who swears that after the trial, Izlar told him that he (Izlar) did not see and could not have seen the defendants take the money. It also appears from the affidavits of appellants' attorney that Izlar was also charged at the outset with stealing the money; but he was released and testified for the state. This recital is sufficient of itself to sustain the circuit judge's order.

The only testimony offered by the defendants is hearsay; Washington swears Izlar told him. That is no testimony at all.

There is no room to sustain the allegations of the fourth exception that "his honor did not pass on the testimony at all." The order recites that the motion was refused "after hearing the affidavits and Jas. E. Davis for the motion."

The judge was right to refuse the motion upon the authority of the *Rhodes* Case, and without the authority of that case. True, the facts of the two cases are not identical; but they are not unlike.

The appellant, though, relies, for the relief he asks, upon the recent case of *State v. Bethune*, 89 S. E. 153. The new trial there ordered was for reasons totally different from any which are suggested in the instant case. In the *Bethune* Case, involving the life of a man, the contrary declaration was made before the trial, and to the state's assistant counsel. We hold that the assistant state's counsel ought to have divulged that state-

ment to the state's counsel. The chief justice expressly put the case "upon a different footing" from that of the ordinary witness.

Our judgment is that the order below be affirmed; it is so ordered.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 310)

COOK et al. v. KNIGHT et al. (No. 9591.)
(Supreme Court of South Carolina. Feb. 8, 1917.)

1. REFORMATION OF INSTRUMENTS \S 36(1) — COMPLAINT—SUFFICIENCY.

A complaint by grantees filed in 1915, praying the reformation of a deed on the ground of mistake, which alleged that the deed was executed in 1872, and that the grantor died in 1901, states a cause of action, though not alleging when the mistake was discovered or that the agreement for the conveyance was in writing.

[Ed. Note.—For other cases, see *Reformation of Instruments*, Cent. Dig. $\S\S$ 141, 143, 146; Dec. Dig. \S 36(1).]

2. EQUITY \S 158 — DEFENSE — PLEADING — LACHES.

The defense of laches applicable to a suit for equitable relief need not be set up specifically, and if clearly established by the evidence, relief will be denied by the court on its own motion.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. \S 395; Dec. Dig. \S 153.]

3. PLEADING \S 367(2)—COMPLAINT—SUFFICIENCY.

As the defense of laches need not be formally pleaded and will be applied by the court on its own motion, a complaint seeking the reformation of a deed on the ground of mistake is not subject to a motion to make more definite and certain, though not averring when the mistake was discovered or that the agreement for the conveyance was in writing.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. $\S\S$ 64, 1174; Dec. Dig. \S 367(2).]

4. EQUITY \S 71(2)—DEFENSES—"LACHES."

The length of time which will justify a court of equity in refusing relief on the ground of laches depends upon the facts of the particular case; laches connoting not only undue lapse of time, but also negligence and opportunity to have acted sooner.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. \S 71(2).]

For other definitions, see *Words and Phrases*, First and Second Series, *Laches*.]

Appeal from Common Pleas Circuit Court of Florence County; Frank B. Gary, Judge.

Action by D. R. Cook and others against W. J. M. Knight and others. From an order denying their motion to make the complaint more definite and certain, defendants appeal. Affirmed.

Philip H. Arrowsmith, of Lake City, for appellants. Bass & Williams, of Lake City, for respondents.

WATTS, J. This is an action for the reformation of a deed. The complaint alleges that the deed was executed in 1872, that

the grantor died in 1901, and the suit was commenced in 1915. There is no allegation as to the time when the mistake was discovered nor excuse for the delay of the plaintiffs in commencing the action. The defendants are the children of the deceased grantor, and the plaintiffs are the grantee and his children. When the complaint was served the defendants made a motion to make the complaint more definite and certain: (1) By alleging in said complaint the time at which the alleged mistake therein set forth and complained of was discovered by the plaintiffs, and especially the plaintiff, D. R. Cook. (2) By alleging in paragraph 1 thereof whether the alleged agreement therein mentioned was or not in writing. The motion was heard by his Honor, Judge Frank B. Gary, who refused the same, and this appeal is prosecuted therefrom.

[1] When the case was argued in this court the respondents took the position that the order of Judge Gary is not appealable, and objected to the jurisdiction of this court, and asked the dismissal of the same without considering the merits. Inasmuch as so many appeals are brought to this court from interlocutory orders that could wait until the case is tried on the merits, thereby entailing useless work on the part of the lawyers and the court, and delaying the trial of the case on its merits, and uselessly prolonging litigation when an appeal after the trial on the merits could determine every contention in the case made by both sides, we are tempted to take this view and refuse to consider the appeal at this stage of the case, but in view of the earnestness of appellants' attorney in thinking the order is appealable now we will determine whether or not his honor was in error in making the order he did. The complaint states a good cause of action for equitable relief. *Wagner v. Sanders*, 49 S. C. 192, 27 S. E. 68.

[2-4] It is not necessary to set up laches as a defense formally; it need not be specially pleaded. It may be set up by the court without being pleaded by the defendant, and without motion of respondent to sustain the decree on that ground, and so applied. In *Wagner v. Sanders*, 62 S. C. 88, 39 S. E. 955, Mr. Justice Gary (now Chief Justice) as the organ of the court says:

"In his decree, the circuit judge says that the defendant Sanders also pleaded the statute of limitations and laches. It may be argued that the decree of the circuit court cannot be supported on these grounds, as the respondents' attorneys did not give notice that they would ask that the decree be affirmed on these additional grounds. Conceding this to be correct as to the statute of limitations, and conceding further that the statute of limitations is inapplicable as a bar to an action seeking equitable relief, the plaintiff may nevertheless be estopped by laches. It is true that laches is not formally set up as a defense, but this is not necessary. In *En. of Pl. & Pr.* vol. 12, p. 829, it is said: 'According to what is considered the better practice, the defense of laches is one of which it is not neces-

sary to take advantage of by the pleadings. If the case as it appears at the hearing is liable to such an objection, the court may, and usually will, remain passive, and refuse relief or decline to entertain the suit.' In a note on page 830, under the head of 'court's own motion,' we find the following: 'While the defense of laches need not be specially pleaded by the defendant, still, when not pleaded, unless it clearly and satisfactorily appears in the court from the evidence that there has been an unreasonable delay in prosecuting the suit; the court, on its own motion, should not rest its decision on that ground. *Hagerman v. Bates* (Colo. 1897) 49 Pac. 139 [24 Colo. 71].' Thus recognizing the power of the court in a proper case, to raise such objection. In accordance with this doctrine the Supreme Court of its own motion, in the case of *Blackwell v. Ryan*, 21 S. C. 112, raised the question of laches and affirmed the judgment of the circuit court dismissing the complaint. The principles as to laches are well stated by his honor, Acting Associate Justice Benet, in *Babb v. Sullivan*, 43 S. C. 436, 21 S. E. 277, as follows: 'It is confessedly impossible to adopt a general rule, and fix a definite length of delay which shall justify a court of equity in refusing relief on the ground of laches. Each case must be governed by its own facts, and courts of equity must be trusted to exercise a salutary discretion. As we understand the doctrine of estoppel by laches, the facts in this case would justify us in holding that even a shorter delay than nine years and six months, inexcusable or unexplained, would have furnished the circuit court with sufficient grounds for refusing the order moved for. Delay is not the sole factor that constitutes laches. If it were so, some period fixed by statute or by the common law of the courts would afford a safe and unvarying rule. Laches connotes not only undue lapse of time, but also negligence, and opportunity to have acted sooner; and all three factors must be satisfactorily shown before the bar in equity is complete. Other factors of lesser importance sometimes demand consideration, such as the nature of the property involved, of the subject-matter of the suit, or the like. As a definition of "laches," however, it is sufficiently correct to say that it is the neglecting or the omitting to do what in law should have been done, and this for an unreasonable and unexplained length of time, and in circumstances which afforded opportunity for diligence. This definition will be found adequate as a test to be applied to the vast majority of cases. The doctrine embraced in it is in accordance with the principles and the practice of courts of equity, which have from the beginning held themselves ready to aid suitors who come in good conscience, good faith, and with diligence; and from the beginning they have discountenanced stale demands, and refused relief from the effect of negligence and inexcusable delay. We have seen, from the very nature of equity jurisdiction, and the principles that guide and control its exercise, that it is impracticable, if not impossible, to fix a definite period of time as a bar or limitation to suits in equity; that lapse of time is not the only test of staleness; that it needs to be conjoined with negligence or inattention, and with opportunity for diligence and for acting sooner. For it is the essence of laches that the party charged with it should have had either actual knowledge, or such notice as would have put him on inquiry. It is manifest, therefore, that the period of time which shall be a bar in equity must needs vary with the varying circumstances in the different cases.'"

The same principle is reaffirmed in *Poston v. Ingraham*, 76 S. C. 170, 56 S. E. 780, and *McAuley v. Orr*, 97 S. C. 224, 81 S. E. 480.

The exceptions are overruled. Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 281)

STATE v. ROOF. (No. 9580.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. CRIMINAL LAW §829(1) — TRIAL — INSTRUCTIONS.

The refusal of requests covered by the charge given is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829(1).]

2. CRIMINAL LAW §1144(14)—APPEAL—PRESUMPTIONS.

Where only a part of the charge of the court was contained in the case, it will be presumed that the correct law was charged in the omitted portions, and error cannot be predicated on the refusal of requests.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2767, 2901, 3032; Dec. Dig. §1144(14).]

3. HOMICIDE §142(7) — ASSAULT WITH INTENT TO KILL—VARIANCE BETWEEN INDICTMENT AND PROOF.

In a prosecution for assault and battery with intent to kill, proof that the instrument with which the cutting was done was a razor does not constitute a fatal variance from averments in the indictment, that accused used a knife.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 256; Dec. Dig. §142(7).]

Appeal from General Sessions Circuit Court of Richland County; S. W. G. Shipp, Judge.

Janie Roof was convicted of assault and battery with intent to kill, and appeals. Appeal dismissed.

A. W. Holman, of Columbia, for appellant. W. Hampton Cobb, Sol., of Columbia, for the State.

FRASER, J. The appellant was convicted of assault and battery with intent to kill. The errors complained of are in the charge to the jury. The indictment alleged that the appellant cut the prosecuting witness with a knife, while the proof showed that the instrument with which the cutting was done was a razor.

There are three exceptions. The last two raise the same question.

[1, 2] I. "Because the court erred in refusing defendant's written request to charge the question of self-defense and character." The case contains only a portion of the charge. A trial judge is not bound to charge in the exact language of the request. If his charge correctly states the law applicable to the case during the charge, he may with entire propriety refuse the charge in the exact language of the request. Only a part of the charge is given, and we must assume that the correct law was charged in the omitted portions. This exception cannot be sustained.

[3] II. The only other question is ruling that there was not a total failure of proof, in that the indictment charged that the instrument of injury was a knife and the proof showed that it was a razor. The case of the State v. Jenkins, 14 Rich. 228, 229, 94 Am. Dec. 132, settles the question against the contention of the appellant. In that case it is said:

"If the mode of applying the violence be the same in kind as described, it is enough, though the weapon or instrument used and the part of the body hurt be other than as averred."

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 275)

STATE v. HAMPTON. (No. 9577.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. INTOXICATING LIQUORS §1—SALE—NATURAL RIGHT.

In view of the statutory declaration that all alcoholic liquors are detrimental and their use against the morals, good health, and safety of the state, no man has a natural right to sell intoxicating liquors, and it is not error for the court so to instruct the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 1; Dec. Dig. §1.]

2. CRIMINAL LAW §778(5)—INSTRUCTIONS—BURDEN OF PROOF.

A charge that, where a man is chargeable with the sale of intoxicating liquors, if the burden of proof has been sustained by the state as later charged, he can justify himself only by showing that he made the sale in the manner authorized by law, is not objectionable as relieving the state of the burden of proving the facts charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1848, 1849, 1960, 1967; Dec. Dig. §778(5).]

3. CRIMINAL LAW §1166½(1)—APPEAL—HARMLESS ERROR.

Defendant accused of selling intoxicating liquor is not prejudiced by the refusal of the court to re-read to the jury on their request the testimony of a witness as to sales made by accused and for which he had been convicted.

[Ed. Note.—For other cases, see Criminal Act, Cent. Dig. §§ 3119-3122, 3128; Dec. Dig. §1166½(1).]

4. CRIMINAL LAW §1158(1)—APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In a criminal case, the Supreme Court cannot consider questions affecting the weight of the evidence, which is a matter for the trial judge alone.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3070, 3071, 3074; Dec. Dig. §1158(1).]

5. CRIMINAL LAW §1086(14)—APPEAL—QUESTION PRESENTED—MOTION FOR NEW TRIAL—STRIKING EVIDENCE.

Refusal of the trial court to hear the motion for new trial, on the ground of error in not striking the testimony of a witness, does not require a reversal, where the record does not show that a motion to strike was made, or that the court refused to hear the motion for new trial.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. §1086(14).]

6. CRIMINAL LAW §1091(1)—APPEAL—EXCEPTIONS—STATEMENT—NECESSITY.

The rule requiring facts stated in an exception to be based on an independent statement of those facts in the case is not merely technical, but should be strictly enforced in a criminal case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2808, 2828-2830; Dec. Dig. §1091(1).]

Appeal from General Sessions Circuit Court of Union County; W. B. Gruber, Special Judge.

C. H. Hampton was convicted of unlawfully selling liquor, keeping a place where liquor was sold, etc., and he appeals. Affirmed.

MacBeth Young and T. H. Munro, both of Union, for appellant. A. E. Hill, of Spartanburg, and John K. Hamblin, of Union, for the State.

FRASER, J. The appellant was charged with the sale of liquor, keeping a place where liquor was sold, keeping a place where people were allowed to resort for the purpose of drinking liquor, storing liquor, and transporting liquor. He was tried and convicted. The verdict was a general verdict of guilty, which included all the offenses charged. The defendant appealed.

[1] I. The first exception complains of error in charging the jury that "no one has a natural or inherent right to sell liquor." The appellant claims that a man has the natural right to deal with his own as he pleases, and this includes the right to sell intoxicating liquor. The right to use our own is limited so as to forbid us to use our own in such a way as to injure others. Our statutes declare all alcoholic liquors are detrimental, and their use against the morals, good health, and safety of the state. Whatever a man may think of the sale of liquor, in the face of this statute (Cr. Code 1912, § 794 et seq.), the courts cannot hold that a man has the natural right to do that which the law declares to be against the morals, good health, and safety of the state. A man may have the right to burn his house, if isolated and uninsured, but no man has the right to burn his house if he thereby burns the houses of his neighbors. This position cannot be sustained.

[2] II. The second error complained of is in the statement in the charge to the jury:

"And, where a man is charged with the sale of liquor, he can justify or excuse himself only. I mean to say, if the burden of proof has been sustained by the state, as I shall presently charge you, he can justify himself or excuse himself by showing that he made the sale in the manner authorized by law."

The appellant claims that this relieved the state of the proof of the facts charged and shut up the defendant to a justification. This overlooks the statement, "If the burden of proof has been sustained by the state." His honor charged the jury that the state

was bound to prove the facts alleged. This position cannot be sustained.

[3] III. The appellant complains that his honor erred in refusing to allow the testimony of the witness Johnson to be re-read to the jury upon their request. That testimony was as to sales by the appellant and sales for which the appellant had been convicted. The exclusion could not have done the appellant any harm, and this exception cannot be sustained.

If there be a fourth exception, it is not in the record and cannot be considered.

IV. The exception numbered 5 complains that:

"His honor erred in refusing to hear a motion for a new trial upon the following grounds of fact, stating that the jury passed on same."

[4] Grounds "a" and "b" refer to the "weight of the evidence." This court cannot consider questions affecting the "weight of the evidence." That is a matter for the trial judge.

[5] Ground "c" complains that his honor did not strike out the testimony of the witness Johnson. The record does not show that there was a motion made to strike out the testimony of this witness, nor does it show that his honor refused to hear the motion for a new trial.

[6] The rule that requires the facts stated in an exception to be based upon an independent statement of those facts in the case is not merely technical. Great latitude is allowed in stating exceptions. The latitude is so great that the rule should be strictly enforced.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 326)

AMERICAN FUNDING CORP. v. EDWARDS. (No. 9596.)

(Supreme Court of South Carolina. Feb. 9, 1917.)

JUDGMENT §308—DEFECTS—VACATION.

Where, in an action in the Court of Common Pleas, the summons and complaint by inadvertence bore the name, civil and criminal court, a default judgment based on such summons and complaint will not, more than two years after its rendition, be vacated on account of the mistake, it appearing that no injury was done to defendant, who called on plaintiff's counsel shortly after entry of the judgment and endeavored to make arrangement to pay it without any question as to its validity, but the record will be corrected by striking out the name of the Civil and Criminal Court and inserting the name of the court of common pleas.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 600; Dec. Dig. §308.]

Appeal from Common Pleas Circuit Court of Charleston County; Edward McIver, Special Judge.

Action by the American Funding Corporation against M. M. Edwards, against whom

default judgment was rendered. From an order denying two motions of defendant, he appeals. Affirmed.

These motions were heard together by Judge McIver, and the motion of plaintiff was granted and the motion of defendant refused in the following order:

This matter comes up on two motions; one by the plaintiff to amend the record of this court to correct an error in the judgment roll of the judgment herein entered in October 1913 by striking out of the summons and complaint the name of the civil and criminal court and inserting in lieu thereof the name of the court of common pleas; the other by the defendant for an order abandoning, vacating and setting aside the same judgment. I am satisfied from the evidence submitted to me that the judgment was duly and properly rendered, and that the error complained of was inadvertent and did not affect the jurisdiction of this court at the time it was rendered. No injury is shown to have been done to the defendant, who called on plaintiff's counsel shortly after the judgment was entered and endeavored to make arrangements to pay the judgment without making any question as to its validity. The motion of the defendant appears to be a belated effort after the lapse of over two years to take advantage of an inadvertent error, and no sufficient showing has been made which would justify the court in granting this motion.

It is therefore ordered that the clerk of this court correct and amend the record of the judgment and the judgment roll herein by striking out in the summons and complaint the name of the civil and criminal court and inserting in lieu thereof the name of the court of common pleas, so that the same may conform with the facts.

It is further ordered that the motion of the defendant for an order abandoning, vacating, and setting aside the order for judgment by default and the subsequent execution thereon be, and the same is hereby, refused.

Edwin J. Blank, of Charleston, for appellant. Whaley, Barnwell & Grimball, of Charleston, for respondent.

WATTS, J. This is an appeal from an order made by Hon. Edward McIver, special judge, in two motions heard by him. For the reasons stated by the circuit judge, it is the judgment of this court that the judgment of the circuit court be affirmed, and that upon the payment by the defendant of either of the judgments, both judgments be satisfied.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 360)

GLOVER v. HEYWARD. (No. 9604.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

APPEAL AND ERROR §120(3)—ORDERS APPEALABLE—DISCRETION OF TRIAL COURT—STATUTE.

Under Code Civ. Proc. 1902, § 368, providing that if defendant fails to appear before the

magistrate, and if it is shown by the affidavits served by appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend a default judgment, and order a new trial, the revocation of an order staying proceedings on such judgment, in the absence of any showing of an abuse of the trial court's discretion, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 842, 864; Dec. Dig. § 120(3).]

Appeal from Common Pleas Circuit Court of Richland County; Mendel L. Smith, Judge.

Proceeding by W. H. Glover against B. R. Heyward to foreclose a mechanic's lien. From an order of the circuit court, on defendant's appeal from a default judgment in a magistrate's court, dismissing the appeal and revoking the order staying the proceedings, defendant appeals. Appeal dismissed.

Johnstone & McLain, of Columbia, for appellant. Barnard B. Evans, of Columbia, for respondent.

FRASER, J. This was a proceeding in a magistrate's court, to foreclose a mechanic's lien. Judgment was given against appellant by default. From this judgment appellant appealed to the circuit court. The case was heard by his honor, Judge Mendel L. Smith, who made the following order:

"This case was heard by me on the return to show cause directed to the plaintiff why a former order issued by me should not be set aside and the case heard on the merits. I ordered the case docketed by the clerk, and, after hearing the return of the plaintiff, heard the matter on the merits. It is ordered that the appeal is hereby dismissed, and that the order staying the proceedings, dated May 17, 1916, is hereby revoked and of no effect.

"[Signed] Mendel L. Smith,
"Presiding Judge, Fifth Circuit.

"Columbia S. C., May 19, 1916."

From this order this appeal is taken. The respondent raises the point that the order of Judge Smith is not appealable. The point is well taken, and is sustained under *Carey v. Tolbert*, 79 S. C. 264, 60 S. E. 674, where it is said:

"The respondent's attorney raises the preliminary question whether the order is appealable. Section 368 of the Code provides: 'If the defendant failed to appear before the magistrate, and it is shown by the affidavits served by the appellant, or otherwise, that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment and order a new trial.' The order of his honor the circuit judge in refusing the defendant's motion was discretionary, and, as the appellant has failed to satisfy this court that his discretion was abused, the order is not appealable.

"It is the judgment of this court that the judgment of the circuit court be affirmed."

No abuse of discretion is shown here. The appeal is dismissed.

(106 S. C. 354)

ERVIN v. ATLANTIC COAST LINE R. CO.
(No. 9603.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

RAILROADS ~~446~~(3) — **KILLING OF STOCK — NEGLIGENCE—JURY QUESTION.**

In an action for the killing of plaintiff's colt, a letter by the superintendent of the defendant railroad company, that investigation disclosed that the colt ran into the train after the engine had passed, is sufficient showing to carry the case to the jury on the presumption of negligence arising from the killing, notwithstanding the negligence was denied.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1629; Dec. Dig. ~~446~~(3).]

Appeal from Common Pleas Circuit Court of Darlington County; T. J. Mauldin, Judge.

Action by J. M. Ervin against the Atlantic Coast Line Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Dargan & Dargan, of Darlington, for appellant. George H. Edwards, of Darlington, for respondent.

GAGE, J. Action for killing of a sorrel colt, on the track of the defendant company, by a train of cars. The plaintiff had a verdict, and the defendant has appealed.

There are numerous suggested errors, but the appellant argued only one question, and stated at the bar that there was but one issue involved. And that is the probative effect of a letter written by the general superintendent of the defendant company to the plaintiff's counsel, and offered in evidence by the plaintiff, to prove that the defendant admitted the killing of the colt. In the letter there was this sentence:

"I wish to state our investigation discloses the fact the colt * * * ran into the train after the engine had passed."

The appellant concedes that the presumption of negligence arises out of the killing, but insists that the letter of the superintendent so rebuts the presumption as to have required the court to direct a verdict for the defendant.

Had the engineer, or that other person who communicated the alleged fact to the superintendent, have taken the witness stand and sworn that the colt ran into the engine after the engine had passed, the court must yet have submitted the truth of the statement to a jury to determine. It has been so distinctly held. *McLeod v. Railroad*, 93 S. C. 71, 78 S. E. 19, 705. The case is not altered that the same fact is presented through another channel, but it is rather weakened.

There is no room to disturb the judgment below, and it is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

FRASER, J., disqualified.

(106 S. C. 315)

RAFTELIS v. BANK OF GEORGETOWN.
(No. 9592.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

ACTION ~~38~~(1)—**JOINDER OF CAUSES OF ACTION.**

A complaint against a bank alleged that plaintiff was a depositor, and drew two checks on his account, which the bank refused to pay, though plaintiff had funds on deposit sufficient to cover the checks, and that, when plaintiff demanded the reason, the bank's cashier stated that a third person claimed to be entitled to the funds deposited by plaintiff, and the complaint alleged injury to plaintiff's credit, and a willful disregard of his right to have his checks paid on presentation. *Held*, that the complaint did not state two causes of action, the refusal to pay the checks being a part and the result of the one transaction, the resultant injury to plaintiff being the same, or rather cumulative.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 549, 565; Dec. Dig. ~~38~~(1).]

Appeal from Common Pleas Circuit Court of Georgetown County; S. W. G. Shipp, Judge.

Action by James Raftelis against the Bank of Georgetown. From an order denying defendant's motion to require plaintiff to state his two causes of action separately, defendant appeals. Order affirmed.

Walter Hazard, of Georgetown, for appellant. Capers G. Barr, of Georgetown, for respondent.

FRASER, J. The plaintiff alleged that he was a depositor in the defendant bank and drew two checks on his account; that the defendant refused to pay either check, although the plaintiff had funds on deposit with the defendant, in excess of the sums for which the checks were drawn; that, when the plaintiff demanded to know why his checks were not honored, the defendant's cashier stated that a third person claimed to be entitled to the funds in the bank deposited by the plaintiff, and for that reason the checks had been refused payment. The complaint alleged injury to his credit and a willful and wanton disregard of the plaintiff's rights to have his checks paid on presentation. The defendant made a motion to strike out certain allegations of the complaint and to require the plaintiff to state his causes of action separately. The motion to require the plaintiff to state the two causes of action separately was refused, but the motion to strike out certain allegations was granted. The defendant appealed from the refusal of its motion to require the plaintiff to state the two causes of action separately.

There are eight exceptions, but they are all based upon the idea that the plaintiff had stated two causes of action. The plaintiff has not appealed. The plaintiff alleged that the defendant had allowed a stranger to hold up his account and prevent the payment of his checks. It is very clear then that, if the

checks were refused payment because of the alleged attachment (practically) of plaintiff's account, then the refusal to pay the checks was a part and the result of the one transaction and so alleged in the complaint. The resultant injury to the plaintiff was the same, or rather merely cumulative.

The order appealed from is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 270)

STATE v. SCOTT. (No. 9575.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

LARCENY \S 68(1)—SUFFICIENCY OF EVIDENCE—OWNERSHIP OF PROPERTY.

In a prosecution for larceny of cotton seed from a house, evidence held sufficient to warrant submitting to the jury the question whether the seed found in defendant's possession was owned by prosecuting witness, though the latter could not identify it.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 180, 181; Dec. Dig. \S 68(1).]

Appeal from General Sessions Circuit Court of Pickens County; Frank B. Gary, Judge.

Gus Scott was convicted of stealing from the house of another certain cotton seed, and he appeals. Appeal dismissed.

H. C. Miller and T. P. Dickson, of Anderson, for appellant. P. A. Bonham, Sol., of Greenville, for the State.

FRASER, J. The appellant was tried and convicted of "privily entering and stealing from the house of one, T. L. Watkins, certain cotton seed of the value of \$25." There are three exceptions. The appellant in his argument says:

"The first exception alleges error on the part of the presiding judge in overruling defendant's motion for a directed verdict, and is correlated to the next two, which are both predicated upon the refusal of the presiding judge to direct a verdict of acquittal, which was made on the ground that there was no testimony proving identity and ownership of the cotton seed found in the possession of the defendant, as the property of the prosecutor, T. L. Watkins."

It will be seen that if there is evidence from which the jury could find that the cotton seed found in the possession of the defendant were owned by Mr. Watkins, then no other question will arise, because both of the other exceptions are based on the failure to prove the ownership as alleged. There was evidence enough. The credibility was for the jury. Early one morning Mr. Watkins found that some one had taken some cotton seed from his seedhouse. Not far from the seedhouse there was a telephone pole, at which there appeared tracks of an unshod mule. The tracks were large. Near by there were tracks of a new rubber tire buggy. Near this pole also there appeared an impression on the ground as if a sack had been

put on the ground, and by the impression of the sack, cotton seed were lying. Large tracks of an unshod mule and new rubber tire buggy were followed to a house in the possession of the defendant, and there were found sacked cotton seed in the possession of the defendant. The defendant was in the act of loading the sacks in the wagon of another man, who had agreed to haul the seed to market. The question was raised as to the ownership of the cotton seed, and the defendant claimed the seed. The owner of the wagon declined to haul seed of doubtful ownership. There was testimony that tended to show that the defendant then carried the seed into the woods and covered them with brush. It is true Mr. Watkins said he could not swear that the seed found were his seed. The evidence was circumstantial, but circumstantial evidence will support a conviction. There is other evidence, but this is sufficient to support the verdict. The jury were warranted in concluding that the sacked seed found in the possession of the defendant were owned by Mr. Watkins, and had been recently stolen. When a motion is made to direct a verdict, the presiding judge must say that there is some evidence, and enough to carry the case to the jury. There is nothing in the charge to intimate more than was absolutely necessary under the circumstances.

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 283)

STATE v. GRIFFIN. (No. 9581.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. SEDUCTION \S 46—CORROBORATION OF FEMALE—"CORROBORATE."

In a prosecution for seduction under promise to marry, testimony of mother, in regard to statements by defendant before and after event to the effect, that he would marry girl, held sufficient to corroborate testimony of girl under statute; "to corroborate" meaning to strengthen or add weight or credibility to a thing.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. \S 83-86; Dec. Dig. \S 46.]

For other definitions, see Words and Phrases, First and Second Series, Corroborate.]

2. SEDUCTION \S 43—EVIDENCE—DECLARATION AFTER OFFENSE—ADMISSIBILITY.

In a prosecution for seduction under promise to marry, statements of promise made by defendant to mother before event held correlated with statements made after event, and therefore competent to corroborate testimony of girl.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. \S 77; Dec. Dig. \S 43.]

Appeal from General Sessions Circuit Court of Richland County; S. W. G. Shipp, Judge.

Walter Griffin was convicted of seducing a girl of sixteen years, by means of deception

and promise of marriage, and he appeals. Affirmed.

The statute upon which this action is based is as follows:

"Any male person above the age of sixteen years who shall, by means of deception and promise of marriage, seduce any unmarried woman in this state, shall, upon conviction, be deemed guilty of a misdemeanor, and shall be fined or imprisoned, at the discretion of the court; but no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged; and no conviction shall be had if on the trial it is proved that such woman was at the time of the alleged offense, lewd and unchaste: Provided, that if the defendant in any action brought hereunder shall contract marriage with such woman, either before or after the conviction, further proceedings hereunder shall be stayed." Cr. Code 1912, § 389.

The exceptions were as follows:

(1) Because the circuit judge erred in refusing to direct a verdict of not guilty at the close of the testimony for the state and at the close of all testimony, when there was no testimony to corroborate the prosecutrix in her statement that this defendant had made her a promise of marriage in order to seduce her; the statute under which defendant was indicted expressly providing that no conviction shall be had upon the uncorroborated testimony of the woman upon whom the seduction is charged.

(2) Because the circuit judge allowed the witness Lydia Johnson, mother of the prosecutrix, to testify that defendant told her that he was willing to marry her daughter; said statements being made by defendant after the alleged act of seduction, and therefore were incompetent and irrelevant.

Paul Cooper, of Columbia, for appellant. W. Hampton Cobb, of Columbia, for the State.

GAGE, J. The defendant, a young negro boy of 19 years, was convicted of seducing a negro girl of 16 years, by means of deception and promise of marriage. Let the statute which creates the offense be reported.

There are two exceptions, to wit: (1) That there was no testimony to corroborate the girl's story, as the statute requires there should be; and (2) that the testimony of the girl's mother about the defendant's declaration to her was incompetent to prove corroboration, because the declaration was made after the alleged seduction. The exceptions will be reported.

[1] The statute has constituted the offense out of two concurring acts: (1) Seduction; and (2) deception by promise to marry. It is not denied, but it was admitted, by the defendant, that he seduced the girl. The only issue is: Did he do so by the deception of a promise to marry her. There is no dispute but that she so testified; the only dispute is that her testimony as to the promise is not corroborated by other testimony. The statute, we think wisely, provides that the woman's testimony must not be uncorroborated. That is to say, there must be testimony other than the woman's, of a person or

of circumstances, to prove the deception by promise to marry. The statute, wisely too, does not declare the character of the testimony, the amount of it, or the weight of it.

To "corroborate" is defined:

"To strengthen; to add weight or credulity to a thing by additional and confining facts or evidence." Black, p. 277.

Webster defines the word, "To make more certain."

The circuit court thought the testimony, other than that of the girl, made the proof of the offense more certain; and we concur in that opinion.

[2] The girl was not lewd or unchaste. There was no habitual intercourse with her by the defendant. The boy paid court to the girl three or four months. He accompanied her to and from church. The boy suddenly left off his attentions. The mother upbraided the boy when she made the discovery. The boy said, "Give me time, I want to talk to the girl," and he did go and talk to her and returned to the mother and said, "Me and the girl made arrangement to marry," and, "Don't be uneasy, I am going to marry your daughter;" and, "I will come down there Tuesday. I am going to give you satisfaction. You must sympathize with me." This occurred after the event. And before the event the mother questioned the boy about his intentions in the court he paid the girl. She said, "I want to know, if you come here bearing me down, let's quit." And thereto he answered: "I guarantee if me and Lillie agree like doing now, Lillie will become a link in my own chain; if not, I will leave her like I found her." The mother testified "that is when he first started at my home."

The first exception is overruled.

The second exception is unsound. That which the boy said after the event is correlated with what he said before the event; the whole of it makes the history of the offense of seduction by promise to marry.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 431)

GRIGGS et al. v. GRAVES. (No. 9622.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

LOGS AND LOGGING ⚡21—CONTRACTS—CONSTRUCTION—ACTIONS—INSTRUCTION.

In an action of claim and delivery for a sawmill, where the controversy was as to amount due, under the contract defendant was entitled to compensation for boards manufactured and delivered at designated points, and for the cutting and backing of lumber for plaintiffs, it was improper to restrict his claim for compensation to boards manufactured.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 53; Dec. Dig. ⚡21.]

Appeal from Common Pleas Circuit Court of Chesterfield County; I. W. Bowman, Judge.

Action by T. G. Griggs and J. J. Griggs, partners, trading as Griggs Bros., against D. L. Graves. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

George K. Laney, of Chesterfield, for appellant. R. T. Caston, of Cheraw, for respondents.

FRASER, J. This is an action in claim and delivery. The plaintiffs claim to be the owners of a certain sawmill and appurtenances, in the possession of the defendant, under the following contract:

"This agreement by and between T. G. Griggs, for Griggs Bros., parties of the first part, and D. L. Graves, party of the second part, witnesseth: That D. L. Graves, the second party, has this day released unto Griggs Bros. a certain sawmill, boiler and engine, and all the sawmill fixtures which he owns or controls at this time, released to the said Griggs Bros. until he shall pay to the said Griggs Bros. the sum of \$600.00, with interest at 8 per cent. per annum. It is further agreed by the parties that the said D. L. Graves is to cut lumber for Griggs Bros. and move from place to place, as Griggs Bros. shall designate, and shall cut and back the lumber so cut; Griggs Bros. to furnish the timber and to pay D. L. Graves the sum of \$5.00 per thousand cash for the lumber so sawed at the time of sawing, the remainder of whatever is earned to be placed on the \$600.00 mentioned above, and to be figured for the set now being sawed at the rate of \$9.00, less stumpage and hauling—hereafter the price to be \$5.50 for the sawing; Griggs Bros. furnishing the timber and doing the delivering of the lumber. It is further understood that D. L. Graves shall have until January 1, 1914, to pay the \$600.00 above mentioned. (Griggs Bros. further agrees to pay D. L. Graves \$12.00 per thousand feet for all the No. 1, 2 and 3 boards they make at present location, delivered f. o. b. cars Ruby or Mt. Groghan, S. C., as Griggs Bros. may direct.) And if he fail to do so, it is a part of this agreement that unless D. L. Graves shall pay the said sum of \$600.00 by January 1, 1914, the said sawmill, boiler and engine and fixtures shall become the property of Griggs Bros., and they witness our hands and seals this January 23, 1913."

The execution of the contract was not denied. The controversy was as to the amount due, and that to be determined by the quantity of lumber delivered.

In charging the jury, his honor, the trial judge, said:

"I am also requested, gentlemen, to charge you, and I do charge you, that the contract in this case provides for delivery of the lumber at Ruby, or Mt. Groghan, and defendant can only charge plaintiffs with such as was delivered to such points to the plaintiffs. That is the contract, and it is in writing, and there can be no dispute about it, and I charge you that."

A careful reading of the contract shows that a part of the lumber was to be "hacked" by Graves; "Griggs Bros. furnishing the timber and doing the delivering of the lumber." The 1, 2, and 3 boards were to be de-

livered by Graves at Ruby and Mt. Groghan. This charge eliminated all but the 1, 2, and 3 boards, and was error.

The judgment is reversed, and the case remanded for a new trial.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(108 S. C. 432)

STONE v. COLUMBIA, N. & L. R. CO.

(No. 9623.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. APPEAL AND ERROR \Leftarrow 1029—REVIEW—HARMLESS ERROR.

In an action for death of a railroad servant, if it appears that there was no evidence of negligence on the part of defendant, the plaintiff cannot recover in any event, and no other error is prejudicial to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. \Leftarrow 1029.]

2. MASTER AND SERVANT \Leftarrow 286(1)—ACTION FOR INJURIES—EVIDENCE.

Where a railroad servant was killed in the yard of another railroad after leaving the only track which defendant was using and going under a car on another track to make an entry in his book, there was no negligence proven against defendant, and it was entitled to a directed verdict.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1001; Dec. Dig. \Leftarrow 286 (1).]

Appeal from Common Pleas Circuit Court of Richland County; I. W. Bowman, Judge.

Action by Roberta C. Stone, administratrix of the estate of Samuel B. Stone, deceased, against the Columbia, Newberry & Laurens Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Frank G. Tompkins, of Columbia, J. M. Wise, of Chester, and W. Hampton Cobb, of Columbia, for appellant. Lyles & Lyles, of Columbia, for respondent.

FRASER, J. This is an action for damages for death by wrongful act, and is brought by the plaintiff as administratrix of her husband, Samuel Stone. Samuel Stone was a car repairer, in the employ of the defendant. Mr. Stone was working on a car on track No. 4, in the yard of the Atlantic Coast Line Railroad Company. While Mr. Stone was at work on the car of the defendant, on track No. 4, he was directed by a representative of the Atlantic Coast Line Railroad Company, to take up his blue flag and come out from under the car as they were about to run a train in on No. 4. Mr. Stone obeyed the order, and went under a car on track No. 5, it seems, to make an entry in his book. The Coast Line engine came back on track No. 5 instead of No. 4, caught Mr. Stone under the car, and killed him. The plaintiff brought action against

the Coast Line for the death. This court held in that case, reported in 96 S. C. 228, 80 S. E. 433, that no recovery could be had against the Coast Line, inasmuch as the deceased did not comply with the blue-flag rule, and as a matter of law the defendant in that case was not responsible. The plaintiff then brought this action against the defendant herein, the Columbia, Newberry and Laurens Railroad Company. The case was tried before Judge I. W. Bowman, who directed a verdict for the defendant, and the plaintiff took this appeal on the following exceptions:

"I. Because his honor erred in admitting in evidence the record of the case of Roberta C. Stone against the Atlantic Coast Line Railroad, whereas he should have held that said record was irrelevant, and did not constitute any defense to the cause of action alleged in the complaint, nor was it responsive to any of the allegations of the answer.

"II. Because his honor erred in directing a verdict on the ground, 'Because the evidence does not permit of a reasonable inference that there was any negligence on the part of the defendant within the allegations of the complaint having any proximate causal connection with the injuries and death of plaintiff's intestate,' whereas he should have held that there was testimony from which the jury could have concluded that the direct and proximate cause of the death of the deceased was the negligence of the defendant.

"III. Because his honor erred in directing a verdict in favor of the defendant on the ground, 'Because the only reasonable inference to be drawn from the evidence is that the plaintiff's intestate was guilty of contributory negligence which operated as a proximate cause of his own injuries and death, without which they would not have occurred,' whereas he should have held that the testimony showed that there could have been reasonable inference drawn from the same other than that the intestate's contributory negligence operated as a proximate cause of his death.

"IV. Because his honor erred in directing a verdict in favor of the defendant on the ground that the judgment in the case of Roberta C. Stone against the Coast Line was a bar to this action, in that it was res adjudicata, whereas he should have held that same was not a bar to this action, and therefore was not res adjudicata, in that it did not adjudicate the merits of the case between the same parties or their privies."

[1] I. It is very manifest that if the second exception cannot be sustained, the other questions are academic, and need not be considered. If it appears that there is no evidence of negligence on the part of the defendant, then the plaintiff cannot recover in any event, and no other error is prejudicial.

[2] The yard in which the deceased was working belonged to the Coast Line, and while the defendant had the right to use tracks No. 4 and No. 5, it was using only No. 4. Track No. 5 was in possession of and used by the Coast Line. The movement of the Coast Line train killed Mr. Stone. The plaintiff was confined under the case as disclosed to rely upon an unsafe place to work.

Plaintiff undertook to show that the tracks were too close together for this kind of repair work. In this plaintiff failed. If plaintiff had shown that the tracks were too close, it would not have appeared to be the proximate cause of the death, because the deceased went away from track No. 4 over to track No. 5 and sat down on a cross-tie to make an entry on his book. A difference of a few feet could not have made any difference in Mr. Stone's position or in the result. Again, make track No. 4 as dangerous as you will, the injury was not received in track No. 4; neither was it inflicted in going to or returning from track No. 4. The negligence, if any, was the negligence of the Coast Line and not of the defendant.

It appearing that there was no negligence proven against the defendant, it was entitled to a directed verdict in its favor. There being no negligence shown, the other questions do not arise.

The judgment is affirmed.

GARY, C. J., and HYDRICK and WATTS, JJ., concur.

GAGE, J., took no part.

(106 S. C. 312)

BARRON et al. v. SOUTHERN SCALE & FIXTURE CO. (No. 9600.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. MORTGAGES \S 559(5)—FORM OF DECREE.

Under Code Civ. Proc. 1912, \S 218, as to joinder of causes of action, a court may in one decree give judgment for the amount due on a mortgage, and also direct a sale of the mortgaged property.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. \S 559(5).]

2. JUDGMENT \S 21—CERTAINTY OF AMOUNT.

A judgment may not be given for an uncertain amount.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 7, 8; Dec. Dig. \S 21.]

3. MORTGAGES \S 494—FORM OF DECREE—"JUDGMENT."

Under Code Civ. Proc. 1912, \S 304, defining a "judgment" as a final determination of the right of the parties, a decree in mortgage foreclosure, which, after finding defendant owed plaintiffs a certain sum, directed its payment on or before a certain date, and sale in default of payment, was sufficient as a judgment: the further direction, that if the proceeds of sale were insufficient to pay such amount the master should report the deficiency and that plaintiffs should have judgment therefor, being mere surplusage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 1441-1445; Dec. Dig. \S 494.

For other definitions, see Words and Phrases, First and Second Series, Judgment.]

4. JUDGMENT \S 271—ENTRY OF JUDGMENT—MAKING UP JUDGMENT ROLL.

The entry of judgment in the book of "Abstracts of Judgments" and the making up of the judgment roll are but ministerial acts, done

for purposes of lien and notice, and follow the judgment as matter of course.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 504-509; Dec. Dig. § 271.]

Appeal from Common Pleas Circuit Court of Richland County; I. W. Bowman, Judge.

Action by Clarendon W. Barron and another against the Southern Scale & Fixture Company. Judgment for plaintiffs. From an order refusing to vacate the entry of judgment, defendant appeals. Affirmed.

Melton & Belser, of Columbia, for appellant. Frank G. Tompkins and W. D. Barnett, both of Columbia, for respondents.

GAGE, J. Appeal from an order of the circuit court. The order was made on a motion by the defendant to vacate an entry of judgment against it in the book of Abstracts of Judgments. The motion was refused, and the defendant has appealed.

The action arises out of this recital: The defendant executed to one Twitty a bond and mortgage, and the same were assigned by Twitty to the plaintiffs. Action to foreclose the mortgage was begun, the master made his report, and the court made on October 26, 1915, a decree for the sale of the property. On November 9, 1915, judgment for \$2,926.21 was entered in the book of Abstracts of Judgments, and on December 6, 1915, the master sold the mortgaged premises. On January 29, 1916, the defendant gave to the National Loan & Exchange Bank a mortgage for \$11,450 on all its property. The real contest in the instant case is betwixt this mortgage creditor and the judgment creditors afore described. The suggestion of the defendant is, for the defendant nominally makes the question, that the words of the court's decree of foreclosure were not sufficient to create a judgment. And that is the whole case, though there are four exceptions. The master reported that there was due and owing to the plaintiff on October 25, 1915, all told \$2,897.91. The court found, *inter alia*, "that there is now due plaintiffs" the amount above stated, and ordered:

"That the defendant, Southern Scale & Fixture Company, do, on or before the 10th day of November, 1915, pay to the plaintiffs, C. W. Barron and Sarah P. Boylston, or their attorneys, the sum of \$2,897.91, with interest from the 25th day of October, 1915, together with the costs and disbursements of the plaintiffs and their attorneys to be taxed by the clerk." And further, "on default of payment at or before the time herein indicated," the mortgaged premises should be sold. And, again, "If the proceeds of sale be insufficient to pay the amounts hereinbefore authorized to be paid out of the said proceeds, with interest, costs, disbursements, and taxes, as aforesaid, the said master do report the deficiency, and that the plaintiffs have judgment therefor against the defendant, Southern Scale & Fixture Company."

These are the relevant parts of the decree. It is on the words last quoted the appellants rely to show that no judgment was

given as of the date of the decree, and that there was therefore no warrant to enter the judgment in the book of "Abstracts of Judgments" on November 9, 1915.

Before the act of 1894 (21 Stats. 816), it was held that, in an action for foreclosure, a money judgment might not be rendered against the mortgagor until a sale of the mortgaged premises and a report of the deficiency. *Hull v. Young*, 29 S. C. 64, 6 S. E. 938; *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636; *Cook v. Jennings*, 40 S. C. 205, 18 S. E. 640.

[1] Under the old practice, the appellant's view is sound. But the statute of 1894 was manifestly enacted to establish a markedly different rule of procedure. By it a court may in one decree give judgment for the amount due, and also direct a sale of property mortgaged to secure that debt. Code of Procedure, § 218.

The appellant does not deny that the court might have given judgment, but it is denied that so much was done. So the only issue is: Did the decree of the circuit court use sufficient and apt words to create a judgment? A "judgment" is defined to be the final determination of the rights of the parties in the action. Code, § 304. In the instant case the court found that on a day certain the defendant was due to the plaintiff a sum certain, and ordered the same to be paid on a day certain. There was nothing else to find.

Counsel did not deny, at the hearing, that, if the court had added the formal words "and the plaintiff shall have judgment therefor," the matter would not be open to question.

[2, 3] But when the debt was finally fixed as due, and on a fixed day, and its payment was directed, all the features of a judgment were present. See *Morgan v. Morgan*, 45 S. C. 323, 23 S. E. 64. *Id certum est quod certum reddi potest*. The circumstances relied on by the appellant to indicate that there was no intention of the court to give a present judgment, to wit, the last-quoted clause above referred to, is at best equivocal. That clause either purported to give a present judgment for a deficiency, or it did not. Its words indicate the former; if that be so, the clause was insufficient to that end. A judgment speaks in the present; a present judgment may in the nature of the case not be given for an uncertain amount. The other horn of the dilemma is that the clause did not purport to give a present judgment. If that be so, then there is no inconsistency betwixt the clause and the particular findings of the court before referred to. If the scrivener of a purely formal decree for foreclosure had any intent, and if it was to follow the practice which prevailed before the act of 1894, he would have directed:

"That the master do report any deficiency that might occur, and, upon coming in of the report,

the plaintiffs should have leave to apply for judgment therefor."

That, however, was not done, in words or in effect. The clause was at most then but surplusage, an unwarranted and irrelevant direction; and it did not at all modify that which the court had definitely found aforesaid, to wit, that the defendant owed the plaintiffs a fixed sum, on a fixed day, with direction to pay it.

[4] The entry of the event in the book of "Abstracts of Judgments," and the making up of the "judgment roll," were ministerial acts, done for purposes of lien and notice, and followed the judgment as matter of course.

The order below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 337)

WHITE et al. v. ATLANTIC COAST LINE R. CO. (No. 9598.)

(Supreme Court of South Carolina. Feb. 9, 1917.)

RAILROADS \Leftrightarrow 350(1)—INJURIES AT CROSSING—JURY CASE.

In an action against a railroad for killing two horses and injuring a buggy and a gun in a crossing collision, case held for the jury under the evidence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1152; Dec. Dig. \Leftrightarrow 350(1).]

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

Action by J. D. White and C. W. White against the Atlantic Coast Line Railroad Company. From a judgment for plaintiffs, defendant appeals. Judgment affirmed.

Mordecai & Gadsden & Rutledge and Octavius Cohen, all of Charleston, for appellant. E. J. Dennis, of Moncks Corner, for respondents.

GAGE, J. Tort, for the negligent injury to personal property. Defense, the injury resulted from the plaintiffs' contributory negligence. The thing hurt was a buggy and two horses attached; the horses were killed, and the buggy and a gun were demolished. The instrumentality was a rapidly moving freight train. The place was at Gaillard's crossing of the railroad track by a dirt highway, in a deep curve of the track, and just out of a cut. The verdict was for the plaintiffs for \$600.

There are three exceptions; but there is only one question, and that is, Was there testimony tending to show such negligence of the defendant that caused the hurt? The third exception makes reference to the rule in Danner's Case; but there is no pretense that the rule was applied by the court below, or that it now has any relevancy to the case.

The circumstances of the accident were these: The plaintiffs were driving a pair of horses hitched to a buggy, and as the horses walked upon the railroad track at the crossing, the tongue of the buggy dropped down and halted the horses; one of the plaintiffs jumped out of the buggy to look after the broken part, and just then and almost immediately the train of cars came upon the team.

The plaintiffs testified there was no signal of the train's approach, by bell or by whistle; had there been they would not have driven upon the track. It was late in the nighttime, and the night was dark, and the headlight was aflame. It is true the train crew testified that the signals were given; but of the truth of the matter the jury had to judge. If not given, that of course was negligence.

The real contention of the defendant was that the signals were not necessary to protect a traveler who knew from other sources of the train's near approach. That may be true; but the only testimony tending to prove such knowledge was that of the plaintiffs. They swore that just as they were on the track they saw the headlight, maybe a quarter of a mile away.

The plaintiffs further testified the impact took place in a minute after they were on the track; and the defendant's witnesses testified the train was running 20 or 25 miles an hour. There was no testimony that the plaintiffs had notice of the near approach of the train in sufficient time to have escaped the collision; and notice could serve no other end to defeat their right.

The court was right, to send the case to the jury; and the judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 423)

CLARK v. DUNBAR et al. (No. 9619.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

APPEAL AND ERROR \Leftrightarrow 337(1) — PREMATURE APPEAL.

In an action for partition, where the first order of sale did not provide for a failure of the purchaser to comply, or order a resale, and where a subsequent order of sale did not provide for a resale in case of purchaser's failure to comply with the bid, but where the third order for a resale provided for judgment against the bidder for a deficiency, if the property failed to bring as much as it did on the last sale, the purchaser being the same at all the sales, an appeal before the third sale from the order as to a deficiency judgment was premature, as it could not be then determined whether appellants would be injured or not; the notice of intention to appeal preserving all appellants' rights for the final hearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1877, 1878; Dec. Dig. \Leftrightarrow 337(1).]

Appeal from Common Pleas Circuit Court of Barnwell County; H. F. Rice, Judge.

Action for partition by Nina A. Clark

against Jennie Dunbar and others. From an order for a judgment for a deficiency based on the last sale, defendants appeal. Appeal dismissed.

James H. Hammond, of Columbia, for appellants. John D. Lee, of Columbia, for respondent.

FRASER, J. This is an action for partition. A sale was ordered. Several sales have been had, but the purchaser failed to comply. The first order of sale did not provide for a failure of the purchaser to comply or order a resale. At this sale the bid was \$3,300. A subsequent order of sale was taken which did provide for a resale in case of a failure of the purchaser to comply with the bid, and the resale was to be made at the risk of the highest bidder. At this sale the highest bid was \$2,400. Again the purchaser failed to comply, and another order was taken for a resale, in which there was provision for a judgment against the bidder for a deficiency if the property failed to bring as much as it did on the last sale. The purchaser was the same at all the sales.

The appellants except to the provision for a judgment for a deficiency based on the last sale, and claim that the amount of deficiency should be based on the first sale. It is very manifest that it does not and cannot be determined at this state of the case whether the appellants will be injured or not. At the next sale the property may bring more than it did at the first sale, and if it should do so, no one is hurt. The appellants have served notice of appeal from the order, and if it shall appear from the result of the sale to be had that unlawful prejudice has been suffered, it will be time enough to consider the alleged error. The notice of intention to appeal preserves all of appellants' rights for the final hearing.

This hearing on appeal is premature, and on that account is dismissed.

(106 S. C. 419)

BAKER et al. v. METROPOLITAN LIFE INS. CO. (No. 9618.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. INSURANCE \hookrightarrow 646(3)—**LIFE INSURANCE—ACTION ON POLICY—PRESUMPTION AND BURDEN OF PROOF.**

In an action upon a life insurance policy, defended on the ground that the policy by its terms was void in that insured, when it was executed and delivered, had cancer, the burden of establishing the defense was on the defendant, and plaintiffs' possession of the policy was prima facie evidence of their right to recover.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1653; Dec. Dig. \hookrightarrow 646(3).]

2. INSURANCE \hookrightarrow 668(7)—**LIFE INSURANCE—ACTION—QUESTION FOR JURY.**

In such action, *held*, on the evidence, that whether insured was in good health when the

policy was executed and delivered was for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737-1740, 1758-1760; Dec. Dig. \hookrightarrow 668(7).]

3. TRIAL \hookrightarrow 139(1)—**ISSUES—QUESTION FOR JURY.**

Where there is any competent evidence relevant to the case in favor of the plaintiff, the issues must go to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341; Dec. Dig. \hookrightarrow 139(1).]

4. INSURANCE \hookrightarrow 668(15)—**LIFE INSURANCE—ACTION ON POLICY—QUESTION FOR JURY—WAIVER.**

In an action upon a policy of life insurance, defended on the ground of its avoidance because insured when it was executed had cancer, evidence *held* to make the insurer's waiver a question for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1743, 1748, 1761, 1767, 1770; Dec. Dig. \hookrightarrow 668(15).]

5. INSURANCE \hookrightarrow 665(3)—**LIFE INSURANCE—EVIDENCE.**

An examination of the deceased by a physician chosen by the insurer is some evidence that a disease, which under the terms of the policy would have avoided it, did not exist when the policy was executed.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1711-1716; Dec. Dig. \hookrightarrow 665(3).]

6. INSURANCE \hookrightarrow 665(8)—**LIFE INSURANCE—EVIDENCE—WAIVER.**

An examination of the deceased by a physician chosen by the insurer is some evidence that the existence of a disease, which by the terms of the policy would have avoided it, was known to and waived by the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1725; Dec. Dig. \hookrightarrow 665(8).]

Appeal from Common Pleas Circuit Court of Chester County; D. D. McColl, Judge.

Suit by Mrs. Nannie E. Baker and another against the Metropolitan Life Insurance Company. Judgment for plaintiffs, motion for new trial overruled, and defendant excepts and appeals. Exceptions overruled, and judgment affirmed.

W. E. Elliott, Jr., and E. W. Mullins, both of Columbia, and Sam E. McFadden, of Chester, for appellant. Gaston & Hamilton, of Chester, for respondents.

WATTS, J. This is a suit on a policy of insurance on the life of Mrs. Josie Mill, in which policy Nannie E. Baker, the plaintiff in this action, is named as beneficiary. The case was tried before his honor, D. D. McColl, as special judge, and a jury at the November term of the court, 1916, for Chester county. At the conclusion of all the testimony in the case, defendant's attorneys made a motion for a directed verdict in favor of the defendant on the ground that the policy in express terms states that it is void if at the time it executed and delivered the policy the party insured had cancer, and that the evidence in the case leads to the uncontradicted conclusion that at the time of insurance and delivery of the

policy insured did have cancer. This motion was overruled by the court, and the case submitted to the jury, who rendered a verdict in favor of the plaintiff in the sum of \$105, with interest thereon at the rate of 7 per cent. per annum from April 21, 1913. Thereupon a motion for a new trial was made upon the same grounds that the motion for a directed verdict was made, and upon the further ground that his honor committed error of law in charging the jury and the usual claim that the verdict was contrary to the evidence. This motion being overruled and judgment entered, defendant appeals, and by its exceptions raises three grounds for reversal:

[1] 1. That the circuit judge should have directed a verdict for the defendant. We see no error in his honor's submitting the case to the jury. The burden was on the defendant to establish its contention that the insured had cancer before and at the time the policy was issued. The plaintiffs had the policy which was the contract of insurance, and that was prima facie evidence of their right to recover.

[2] There was ample evidence to go to the jury for them to say at the time the policy was issued and delivered whether or not the insured was in good health.

The defendant's physician, who in person saw the insured, gave his opinion that she was in good health, and he recommended her as "first class." The deceased stated in her application, which was in writing and put in evidence, that she had suffered only from "la grippe" and had employed no doctor in two years prior to the application except Dr. Cowherd. The agent of the defendant who took the application by his certificate stated that the applicant appeared to be a good risk. The defendant had ample opportunity to investigate and satisfy itself as to the statements made by Mrs. Dill before the policy was issued. If they were satisfied and issued the policy, they cannot now be heard to say that the doctor selected by them to represent them made a mistake, and that the insured was not healthy and had cancer, in the absence of a false or fraudulent representation made by the insured, and there is not the slightest evidence of this in the whole testimony, for all three of the doctors put up by the defendant say that they did not tell her that she had cancer. There is a conflict of evidence as to whether she had cancer at all, whether it was before or after the policy was issued. It was for the jury to decide the evidence as to the issues on the case.

[3] The defense interposed was an affirmative defense, and the burden of proof is on the defendant. Where there is any competent evidence relevant to the case in favor of the plaintiff, the issues must go to the jury to be decided by them. That has been de-

cided so often by this court and in so many cases that quotation of cases is unnecessary as being useless labor and "mere weariness of flesh."

This exception is overruled.

[4] The second exception charges error that "the circuit judge should not have modified the defendant's two requests to charge by charging in connection therewith the law of waiver." And the third ground is that "the circuit judge in his general charge should not have charged the law as to waiver."

There were some circumstances in the case whereby it could be inferred that the insured thought that she had made a binding agreement with the defendant when the policy was issued and delivered to her, and she relied on this, and there was enough evidence in the case as to waiver for it to go to the jury. Wallace, the company's physician, had every opportunity to satisfy himself as to her state of health and physical condition, and if he did not see fit to do so then it was his fault. He was the representative of the company and could and should have known. They thought her a good enough risk to receive her money; she was a good risk while alive.

[5, 6] It has been held by this court:

"An examination of the deceased by a physician chosen by the insurer is some evidence of one or two things: Either that the disease did not exist, or that its existence was known to and waived by the insurer." *Gamble v. Metropolitan Life Ins. Co.*, 95 S. C. 196, 78 S. E. 875.

In view of all the evidence in the case, we fail to see that the circuit judge was in error. All exceptions are overruled.

Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 351)

DAVIS v. ATLANTIC COAST LINE R. CO.
(No. 9602.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

APPEAL AND ERROR ~~6~~781(1)—DISMISSAL OF APPEAL—ACADEMIC QUESTION.

Where a railroad in a suit for wages admitted owing the wages, but alleged that they were withheld because another had presented plaintiff's power of attorney to collect the wages, notified the attorney under that power to come in and defend, and asked the court's directions as to paying the wages, and the attorney, though not joining as a party, testified as a witness and admitted that he had returned the power of attorney to the plaintiff at the latter's request to avoid causing his discharge, an appeal by the railroad from a judgment for the plaintiff presented only academic questions, and will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63, 3122; Dec. Dig. ~~6~~781(1).]

Appeal from Common Pleas Circuit Court of Florence County; S. W. G. Shipp, Judge.

Action by Tony Davis against the Atlantic

Coast Line Railroad Company. Judgment for the plaintiff in the circuit court on appeal from a magistrate's court, and defendant appeals. Appeal dismissed.

McNeill & Oliver, of Florence, for appellant. Mitchell & Lynch, of Florence, for respondent.

FRASER, J. The appellant states his case as follows:

"This was an action brought by Tony Davis in a magistrate's court to recover from Atlantic Coast Line Railroad Company certain wages due to him as laborer for said company. The defendant admitted the indebtedness, but set up by way of defense that the reason for its not paying such wages to the plaintiff was that one W. G. Roscoe had demanded payment to him of the money by virtue of a power of attorney apparently given to him by the plaintiff and which authorized him to demand and receive such wages of the defendant; the defendant in the meantime, after service of the complaint, having served upon the said Roscoe a notice to come in and defend the suit or take the steps necessary to establish the validity of his power of attorney, or that such judgment as should be recovered by the plaintiff would be pleaded in bar of any action that he might thereafter bring to recover such wages of the defendant, and the defendant asked the direction of the court as to whom such wages should be paid. The plaintiff set up by way of reply that the power of attorney in question conveyed a naked power, revocable at the will of the plaintiff, and that it had been so revoked; that said power of attorney was rendered void and of no effect because two powers of attorney, identical in terms and of the same date, had been given by the plaintiff to the said Roscoe; and, further, that since the said Roscoe had received a part of the plaintiff's wages previously and had then surrendered to the plaintiff one of said powers of attorney, this operated as a revocation of both. The magistrate found for the plaintiff, and upon appeal to the circuit court his honor, Judge S. W. G. Shipp, sustained the magistrate. Within due time notice of appeal to this court was served; one ground only being relied upon.

"Argument.

"By express terms of the power of attorney given to W. G. Roscoe by the plaintiff-respondent the said Roscoe had exclusive right to recover and receive all wages due from the defendant-appellant to the plaintiff-respondent, and, further, the plaintiff-respondent had therein stipulated that, should he at any time receive any such wages, they should nevertheless be held by him in trust for the sole use and benefit of the said W. G. Roscoe and no other, and should be forthwith delivered to him."

W. G. Roscoe was present at the trial, and testified as follows:

"This power of attorney that is marked Exhibit A was made to me. I did present this power of attorney to Special Paymaster Jacobs of defendant company on the 8th of July, 1915, and the 24th of July, 1915. (Plaintiff admits that demand was made by witness.)

"No cross-examination.

"Redirect: This power of attorney, marked Exhibit B, was given to paymaster at Mars Bluff and he was instructed to hold up plaintiff's money on it. No money was paid to me by the Coast Line for Tony Davis on the power of attorney, marked B. Tony Davis asked me to withdraw the power of attorney so he would not lose his job. I did so, and turned the power over to the plaintiff.

"Cross-examined: Tony Davis did give me, on the day that I gave him his power of attorney, \$15.22, which was all he drew. (Plaintiff's attorneys hand witness a paper.) Yes; I did receive a letter like that copy. (Letter introduced and marked Exhibit C.)"

The defendant admits the debt, and Roscoe withdraws the power of attorney. The question is academic.

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 356)

TAYLOR v. SOUTHERN STATES LIFE INS. CO. (No. 9594.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. INSURANCE \Leftrightarrow 668(11) — DISABILITY — QUESTION FOR JURY.

Under life policy providing for part payment on physical disability which wholly, continuously and permanently incapacitates insured from carrying on any gainful occupation, evidence held to warrant submission to jury of issue of disability.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1745, 1763, 1764; Dec. Dig. \Leftrightarrow 668(11).]

2. INSURANCE \Leftrightarrow 524—DISABILITY—RIGHT TO PAYMENT—"TOTALLY DISABLED."

An illiterate three-horse farmer, accustomed only to bodily labor, made by disease suddenly unfit for it, comes within the meaning of a clause providing for part payment on physical disability which wholly, continuously, and permanently incapacitates insured from carrying on any gainful occupation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1310; Dec. Dig. \Leftrightarrow 524.

For other definitions, see Words and Phrases, Second Series, Totally Disabled.]

Appeal from Common Pleas Circuit Court of Marion County; Thomas S. Sease, Judge.

Action by Levi F. Taylor against the Southern States Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Aquilla J. Orme, of Atlanta, Ga., and Jas. W. Johnson, of Marion, for appellant. Hoyt McMillan, of Mullins, for respondent.

GAGE, J. Action upon a contract of insurance. Verdict for the plaintiff for \$531.33. Appeal by the defendant. The insurance was of the plaintiffs' life, and for \$2,000; but the contract evidenced by the policy had this clause written in it, to wit:

"If the insured shall furnish to the company due proof that he has become physically disabled, and wholly, continuously, and permanently incapacitated from carrying on any gainful occupation, then in such case, immediately on such proof as aforesaid being furnished to the company, the policy shall mature as an endowment to the extent of one-fourth of the amount insured hereunder, which shall thereupon be paid in cash to the insured, in part payment of the amount insured hereunder."

The operation of that clause on the testimony in the case makes this lawsuit. The

company insists that the testimony offered by the plaintiff does not tend to prove that he "has become physically disabled, and wholly, continuously, and permanently incapacitated from carrying on any gainful occupation." Therefore the defendant esteems that it was entitled to have the trial court to so direct the jury. And, while there are three exceptions, the appellant's counsel stated at the hearing that the chief ground of the appeal was for the court's refusal to direct a verdict. To that alone we shall direct our attention; for we are of the opinion that the first and third exceptions are so devoid of merit as to need no discussion.

It was stated by the general counsel of the company, and in the oral argument, that clauses like that in issue first began to be written in 1906, and that there has been no general construction of the clause by the courts of last resort. The insistence of the defendant is that the plaintiff's own testimony, instead of proving total disability, negatives that conclusion. So the case depends upon what the plaintiff has said and the operation of his contract thereupon. If there may be two reasonable opinions about the result of this process of deduction, then the court was right to leave the inference to the jury. That rule, like rules of law generally, is plain enough; the rub comes in its application to the facts.

[1] We are satisfied that the court was right to submit the issue to a jury. The setting of the case is this: The plaintiff is a man of 60 years; he is a three-horse farmer; he never learned to read and he only learned to write his name, and he cannot do that now; he was suddenly stricken down during January while doing manual labor, was carried to a hospital at Florence, and began to mend only in September following; he has never since the attack been able to do farm-work; since the first attack he has been sick "all the time most." On cross-examination the plaintiff testified that when his wagon was loaded he drove it out to his farm; that he sometimes rode in a buggy with a boy who delivered milk for him; that he looked after the feeding of the cows; that he ran a dairy business with four cows with the help of a 14 year old boy; that he made arrangements for farm purchases, etc. It is this testimony upon which the defense relies to negative total disability.

The policy itself is evidence that the words of the disability clause are not to be literally construed. That instrument suggests several instances of what are deemed total disablements, to wit:

"Permanent loss of the sight of both eyes, or the loss of both hands at or above the wrist, or the loss of both feet at or above the ankle, or the loss of one hand at or above the wrist and one foot at or above the ankle, or being permanently totally paralyzed, are some of the

causes which will be admitted by the company as a total disablement under this clause."

[2] An illiterate three-horse farmer, dependent in large measure on his own strong arm for a livelihood, accustomed and trained only to bodily labor, made by disease suddenly and generally unfit for bodily labor, comes within the meaning of the contract; he is deemed totally disabled when he is no longer able to do his accustomed task, and such work as he has only been trained to do, and upon which he must depend for a living. The man of waning years, of small means, of no education, totally dependent upon the strength of his body for a livelihood, is bankrupt when the marvelous and mysterious parts of his organism go wrong. If they do not answer the summons of his will, if indeed it is able to summon them, to do the common tasks, he is undone, and for his purposes totally undone. It would be like squaring the circle for a judge to undertake to say just at what juncture a part became a whole, at what period a disability is enlarged from partial to total.

We think the circuit judge compassed the whole case when he ruled on the motion for a directed verdict. He said:

"I think the case will have to go to the jury. I think every case will have to stand on its own bottom as to disability. I am almost prepared to say that what might be disability to one person might not be to another. For example, leaving out the special case mentioned in the policy, take a lawyer that loses both of his legs; he could still pursue his vocation; but if he was a farmer or a carpenter he could not. So it depends entirely on the individual, I think, and that, of course, would be a matter for the jury."

The judgment of the circuit court is affirmed.

HYDRICK, WATTS, and FRASER, JJ., concur. The CHIEF JUSTICE did not sit.

(106 S. C. 392)

STATE v. WINFIELD. (No. 9613.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

CRIMINAL LAW \S 419, 420(1) — HEARSAY EVIDENCE.

In murder trial, it was error to admit testimony that the witness, awakened by the shooting, heard men going by in the dark, and a question, "Did you get him," replied to with the words "Yes, but God damn it, I got him in the back," and that one of the men said, "What are you going so fast for?" where the witness did not identify any of the voices; the testimony being plain hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 973, 975, 976, 980-983; Dec. Dig. \S 419, 420(1).]

Gary, C. J., dissenting.

Appeal from General Sessions Circuit Court of Aiken County; H. P. Rice, Judge.

Seth Winfield was convicted of manslaughter, and appeals. Reversed, and new trial ordered.

Defendant's exceptions were as follows.

(1) The presiding judge erred in modifying defendant's fifth request to charge by instructing the jury that if defendant was shooting at Norman Wilson in self-defense and killed Rich Johnson, he would not be guilty. Whereas, the said request to charge contained the totally different proposition of law that, if the deceased, Rich Johnson, was aiding Norman Wilson as an accessory to take the life of defendant, he would have the same right to kill the accessory in self-defense as he had to kill the principal in self-defense—the error being that said modification totally destroyed the effect of said request, which contained a sound proposition of law which defendant was entitled to have charged to the jury, and was virtually a refusal of said request, which was highly prejudicial to the defendant's rights.

(2) The presiding judge erred in allowing the witness Grant Sapp, to testify, over defendant's objection, that while he was at Fanny Dobe's house, about one-half mile from the scene of the homicide, and about 10 minutes after the shooting, three or four persons passed by the house, and he heard one of them say: "Did you get him?" and the other man answered, "Yes, but God damn it, I got him in the back." Also, "They said what are you going so fast about; no use to be going so fast"—the error being that said testimony was not a part of the *res gestæ*, nor was it shown to be a statement or declaration made by either of the defendants, but was rankest hearsay, not binding on the defendants, clearly incompetent, and extremely harmful and prejudicial to the rights of the defendant.

J. B. Salley, of Aiken, for appellant. R. L. Gunter, Sol., of Aiken, for the State.

GAGE, J. The defendant was convicted of manslaughter, and the judgment was seven years' imprisonment at hard labor. He has appealed.

There are two exceptions, but the appellant stated at the hearing that his chief reliance was upon the second exception, and we shall consider that one alone. Let the exceptions be reported.

The homicide was done at a "hot supper" on a Saturday night, some two hours after midnight, and out of doors in the edge of a wood, where several men were playing at cards by a light wood knot fire. "A drove" of negroes were present thereabout, and "shooting took place all around." The deceased, Rich Johnson, had a pistol, as had others. The defendant also had a pistol, and by his own account he shot several times at one Norman Wilson, in defense of himself. No witness testified he saw the defendant shoot Johnson; and the dead body was not discovered until the following morning, when it was found in an adjoining field some 70 yards from the light wood knot fire. So far as the testimony shows, whoever killed Johnson did not know he had done the act until the next morning after the event. After the general shooting the crowd dispersed, running in many directions.

The state offered a witness named Sapp, who testified he was not at the frolic; that he was in a house a mile or a half a mile distant from the place of the frolic; that

he heard the shooting; that the shooting awakened him, and he stood in the window of the house; that some minutes after the shooting, he could not say how long, he "heard some fellow say to another one, 'Did you get him?' and another one said, 'Yes, but God damn it, I got him in the back;'" that the witness saw three or four men going west; that one of the men said, "What are you going so fast for?" that the witness could not say how far the men were from his house when they spoke the quoted words; the witness further said he did not know what person spoke the words. This testimony of Sapp's was objected to by the defendant. The court ruled:

"I do not think it would be a part of the *res gestæ*, but I think it would be for the jury to say whether one of these men made those remarks. If they believe that a remark was made, I think it would be for the jury to say whether or not they made it."

Plainly the court was right to exclude the testimony as part of the things done at the transaction, the *res gestæ*. But the testimony was not competent in any view.

The defendant had testified he shot in self-defense. The testimony of Sapp made him say he shot Johnson in the back. The person who made the declaration was not identified, save by the pronoun "I." The declarant testified he did not know who "I" was. An unidentified voice, out of the darkness of the night, said in effect that the defendant did the act. That was plain hearsay, it was incompetent, it amounted to an unproven confession by the defendant, and it was hurtful to his cause. See *Hambright v. Railroad*, 102 S. C. 169, 86 S. E. 375.

The judgment is reversed, and a new trial ordered.

HYDRICK, WATTS, and FRASER, JJ., concur.

GARY, C. J., dissents.

(106 S. C. 228)

TUTEN et al. v. McALHANEY et al.
(No. 9597.)

(Supreme Court of South Carolina. Feb. 9, 1917.)

1. DEEDS \S 196(3)—EXECUTION—UNDUE INFLUENCE—BURDEN OF PROOF.

Where the condition of a grantor is such that the borderland between his weak-mindedness and his imbecility is a mere shadow, and a conveyance of valuable property is made by such grantor to a stranger in blood without any consideration whatsoever, the burden is on such stranger in blood, who has obtained such property by deed, to remove the presumption of undue influence.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 649; Dec. Dig. \S 196(3).]

2. DEEDS \S 211(4)—EXECUTION—EVIDENCE.

Evidence held to show that a deed was secured by undue influence upon a grantor of doubtful mentality, without consideration.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 641, 642; Dec. Dig. \S 211(4).]

3. DEEDS ⇐70(7)—EXECUTION—FRAUD.

Where a man gets a valuable tract of land for nothing from a person whose condition is such that the borderland between weak-mindedness and imbecility is a mere shadow, in the absence of a clear and satisfactory explanation, he is guilty of fraud.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 175; Dec. Dig. ⇐70(7).]

4. VENDOR AND PURCHASER ⇐244—NOTICE OF FRAUD—EVIDENCE.

Evidence held insufficient to show that one defendant, in purchasing from the other, had notice of fraud by which the other secured a deed, so as to put him on inquiry.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609-611; Dec. Dig. ⇐244.]

Appeal from Common Pleas Circuit Court of Hampton County; Geo. E. Prince, Judge.

Action by John Tuten and others against H. F. McAlhaney, L. R. Bishop, and another. Judgment for plaintiffs against McAlhaney, and for Bishop, and McAlhaney appealed. Affirmed.

The opinion of Judge Prince referred to is as follows:

This action came on to be heard before me at Hampton, S. C., at the spring, 1916, term of court. Certain issues of fact were, by consent of counsel, framed by the court and submitted to a jury. Testimony on such issues, oral and documentary, was taken. The following are the issues which were submitted to the jury by the court for the enlightenment of the court, and the jury's findings on such issues:

"1. Was William M. Tuten, on August 14th, wholly mentally incapacitated to do business? A. No.

"2. If the said William M. Tuten was not wholly incapacitated on the 14th of August, 1914, was he at that time so incapacitated as to render him easily defrauded? A. Yes.

"3. Did H. F. McAlhaney procure the deed, dated August 14, 1914, either by fraud or fraudulent representation? A. No.

"4. What was the reasonable value for lands described in the deed at the date of the deed? A. \$15 per acre.

"5. How much did H. F. McAlhaney agree to pay for the said lands, if anything? A. Nothing.

"6. How much did H. F. McAlhaney actually pay for the lands, if anything? A. Nothing.

"7. Did Bishop, at the time he took conveyance of part of the land from McAlhaney, have notice of any defect in McAlhaney's title? A. No.

"8. If Bishop did not have actual notice of any defect in McAlhaney's title, did he have knowledge of such defects as would have put any reasonable man on inquiry as to such defects? A. Yes."

Upon the rendition of the verdict of the jury, the case was fully argued before me by counsel for the plaintiffs and the defendants.

This is an action by the plaintiffs, as heirs at law of one William M. Tuten, who died on or about the 14th of October, 1914. The suit is to set aside an alleged deed made by William M. Tuten to the defendant H. F. McAlhaney, on the 14th day of August, 1914, covering 296 acres of farm lands in Hampton county, and to set aside a deed made by the defendant H. F. McAlhaney to the defendant L. R. Bishop, dated the 9th day of November, 1914, for a purported consideration of \$1,100, covering 100 acres of the said tract of land.

It is alleged by the plaintiffs that, at the time of the making of the said deed by William M.

Tuten, the said William M. Tuten was insane, and that both before and after the said 14th day of August, 1914, and up to the time of his death, the said William M. Tuten was in very feeble health, and was not of sound and disposing mind, being incapacitated for and incapable of attending to any business whatsoever. It is charged that both of the defendants McAlhaney and Bishop knew of the insanity and incapacity of Tuten. It is charged that the said deed from William M. Tuten to McAlhaney was procured by fraud, and that no consideration for said deed was paid, although the said deed expressed a consideration of \$3,000. It is charged that Bishop knew of the existence of this state of affairs, or had such knowledge or information as would put him upon inquiry as to any alleged defects in the title of McAlhaney. It is further alleged in the complaint that the defendant L. R. Bishop and the defendant H. F. McAlhaney conspired together, and that the resultant transactions of such conspiracy were the direct results of a fraudulent scheme on the part of the said defendants.

The defendant H. F. McAlhaney denies all of the material allegations of the complaint, and by way of a further defense alleges that he purchased the said land from the said William M. Tuten, deceased, for a valuable consideration, which consideration it is alleged in the answer was fully paid by the defendant. The defendant L. R. Bishop denies all of the material allegations of the complaint, and alleges as a further defense that he is the owner in fee simple and in possession of 100 acres of land mentioned in the complaint and described as follows: "Bound on the north by lands of John Tuten, or Rock Spring Public Road, separating the said tract of land from John Tuten and others; on the east by lands of C. H. Cummings; on the south by lands of T. H. Tuten; and on the west by lands of H. F. McAlhaney; the same being a portion of a tract of two hundred and ninety-six acres purchased by H. F. McAlhaney from William M. Tuten, August 14, 1914"—and that the defendant McAlhaney, on the 9th day of November, 1914, made, executed, and delivered to the defendant L. R. Bishop a deed of conveyance to the said 100 acres of land above described; and the defendant Bishop further alleges that he did not have any notice whatsoever of any mental incapacity on the part of the said William M. Tuten.

[1] At the conclusion of the hearing before me, I directed the parties litigant to have prepared and transmitted to me a copy of all of the testimony, both oral and documentary, for my consideration. After careful consideration and mature deliberation, I find and conclude that while William M. Tuten, on the 14th day of August, 1914, was not an out-and-out imbecile or idiot, still he was extremely weak-minded, decrepit, and, in consideration of his state of mind, the borderland between his weak-mindedness and his imbecility or idiocy was but a shadow. This court is satisfied that he was induced by a stranger in blood, who was a strong-minded man, to execute the deed in question for which not one dollar was paid, which transferred from him the control and possession of valuable farming lands which were worth, as the testimony shows, \$4,440. This court holds that where the condition of a grantor is such that the borderland between his weak-mindedness and his imbecility is a mere shadow, and a conveyance of valuable property is made by such grantor to a stranger in blood without any consideration whatsoever, that the burden is on such stranger in blood who has obtained such property by deed to remove the presumption of undue influence.

[2] This court holds that William M. Tuten did an unnatural thing, and while he was in a

weak-minded state. In this connection it should be noted that grantor's quarrel was only with the conduct of two out of five of his sons. There is absolutely no testimony that his daughter's conduct was not all that the father could expect or ever wish, yet we find him exacting from her an agreement to support him for life in consideration of the conveyance to her of only 50 acres.

[3] Where a man gets a valuable tract of land for nothing from a person whose condition is such that the borderland is a mere shadow, in the absence of a clear and satisfactory explanation, he is guilty of fraud. Such being the law and the testimony clearly showing that such was the mental condition of William M. Tuten on the 14th day of August, 1914, and that this \$4,440 tract of land was secured by McAlhaney, who was a stranger in blood, without any consideration whatsoever, I unhesitatingly set aside the deed from William M. Tuten to H. F. McAlhaney, bearing date the 14th of August, 1914, covering 296 acres of land, described as follows, to wit: "All of that certain piece, parcel or tract of land situate, lying and being in Hampton county, South Carolina, containing two hundred and ninety-six acres, more or less, and bounded on the north by lands of R. L. McAlhaney, William Tuten and John Tuten; on the east by lands of C. H. Cummings; on the south by lands of T. H. Tuten and John Tuten; and on the west by lands of R. H. Sinclair"—and I authorize and direct the delivery up and cancellation of record the deed in question from William M. Tuten to H. F. McAlhaney.

Having disposed of the deed to McAlhaney, it now remains for the court to dispose of the contention raised by the pleadings and testimony as to the defendant L. R. Bishop, and his claim of 100 acres of land, which he states he purchased from McAlhaney without knowledge or notice of any defects in the title of McAlhaney, or without knowledge or notice of any facts sufficient to put him upon inquiry as to such defects in the title of McAlhaney. McAlhaney married the sister of Bishop. In July or August, Bishop states he was at McAlhaney's place on a visit. Bishop claims that he knew of William M. Tuten's physical illness, and that after the death of the said William M. Tuten he, the defendant Bishop, knew of a contest between the Tutens and McAlhaney as to the crops growing on the identical land in question in this action which is claimed by the defendant Bishop. Bishop's father on the witness stands testified that he knew of a contest between the Tutens and McAlhaney as to the land in question. Bishop states that he paid McAlhaney on delivery of the deed the sum of \$420, and that the balance of the purchase money, to wit, the difference between \$420 and \$1,100, the alleged agreed price, was secured to the said McAlhaney by a mortgage over the 100 acres so purchased. The testimony shows that the Tutens were in possession of the property up to the death of William M. Tuten and for some time thereafter. Before the transaction between Bishop and McAlhaney was closed, Bishop visited the neighborhood, and the land contest was the subject of common report throughout the neighborhood, according to the testimony of Bishop's father. On the trial of the case, I ruled that where fraud was shown in the inception of a transaction, the purchaser from fraudulent grantee did not have the burden of proof, or showing the transaction to be bona fide, and that the burden of proof that the purchaser from the fraudulent grantee bought with notice or knowledge of the defects in his title was upon those attacking such transaction as fraudulent to show notice or knowledge sufficient to put a reasonable man upon inquiry as to the condition of the title of the person from whom he bought.

[4] This court does not think that the evidence

above enumerated is sufficient in the respect named to show that Bishop took with notice or knowledge of such defects in the title of McAlhaney, and does not show notice or knowledge sufficient to put him upon inquiry as to the condition of McAlhaney's title; and in this respect I do not agree with the finding of the jury, to the effect that Bishop had knowledge or notice sufficient to put him upon inquiry as to the condition of the title of McAlhaney; and, therefore, I refuse to set aside the said conveyance. It appears to the court that Bishop has not paid the difference between the price he agreed to pay, to wit, \$1,100, and \$420, to McAlhaney or any one else. It also appears that McAlhaney holds a mortgage over the said 100 acres of land for the balance of such purchase price. It was testified to, and I find that Bishop has paid the interest for one year on the said mortgage. I, therefore, hold that the balance of the purchase price of the said land should be paid to the administrator of the estate of William M. Tuten by the said Bishop, and it is ordered that the defendant H. F. McAlhaney forthwith, upon the service of a copy of this order upon him, do deliver to Reddin Tuten, the administrator of the estate of William M. Tuten, or his successors in office or his attorney, the note and mortgage executed to him by the said defendant L. R. Bishop, and that the title to the said note and mortgage be, and the same is hereby, vested in the administrator of the estate of William M. Tuten.

It follows from what I have hereinbefore found to be the facts and held to be the law applicable thereto that the defendant H. F. McAlhaney has wrongfully collected from his co-defendant L. R. Bishop the sum of \$420, the cash payment on the land he sold to Bishop on the 9th day of November, 1914, and the further sum of \$47.80, one year's interest on the purchase-money mortgage of \$680, and that said defendant should account to and pay over to the said Reddin Tuten, as administrator of William M. Tuten, both of said sums of money with interest on each of said sums from the date it was wrongfully received by the said McAlhaney. Any party to this cause is hereby granted leave to apply at the foot of this decree to this court for such additional order as may be necessary to enforce their several rights as herein fixed. Let the defendant H. F. McAlhaney pay the costs of this proceeding. Let a certified copy of this decree be forthwith personally served upon each of the defendants. And it is so ordered, adjudged, and decreed.

J. W. Vincent, of Hampton, for appellant.
E. F. Warren, of Hampton, for respondents.

FRASER, J. The record shows the following:

"This is an action brought by the heirs at law of William M. Tuten, deceased, to set aside a deed made by him to H. F. McAlhaney on August 14, 1914, on the grounds of incapacity of the grantor, fraud and misrepresentation on the part of the grantee, and want of consideration. The action sought to set aside, also, a deed made by H. F. McAlhaney to L. R. Bishop on November 9, 1914, covering 100 acres of the premises included in deed from Tuten to McAlhaney on the alleged ground that McAlhaney and Bishop conspired to defraud the plaintiffs. The case was tried at the February term, common pleas, Hampton county, S. C., before Judge George E. Prince and a jury."

Judge Prince then heard the case on the testimony as heard by the jury and arguments of counsel. He gave judgment in favor of the plaintiffs, setting aside the deed of Tuten to McAlhaney, but affirmed the deed from McAlhaney to Bishop. He order-

ed McAlhaney, however, to pay to the administrator of William M. Tuten the money paid to him by Bishop and to transfer to said administrator the security for the unpaid portion of the purchase money. From the decree, McAlhaney appealed.

There are seven exceptions, but they raised questions of fact. The Constitution of this state provides as to this court (article 5, § 4):

"And said court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases where the facts are settled by a jury and the verdict not set aside."

In this case the verdict was not set aside. The only conflict is as to the finding of fraud, and, as to that finding, the decree appealed from is affirmed, for the reasons stated by Judge Prince.

The judgment is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 300)

BUNCH et al. v. DUNNING. (No. 9586.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

1. DEEDS \S 56(7)—DELIVERY.

Where a sale of land was negotiated, a deed was prepared, signed by the grantor, and offered to the grantee, who declined to accept it until proper renunciation of dower was made by the grantor's wife, and the deed was returned for that purpose, but, before the renunciation was made, the grantor died, and some months later his pretended wife renounced dower, and the grantee paid the price, not to a legal representative of the grantor or his heirs at law, but to an attorney at law, there was no legal delivery of the deed, and it was invalid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 125.]

2. ATTORNEY AND CLIENT \S 76(2)—PRINCIPAL AND AGENT \S 43(1)—REVOCATION OF AUTHORITY BY DEATH.

The authority of an attorney at law or attorney in fact ceased and was revoked by the client's or principal's death, and the attorney had no power or authority to represent him after his death.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 125, 127; Principal and Agent, Cent. Dig. §§ 67, 69, 70.]

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

Action by Barcha Josephine Bunch and another against F. A. Dunning. From a judgment for plaintiffs, defendant appeals. Judgment affirmed.

Octavus Cohen and Lewis G. Fultz, both of Moncks Corner, for appellant. R. Lon Weeks, of St. George, and E. J. Dennis, of Moncks Corner, for respondents.

WATTS, J. This is an action by plaintiffs against the defendant to set aside a deed

of conveyance by Josiah Stevens, deceased, to F. A. Dunning. The complaint alleges: That the plaintiffs, respectively, are the widow and daughter of the deceased, Josiah Stevens. That Josiah Stevens died intestate on December 28, 1913, leaving the plaintiffs as his only surviving heirs. That on May 23, 1913, the deceased executed a deed of conveyance to the premises described in the complaint in this action 290 acres for \$300 to Dunning, but the plaintiffs allege that the deed is invalid on three grounds: That the deed was without valuable consideration, and was not delivered, and was executed for the purpose of fraudulently defeating the lawful rights and interests of the plaintiffs in the premises, and to favor persons who could not take from the deceased directly, and that all of these facts were personally known to Dunning, who conspired with the deceased for the purpose of defeating the rights of the plaintiffs, and especially the widow, who was estranged from her husband, and the deceased for years had lived apart from her. The answer denied the allegations of the complaint, and alleged that the deed of conveyance was executed for a valuable consideration, and that he was the owner in fee of the land in question.

The cause was tried in March, 1916, term of court for Berkeley county before his honor, Judge Memminger, and a jury. Motion for a nonsuit and for a direction of a verdict were made by the defendant; both were overruled.

His honor submitted the following issues to the jury:

(1) "Was the plaintiff Mrs. Susan Stevens the lawful wife of Josiah Stevens, deceased, and the plaintiff Mrs. Barcha Josephine Bunch the only lawful child of their marriage?" (2) "Is the deed in question a valid deed?"

The jury answered the first question "Yes," and the second question "No." Thereupon the presiding judge signed an order confirming the verdict of the jury. After entry of judgment defendant appeals, and by 18 exceptions alleges error and seeks reversal.

It is unnecessary to consider all of the exceptions, but we will first consider the testimony as to whether or not the deed in question was ever delivered to the defendant. If it was not taken, no further consideration of the case is necessary.

The jury found that the deed in question was invalid, and the court concurred in this finding. If the deed in question was never delivered, then it was not a valid deed, and the defendant acquired no right, title, or interest thereunder.

The defendant's evidence is that the deed was prepared and turned over to him, and he had it in his possession two months before Stevens' death, but he did not pay the money, but returned the deed because there was no renunciation of dower by the wife; that there was no consummation of the trade and

no payment of money, although he stood ready to pay when the deed was perfected and dower renounced; that Stevens died on December 28, 1913, and he paid the money on February 5, 1914, to Mr. Herndon, a lawyer in Charleston, and got the deed with a renunciation of dower on it not by the plaintiff in this case who is found by the jury to be the lawful wife of Stevens, but by one Nora Harmon or Nora Stevens, who claimed to be the wife of Stevens. We cannot escape the conclusion that not only was there sufficient evidence to sustain the finding of the jury, concurred in by the trial judge, that the deed was invalid, but no other reasonable inference can be drawn from the evidence that the deed never was legally delivered to the defendant.

[1, 2] Stevens and Dunning negotiated for the sale, a deed was prepared and signed by Stevens and offered to Dunning. Dunning declined to accept it until proper renunciation of dower was made by the wife of Stevens, and it was returned for this purpose; before this was done Stevens dies, and some months later the pretended wife of Stevens renounces dower, and the money is paid over, not to a legal representative of Stevens or his heirs at law, but an attorney at law. Even if Mr. Herndon was the attorney of Stevens as an attorney at law or attorney in fact his authority ceased and was revoked by Stevens' death, and he had no power or authority to represent him after his death. Any authority he had as agent or attorney ceased with the death of Stevens. *Johnson v. Johnson*, 27 S. C. 316, 3 S. E. 606, 13 Am. St. Rep. 636.

Stevens died before the deed was delivered or the money paid, and the attorney, Herndon, had no power or authority after his death to deliver the deed and collect the money set forth in the deed as the consideration. Having reached the conclusion that the finding of the jury concurred in by the trial judge that the deed was invalid in that it was never legally delivered to the defendant, this conclusively determines the cause, and it is unnecessary to consider the other exceptions in the case.

The exceptions are overruled, and judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 362)

MERCHANTS' & PLANTERS' BANK v. BRIGMAN et al. (No. 9605.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. CHATTEL MORTGAGES ⇨162—OVERDUE MORTGAGE—TITLE AND POSSESSION.

Ordinarily when a chattel mortgage is past due, and there is anything due thereon, the title

vests in the mortgagee, who is entitled to the possession of the property.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 286-293.]

2. CONSTITUTIONAL LAW ⇨300—HIGHWAYS ⇨166—DUE PROCESS OF LAW—LIEN ON AUTOMOBILES FOR INJURIES CAUSED BY—ATTACHMENT.

Act 1915 (27 St. at Large, p. 737) § 1, providing that when a motor vehicle is operated in violation of the law or negligently or carelessly, and when any one receives personal injuries thereby, or when any property is damaged thereby, such damages shall be a lien on such motor vehicle, next in priority to the lien for state and county taxes, recoverable in any court of competent jurisdiction, with the right to attach such vehicle as provided by law for attachment, does not violate the due process of law provisions of Const. art. 1, § 5, and U. S. Const. Amend. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 940; *Highways*, Cent. Dig. § 457.]

3. HIGHWAYS ⇨166—POLICE POWER—MOTOR VEHICLE—LIEN AND ATTACHMENT.

Such act is a valid exercise of the Legislature's police power.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 457.]

4. CONSTITUTIONAL LAW ⇨70(3)—POWER OF COURT—WISDOM OF STATUTE.

As long as the Legislature acts in relation to the police power vested in it, it is not for the court to say whether the act is wise or unwise.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 131.]

5. CHATTEL MORTGAGES ⇨148—PUBLIC NOTICE.

Act 1915 (27 St. at Large, p. 737) § 1, being a public act, puts the whole world on notice that the claim of one who sustains personal injury or property damages from the illegal or negligent operation of a motor vehicle, is superior to that of any other person, except the state and county, and a mortgagee takes with notice of the act.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 243.]

6. ATTACHMENT ⇨22—AUTOMOBILE—STATUTE.

Under such statute the machine can be attached and made liable to the lien, where it is loaned, and the party operating it inflicts the injury.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 54-60.]

7. STATUTES ⇨117(2)—SUBJECT AND TITLE.

Act 1915 (27 St. at Large, p. 737) § 1, entitled "An act to further regulate the running of motor vehicles in this state," and, by section 1, providing that, where a motor vehicle is operated in violation of the law, or negligently, and when any person receives personal injury thereby, or any property is damaged thereby, the damages shall be a lien upon the vehicle, with the right of attachment, relates to and is germane to the title, and hence does not violate Const. art. 8, § 17, providing that each act shall relate to but one subject expressed in its title.

Appeal from Common Pleas Circuit Court of Dillon County; T. J. Mauldin, Judge.

Action of claim and delivery by the Merchants' & Planters' Bank against M. W. Brigman and S. V. Lane, as sheriff of Dillon county. Judgment for plaintiff, and defendant Lane excepts and appeals. Reversed.

Gibson & Muller, of Dillon, and Hoyt McMillan, of Mullins, for appellant. Joe P. Lane and G. G. McLaurin, both of Dillon, for respondent.

WATTS, J. This is an appeal from an order and decree of his honor, Judge Mauldin, who heard the case at Dillon county court of common pleas at the fall term of court, 1915, and filed his decision February 8, 1916. The brief has the following statement:

"This was an action for the recovery of the possession of personal property accompanied by regular claim and delivery proceedings and commenced by the service of a summons and complaint on or about the 28th day of November, 1914. The affidavit and bond for claim and delivery were the usual affidavit and bond for claim and delivery action, and the automobile was duly seized and taken from Sheriff S. V. Lane under the action. S. V. Lane, sheriff of Dillon county, answered and resisted the action, and the case came on for hearing on its merits before Judge T. J. Mauldin and a jury the 18th day of October, 1915. During the progress of the case counsel for both sides agreed to take all issues away from the jury with the exception of the question of value of the property involved, and submit all other facts and law to the court for its determination. On the question submitted to the jury, they found the value of the property (one Ford automobile) to be \$125. The judge reserved his decision until the 8th day of February, 1916, when he rendered a decision in favor of the plaintiff for the recovery of the property or the value thereof, \$125."

The defendant Sheriff S. V. Lane gave due notice of appeal, and the case comes on for a hearing before this court on the case and exceptions.

The legal issues raised by the exceptions are: First. Whether or not, plaintiff's mortgage being past due and the legal as well as the equitable title having vested in it to the property in question, it was entitled to the possession thereof. Second. Did the plaintiff pursue the wrong remedy? Third. Is the act in question valid?

[1] Ordinarily when a chattel mortgage is past due and there is anything due thereon, the title vests in the mortgagee, and the owner and holder of the mortgage is entitled to the possession of the mortgaged property. If there was not the act of the Legislature in reference to automobiles which is relied on in this case to controvert this view, this point would be free from difficulty, as the numerous decisions of this court decide this question in the affirmative.

[2-4] This act is full and comprehensive, and is as follows:

"An act to further regulate the running of motor vehicles in this state.

"Section 1. Be it enacted by the General Assembly of the state of South Carolina: When a motor vehicle is operated in violation of the provisions of law, or negligently and carelessly, and when any person receives personal injury thereby, or when a buggy or wagon or other property is damaged thereby, the damages done to such person or property shall be and constitute a lien next in priority to the lien for state

and county taxes upon such motor vehicle, recoverable in any court of competent jurisdiction, and the person sustaining such damages shall have a right to attach said motor vehicle in the manner provided by law for attachments in this state: Provided, that this act shall not be effective in case the motor vehicle shall have been stolen by the breaking of a building under a secure lock, or when the vehicle is securely locked."

Act 1912 (27 St. at Large, p. 737).

The plaintiff-respondent contends that this act is unconstitutional and void in that it is in violation of article 1, § 5, of the Constitution of South Carolina; also in violation of section 17 of article 3 of the Constitution of South Carolina, and in violation of a portion of the Fourteenth Amendment of the Constitution of the United States. We do not think that contention of the respondent that the act is unconstitutional and void can be sustained.

The Legislature has the inherent police power to pass any law it judges fit for the protection and welfare of its people in traveling over the public highways of the state, and it is a matter within the discretion of the Legislature of the state to determine what interests the public requires, and to adopt such measures and means as are reasonably necessary for the protection of such interests, and to make reasonably safe the traveling public.

As long as the Legislature acts in relation to the police power vested in it as the law-making power, it is not for the court to vacate their action upon constitutional grounds, or to say whether the measure is wise or unwise. The Legislature by passing the act judged the measure to be reasonable and wise. The public generally has the right to use the highways of the state and travel over the same—afloat, horseback, in vehicles, and motor vehicles.

Motor vehicles are a new and comparatively a modern means of locomotion. They are unquestionably dangerous, and can and do destroy property, kill and maim people as much as locomotives and engines and cars on railroad tracks. The only difference being that railways are operated on tracks owned by them where no one else has the right as a matter of right to travel, and motor vehicles are operated on highways where the public generally has the right to travel. The railroads are generally able to respond in damages for any damages willfully and negligently inflicted by them.

As to the owners of motor vehicles, such as automobiles, it is a different proposition. There is a distinction in law as to the liability and measure of damages as to a common carrier for hire and a private carrier for hire. If the common carriers killed and maimed as many people and destroyed as much property under similar circumstances of negligence and willfulness as the automobile and other motor vehicles there would be great indignation and large damages awarded.

The Legislature had the right in the exercise of police power to guard its citizens and the public generally by passing a law in a measure that protects them from negligence, carelessness, and recklessness of persons driving dangerous machines, and the proviso making the machine that inflicted the injury liable for the damages and providing attachment of the same is not taking property without due process of law, but is passed in the best interest of the public.

The act of the Legislature only gives the right to make the machine liable, and not the owner of the machine, unless the owner was in the machine.

[5] The mortgage in this case was given on August 8, 1914, and the act of the Legislature was passed in 1912; the plaintiff took the mortgage with full knowledge of the act in question. It was a public act, and, being such, was notice to the world. The act of the Legislature put the whole world on notice that it intended to make the claim of the injured one against the machine inflicting the injury superior to that of any other person who asserts a lien or claim to it, and that the claim could be enforced, not against the owner of the machine, but against the machine itself. It does not make any difference whether the owner consented or not.

[6] If a machine is loaned and a party operating it inflicts injury the machine can be attached and made liable under the act. The owner parts with possession at his peril that if injury is inflicted by the machine the machine is made liable, not the owner, but the machine. There is an old saying that "with your own whip and your friend's horse there will be some fast riding."

The Legislature in passing the act in question in the exercise of its police regulations as to how dangerous instrumentalities could be operated on public highways did not exceed its power and go beyond what it had the right to do. It had the right to regulate the running of a dangerous instrumentality, such as an automobile or other motor vehicles unquestionably are, on the public highways of the state.

[7] The act itself relates to and is germane to the title, and is not in violation of the spirit of the Constitution.

It is unnecessary to consider the other exceptions in the case, as the crucial point in the case is the act of the Legislature questioned and assailed as invalid and unconstitutional. We hold that the act of Legislature in question is valid and constitutional.

The judgment of the circuit court must be reversed.

Reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 395)

BAGNAL v. SOUTHERN EXPRESS CO.

(No. 9614.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

APPEAL AND ERROR \hookrightarrow 1091(4) — REVIEW — PRESUMPTION—APPEAL FROM INTERMEDIATE COURT.

In view of Code Civ. Proc. § 407, relative to appeals to circuit court, which provides that upon hearing the appeal the court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits, and that the court may affirm or reverse the judgment of the court below in whole or in part and as to any or all of the parties as to errors of law or fact, in an action to recover the alleged value of merchandise and for the penalty for failure of defendant express company to pay the claim within the time required by law, where the testimony was sufficient to sustain the judgment of the magistrate's court for the plaintiff, and it was affirmed on appeal to the circuit court, the Supreme Court will assume that the circuit court affirmed the judgment on the merits, where it does not appear that the affirmance was controlled or affected by errors of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4307-4309.]

Appeal from Common Pleas Circuit Court, Sumter County; S. W. G. Shipp, Judge.

Action by J. M. Bagnal against the Southern Express Company. Judgment for plaintiff in the magistrate's court, which was affirmed on appeal by the circuit court, and defendant appeals. Affirmed.

The defendant's exceptions here follow:

His honor, the circuit judge, erred, it is respectfully submitted:

(1) In not reversing the said magistrate who charged that the provisions of sections 2598 and 2599 of volume 1 of the Code of 1912, which he referred to as "the warehouseman law," was the law of this case, without qualification, and stated to the jury immediately after so charging, "It is for you to say whether or not the Southern Express Company absolved itself of liability." For this charge led the jury to believe that unless the defendant made or attempted to make a sale of the goods, as set forth in the aforesaid sections of the Code, it would be absolutely liable for the destruction of the goods, even if this was due to their decaying before they could be delivered, and in the absence of any fault or negligence of its own. Whereas, sections 2598 and 2599 of Volume 1 of the Code are not only by their express terms applicable only to public warehousemen and also shown by their wording to be clearly permissive and not mandatory, but are clearly repealed, in so far as they could apply to common carriers—if they were ever intended to apply to them—by No. 88 of the Statutes at Large of 1913, which makes it clearly permissible and not mandatory for the carrier to sell uncalled for, perishable goods, and which could not possibly be interrupted as forcing the carrier to go through the form of attempting to sell a box of rotten peaches in order to shield itself from absolute liability for their destruction. This statute was in full force at the time that the goods sued for in this action were received by the Southern Express Company.

(2) In not reversing the said magistrate who modified the defendant's first request to charge, which charge was as follows: "If the jury believes from the evidence that this shipment was transported to the defendant's warehouse,

in safety, at Sumter, S. C., and the defendant made reasonable efforts to ascertain the particular residence of the plaintiff and the consignee could not be found, and by reason of such non-delivery the goods perished, being fruit that was perishable, then I charge you that the plaintiff cannot recover in this case." North Penn. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287; 7 A. and E. Ency. of Law, p. 545; W. H. Baker v. W. U. Tel. Co., 87 S. C. 174, 69 S. E. 151. The modification being as follows: "And they followed the statute." Whereas, the request stated a sound proposition of law applicable to the facts of the case, and it was clearly error to limit its application by adding a charge as to a statute which, as pointed out in the first exception, could have no application at all to this case and certainly no such effect as the magistrate's charge would have given it.

(3) In not reversing the said magistrate, who refused to charge the defendant's sixth request to charge, which was as follows: "I charge you it was not incumbent on the defendant to go through a form of sale, if when defendant's agent opened the box the contents were decayed or worthless if you believe he did open the box and found such condition." Whereas, he should have charged same as all the evidence in the case (without contradictions) showed that the fruit was rotten on the third day and the same, being worthless, could not be sold.

(4) In affirming the judgment of the said magistrate merely upon the ground that it appeared in the testimony that the "plaintiff had several times received shipments through the defendant company." Whereas, there was not a word of testimony in the case to the effect that the shipments referred to had been received at the same address at which the plaintiff resided at the time the shipment sued for reached Sumter, or that the said shipment had not been fully addressed as to street and number. And without testimony on both these points testimony merely to the effect that shipments had been received before by the plaintiff through the defendant was entirely valueless as a basis for the inference that in the case at bar the defendant had been blameworthy in not delivering this shipment before the fruit it contained had time to spoil.

Mark Reynolds and B. D. Hodges, both of Sumter, for appellant. L. D. Jennings and R. D. Epps, both of Sumter, for respondent.

GARY, C. J. This action was commenced in a magistrate's court to recover the sum of \$1, the alleged value of a box of peaches, shipped from a station in Clarendon county to the plaintiff at Sumter, S. C., and for the penalty of \$50, for failure to pay the claim within the time required by law. The address on the box did not contain the number of the street upon which the plaintiff resided. The same person, however, who shipped the peaches in question, had, on several previous occasions, shipped boxes of peaches to the plaintiff similarly addressed, and they were delivered without delay. The box arrived at Sumter on Saturday morning of the 4th of July, but the 4th of July was not observed until Monday the 6th. Mrs. Adams, the daughter of the plaintiff, testified that on Tuesday morning, between 10 and 11 o'clock, she telephoned the express office and asked if any peaches were there for Mr. Bagnal, and was told by the man who answered (who she thinks gave the name of

Dickinson) that some had come Saturday morning, that a notice had been sent, and that they had been thrown out Monday morning because of decay. Mrs. Adams was recalled, and testified that she called at the post office on Tuesday morning for mail; that the plaintiff's mail had been coming with hers, and had been received by him at her residence, both before and at the time in question, addressed like the card put in evidence; and that, when she called on Tuesday, the card was not delivered to her. There was no testimony tending to show that the plaintiff received any notice, prior to the time when his daughter telephoned to the express company.

The following postal card was introduced in evidence:

Post Card Notice.

[Address side:] Unclaimed—J. M. Bagnal, Sumter S. C.

[Reverse side:] Office of Southern Express Company (Incorporated),

Sumter, State of S. C., 7-4-1914.

J. M. Bagnal: We have received to your address by O. O. D. \$— Express charges, \$.25, which please call and receive, presenting this card. After this notice the goods are held at your risk. Southern Express Co., by B.

This card bears a postmark dated July 6th, at 4 p. m., and stamped, almost directly over this, another postmark dated July 7th, at 6 p. m. It is agreed that original be exhibited to the Supreme Court. The reason the original was exhibited to the Supreme Court was to enable it to ascertain whether the date thereof had been changed.

The jury rendered a verdict in favor of the plaintiff for \$1, the value of the peaches, and \$50 penalty; and the defendant appealed to the circuit court. On hearing the appeal, his honor, Judge Shipp, made the following order:

"I have read the entire record herein, and I am satisfied substantial justice has been done, and that judgment of the magistrate should be and is hereby affirmed.

"It appears in testimony that plaintiff had several times received shipments through the defendant company. The company must deliver perishable goods, if necessary, on Sunday or a legal holiday, if reasonable diligence requires it."

The defendant appealed to this court upon exceptions, which will be reported.

Section 407 of the Code, relative to appeals to the circuit court, provides that:

"Upon hearing the appeal, the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties, and for errors of law or fact."

In the case of Stanford v. Cudd, 93 S. C. 367, 76 S. E. 986, it was held that, where the testimony is sufficient to sustain a judgment of the magistrate's court, and it is affirmed on appeal to the circuit court, this court will assume that the circuit court affirmed the judgment on the merits, in the absence of

facts showing that the affirmance was controlled or affected by errors of law. The language of the court in that case was as follows:

"In obedience to the statute (section 407 of the Code), the circuit court might have concluded that the magistrate erred in refusing some or all of the defendant's requests, or in admitting some or all of the testimony objected to by defendant; but the court might have thought, upon consideration of the case on the merits, that, notwithstanding such errors, the plaintiff was entitled to judgment; and as there was evidence which would have warranted such a conclusion, and as we cannot say that the judgment was affected or controlled by any error of law, it must be affirmed."

The rule is thus stated in *Price v. Railway*, 93 S. C. 576, 77 S. E. 703:

"As the circuit court is required to give judgment, in such cases, according to the justice of the case, without regard to technical errors and defects which do not affect the merits (Code Proc. § 407), and as the record does not disclose the grounds upon which the court rendered its judgment, we must assume that it was rested upon some sound and meritorious ground, and sustain it, if the record discloses any such ground."

Those authorities are conclusive of this case. There is nothing in the record showing that his honor, the circuit judge, based his conclusion upon any of the propositions of law which the appellant's attorneys contend are erroneous; and the judgment of the circuit court is shown by the testimony to rest upon sound and meritorious grounds.

Affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(19 Ga. App. 232)

McPHEARSON v. STATE. (No. 7909.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. HOMICIDE — 309(6) — EVIDENCE — SUFFICIENCY.

The evidence authorized the charge of the court upon the law of voluntary manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 655; Dec. Dig. — 309(6).]

2. CRIMINAL LAW — 770(1)—HOMICIDE — 297—INSTRUCTIONS.

It is not error for a trial judge to instruct the jury as to every lawful defense raised by the testimony in the case, notwithstanding the defendant makes a written request that the court instruct the jury that he relies upon one or more defenses only, and not upon a special defense named. If the court had acted on the request of the defendant, the latter could not be heard to complain, but, on the other hand, it was within the power of the court, and eminently proper, to give the defendant the advantage of every defense suggested by the evidence. Under the testimony, leaving out of consideration the statement of the accused, the court properly instructed the jury in this case touching the right of a father "to kill another on ac-

count of an injury done to his daughter, either by an effort to take her virtue, or by an assault made upon her"; no complaint being made as to accuracy of the instruction given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. — 770(1); Homicide, Cent. Dig. § 611; Dec. Dig. — 297.]

3. CRIMINAL LAW — 829(1), 1110(1), 1144(14) — TRIAL — INSTRUCTIONS — REQUESTS — APPEAL.

A reversal will not be granted because the trial judge refused to give certain requested instructions to the jury, where the same matter was fully and fairly presented in the charge given (*Central of Georgia Railway Co. v. Blackman*, 7 Ga. App. 766, 68 S. E. 339; *Mixon v. State*, 7 Ga. App. 805, 68 S. E. 315 [7]; *Carter v. State*, 106 Ga. 373, 32 S. E. 845, 71 Am. St. Rep. 262 [4]; *Perdue v. State*, 135 Ga. 277, 278, 69 S. E. 184 [5]); and where error is assigned upon the refusal to give a requested instruction to the jury, and no complaint is made that the request was not substantially covered by the charge given by the court, and the entire charge is not brought up, this court is unable to determine whether the refusal of the request was erroneous; and where it neither appears from the bill of exceptions nor from the record that the charge of the court was ever reduced to writing or was on file in the office of the clerk of the court below (*Pen. Code* 1910, §§ 1056, 1057), this court will not order it sent up under section 6149 (4) of the Civil Code of 1910 (*Perdue v. State*, 17 Ga. App. 299, 86 S. E. 661). See, also, *Hawkins v. Collier*, 106 Ga. 18, 31 S. E. 755. In the absence of any assertion to the contrary, it will be presumed that the charge of the court sufficiently covered the precise doctrine referred to in the requested instruction. Therefore that ground of the motion for a new trial complaining of the refusal of the court to give a certain requested instruction, relating to threats will not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2011, 2767, 2901, 2903, 2907, 2909, 2919, 3032; Dec. Dig. — 829(1), 1110(1), 1144(14).]

Error from Superior Court, Floyd County; Moses Wright, Judge.

George McPhearson was convicted of homicide, and he brings error. Affirmed.

F. W. Copeland, of Rome, for plaintiff in error. W. H. Ennis, Sol. Gen., of Rome, for the State.

WADE, C. J. [1-3] It is not necessary to add to what is said in the headnotes, further than by calling attention in the briefest manner to the substance of the evidence which, in the opinion of this court, authorized the trial judge to submit to the jury the question whether the accused was guilty of the offense of voluntary manslaughter, and which supports the verdict returned.

The father of a wayward young woman, who had been encouraged by her more recent conduct to hope for her ultimate reformation, found that she was absent from his home at night, and, guided by his knowledge of her past, armed himself with a gun and sought her in a part of a city apparently much frequented by rowdy and disreputable persons, where he was informed that she had been

seen in a bawdyhouse with the man he afterwards slew. He finally encountered his daughter on the streets, apart from this man, and induced her to accompany him home. On the way home his daughter informed him that the deceased had insulted and slapped her, and had told her, when she threatened to report his conduct to her father, that he would provide a "wooden overcoat" for the latter. It appears from other evidence that the deceased had in fact abused and slapped the daughter of the defendant at the time she alleged, and this information reached the father from another source. After the accused and his daughter arrived at home, the father remained on the front porch, the daughter entered the house, and the father assumed that she had retired to her room, though in fact she had gone to her mother's room instead. Some minutes later the father himself entered the house, and, failing to find his daughter in her room, concluded that she had returned to the scene of debauchery from which he had just removed her, and went back to the same locality accompanied by his son-in-law, to discover her and bring her home. When they reached the place where he had previously found his daughter, they encountered the deceased, and the deceased became embroiled in a difficulty with the son-in-law and shot him, and immediately thereafter the accused fired upon and killed the deceased. Cooling time is always a question for the jury, and whether or not between the time when the father was informed of the presence of his daughter with the deceased in a lewd house or the time when he was told by her that the deceased had abused and slapped her and the time when he encountered and slew the deceased there was a sufficient interval for the passion to subside which must have been instantly excited by the receipt of this information was wholly for determination by the jury; and by their verdict they declared that at the time of the killing the accused was, in their opinion, acting under the influence of irresistible passion, and not in self-defense or in other circumstances that justified the killing. It is clear that the circumstances narrated were amply sufficient to provoke in the mind and heart of the average or normal father such a burning flame of anger as might rage without abatement, not only for minutes, but for hours, and the accused may well have been under the overmastering influence of that passion when he encountered the deceased for the first time after he had been apprised of facts indicating the participation of the deceased in the debauching of his daughter, and an entire contempt for his right or ability to protect a member of his family who, whatever her past, was the child of his loins—bone of his bone and flesh of his flesh.

The trial court therefore properly charged

the law of voluntary manslaughter, and the evidence was amply sufficient to support the verdict returned.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 217)

SWATTS v. HARRISON. (No. 7602.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. TRIAL \S 68(2)—REOPENING OF CASE.

There was no error in allowing the case reopened for the introduction of further testimony after the argument was begun.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 161, 162; Dec. Dig. \S 68(2).]

2. HUSBAND AND WIFE \S 25(1)—AGENCY OF HUSBAND—LIABILITY OF WIFE.

On the facts alleged in the petition for certiorari, the verdict is not contrary to the evidence nor without evidence to support it, except as to \$45 usury included therein. Indeed, the evidence clearly disclosed that the notes were given for a loan of money in the sum of \$1,500, and the draft for the money was made payable to the order of the wife. It matters not that she indorsed the draft and delivered it to the husband, which fact may be inferred by his indorsement upon the draft. As was said by Bleckley, in the case of Boland v. Klink, 63 Ga. 448: "Generally, when a wife wants an agent to represent her in a business transaction, she will select her husband." The case from which this language is quoted is, in large measure, controlling on the facts of this case. When the wife makes a purchase through her husband, "it is the same as if she made it in person; and when the transaction creates a debt for property which is transferred or conveyed to her by the creditor, and she gives the required security in person, the debt is hers, not her husband's and the act of giving security binds her."

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 148, 150, 153; Dec. Dig. \S 25(1).]

3. COURTS \S 190(1)—CITY COURTS—REVIEW—USURY.

It does affirmatively appear, from the facts alleged in the petition that the sum of \$45, included in the three notes sued on, is usury. The judgment refusing sanction to the writ of certiorari must therefore be reversed. It affirmatively appearing from the allegations of fact set forth in the petition for certiorari that the verdict complained of included usury in a sum stated, the judge of the superior court erred in refusing to sanction the certiorari.

[Ed. Note.—For other cases, see Courts, Dec. Dig. \S 190(1).]

Error from Superior Court, Grady County; E. E. Cox, Judge.

Action by M. H. Harrison against Ida G. Swatts, begun in city court. There was a judgment for plaintiff, and, her petition for certiorari being overruled, defendant brings error. Reversed.

Harrison sued Mrs. Swatts, in the city court of Whigham for \$1,545, principal, and for interest at 8 per cent. per annum from date, on her promissory notes to him. Liability was denied on the ground that the notes were given merely for the purpose of

securing a loan to the defendant's husband, and there was a plea of usury to the extent of \$45. The trial having resulted in a verdict and judgment in favor of the plaintiff for the full amount sued for, the defendant presented to the judge of the superior court a petition for certiorari, which he refused to sanction; and error is assigned thereon.

From the evidence set forth in the petition for certiorari it appears that the notes sued on were for a loan made by the plaintiff, which was negotiated through N. F. Jones, and that the plaintiff did not deal with the defendant in person; that he gave Jones a draft payable to the defendant, for \$1,500, which was afterwards indorsed by her. The defendant testified that when she signed the notes she understood that her husband was securing a loan, and that she was putting up security for him; that her husband, with T. J. Mills and some one else, came to her home with the notes and a mortgage or other papers, and she signed all the papers they wanted her to sign, and they carried the papers away with them; that she had no conversation with any of them; that her husband was not acting as her agent, and neither he nor any one else had been authorized by her to secure a loan from the plaintiff; that she "never made a loan from plaintiff"; that no part of the money was ever paid to her, and no accounting for any part of it was ever made to her; that the indorsement on the draft, which was followed by her husband's indorsement, appeared to be in her handwriting, but the draft was never in her possession, and she did not remember having seen it. T. J. Mills testified that at the time of the signing of the notes he was representing the defendant's husband, but supposed the plaintiff was depending on him to see that the papers were properly executed; that he did not remember any conversation at that time, and did not remember whether he turned the plaintiff's draft over to the defendant herself, or to her husband. The plaintiff testified that the defendant's husband got N. F. Jones to come to see him about making a loan, and he (the plaintiff) left the matter with T. J. Mills and N. F. Jones, to represent him and close it up as soon as the papers were signed; that he relied on T. J. Mills to see that the papers were properly executed, and he did not see the defendant during the transaction. Over objection he was allowed to testify that he "was making the loan to Mrs. Swatts, and not to her husband"; the defendant's counsel objecting on the ground that the witness had stated that he did not see the defendant during the transaction, and no agency had been shown. After the plaintiff's counsel had made the opening argument to the jury, and while the defendant's counsel was arguing the question of usury, the court,

over objection, permitted the plaintiff to reopen the case and testify that when the defendant's husband came to see him about the loan, he explained that he had the money already loaned out, and that if he called it in and made this loan to Mrs. Swatts, he would lose \$45 interest, and Mr. Swatts replied, "We are willing to pay the \$45 to get it."

In the petition for certiorari it was alleged that the verdict was contrary to the evidence; that to the extent of \$45 it included usury; that the court erred in allowing the plaintiff to testify that he was making the loan to the defendant, and not to her husband; that the court erred in allowing the plaintiff to reopen the case and testify further; and that the court erred in charging the jury that the question at issue was whether the parties intended the contract to be an original undertaking of the defendant, or that she was to become surety for her husband.

S. P. Cain, of Whigham, for plaintiff in error. R. B. Terrell, of Whigham, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 229)

GRANT v. STATE. (No. 7884.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1038(4)—TRIAL—INSTRUCTIONS.

Failure to charge, in the trial of a criminal case, a principle of law applicable to one of several defenses, based entirely upon the statement of the defendant and a codefendant, tried jointly, no request, in writing or otherwise, having been made for such charge, is not error. *Walker v. State*, 122 Ga. 747, 751, 50 S. E. 994 (last paragraph); *Gray v. State*, 6 Ga. App. 428, 65 S. E. 191 (3); *Robinson v. State*, 114 Ga. 56, 39 S. E. 862 (4).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2646; Dec. Dig. \S 1038(4).]

Error from City Court of Dublin; J. B. Hicks, Judge.

Dan Grant was convicted of the unlawful sale of intoxicants, and he brings error. Affirmed.

Fred Kea, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

GEORGE, J. Dan Grant and others were jointly tried for the offense of selling whisky. One of the defenses relied upon by Grant in his statement at the trial was that he had acted merely as agent of the buyer in procuring the whisky. Several exceptions to the admission of testimony were taken, but in the brief filed by counsel for

plaintiff in error he insists a new trial should be granted him for the sole reason that the court did not give in charge the law applicable to the particular contention stated above. No request for such a charge was made, and the court did charge the jury that they might believe this defendant's statement in preference to the sworn testimony.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 271)

TOOMEY BROS. v. CITIZENS' & SOUTHERN BANK. (No. 8301.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by Editorial Staff.)

BANKS AND BANKING ⚡74—ASSIGNMENTS—INSOLVENCY.

Where plaintiff bank lent a sum of money receiving as collateral security notes, including a note made by defendant from the borrowing bank, which on the following day was closed as insolvent, plaintiff bank, having no intimation of the insolvency, might enforce collection of the note despite Civ. Code 1910, § 2360, prohibiting conveyances and assignments by a bank in contemplation of insolvency or after insolvency, except for the benefit of creditors and stockholders; the section having no application against an innocent assignee for value without knowledge of the insolvency of the assignor bank.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 156; Dec. Dig. ⚡74.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by the Citizens' & Southern Bank against Toomey Bros. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Salem Dutcher, of Augusta, for plaintiffs in error. Alexander & Lee and Wright & Wright, all of Augusta, for defendant in error.

JENKINS, J. 1. On December 2, 1913, a bank borrowed a sum of money from the plaintiff bank, payable 30 days after date, and gave to the lending bank as collateral security, customers' notes, in which was included a note made by the defendant in this case. The borrowing bank was closed as insolvent on the following 13th day of December. In the facts and circumstances in the record there is nothing that would impute to the lending bank knowledge that such a transaction was had pending or in contemplation of insolvency. The positive testimony of the acting official of the lending bank shows that it had no intimation of such condition. The provisions of Civil Code, § 2360, which prohibits all conveyances and assignments by a bank in contemplation of insolvency or after insolvency, except for the benefit of all creditors and stockhold-

ers, is intended to prevent preferences for an antecedent debt, and has no application against an innocent assignee for value without knowledge of such condition of the bank. Booth v. Atlanta Clearing House, 132 Ga. 100, 63 S. E. 907; Hightower v. Mustian, 8 Ga. 506; Clarke v. Ingram, 107 Ga. 576, 33 S. E. 802.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 271)

INNES v. STATE. (No. 7752.)

(Court of Appeals of Georgia, Division No. 1. Feb. 2, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ⚡878(2)—CONVICTION—INDICTMENT.

A general verdict of guilty upon an indictment containing several counts, charging kindred but distinct offenses under different sections of the Code, cannot be upheld, unless it appears from the evidence that the accused is guilty on all the counts in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2099; Dec. Dig. ⚡878(2).]

2. INDICTMENT AND INFORMATION ⚡129(1)—JOINDER OF COUNTS—KINDRED OFFENSES.

Where the accused fraudulently converts to his own use property intrusted to him, he is indictable under the first clause of section 189 of the Penal Code of 1910. Where he otherwise than by a conversion to his own use disposes of the property intrusted to him, without the consent of the owner or bailor, to his injury, and without paying to the owner or bailor on demand the full market value or price thereof, he is indictable under the second clause of that section. Section 192 of the Penal Code defines a distinct offense, and the offenses defined in sections 189 and 192 are kindred offenses, and may be charged in separate counts of the same indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 414; Dec. Dig. ⚡129(1).]

3. JURISDICTION—VENUE ESTABLISHMENT.

The venue of the alleged crime was established under the law, and the trial court had jurisdiction.

4. CHARGE—EXCEPTIONS—SUFFICIENCY.

The exceptions to the admission of evidence and to the charge of the court are without merit.

5. EMBEZZLEMENT ⚡35—PROSECUTION—EVIDENCE—DEMAND.

The fourth count in the indictment, as properly construed by the trial court, is based upon the first clause of section 189 of the Penal Code of 1910. Under this clause it was unnecessary to allege and prove a demand for payment. No demand having been shown, although alleged, and the court having construed the fourth count in this indictment to charge only the offense defined in the first clause of the section, the general verdict of guilty is not contrary to law. The motion for a new trial was properly denied.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55-59; Dec. Dig. ⚡35.]

Luke, J., dissenting.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Victor E. Innes was convicted of the offense of larceny after trust, and he brings error. Affirmed.

Victor E. Innes was tried and convicted on an indictment charging, in four separate counts, the offense of larceny after trust. The first count charged, in substance, that he and his wife were intrusted by Lois Nelms Dennis with \$3,745.20, for the purpose of applying this sum of money for the use and benefit of the owner, and that, after being so intrusted, the defendants did unlawfully and fraudulently convert the money to their own use. The second count is but a repetition of the first, with the added allegation that the sum of money intrusted to the defendants was made up of several amounts and delivered over to them on separate dates. The third count charged that the defendants, after having been intrusted by the same bailor with the identical sum of money named in the first and second counts, for the purpose of investing it in certain lands and real estate in Montana and in Sonora county, in Mexico, in the name of the bailor, did wrongfully and fraudulently convert said money to their own use. The fourth count charges the same trust, for the same purpose, and by the same bailor, and concludes in this language:

"Did wrongfully and fraudulently dispose of said \$3,745.20 otherwise than by applying it to the use and for the purpose for which it was intrusted by said bailor, without her consent and to her injury, and without said bailees, to wit, Victor E. Innes and Ida May Innes, having paid to said bailor the full value and market price thereof, and without having paid to Mrs. Lillie L. Nelms, administratrix on the estate of Lois Nelms Dennis, on demand, the full value and market price thereof," etc.

There was a general verdict of guilty, and, upon the overruling of the defendants' motion for a new trial, exceptions were taken.

Jno. S. Candler, C. L. Pettigrew, and Jas. K. Hines, all of Atlanta, for plaintiff in error. Eb. T. Williams, Sol. Gen., Hugh M. Dorsey, E. A. Stephens, and R. R. Arnold, all of Atlanta, for the State.

GEORGE, J. (after stating the facts as above). [1] It is well settled that an indictment may, in several counts, charge a violation of one statute in different ways, in which event a general verdict of guilty is good, if the evidence sustains either count. On the other hand, an indictment may charge, in different counts, the commission of distinct offenses of similar nature; in which event a general verdict of guilty is not good, unless the evidence sustains each count.

[2, 3] Undoubtedly, section 192 of the Penal Code defines a distinct offense, and none of the class of cases contemplated by this section were intended to be embraced also in section 189. The latter section (section 189) defines two separate and distinct offenses. The offenses defined in sections 189 and 192 are kindred offenses, according to our Code, and

may be properly charged in separate counts of the same indictment. The venue of the offense in the case at bar was properly shown to be in Fulton county, and the evidence warranted the verdict finding the defendant guilty as charged. *Walker v. State*, 117 Ga. 260, 43 S. E. 701; *Martin v. State*, 123 Ga. 478, 51 S. E. 334; *Dunn v. State*, 82 Ga. 27, 8 S. E. 806, 3 L. R. A. 199; *Mangham v. State*, 11 Ga. App. 427, 75 S. E. 512; *Carter v. State*, 143 Ga. 639, 85 S. E. 884 (2).

In the indictment in the case at bar, the fourth count, as construed by the trial judge, was not based on the second clause of section 189 of the Penal Code, nor is that count, in its language, necessarily based on the clause of section 189 referred to in this opinion as the second clause thereof. No demurrer was filed, and we are not concerned with the intention of the pleader in this case, for reasons hereinafter stated; nor do we wish to be understood as saying that the fourth count in the indictment cannot properly be considered as based upon the second clause of Penal Code, § 189. We think the pleader undoubtedly meant to charge, in the fourth count, a violation of the second clause of this section; and we are equally sure that this count might have been so construed, at least, in the absence of any demurrer. The charge in the fourth count is not inconsistent with the charges contained in the first, second, and third counts of the indictment, to the effect that the defendant committed the offense of larceny after trust delegated by directly converting the money to his own use. The conversion charged in the fourth count is consistent with the charge of direct conversion by the defendant; and, although not inconsistent with some other wrongful and fraudulent application of the money intrusted to him, the trial court construed the indictment to charge one offense, and that a direct conversion by the defendant to his own use; and the construction given the indictment by the trial judge, in the trial of the case and in his charge to the jury, is controlling upon the court, and fixes the law of the case until corrected as provided by law.

Let us examine section 189. This section provides for the punishment of any factor, commission merchant, etc., or any other bailee with whom any money or any other thing of value may be intrusted or deposited, who shall fraudulently convert the same or any part thereof to his own use, or otherwise dispose of the same or any part thereof without the consent of the owner or bailor, to his injury, and without paying the owner or bailor on demand the value or market price of same. The meaning of the section is to be found in the opinions of the Supreme Court of this state construing the same. In *Cody's Case*, 100 Ga. 105, 28 S. E. 106, Justice Little said:

That this section "provides for two distinct offenses: (1) If any of the bailees named, with whom any money or other valuable thing shall be intrusted or deposited, shall fraudulently

convert the same or any part thereof to his own use, the statute is broken. (2) If any of such bailees with whom the property shall be intrusted or deposited shall dispose of the same to the injury of the bailor (otherwise than to fraudulently convert it to his own use) without the consent of the bailor, and without paying to the owner or bailor, on demand, the full value or market price, he has committed an offense against which the statute provides."

In order to sustain a conviction under the second clause of this section, it is necessary both to aver and to prove a demand of the bailee and a refusal by him to pay. It is apparent that the statute is broken when the bailee converts the money to his own use or when he otherwise disposes of it. To dispose of it otherwise is by Justice Little declared to be a disposition of it fraudulently made otherwise than by converting it to the bailee's own use. Let us consider the fourth count of the indictment in this case, in connection with the Code section referred to, as construed by the Supreme Court. The defendant, Innes, is charged with having received a certain sum of money, for a certain specific purpose, from the bailor, Lois Nelms Dennis, and it is charged that after having so received it he "did wrongfully and fraudulently dispose of said money otherwise than by applying it to the use and for the purpose for which it was intrusted by said bailor, without her consent," etc. On close examination it is apparent that this count in the indictment does not charge that the bailee, Innes, did, otherwise than by converting the money to his own use, dispose of it. In order to bring this count under the second clause of section 189 this allegation is absolutely necessary. The charge in the indictment is that he did dispose of the money otherwise than by applying it to the use and for the purpose for which it was intrusted by the said bailor (Lois Nelms Dennis). He did not, according to this charge, dispose of the money otherwise than by applying it to his own use. The peculiar wording of the fourth count in this indictment is perfectly consistent with the charge that Innes directly converted to his own use the money with which he was intrusted; and while it may not be inconsistent with a charge that he did, otherwise than by converting it directly to his own use, dispose of it, this indictment does not require that construction. Under this count in the indictment the state might have proved that Innes directly converted the money to his own use; and this proof would not be at variance with the allegation that he did wrongfully and fraudulently dispose of the money "otherwise than by applying it to the use and for the purpose for which it was intrusted by said bailor" (Lois Nelms Dennis). It is true, as we think, that the state might have proved that Innes disposed of this money by investing it in bank stock, or by depositing it in a bank, contrary to the trust; but the state

did not offer such proof, and the trial judge construed the indictment as a whole to charge the offense of larceny after trust delegated by converting it to the defendant's own use, and confined the state to proof of direct conversion by the defendant of the money intrusted to him. This, in our opinion, is the conclusion of the whole matter.

[4, 5] Let us examine the charge of the court:

"Now this indictment is in four counts. Each count charges the offense of larceny after trust. As a matter of fact, in the opinion of the court, there is very little substantial difference in the counts, and all the counts charge simply the crime of larceny after trust."

Further on the court said:

"Now this indictment charges in general terms that this defendant was intrusted by Mrs. Lois Nelms Dennis with a certain amount of money, \$3,400 or \$3,500—the amount is not material—for a certain purpose, the purpose stated in the indictment, and that the money was to be applied by Innes to the use and benefit of Mrs. Dennis, who was the owner of the property—the money—and the party who intrusted it to him. And the indictment further charges that, after having been so intrusted with this money for the purpose aforesaid, he converted it to his own use fraudulently; that is, he appropriated it to his own use with intent to steal it."

Further on in the charge the judge used the following language:

"While the indictment sets forth the offense in different counts, it merely charges substantially one offense against this defendant and the other defendant. And if you believe beyond a reasonable doubt, from this evidence, that all the counts are violated, not only the general count but the specific count (one of the counts being specific, giving the amounts and dates her money is alleged to have been obtained, and the fourth count alleging demand and refusal to pay), you could find a general verdict of guilty. I charge you that demand in this case is unnecessary under the law and evidence applicable thereto."

Looking to the whole charge, nowhere is the jury informed that the defendant could be convicted upon proof of any disposition other than a direct conversion by him to his own use of the moneys intrusted to him. It is true that the judge did not expressly take away from the jury the fourth count in the indictment, but he construed the fourth count in the indictment to fall under the first clause of section 189, and if his construction was permissible (and of that the writer has no moral doubt), then the added allegations of demand and refusal to pay were by the court properly treated as mere surplusage, as was done in *Keys' Case*, 112 Ga. 392 (1), 394, 37 S. E. 762, 81 Am. St. Rep. 63. The general verdict of guilty on an indictment containing more than one count is good where the effect of the ruling of the trial judge is to limit the jury to a consideration of certain counts in the indictment, supported by the evidence. Let us examine one case. In *Waver v. State*, 108 Ga. 775, 33 S. E. 423 (1) it was said:

"When on the trial of an indictment containing three counts the court instructed the jury in these words: 'You will not allow the charges in the first and second counts of that indictment to disturb your deliberations; with those two counts you have no concern; you will look to the third count in the bill, and, applying the law as already given you in charge to the facts, make your verdict,' and there was a general verdict of guilty, such verdict was properly treated as having been based on the third count in the indictment."

It is true, in the case at bar, that the trial judge did not expressly eliminate the fourth count, nor was it necessary for him to eliminate the same. This charge, that Innes disposed of the money intrusted to him by Lois Nelms Dennis by applying it otherwise than to the purposes intended by her, and for which she intrusted it to him, is clearly susceptible of the construction placed upon it by the trial court, to wit, that Innes converted the money to his own use, with intent to steal the same. Indeed, the trial court should have so construed this indictment, because it would have been manifestly unfair to the accused to allow the state to prove a conversion, other than a direct use of the money by the defendant himself, under the indefinite, redundant statement in the indictment. When, therefore, the court instructed the jury that "demand in this case is unnecessary under the law and evidence applicable thereto," he as effectively took away from the jury any right to consider a conversion of the money, or any part thereof, intrusted to Innes by the bailor, Lois Nelms Dennis, by applying it to any other than his own use, as if he had expressly stated to the jury that they should not consider any other charge against the defendant than that of direct conversion of the bailor's money by him to his own use, with the intent to steal the same.

Indeed, the court did expressly instruct the jury that they would be authorized to convict the defendant only in the event they believed from the evidence, beyond a reasonable doubt, that the defendant did convert the money intrusted to him to his own use. It is to be noted that the judge shaped the case against Innes as based upon the first clause of section 189 and section 192, in his construction of the indictment, a construction not only permissible, but entirely consistent with the rights of the defendant; and that also, in his sentence, he regarded the offenses charged in the indictment as one, and imposed upon the defendant only the penalty provided under the first clause of section 189. There is no necessity for a retrial of this case. The facts in the record abundantly support the verdict, and both the language in the fourth count of this indictment and the construction placed thereon by the trial court, which must be taken as the law of this case so far as the state is concerned, placed the case under the first clause of section 189 of the Penal Code.

Judgment affirmed.

WADE, C. J., concurs. LUKE, J., dissents.

LUKE, J. (dissenting). I cannot agree to the judgment of affirmance in this case. It is admitted in the majority opinion that the defendant is not charged with the same offense in different ways under one section of the Penal Code, but is charged with kindred crimes under different sections of the Penal Code, to wit, section 189 and section 192. There are four counts in the indictment. The fourth count charges as follows:

"For that the said Victor E. Innes and Ida May Innes, in the county aforesaid, on the 29th day of May, 1914, with force and arms, having been then and there intrusted by Lois Nelms Dennis with the sum of \$3,745.20 in money, of the value of \$3,745.20, and the property of said Lois Nelms Dennis, for the purpose of investing said sum of money in lands and real estate in Montana and within a radius of 46 miles of Lewiston in Montana, and in certain lands and real estate in Sonora county in Mexico, and after having been so intrusted by said bailor, Lois Nelms Dennis, for the purpose herein set forth, did wrongfully and fraudulently dispose of said \$3,745.20 otherwise than by applying it to the use and for the purposes for which it was intended by said bailor, without her consent and to her injury, and without said bailees, to wit, Victor E. Innes and Ida May Innes, having paid to said bailor the full value and market price thereof, and without having paid to Mrs. Lillie L. Nelms, administratrix on the estate of said Lois Nelms Dennis, on demand made, the full value and market price thereof, contrary to the laws of said state, the good order, peace, and dignity thereof."

The trial court construed the fourth count to be under the first clause of section 189 of the Penal Code, and in the opinion of the majority of this court it is held that:

"The construction given the indictment by the trial court, in the trial of the case and in his charge to the jury, is controlling upon the court, and fixes the law of the case until corrected as provided by law."

I cannot assent to this proposition. If the trial court erroneously construed this count in the indictment, this court is not bound by it. The writer grants that the trial court could have eliminated the count by expressly doing so in the charge to the jury, but, the defendant having been put in jeopardy upon this indictment, he was entitled to a verdict of not guilty upon any count that the state failed to make good by proof. Different counts in an indictment under kindred statutes stand as if they were two indictments; and the right to impose sentence, where the verdict is general in such a case, is the right to sentence as for two separate and distinct offenses. Can there be any doubt that the fourth count was drawn under the second clause of section 189 of the Penal Code? To read that section of the Code and read the indictment is to answer the question. Does section 189 make two kinds of acts criminal? If so, the state failed to show the one alleged in the fourth count. Is the defendant entitled to a verdict of not guilty on that count, or shall a verdict of guilty under that

count stand, simply because the trial court construed the fourth count to have been drawn under the first clause of section 189? In *McCoy v. State*, 15 Ga. 208, Judge Benning, for the court, in construing the language of this section, said:

"These words make two kinds of acts criminal: First, that in which the party fraudulently converts the article to his own use. Second, that in which he otherwise disposes of the article, but to the injury of the owner, and without his consent, and without paying him the full value or market price of the article. In the first kind, the crime is complete, as soon as the party fraudulently converts the article to his own use. Nothing more need happen. It is not necessary that he should also fail to pay the owner the full value or market price of the article. In the second class, in which the article is disposed of otherwise than to the use of the party himself, the crime is not made complete by the mere disposing of the article. To make it complete, three other things must also exist: An injury to the owner, the non-consent of the owner, a failure to pay the owner the full value or market price of the thing disposed of."

In the case of *Alderman v. State*, 57 Ga. 367, it was held that:

"An indictment for larceny after trust, under sections 4422 or 4224 [now section 189] of the Code, which charges that defendant did fraudulently convert the goods intrusted to him to his own use, need not charge that the same was done without the consent of the owner or bailor, and to his injury, and without paying him on demand the full value thereof; these clauses of the sections, or either of them, apply to other disposition of the goods than to the bailee's fraudulent conversion to his own use, and need only be charged and proven in such cases."

Justice Hall in *Soule v. State*, 71 Ga. 270, said:

"In the case of *McCoy v. State*, 15 Ga. 205, 208, which seems to have been well considered, Benning, J., speaking of this statute, and applying it to the case then before the court, and which in its main features is much like the present, said: 'These words make two kinds of acts criminal: First, that in which the party fraudulently converts the article to his own use. Second, that in which he otherwise disposes of the article, but to the injury of the owner and without his consent, and without paying him the full value or market price of the article. In the first kind, the crime is complete as soon as the party fraudulently converts the article to his own use. Nothing more need happen. It is not necessary that he should also refuse to pay the owner the full value or market price of the article. In the second class, * * * to make the crime complete, three other things must also exist: An injury to the owner, the nonconsent of the owner, a failure to pay the owner the full value or market price of the thing disposed of,' and as we think, upon demand for the same."

The indictment in the case of *Cody v. State*, 100 Ga. 106, 28 S. E. 106, charged as follows:

"For that the said Pearce Cody, on the 21st day of September in the year 1896, in the county aforesaid, did then and there unlawfully, after having been intrusted by Bob Cherry, the owner thereof, with ninety dollars in paper money of the value of ninety dollars, and two dollars in silver money of the value of two dollars, for the purpose of holding and keeping said money for said Bob Cherry, he, the said

Pearce Cody, did fraudulently convert said money to his own use and did otherwise dispose of said money without the consent of said Bob Cherry, the owner thereof, and to the injury of him, the said Bob Cherry, and without paying the said Bob Cherry the said money or the full market value thereof, on demand, which demand was made."

To this indictment the defendant, Cody, demurred, and the Supreme Court, in passing upon the question raised, said:

"The first ground of demurrer raises the question, whether one who is charged with having been intrusted with money by the owner to hold and keep for him, and who fraudulently converts the same to his own use, is guilty of any violation of the laws of the state. It is true that the bill goes further and charges that the bailee did otherwise dispose of the money without the consent of the bailor and to his injury and without paying to the bailor on demand said money, or its full market value; but we regard the latter part of the charge as surplusage and as adding no strength to the preceding charge contained in the bill of indictment. Section 191 of the Penal Code [now section 189] provides for the punishment of any factor, commission merchant, warehouse keeper, wharfinger, wagoner, stage driver, or common carrier on land or water, or any other bailee with whom any money or any other thing of value may be intrusted or deposited, who shall fraudulently convert the same or any part thereof to his own use, or shall otherwise dispose of the same or any part thereof without the consent of the owner or bailor, to his injury, and without paying the owner or bailor, on demand, the value or market price of same. It is manifest from a careful reading of the section above referred to that it provides for two distinct offenses: (1) If any of the bailees named, with whom any money or any other valuable thing shall be intrusted or deposited, shall fraudulently convert the same or any part thereof to his own use, the statute is broken. (2) If any of such bailees with whom the property shall be intrusted or deposited shall dispose of the same to the injury of the bailor (otherwise than to fraudulently convert it to his own use) without the consent of the bailor, and without paying to the owner or bailor, on demand, the full value or market price, he has committed an offense against which the statute provides. Each of these acts is made a distinct offense, punishable as provided in the section. *McCoy v. State*, 15 Ga. 205; *Soule v. State*, 71 Ga. 270."

While the learned trial judge was a member of this court, the court, in the case of *Raiden v. State*, 1 Ga. App. 532, 57 S. E. 989, said:

"The Penal Code, § 191 [now section 189], makes two kinds of acts criminal: (1) That in which the party fraudulently converts to his own use the money or article intrusted; (2) that in which he otherwise disposes of the same without the consent of the owner or bailor, and to his injury, and without paying to such owner or bailor on demand the full value or market price thereof. In the first kind the crime is complete as soon as the party fraudulently converts the articles to his own use. *McCoy v. State*, 15 Ga. 211. In the second kind the crime is complete (the other elements being present) when demand is made and the full market value or price is not thereupon paid. Venue for the criminal prosecution lies only in the county where the crime becomes completed in one of the methods above stated."

I do not think that *Sanders v. State*, 86 Ga. 717, 12 S. E. 1058, nor *Keys v. State*, 112

Ga. 392, 37 S. E. 762, 81 Am. St. Rep. 63, is authority to the contrary. In the Sanders Case the indictment charged the defendant with fraudulently converting to his own use certain property or otherwise disposing of the same. The indictment in that case was bad because he was not charged positively with any offense. In the Keys Case the indictment was framed under section 192 (then section 194), and charged the defendant with having been intrusted with money for the use and benefit of a named person, and with fraudulently having converted the same to his own use to the injury of and without the consent of the bailor. The court held that the allegation, "without the consent of the owner," was surplusage. There is only one count in the Sanders Case, and only one count in the Cody Case, and only one count in the Keys Case. Fraudulent conversion was alleged in each of those cases. Now in the Innes Case we find not one count, but four counts, based on kindred statutes. We find in effect four separate indictments. The crime charged in one of the counts, or one of the indictments, admittedly is not proved, yet a verdict of guilty is allowed to stand, upon the ground that the fourth count in this indictment is mere surplusage. It is my opinion that the charge of the trial court that "demand in this case is unnecessary under the law and evidence applicable thereto," not only did not serve to eliminate the fourth count in this indictment, but was erroneous for three reasons: (1) Because, before a conviction could be had on the fourth count, proof of demand was necessary. (2) Because, under the majority opinion in this case, it would amount to an expression of an opinion that fraudulent conversion had been shown; especially as the court had just charged the jury that they could convict on either or all the counts in the indictment. (3) Because the court had already charged the jury:

"If you find this defendant guilty on either one of these counts, you would express in your verdict the count upon which you find a verdict of guilty. For instance, if you find him guilty on the first count, say, 'We, the jury, find the defendant guilty on the first count;' and so with the other counts, if you should find him guilty on any one of the other counts and not guilty on others. But I charge you that while the indictment sets forth the offense in different counts, it merely charges substantially one offense against this defendant and the other defendant. And if you believe beyond a reasonable doubt, from this evidence, that all the counts were violated, not only the general count but the specific count (one of the counts being specific, giving the amounts and dates when the money is alleged to have been obtained, and the fourth count alleging demand and refusal to pay), you could find a general verdict of guilty."

An instruction that a verdict of guilty could be found on the fourth count without proof of demand, under the facts of this particular case, in effect said to the jury: Fraudulent conversion to the defendant's

own use has been proved; therefore demand is unnecessary. Did the charge of the court eliminate the fourth count? I cannot agree that it did.

2. There are exceptions to the charge of the court which are not without merit.

3. In the opinion of the writer the indictment as alleged in the four counts of the indictment is not proved; neither is the fraudulent conversion shown as alleged; and neither is the venue proven.

In my judgment the general verdict of guilty under the evidence is not authorized. "Judex damnatur cum nocens absolvitur;" but the guilty must be convicted according to law.

(19 Ga. App. 247)

COLUMBIAN NAT. LIFE INS. CO. v. MULKEY. (No. 6264.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. COURTS \S 488(1) — APPELLATE JURISDICTION—LOSS—WRIT OF ERROR—DISMISSAL.

There is no merit in the motion of the defendant in error to dismiss the writ of error.

(a) The constitutional question raised, or attempted to be raised, in the motion to dismiss the writ of error, was virtually decided by the Supreme Court when this case was before it on a certification by this court of a question of law therein, and when the motion of the defendant in error for that court to refuse to answer such question was denied; the Supreme Court ruling that the Court of Appeals had jurisdiction of the case at the time the certification of the question was ordered. This being true, it is obvious that this court did not lose jurisdiction of the case merely because the clerk of this court did not transmit to the Supreme Court a certified copy of the question, together with the record in the case, until after the expiration of the second term after the writ was brought; such action by the clerk being merely ministerial in its nature. The question was legally certified to the Supreme Court when this court passed the order certifying it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. $\S\S$ 1316, 1317, 1319, 1320; Dec. Dig. \S 488(1).]

2. INSURANCE \S 615 — ACTION — DEFENSES—RETURN OF PREMIUM—STATUTE.

Where suit is brought on an insurance policy which contains a stipulation to the effect that the policy will be void if procured by fraud on the part of the insured, a defense by the insurer that the policy is avoided on account of willful and material misrepresentations, made by the insured in his application for the policy, is not an attempt to rescind the contract, but an attempt to have it declared void ab initio. In such a case it is not necessary for the insurer, before pleading that the policy was voided by such misrepresentations, to return the premiums paid or the notes given therefor. The provisions of section 4305 of the Civil Code are not applicable to such an action, but the law governing it is found in sections 2479, 2480, 2481. In other words, the insurer has a right to retain the premiums already received on the policy, and to avoid the policy because of the fraud practiced upon it by the insured, and to plead such fraud as a defense to the suit. *Columbian National Life Insurance Co. v. Mulkey*

(decided by the Supreme Court October 21, 1916) 146 Ga. 267, 91 S. E. 106.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. ¶ 615.]

3. INSURANCE ¶640(1)—PLEADINGS—STRIKING OUT.

Under the ruling of this court when this case was formerly before us (Columbian National Life Insurance Co. v. Mulkey, 13 Ga. App. 508, 79 S. E. 482), it was not error for the trial court to strike paragraphs 3, 5, 6, and 7 of the original answer, or to strike the whole of the amendment allowed and filed November 1, 1913, or to strike the whole of the amendment allowed and filed December 15, 1914. This court in its previous decision of the case, however, did not pass on the question ruled upon in the preceding paragraph of this decision; and, under the decision of the Supreme Court in this case (146 Ga. 267, 91 S. E. 106, supra), the trial judge erred in striking the paragraphs of the original answer, with the exception of those just mentioned, and in striking the amendment allowed and filed December 3, 1914, and in refusing to allow the defendant to sustain by proof the allegations therein made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1617; Dec. Dig. ¶640(1).]

4. APPEAL AND ERROR ¶843(1) — ASSIGNMENTS OF ERROR—CONSIDERATION.

The error in striking the above-mentioned pleas of the defendant rendered the further proceedings in the case nugatory, and it is unnecessary to discuss the other assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3335, 3337-3341; Dec. Dig. ¶843(1).]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Janie Mulkey against the Columbian National Life Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

See, also, 13 Ga. App. 508, 79 S. E. 482, 146 Ga. 267, 91 S. E. 106.

Colquitt & Conyers, of Atlanta, for plaintiff in error. Horton Bros. and Anderson & Hountree, all of Atlanta, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 267)

DUNAWAY v. STOCKS et al. (No. 8245.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS ¶80(12)—STOCK SALES—ACTIONS—RECOVERY.

An action for deceit was brought against a corporation and its directors, wherein the plaintiff elected to rescind his purchase of certain stock of the corporation, and asked for judgment against the defendants for the face value thereof, alleging in his petition that, in consideration of the conveyance by him of certain land, he became the purchaser, through a named individual, of certain stock in the corporation, and that the defendants had made certain false

and fraudulent representations regarding the condition of said company, by means of circulars issued and circulated prior to his purchase of such stock. It is not proved that the representations when made were untrue, nor that the defendants had knowledge of or had signed or authorized them; and the answer of the defendants offered to rescind the contract of purchase, so that the stock shown to be worthless would be canceled and the land reconveyed to the plaintiff. *Held*, that no error was committed by the trial judge in granting a nonsuit as to the defendant officials of the corporation, nor in directing a verdict and entering a decree thereon requiring cancellation of the said stock and a reconveyance of the land to the plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 264; Dec. Dig. ¶80(12).]

2. APPEAL AND ERROR ¶1078(1)—WAIVER OF GROUNDS OF REVIEW ON APPEAL—BRIEFS.

The brief of the plaintiff in error states that the case at bar is simply one of deceit, brought against Stocks and others, on account of the sending forth of circulars containing false information; and as the contention set forth in the petition as to the illegal issuance and sale of the stock is not argued in the brief, this ground of his complaint is treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ¶1078(1).]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by B. L. Dunaway against T. F. Stocks and others. There was a judgment for the individual defendants, and plaintiff brings error. Affirmed.

Gober & Jackson and W. I. Heyward, all of Atlanta, for plaintiff in error. Dillon & Hurress and P. C. McDuffie, all of Atlanta, for defendants in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 270)

PARKER v. ROBERTS. (No. 8277.)

(Court of Appeals of Georgia, Division No. 2. Feb. 1, 1917.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER ¶176—REMEDIES OF PURCHASER—DEFICIENCY.

Where land is bargained by the tract, a deficiency in the acreage sold cannot be apportioned unless the purchaser can show that actual fraud was perpetrated by the vendor. *Kendall v. Wells*, 126 Ga. 343, 55 S. E. 41; *Goette v. Sutton*, 128 Ga. 179, 57 S. E. 308; *King v. Cowart*, 136 Ga. 739, 72 S. E. 37; *Montgomery v. Robertson*, 134 Ga. 66, 67 S. E. 431.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. ¶176.]

2. VENDOR AND PURCHASER ¶176—REMEDIES OF PURCHASER—DEFICIENCY.

Where, in a suit on a note for the purchase money of land so conveyed, the maker of the note undertakes to have an alleged deficiency in acreage apportioned in the amount of the recovery, but does not allege and prove actual fraud on the part of the vendor, the plaintiff is

entitled to a judgment in the whole amount of the note sued on, and the fact that the jury may have rendered a verdict allowing a portion of the shortage as shown by his evidence does not give the defendant the right to complain. Pullman Co. v. Schaffner, 126 Ga. 610, 55 S. E. 933, 9 L. R. A. (N. S.) 407(4).

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. 6-176.]

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Action between Oscar Parker and W. T. Roberts. There was a judgment for the latter, and the former brings error. Affirmed.

J. J. Barge, of Atlanta, for plaintiff in error. J. F. Golightly, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 269)

DICKERSON v. DICKERSON. (No. 8274.)
(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. CONTRACTS 68—CONSIDERATION—COMPROMISE.

It is well settled that the law favors compromises, when made in good faith, whereby disputed claims are settled, and especially is this true when related to family controversies; and a promise, when thus made, in extinguishment of a doubtful claim, furnishes sufficient consideration to support a valid contract. While it is not necessary that the contention which forms the basis of such a compromise shall be meritorious in order to support the promise, yet it is essential, in order to furnish a consideration therefor, that the contention be made in good faith and be honestly believed in.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 328-330; Dec. Dig. 6-68.]

2. CONTRACTS 68—CONSIDERATION—SUFFICIENCY.

The contention of a former husband that his deceased wife was indebted to him for services rendered will not support a promise on the part of his son to pay a stated sum of money in order to prevent action against the decedent's estate, where it appears from plaintiff's own testimony that the deceased wife had only a life estate in certain realty, and owned no other property whatever. Bass v. Bass, 73 Ga. 134 (c); Belt v. Iazzenby, 126 Ga. 767, 56 S. E. 81.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 328-330; Dec. Dig. 6-68.]

3. COMPROMISE AND SETTLEMENT 24—JURY QUESTION—GOOD FAITH.

While ordinarily the question of good faith in such a transaction is a question for the jury, the trial judge in this case did not err in granting a nonsuit.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 95; Dec. Dig. 24.]

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action between W. F. A. Dickerson and M. H. Dickerson. There was a judgment

for the latter, and the former brings error. Affirmed.

A. M. Brand, of Atlanta, for plaintiff in error. Alonzo Field, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 208)

THIRD NAT. BANK OF FITZGERALD v. BAKER et al. (No. 7459.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by the Court.)

1. EVIDENCE 269(1), 317(2) — DECLARATIONS—REASON FOR SIGNING NOTE—HEARSAY.

On the trial of an action on a promissory note, where the defendants pleaded that the note was based upon an illegal consideration and was void, because given for the purpose of suppressing a criminal prosecution against one of them, testimony as to statements made by him to the other defendants (his mother and his brother-in-law), that he had violated the law and that he was going to be prosecuted for the crime unless they executed a note with him, was admissible for the purpose of explaining their conduct in signing the note, but not as proof that a criminal prosecution was threatened.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063, 1175, 1192; Dec. Dig. 269(1), 317(2).]

2. BILLS AND NOTES 537(3) — CONSIDERATION—SUPPRESSION OF CRIMINAL PROSECUTION—QUESTION FOR JURY.

Whether the consideration of the note was the suppression of a threatened prosecution was purely a question of fact for the jury, under appropriate instructions from the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1866-1870; Dec. Dig. 537(3).]

3. BILLS AND NOTES 104—SURETY—CONSIDERATION—VALIDITY.

Proof that the maker of a note was a cashier in a national bank and had violated section 5209 of the Revised Statutes of the United States (U. S. Comp. St. 1913, § 9772), that prosecution was threatened for such violation, and that he, his mother, and his brother-in-law signed the note for the purpose of suppressing and settling the threatened criminal prosecution, voids the contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 242-247; Dec. Dig. 104.]

4. CONTRACTS 353(5) — TRIAL 295(5) — MISLEADING INSTRUCTIONS — INSTRUCTION FOR DEFENDANT.

The court charged the jury: "In passing on this case, the court instructs you that the suppression of a criminal offense does not mean an imaginary violation of the law, but it does mean such facts as constitute at least a prima facie violation of the law or a technical violation of the law. It is contended that C. E. Baker did violate section 5209 of the Revised Statutes, and it becomes part of your duty, in the trial of this case, to look into that question. If Mr. Baker did not violate any criminal law, did not amount to prima facie violation of a criminal law, then there could be no criminal prosecution. There would have to be a violation

of some law before there would be a suppression of a criminal prosecution; and, if no violation of a criminal law, there could not be a suppression of a criminal prosecution as to those particular facts and items. It is contended that there was a violation of the criminal act as provided under section 5209 of the federal statutes." *Held* that, considering the whole charge of the court, this particular excerpt from the charge was not subject to the criticism that it was misleading or that it in effect instructed the jury that they should find for the defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1833; Dec. Dig. ¶ 353(5); *Trial*, Cent. Dig. § 708; Dec. Dig. ¶ 295(6).]

Error from City Court of Valdosta; J. G. Cranford, Judge.

Suit by the Third National Bank of Fitzgerald against C. E. Baker, as principal, and Mrs. D. V. Baker and T. H. McKey, as security. Verdict for defendants, plaintiff's motion for new trial, overruled, and it brings error. Affirmed.

Hollins N. Randolph, of Atlanta, Denmark & Griffin, of Valdosta, and Wall & Grantham, of Fitzgerald, for plaintiff in error. E. K. Wilcox, of Valdosta, and Haygood & Cutts, of Fitzgerald, for defendants in error.

LUKE, J. The plaintiff instituted suit upon a promissory note against C. E. Baker, as principal, and Mrs. D. V. Baker and T. H. McKey, as security. The defendants admitted the execution of the note, but denied indebtedness, and pleaded, in substance, that said note was void; that the plaintiff was a national banking association under the laws of the United States; that while C. E. Baker was cashier of said bank, and for some time prior to the termination of his connection with the bank one J. A. Zorn was a customer of said bank and had borrowed from it considerable sums of money for use in his business of manufacturing cross-ties; that said Zorn had negotiated for certain leases of cross-tie timber to be made, and the same were in some instances taken in the name of C. E. Baker, and said Baker had in instances individually guaranteed accounts made by said Zorn and which were paid by said Zorn through said bank; that said Baker, as cashier of said bank, had taken in behalf of said bank certain commercial paper of one E. C. Zorn, a brother of J. A. Zorn, and indorsed by said J. A. Zorn, and the aggregate amount of the indebtedness on which the said J. A. Zorn's name appeared as maker and as indorser was in excess of the 10 per cent. limit allowed by the national banking act to be made to any one borrower, and the loan thus made was really for the benefit of said J. A. Zorn; that prior to the making of the note of E. C. Zorn the same indebtedness had been carried in the name of "Abba Cross-Tie Company," the said Abba Cross-Tie Company being the said J. A. Zorn, and, upon objection having been made to the transaction, the Abba Cross-Tie Company paper was canceled and new paper made in the name of E. C. Zorn;

that said Baker and said J. A. Zorn had made an agreement whereby said Baker was to have a share of the profits of the cross-tie business in consideration of the financing of said business through said bank; that upon severing his connection with said bank the officials of said bank demanded of said Baker that he indorse the notes held by said bank at the time against J. A. Zorn and against E. C. Zorn, making the assertion that the indebtedness was the indebtedness of said Baker, and, under pressure thus brought, Baker did indorse the said papers; that, upon the said J. A. Zorn paper not being paid, the officials of said bank made demands upon Baker for the payment of the same, and, upon it still being unpaid, coupled their demands with intimations that Baker would be in serious trouble with the government unless it was settled, and, to add greater force to their threats, procured a national bank examiner to take the matter up with Baker; that said bank examiner, acting under procurement of said bank officials, informed said Baker that he had come to get said matter settled, and that unless it was settled it would be necessary for him to report the matter to the department, and that this would result in serious trouble for Baker; that numerous threats were continually being made, and the seriousness of the same caused Baker to mention the matter to his mother, the defendant Mrs. D. V. Baker, and to his brother-in-law, defendant T. H. McKey, and thereupon negotiations resulted between A. B. Cook, acting for the plaintiff, and the said McKey, in which threats were made known to said McKey and renewed to him and through him and said C. E. Baker to his mother Mrs. D. V. Baker; that the defendants were thus informed that, unless the alleged indebtedness of said Baker (the Zorn indebtedness) was satisfactorily settled by good paper or money, the entire matter, which had already been called to the attention of the national banking department or Comptroller of the Currency, would be referred to the department of justice, and that the bank would prosecute the said Baker for violating the national banking law while he was cashier of said bank; that the prosecution referred to was an alleged violation of section 5209 of the Revised Statutes of the United States, in making a misapplication of the funds of said bank by obtaining the same under papers made in the name of J. A. Zorn, and in making false entries as to the same, in that the details of said loan were not made known and entered on the books of the bank, and in lending an amount in excess of 10 per cent. of the capital stock of said bank to one person, and being interested in such loans, and in not including the same in reports made to the Comptroller of the Currency; that, acting under the influence of these threats of criminal prosecution, and after being assured that if the note sued

on was given the entire matter of threats and criminal prosecution would be dropped, and solely for the purpose of avoiding the prosecution of said Baker in the United States court on the charge aforesaid, the defendants executed the note sued upon; that said note was given for the purpose and consideration of suppressing a criminal prosecution, and was thus based upon an illegal consideration and void. The defendant C. E. Baker pleaded, also, that he had been legally adjudicated a bankrupt, and was legally granted a discharge in bankruptcy in accordance with the bankruptcy laws of the United States; and that the demand or cause of action sued upon is one from which he was thus discharged.

The trial of the cause resulted in a verdict in favor of defendants. The plaintiff duly filed its motion for new trial, and, upon the overruling of the motion, brought the case to this court, assigning error upon the refusal of the court to grant a new trial.

[1] 1. Grounds 1 to 27, inclusive, of the amendment to the motion for a new trial, assign error upon the rulings of the trial court in admitting certain evidence of Mrs. Baker, one of the securities on the note sued on, over objection that her statements were hearsay evidence, self-serving declarations, not in the presence of the payee, and communication between two defendants, and not authorized by the payee of the note; the court permitting her to testify to communications and statements made to her by her son, C. E. Baker, and her son-in-law, T. H. McKey, to the effect that the bank officials were going to prosecute C. E. Baker for a crime committed while he was cashier of the plaintiff bank, and that the said criminal prosecution and crime could and would be settled if she and T. H. McKey would sign as security the note sued on. Ground 28 of the motion for a new trial assigns error because the court refused to rule out all of the evidence introduced by the defendants of any threats against C. E. Baker which were communicated to McKey or Mrs. Baker by him, or by any other persons except representatives of the bank; the specific objections being, that communications by C. E. Baker to Mrs. Baker and McKey were hearsay, and that communications between the defendants themselves, which were unauthorized by the bank and unknown to the bank, were self-serving in so far as they attempted to show any threats against Baker, or any agreement not to prosecute him if the note sued on was executed.

The general rule of evidence is that hearsay evidence has no probative value and is inadmissible, but this rule is subject to exception. It is admitted under our statute in specified cases, from necessity (Civil Code of 1910, § 5762). By section 5763 of the Civil Code it is provided that:

"When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they are admitted in evidence, not as hearsay, but as original evidence."

[3] There is a marked difference between the admissibility of evidence and the legal effect of such evidence when admitted. Mrs. Baker is a party to the case, and her testimony cannot be treated as self-serving declarations, in so far as it related to statements explaining her conduct and motives for signing the contract. Such evidence by her, in our opinion, is to be treated as original evidence. If the note sued on was in fact given to settle or suppress a criminal prosecution, such a note would be void even in the hands of an innocent person without notice. *Jones v. Dannenberg Co.*, 112 Ga. 426, 37 S. E. 729, 52 L. R. A. 271; *Small v. Williams*, 87 Ga. 681, 682, 13 S. E. 589. If therefore Mrs. Baker was induced to sign the note under the circumstances set up in her answer, and if by reason thereof the note was void, it would in our judgment be permissible, under the law, for her to testify to the conversation had by her with her co-obligor, for the purpose alone of ascertaining her motives and explaining her conduct in the premises. We think that such conversations and statements inducing or leading up to the giving of the note by her would constitute a part of the *res gestæ* of the transaction. We do not wish to be understood as holding that statements made to her by her co-obligor, inducing her to sign the note, which were unauthorized or unknown of by the payee, would in themselves be sufficient to prove the truth of such statements, for the purpose of binding the payee in the note in any manner whatsoever; but we simply hold that her evidence was admissible solely to explain the facts and circumstances surrounding the signing of the note by her. In the case of *Small v. Williams*, *supra*, it was held:

"Pertinent declarations made by a person whilst on his way to procure the execution of a mortgage to secure an antecedent debt or liability, the expedition having resulted in its procurement, are admissible in evidence against the mortgagee on the question whether the mortgage was procured by fraud or duress. They are a part of the *res gestæ* of the transaction, and consequently are admissible in evidence irrespective of the relation of agency between the mortgagee and the person who procured for him the execution of the mortgage."

In the case of *Snyder v. Willey*, 33 Mich. 483, the court held:

"Where the defense is made to a suit upon a promissory note that it was given in compromise of a criminal complaint against the maker's son-in-law and was procured through the entreaties of the daughter, whose fears had been played upon by the plaintiff for that purpose, it is competent to show what she stated to her father to induce him to give the note"—this being part of the transaction.

"Thus, where the question is whether the party acted prudently, wisely, or in good faith, the information on which she acted, whether

true or false, is original and material evidence," says Greenleaf on Evidence, § 101.

Hearsay evidence is admissible to explain conduct. *Stamps v. Newton County*, 8 Ga. App. 229, 68 S. E. 947 (9).

[4] 2. Grounds 29 to 32, inclusive, assign error upon the charge of the court. The remaining assignments of error are upon the ground that the judge failed to charge certain principles of law which the movant contends were applicable and should have been charged without request. We do not think that the charge of the court was misleading, and we do think that the charge of the court, when considered in its entirety, was full and fair upon the issues in the case.

[2] 3. The remaining question for this court to determine is whether the evidence was sufficient to sustain the plea of the defendant. The evidence clearly shows that C. E. Baker was guilty of concealing the transactions he had with Zorn, covering them up by entries upon the books; that the reports to the banking department did not show really what the transactions were; that in fact Baker was drawing a salary or profit from the business owned by Zorn in the cross-tie business; that the bank did not know that Baker was financing the cross-tie business with the funds of the bank, because he himself was being paid something for his services.

"The fact that entries in a report made by a national bank to the comptroller accurately state the facts as shown by the books does not prevent them from being false, where the books themselves do not correctly show the actual transactions or condition of the bank." *Morse v. U. S.*, 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938.

The testimony shows that Baker was charged by the officials of the bank with a violation of the banking laws, and was advised by the officers and by the bank examiner of the seriousness of the charges and the seriousness of the results, and was advised that settlement must be had; in fact, the evidence showed that the statement was made to Baker by an officer of the bank (Cooke) that the president (Davis) had said that:

"Unless (Baker) arranged that matter, the bank would spend \$1,000 or put him in jail."

Cooke testified that he told Baker that the president of the bank had said:

"I don't mind losing \$1,000 if he has violated the law [referring to Baker]. I would like to spend a thousand dollars putting him in jail."

The facts show that the bank was trying to force Baker to take care of the Zorn debt and other indebtedness to the bank. Cooke, an official of the bank, wrote to McKey, one of the securities, on December 7, 1911, as follows:

"My Dear Mr. McKey: Some time last spring I wrote you a personal letter relative to Mr. Baker's affairs. At that time no definite arrangements had been made by him, and, not anticipating any trouble, I assumed you did not wish to act upon suggestions made. I trust

you will regard this as a confidential communication, inasmuch as Mr. Baker was employed by this bank on my representation, based somewhat on your letter to me at the time, which no doubt justified my relations with him. But his indifference to claims held by this bank against him, as principal and indorser, makes it a very difficult matter for me to keep the board from reporting him to the government, in which event I can be of no service to him, as the matter will be entirely out of my hands, and I have held the matter over pending some adjustment of his affairs. He certainly does not realize the importance of preventing the institution of proceedings of this kind, or he would have made some disposition of the matter before now. However, I do not care to assume that his people were ignorant of the facts in the case, without giving them an opportunity of preventing, before it was too late, what might prove a rather serious matter."

Cooke, on April 24, 1911, wrote to C. E. Baker and inclosed the following letter from the bank examiner:

"Please inform me as to whether or not Mr. C. E. Baker has made any further payment on his indebtedness to your bank. I would regret very much to be obliged to make a complaint concerning the lending to himself of so much of the funds of the bank without the knowledge or consent of the board. If I am obliged to do this it will of course give him a great deal of serious trouble. Please let me hear from you at your earliest convenience, and greatly oblige. Yours truly, J. K. McDonald, Examiner."

After further interviews, Haygood & Outts, representing C. E. Baker, on December 16, 1911, addressed to Third National Bank and Elkins & Wall, attorneys for the bank, the following letter:

"Referring to your last suggestion and inquiry by your Mr. Wall, to the members of our firm as to the adjustment of the differences between the Third National Bank and Mr. C. E. Baker, we beg leave to say that the note which was offered to the bank and which was in the custody of the directors, subject to their acceptance of it, and which the bank declined to accept and returned to Mr. Baker, was by him returned to the security, in order that it might be cancelled. Mr. Baker did not deem it proper to keep the note, and, for the satisfaction of the security, thought it best to return it. Such a note can be obtained, however, by Mr. Baker within forty-eight hours, but he dislikes to again ask for security to sign the note with him, unless there is some assurance that it would be accepted. Both Mr. Baker and the security not only desire to know that it would be accepted, but also that its acceptance would mean an entire settlement of all issues pending between the bank and Mr. Baker, and thus result in the satisfaction of the executions obtained against him, and the dismissal of the pending cases growing out of the same; and also that there will be no further effort made to embarrass Mr. Baker by the presentation of any kind of charges against him, which has been heretofore referred to in the correspondence between the parties as involving the submission of the matters to the department of justice. While Mr. Baker indignantly disclaims any suggestion of a violation of the national banking laws, and would have nothing whatever to fear if such threats were carried out, yet naturally he and the security would want to know that these suggestions, as well as all issues and differences, would be finally ended and settled. We would be glad to have your prompt reply to this letter, as Mr. Baker expects still to be able to obtain the security required, and upon receiving your favorable an-

swer to-day, will be able to obtain the note by Monday."

On December 19, 1911, the note sued on was delivered to the bank.

The evidence authorized the verdict, and the court did not err in overruling the motion for new trial.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(79 W. Va. 475)

**COUNTY COURT OF WYOMING COUNTY
v. WHITE et al. (No. 3312.)**

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1917.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES §14—REMOVAL OF POLES—NOTICE—STATUTE.

It is the duty of a telephone company, occupying a public highway under a franchise from the county court, to remove and reset its poles and lines at its own expense, when notified to do so, if they are so situated as to interfere materially with the work, lawfully prosecuted, of permanently improving such highway. The franchise of such telephone company is subordinate to the rights of the traveling public in the highway.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 8.]

2. TELEGRAPHS AND TELEPHONES §14—REMOVAL OF POLES—MANDAMUS.

Although the county court is authorized by statute to remove and reset such telephone poles, and to charge the expense thereof to the owner, it is not obliged to do so, and may demand a writ of mandamus to compel their removal by the owner.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 8.]

3. TELEGRAPHS AND TELEPHONES §14—POLES—OBSTRUCTION—STATUTE.

Telephone poles standing on the right of way in such proximity to the traveled road as to materially interfere with the work of permanently improving it constitute an obstruction to the use of the public road by the traveling public, within the meaning of section 56a (77), c. 43, Barnes' Code (Code 1913, § 1844).

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 8.]

4. JUDGMENT §585(3)—BAR—REMOVAL OF TELEGRAPH POLES—MANDAMUS—PENDING INJUNCTION.

The pendency of a suit brought by such telephone company simply to enjoin the county court and its contractors, engaged in making permanent highway improvement, from willfully and wantonly destroying its poles and wires, and the granting of a temporary injunction order restraining such willful trespass, is no impediment to the right of the county court to apply for a writ of mandamus to compel such telephone company to remove its poles and lines.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1062-1064, 1067, 1073, 1094.]

Mandamus by County Court of Wyoming County against Guy White and others. Peremptory writ ordered.

M. F. Matheny, of Charleston, R. D. Bailey, of Baileysville, and J. Albert Toler and E. W. Worrell, both of Pineville, for petitioner. S. D. Stokes, of Williamson, and R. E. Hughes, of Charleston, for respondents.

WILLIAMS, J. Upon direct application to this court by the county court of Wyoming county for a mandamus to compel Guy White and Ulvert O. Sanders, partners, doing business in the name of the Wyoming Telephone Company, to remove certain telephone poles which had been erected on the right of way along certain public roads of the county, under a franchise granted by the said county court, but which now interfere with the work now in progress of permanently improving said roads, an alternative writ was issued, to which respondents demurred, and also made return. From the pleadings, exhibits, and affidavits the following facts appear:

Under a franchise granted to it by the county court of Wyoming county in the year 1905 the Wyoming Telephone & Development Company erected its telephone lines along certain public roads in the county. The lines and franchise have since passed to respondents, who are now operating the lines as partners, under the name of the Wyoming Telephone Company.

In August, 1915, the voters of that county voted a bond issue of \$550,000 for the purpose of permanently improving certain public roads of the county along some of which the telephone lines had been erected. The bonds were issued and sold, and in April, 1916, the county court contracted with Henning & Hagerdon, a corporation, for the work of permanently improving the road leading from Mullens to Pineville, and at the same time with Winston & Co., a corporation, for the improvement of the road between Pineville and Oceana, with John P. and C. P. Keeley, partners doing business as Keeley Bros., for the improvement of the road from Oceana to Baileysville, and with T. Towles & Co., a corporation, for the permanent improvement of the road from Baileysville to the McDowell county line. The several contractors gave bond and began work of construction. The roads were narrow and led through a virgin forest along the narrow mountain streams and by overhanging cliffs, and, in order to carry on the work and complete it according to specifications, it becomes necessary to remove a great many telephone poles that stood so near to the edge of the roadbed as to be in the way of blasting rock and shoveling earth necessary to be removed in order to make the road of specified width. Pursuant to orders of the county court, the road engineer notified respondents to remove certain designated poles standing along the road between Pineville and Mullens and between Pineville and Oceana, and that, if they did not remove and reset them, they would be reset at the instance of the road engineer, and the expense thereof charged to respondents, as provided in section 56a(79), c. 43, Code (sec. 1846). The notice was not heeded, and the engineer did remove and reset a number of the poles. But many of

them yet remain as originally set and materially interfere with the construction work.

Previous to the filing of relator's petition in this court, White and Sanders had filed their bill in the circuit court of Wyoming county against the county court, which suit was later removed to the circuit court of Mercer county, and procured a temporary injunction restraining the county court, the road engineer, and the contractors "from willfully and deliberately destroying" plaintiffs' poles and wires, and from molesting or damaging said property "any further than was necessary on account of said improvement," and commanding them to "remove and reset said poles." Although the return purports to exhibit a copy of the injunction order, it is not found among the papers. However, it is admitted the injunction is temporary only. It appears to be reasonably certain that the poles which the defendants in the injunction suit were commanded to reset were the ones alleged to have been willfully cut down by the contractors, and not the poles then standing. That suit has not been disposed of, and is now pending on motion to dissolve the injunction. Pending that motion the county court has applied to this court for a writ of mandamus to compel respondents to remove their poles and wires at all places where they interfere with the work of permanent road improvement now under contract as aforesaid, and especially to remove temporarily the poles designated by marks and numbers and so described in the written notices previously served on respondents, until such time as may be necessary for the contractors to complete their work. The alternative writ avers that, when the work was begun, it became apparent that all of the poles and lines of wire along almost the entire length of the roads to be permanently improved would have to be removed temporarily until the right of way could be cleared of timber and the blasting and excavating necessary to be done was completed.

Respondents seek to justify their refusal to remove their poles and lines on the ground that they do not interfere with public travel on the highway, and that, even if they do interfere with the work of permanently improving the highway, it is nevertheless the duty either of the county court or the contractors to remove and reset the poles and restring the wire in a careful manner. From the affidavit of Blake Taylor, the civil engineer employed by the county court to superintend the work of road construction, it appears that the roads now under contract are the leading thoroughfares of the county; that they follow the creeks, gorges, and defiles through a mountainous country, and for many miles are overhung with virgin forests and cliffs; that in the work of construction it is necessary to fell a great deal of timber along the right of way on the steep moun-

tain sides, and to remove large quantities of stone and earth; that it is physically impossible to do so without injury to or destruction of respondents' telephone lines in their present location; and that it is necessary the same should be temporarily removed from the right of way in many places during the entire time of construction. He further says that, acting under the authority of the county court, he made an oral agreement with Ulvert O. Sanders, one of the respondents, that respondents should go upon the ground as the work progressed and take care of their lines; that, although he frequently requested them to do so, they refused to meet affiant upon the ground for that purpose; and that, after their refusal to comply with said oral agreement, affiant, on the 15th day of June, 1916, gave respondents written notice to remove certain poles. He also says the line is old and dilapidated, and that many of the poles are so rotten and worm-eaten that to remove them and restring the wires would require many new poles, and the constant attention and supervision of experienced linesmen to relocate the line to meet the changing conditions resulting from the continuing work of road construction. This evidence is not contradicted.

[1] One question presented is: Upon whom rests the legal duty to remove the telephone poles and wire? Relator is a municipal corporation, a governmental agency, intrusted with the duty of locating, building, and maintaining the public highways of the county. Respondents, owners of the telephone lines, are engaged in the public service, and are occupying a portion of the public right of way with their lines, by virtue of a franchise granted, pursuant to legislative authority, by the county court to their predecessors in title. The right of the public in the highway for the purpose of travel in the ordinary modes is a primary and fundamental right, and is not limited to that portion only of the right of way heretofore traveled. Respondents have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right of way for the purpose of a roadway necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public. This principle was not controverted in the argument. But it was contended that the poles did not interfere with travel in the roadway, and that, being in the way only of the work of improving the highway, it was therefore the duty either of the county court or of their contractors to remove them in a careful manner, at their own expense. This is certainly not the law. Section 56a(77), c. 43, Barnes' Code (Code 1913, § 1844) reads as follows:

"It shall be the duty of all telephone, telegraph, electric railway or other electrical companies, to remove and reset, telephone, telegraph, trolley and other poles and the wires connected therewith, when the same constitute obstructions to the use of the public road by the traveling public."

This statute imposes the duty upon a telephone company to remove its poles and wires when they constitute obstructions to the use of the public road either for travel or for the purpose of repair. The widening and permanently improving the road now being done is for the benefit of the traveling public, and the interference by the poles and wires with this work, while not within the letter of the statute, is clearly within its spirit and intentment, and the duty to remove the poles is as imperative upon respondents as if they stood in the old roadbed and did actually hinder travel thereon. It is clearly such an interference as is contemplated by the statute. Interference with the work of improving a highway for better traveling is necessarily an incidental interference with public travel. It is not shown that the contractors were under any contractual obligation to remove the poles, and the law certainly imposes no such duty as an incident to their undertaking.

[2] It is further insisted that, inasmuch as section 56a (79), same chapter, authorizes the county road engineer to remove and reset poles, in the event the owner refuses to comply with notice, previously given, to do so himself, and to charge the expense thereof to such owner, such is the exclusive remedy in such case. We do not concur in this proposition. Recognizing the supreme importance to the public of keeping the highways free from obstructions, the Legislature saw fit to invest the county court with the authority given by the statute referred to, as a more speedy remedy, than any by proceedings in court, but such was clearly not intended to be an exclusive remedy, and it does not deny the remedy by mandamus to compel the owner of the lines to remove the obstructions. The county court is not bound to expend the public revenues in such case and take the risk of the owners' insolvency when it seeks to recover the money thus expended. It may elect its remedy.

[3] Respondents further urge that places where the poles might be reset with safety were not designated, and therefore they were

excused from not obeying the written notice to reset them. A complete answer to this contention is, they never went upon the ground, or otherwise sought to ascertain where the poles might be safely relocated during the progress of the construction work. Furthermore, the contour of the ground along the highway and the nature of the improvements are such as may make it wholly impracticable to relocate the line so that it may not be in the way of felling timber and blasting rock in many places along the highway. It may therefore be necessary for respondents to remove their lines off the right of way entirely in places, at least temporarily, and until the permanent road improvement is completed. Respondents' duty in this respect is to be determined by the necessity of the case. They must care for their own line. This does not mean that the county court or the contractors have any right to willfully or wantonly destroy or injure respondents' property. They must use reasonable care not to injure the property any more than is reasonably necessary in the execution of work.

[4] It is further insisted that the county court is estopped to demand a writ of mandamus on account of the pendency of the injunction suit in the circuit court of Mercer county. It does not appear from the pleadings and exhibits in this case that an injunction was applied for for any other purpose than to restrain the defendants in that suit from wantonly and willfully cutting down and destroying respondents' poles and wires, nor is it claimed that the injunction granted goes any further than to inhibit the commission of such willful trespass. So far as it now appears, the question presented on this application—i. e., whether it is the duty of the county court or the duty of the owners of the telephone line to remove and reset the poles—is not involved in that suit. That case apparently rests upon a motion to dissolve a temporary injunction restraining the commission of a wanton trespass only, and is therefore no impediment to this proceeding.

We are of opinion that relator has a clear legal right to demand the removal by respondents of their poles and wires temporarily from the right of way wherever they are so located as to interfere with the necessary work of permanent highway improvement now in progress, and our conclusion is to award the writ.

(73 N. C. 18)

MIDGETTE et al. v. BASNIGHT. (No. 23.)
(Supreme Court of North Carolina. Feb. 21,
1917.)

1. APPEAL AND ERROR ~~6~~927(3) — REVIEW —
MOTION FOR NONSUIT.

In considering refusal of defendant's motion for nonsuit, the appellate court must accept plaintiff's evidence as true and consider it in the light most favorable to plaintiffs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4024.]

2. BILLS AND NOTES ~~6~~523—INDORSEMENT—
EVIDENCE—SUFFICIENCY.

In view of Revisal 1906, § 2179, providing that, in order to a valid indorsement, the name must be written on the instrument itself or upon some paper attached thereto, and section 2168, providing that an indorsement may be made by an agent duly authorized, in an action to recover the amount of a draft, plaintiff's evidence on defendant's motion for nonsuit held to justify the inference that the indorsement of defendant's name on the draft was made by a third person at defendant's request.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1822-1825.]

Appeal from Superior Court, Dare County; Whedbee, Judge.

Action by E. M. Midgette and others against W. H. Basnight. Defendant's motion for a nonsuit was denied, and he excepts and appeals. Affirmed.

The action was to recover \$75, the amount of a draft which plaintiff firm had advanced on an instrument in terms as follows:

"Manteo, Sept. 9, 1914.

"At sight pay to order of W. H. Basnight seventy-five dollars, value received, and charge same to account of W. C. Weir.

"[Signed] W. C. Weir.

"To J. L. Treadway, Chatham, Va."

On back draft, as presented by plaintiff at the trial, appeared the following indorsements:

"W. H. Basnight. Midgette & Daniels. First National Bank, Durham N. C. Bank of Manteo N. C., and same duly protested for nonpayment by a notary public at Chatham, Va., and attested by his notarial seal."

Verdict and judgment for plaintiffs.

W. A. Worth, of Elizabeth City, and S. L. Dasher, of Manteo, for appellants. B. G. Crisp, of Manteo, for appellees.

HOKE, J. The facts in evidence in support of plaintiff's claim tend to show that in September, 1914, one C. W. Weir, drawer of this instrument, was in and around Manteo engaged in inspecting timber; that about the time of his first coming Basnight had introduced him to M. L. Daniels, a member of plaintiff firm, stating he was all right and to let him have any goods they might wish to purchase and advanced for them on that occasion to be used in buying goods two checks and \$5 in money, making an indebtedness to himself of \$27.60; that a week or so later Weir came to plaintiffs' store with the draft in question for \$75, purporting to be indorsed by W. H. Basnight, defendant, and having also a note purporting

to be signed by Basnight, asking plaintiffs to cash the draft and retain for him the \$27.60, which was done, and a day or so after this \$27.60 was paid to W. H. Basnight by M. H. Daniels for the firm. It further appeared that at the time the draft was drawn C. W. Weir, being at the home of defendant, told the latter that plaintiffs were going to cash a draft for him for \$75, and asked defendant to write a note requesting that plaintiffs retain out of the amount the \$27.60 due from Weir to defendant; that defendant, not having his glasses, told Weir to write the note, which he then did, in defendant's presence, and later defendant received the \$27.60 from plaintiffs, as stated.

[1] Accepting this testimony as true and considering the same in the light most favorable to plaintiffs, the established rule on a motion to nonsuit, we think that the judgment of the lower court in denial of such motion is clearly correct.

[2] True, our statute on negotiable instruments provides that, in order to a valid indorsement, the name must be written on the instrument itself or upon some paper attached thereto (Revisal, c. 54, § 2179; Daniel on Neg. Instruments [Calvert] § 689A), and our decisions on the subject are to the effect that such indorsement does not prove itself, but the fact must be established by "proper testimony" (Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447, 111 Am. St. Rep. 879; Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803). But the statute also provides (section 2168), and both provisions are in expression and affirmance of the better-considered decisions on the subject, that an indorsement may be made by an agent duly authorized thereto. Revisal, c. 54, § 2168. And from the facts in evidence, as heretofore stated, we think it a clearly permissible inference that the indorsement in question was made by authority of defendant, and that the motion for nonsuit was therefore properly overruled. True, defendant denies that he indorsed the draft or authorized any one to do so for him, and he denies also that he wrote the note requesting payment, or that he authorized the same, but this is evidence coming from defendant and tending to support his position, and may not be considered on the exceptions as presented.

We find no error in the trial.

The judgment for plaintiffs is therefore affirmed.

Affirmed.

(73 N. C. 698)

PICKERELL & CRAIG CO. v. WILSON
WHOLESALE CO. (No. 67.)

(Supreme Court of North Carolina. Feb. 21,
1917.)

APPEAL AND ERROR ~~6~~1096(1) — SCOPE —
REVERSAL.

Where on remand, the trial court followed the principle stated on the appeal, and no party

was prejudiced, but a fair opportunity was given to present the case on both sides, the court will decline to reverse the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1177, 4353, 4357.]

Appeal from Superior Court, Wilson County; Allen, Judge.

Action by the Pickerell & Craig Company against the Wilson Wholesale Company. Judgment for plaintiff, and defendant appeals. No error.

F. S. Hassell, of Wilson, for appellant. F. D. Swindell, of Wilson, for appellee.

PER CURIAM. This case was before us at a former term (169 N. C. 381, 86 S. E. 187). At the last trial, when the judgment from which this appeal is taken was rendered, the court seems to have followed the principles stated in the first appeal, and we see no substantial error in the case. The exceptions are taken mostly to questions of evidence, but neither party appears to have been really prejudiced by that which was admitted, or by any of the rulings. *Young v. Brooks Manufacturing Co.*, 151 N. C. 272, 65 S. E. 1005. A fair opportunity was given to present the case on both sides, and we must decline to disturb the judgment.

No error.

(173 N. C. 28)

SUMNER v. ASHEVILLE TELEPHONE & TELEGRAPH CO. et al. (No. 537.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. MASTER AND SERVANT §190(20)—**FOREMAN AS VICE PRINCIPAL—RESPONSIBILITY OF EMPLOYER FOR NEGLIGENCE.**

The foreman of a telephone and telegraph company directing the work of attaching a cable to a messenger wire along the company's poles was a vice principal, rendering the company responsible for his negligent default in failing properly to warn an employé of the defects in the transformer on the adjacent poles of a power company, and of the dangers incident to existing conditions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 471.]

2. ELECTRICITY §15(1)—**PERSONAL INJURIES—LIABILITY OF POWER COMPANY—TRESPASS ON POLE.**

Where the employé of a telephone company went on the pole of a power company in the absence of any contract or agreement giving either the employé or the telephone company the right to be upon the power company's poles, both the telephone company and its employé were trespassers, and the power company was not liable to the employé for an electric shock received by him through defect in a transformer, since the established principal in the law of negligence, that there is no liability to trespassers, except for injuries willfully or wantonly inflicted, is applicable to electric companies and electric appliances.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 8.]

Appeal from Superior Court, Buncombe County; Harding, Judge.

Action by L. H. Sumner against the Ashe-

ville Telephone & Telegraph Company and the Hendersonville Power & Light Company. From a judgment for plaintiff, defendants appeal. Affirmed as to defendant Telephone Company; reversed as to defendant Power Company.

Civil action to recover damages for alleged negligence resulting in serious physical injuries, tried before his honor, W. F. Harding, Judge, and a jury, at June term, 1916, of the superior court of Buncombe county.

There was evidence on the part of plaintiff tending to show that in August, 1915, the defendant the telephone and telegraph company was putting up a line of poles and wires on eighth avenue in Hendersonville, N. C., and that plaintiff, an employé of said company, was engaged in attaching the cable to the messenger wire along said defendant's poles and in close proximity to, and at places touching, the poles of its codefendant, the power company, which also had its line along said street; that, in doing his work, plaintiff was using safety belt and strap, the seat being about 20 feet from the ground and 18 inches below the messenger wire, and, as plaintiff would attach or clip the cable to the messenger wire, he would push his seat along this wire as his work progressed; that the wires of the telephone company were not charged with electricity at the time and, when they were, did not, under ordinary conditions, carry sufficient current to cause serious injury, but the wires of the power company, which were at points very near the telephone company's wire, usually carried a current of high voltage and importing serious menace when not properly insulated; that, on the day in question, while plaintiff was performing his work, he came to a "span" (the distance between two poles) where the wire of the power company had sagged so as to be threateningly near the telephone company's messenger wire, and he called the attention of his foreman or boss to this condition, and was directed by him to leave that span and go to another ahead, where there appeared to plaintiff to be no danger existent or threatened; that, in the endeavor to carry out the order, he passed around and necessarily touched a pole of the power company which was wet and had become charged with electricity of dangerous voltage by reason of a defective or leaky transformer attached to a cross-arm on the pole; that, in the effort to pass around this pole and go on with his work, he received an electric shock, rendering him for a time unconscious and causing serious and painful injuries; that the foreman or boss who gave the plaintiff the order to go to another span was aware of the defect of the transformer and of the threatening conditions incident to it, but did not communicate such knowledge to plaintiff or in any way warn him of the danger, and plaintiff did not know, or have

opportunity to know, that an injury was likely.

There was denial of liability on the part of both defendants, with evidence in support of their positions, and there were facts in evidence tending to show that the boss fully communicated to plaintiff all he knew of the transformer and the dangers incident to its condition, and that plaintiff acted throughout in full assumption of any and all risks incident to the work and to his manner of doing it.

On issues submitted, the jury rendered the following verdict:

"(1) Was the plaintiff injured by the negligence of the defendant the Asheville Telephone & Telegraph Company, as alleged in the complaint? Answer: Yes.

"(2) Was the plaintiff injured by the negligence of the defendant the Hendersonville Light & Power Company? Answer: Yes.

"(3) Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer of the defendants? Answer: No.

"(4) What damages, if any, is the plaintiff entitled to recover? Answer: \$2,000."

Judgment on the verdict, and defendants excepted and appealed.

B. J. Clay, of Atlanta, Ga., and A. Hall Johnston, of Asheville, for appellant Asheville Telephone & Telegraph Co. Merrimon, Adams & Adams, of Asheville, for appellant Hendersonville Power & Light Co. Jones & Williams, of Asheville, for appellee.

HOKB, J. (after stating the facts as above). We have carefully considered the record and exceptions and find no error therein which gives the telegraph and telephone company any just ground of complaint. The positions insisted on by the defendant were substantially recognized and approved by the court either in the general charge or in response to prayers for instructions presented by defendant, except the motion that the case be nonsuited and the prayer that the judge charge the jury that, on the evidence, if believed, no liability should attach. But these exceptions could not be sustained in view of evidence on the part of plaintiff tending to show that the plaintiff's foreman or boss knew of the defect in the transformer and gave the plaintiff the order to proceed with his work without telling him of conditions or in any way informing him of the danger incident to the work under conditions as they actually prevailed.

[1] Under our authorities and on the facts in evidence as they have been accepted by the jury, this foreman or boss stood towards the plaintiff in the position of vice principal, rendering the company responsible for his negligent default in failing to properly warn the plaintiff of the defects in the transformer on the poles of the power company and of the dangers incident to existent conditions. *Beal v. Fiber Co.*, 154 N. C. 147-155, 69 S. E. 834; *Chesson v. Walker & Myers*, 146 N. C. 511, 60

S. E. 422; *Turner v. Lumber Co.*, 119 N. C. 387, 26 S. E. 23. And there is nothing, either in the conduct of plaintiff or in his contract of employment, that, as a matter of law, operates to protect said defendant from such liability. *Mobile Electric Co. v. Sanges*, 169 Ala. 341, 53 South. 176, Ann. Cas. 1912B, 461; *Speight v. Rocky Mountain Telephone Co.*, 36 Utah, 483, 107 Pac. 742; *Co-Operant Telephone Co. v. St. Clair*, 168 Fed. 645, 94 C. C. A. 109; *Raab v. Hudson River Telephone Co.*, 139 App. Div. 286, 123 N. Y. Supp. 1037.

[2] In reference to the other defendant, the light and power company, we do not see that any recovery can be sustained. There is nothing to show that there was any contract or agreement which gave either the plaintiff or his employees the right to be upon the power company's poles. On the facts in evidence and as to that company, they were both trespassers, and, on authority, there has been no breach of duty towards plaintiff which gives him any right to relief. *Heskell, Adm'r v. Auburn Light, etc., Co.*, 209 N. Y. 86, 102 N. E. 540, L. R. A. 1915B, 1127; *Sias v. Lowell, etc., Co.*, 179 Mass. 343, 60 N. E. 974; *Railway Co. v. Andrews*, 89 Ga. 653, 16 S. E. 203; 9 R. C. L. tit. Electricity, p. 1207; *Curtis on Electricity*, § 462.

In this last citation, it is said:

"The well-established principle in the law of negligence, that there is no liability to trespassers except for injuries willfully or wantonly inflicted, is applicable to electric companies and electric appliances. Though an electric company may have been guilty of some neglect, in the case of its appointees, it is not liable for injury to one who is a trespasser as against the company unless the injury is willfully inflicted."

And our decisions are in approval of the general principle. *Vassor v. Railroad*, 142 N. C. 68, 54 S. E. 849, 7 L. R. A. (N. S.) 950, 9 Ann. Cas. 535.

We are of opinion therefore that, on the record, the judgment against the telephone and telegraph company be affirmed, and as against the power company the judgment is reversed, and motion for nonsuit be allowed.

Affirmed as to telephone and telegraph company; reversed as to power company.

(173 N. C. 20)

MANN v. MANN et al. (No. 24.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

EXECUTORS AND ADMINISTRATORS ~~vs~~ 196—
FURTHER ALLOWANCE TO WIDOW—STATUTE.

The assignment of \$300 to widow under Revisal 1905, § 3008, providing allowance for year's provision immediately upon husband's death, does not bar subsequent allowance on petition under section 3103 et seq., where estate exceeds \$2,000, section 3103 merely precluding further allowance when estate is insolvent or less than \$2,000, the first allowance being intended for widow's immediate needs, as at that time extent of the estate is not determined.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 725.]

Appeal from Superior Court, Hyde County; Whedbee, Judge.

Special proceeding by Julia Mann against T. A. Mann and others, executors, for an increased allowance for year's provision under section 3104, Revisal. Judgment for plaintiff, and defendants appeal. Affirmed.

Manning & Kitchin, of Raleigh, and S. S. Mann, of Swan Quarter, for appellants. Spencer & Spencer, of Swan Quarter, and Harding & Pierce, of Greenville, for appellee.

BROWN, J. It appears from the findings of fact that plaintiff, widow of J. A. Mann, was assigned a year's provision of \$300 on September 12, 1916, by his executors, in accordance with section 3098 of Revisal. It is contended that such assignment is a bar to any subsequent petition for an increased allowance under section 3103 et seq. This contention cannot be sustained. The statute, taken as a whole, plainly indicates that the year's provision of \$300 is intended for the immediate and pressing needs of the widow. It may or may not be all that she can receive, depending entirely upon the value of the estate. If the estate shall turn out to be insolvent or does not exceed \$2,000, the allowance for the support of the widow shall not in any case exceed the amounts named in section 3092, and, in the language of the statute (section 3103) "the allowance made to her as above prescribed shall preclude her from any further allowance."

In her petition for such "further allowance" the widow is required to state the value of any allowance already assigned to her as well as the value of articles consumed by her. The very language of the statute plainly indicates that the widow may have a further allowance in addition to the first if the estate exceeds \$2,000.

The reason the widow is not estopped by the assignment of \$300 (which is generally made by the personal representative immediately after the death of her husband for her immediate needs) is because neither she or the personal representative is supposed at that time to know the value of the personal estate, and it would be unjust to hold the widow bound by an allotment of \$300 when, as in this case, the estate turns out to be worth more than the \$2,000 prescribed by the statute.

Affirmed.

(173 N. C. 25)

RHODES v. ANGE. (No. 68.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. **BOUNDARIES** ¶51—"PROCESSIONING PROCEEDINGS"—NATURE OF.

The primary and leading purpose of a processioning proceeding is to settle boundaries between adjoining proprietors of land, and while this is the main object, the title of the land

may be necessarily involved in the establishment of the true line.

[Ed. Note.—For other cases, see **Boundaries**, Cent. Dig. § 252.]

2. **BOUNDARIES** ¶51—"PROCESSIONING PROCEEDINGS"—TITLE.

The question of title in a processioning proceeding may be raised by the pleadings or the facts of the particular case.

[Ed. Note.—For other cases, see **Boundaries**, Cent. Dig. § 252.]

3. **ADVERSE POSSESSION** ¶96—TITLE.

Adverse possession cannot confer title beyond its limits.

[Ed. Note.—For other cases, see **Adverse Possession**, Cent. Dig. §§ 533-536.]

4. **ADVERSE POSSESSION** ¶116(1)—PROCESSIONING PROCEEDINGS—INSTRUCTIONS.

In processioning proceeding, where the true line was in controversy, and defendant based his claim on adverse possession, a charge that the jury could consider the possession of the respective parties in determining the location of the true line, and that if defendant had been in possession of the land in question for 20 years or longer prior to the beginning of the action, verdict should be for him, was correct, giving him benefit of the issue of title if raised by the pleadings.

[Ed. Note.—For other cases, see **Adverse Possession**, Cent. Dig. § 66.]

5. **BOUNDARIES** ¶37(1)—EVIDENCE—WEIGHT.

In a processioning proceeding, neither the testimony of a surveyor as to the true line nor the conduct of the parties with reference thereto is conclusive.

[Ed. Note.—For other cases, see **Boundaries**, Cent. Dig. §§ 184-189, 192, 194.]

Appeal from Superior Court, Martin County; Allen, Judge.

Action by Edgar Rhodes against Joe Ange and another. From a verdict for plaintiff, the named defendant appeals. Affirmed.

S. J. Everett, of Greenville, for appellant. A. R. Dunning, of Williamston, for appellee.

WALKER, J. [1] The nature of a processioning proceeding has frequently been considered and decided by this court. Its primary and leading purpose is to settle boundaries as between adjoining proprietors of land, but while this is the main object, the title to land may necessarily become the subject of inquiry, in order to ascertain the ultimate fact as to the true location of the boundary. In such proceedings, unless perhaps both parties claim under a paper title it will be difficult, if not impossible, to confine the investigation required to the mere location of the dividing line. When both parties claim by right of possession, or one by a paper title and the other by adverse possession, it will become necessary in the large majority, if not all, of the cases to ascertain the nature and extent of the possession, and even in the case of a claim under a paper title, the true location of corners and of boundaries, as preliminary to the location of the dividing line which is in dispute. So that it may, speaking generally, be safely said that the title to the land is not involved in such a

proceeding, but that means that it is not directly involved, for in many cases, as we have already shown, it may become incidentally one of the questions or issues in the case, which must be decided before the main issue as to the location of the dividing line can be determined. The case of partition proceedings is a similar one and illustrates the point, as shown in *Woody v. Fountain*, 143 N. C. 69, 55 S. E. 425. There the question of title is not necessarily involved, but it may become necessary upon a plea of sole seisin to determine, first, how the parties stand with reference to the title before deciding whether they are tenants in common and entitled to partition. It is a preliminary question which must be settled before the relief prayed can be granted. A partition proceeding will very often run into an action of ejectment, and the same may be said of a processioning proceeding. In the latter case the ownership of the land on either side of the alleged disputed line, which is a prerequisite to the right of having the land processioned, cannot always be determined by mere occupancy, but often will require an investigation of the title, as in other cases where the issue is not primarily involved. The failure to note this distinction, between a proceeding where the location of a line is solely involved and one where the title may incidentally arise, has caused the question in this appeal to be presented and the court to be misunderstood.

[2] We have held in numerous decisions that the question of title may be raised by the pleadings or by the facts of the particular case. *Parker v. Taylor*, 133 N. C. 103, 45 S. E. 473; *Hill v. Dalton*, 136 N. C. 339, 48 S. E. 784; *Id.*, 140 N. C. 9, 52 S. E. 273; *Smith v. Johnson*, 137 N. C. 43, 49 S. E. 62; *Stanaland v. Rabon*, 140 N. C. 202, 52 S. E. 417; *Davis v. Wall*, 142 N. C. 450, 55 S. E. 350; *Woody v. Fountain*, 143 N. C. 66, 55 S. E. 425; *Green v. Williams*, 144 N. C. 60, 56 S. E. 549; *Brown v. Hutchinson*, 155 N. C. 205, 71 S. E. 302. It was said in *Green v. Williams*, *supra*:

"Our processioning act is similar in some respects to the 'writ of perambulation' at common law, which is sued by consent of both parties when they are in doubt as to the bounds of their respective estates, and is directed to the sheriff, who is commanded to make the 'perambulation' with a jury, and to set the bounds and limits between them in certainty. *Fitz. Nat. Brev.* 133. There it was done by consent of the parties, and when there was no dispute as to the title, and none as to the right to occupy the adjoining tenements, while with us, either of the adjoining proprietors, where a dispute as to the true dividing boundary has arisen, is entitled to have the land processioned, without the other's consent, and even when the question of title may become incidentally involved, and then all controverted matters, where there has been an appeal, are settled by the jury under the guidance of the court."

[3,4] In this case the judge instructed the jury that they could consider the possession

of the respective parties, with respect to the disputed line, as evidence to determine where the true line is located, but that mere possession did not of itself fix the line, it being only an evidential circumstance upon the question as to where it is. But he also told them that "if the defendant, and those under whom he claims, had been in possession of the land in question up to the lane for 20 years, or longer, prior to the bringing of this action," they would answer the issue according to the defendant's contention, that is, "beginning at the stake in the road and running along the lane a straight line by the poplar to the swamp." This instruction was given at defendant's request. The addition to it was correct, as adverse possession cannot confer title beyond its limits. When the charge is read as a whole, as it should be, it is clearly seen that the defendant got the full benefit of his adverse possession in locating the line as he contended it should be. The only issue submitted (without objection) was: "What is the true dividing line between the lands of the plaintiff and those of the defendant?" The question in controversy was whether the line ran from A to B or from A to C. But, notwithstanding the form of the issue, the court allowed the jury to consider the defendant's possession, and his title accruing therefrom, in locating the true line. If it be conceded that the pleadings put the title in issue, they did not do so directly, and even if they did, the defendant has been given the full benefit of his possession. The jury evidently found that the defendant had no such possession as established the line at A C.

[5] The judge was also correct in stating that the testimony of the surveyor as to the true line did not necessarily establish it, but was only evidence of it, and the same is true as to the conduct of the parties with reference to the lane.

There is no error that we can find in the case which warrants a new trial.

No error.

(173 N. C. 696)

GODFREY v. CORPORATION OF ELIZABETH CITY. (No. 15.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

MUNICIPAL CORPORATIONS — 784 — NEGLIGENCE IN MAINTAINING DRAINWAY.

A city's act in maintaining in an unfrequented section then being developed a drainway 15 or 18 inches deep running across a street and covered by a bridge a greater part of the distance cannot alone be held to establish negligence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1636, 1637.]

Appeal from Superior Court, Pasquotank County; Whedbee, Judge.

Action by Mary Godfrey against the Corporation of Elizabeth City. From a judgment of nonsuit, plaintiff appeals. Affirmed.

The action is to recover damages for physical injury caused by the alleged negligence of the defendant in failure to keep one of its streets in proper repair and sufficiently lighted.

W. L. Cohoon and Ward & Thompson, all of Elizabeth City, for appellant. Thos J. Markham, of Elizabeth City, for appellee.

PER CURIAM. We have carefully examined the evidence and are of opinion that, giving it the most favorable construction for the plaintiff, there is no evidence of negligence unless we hold that maintaining a drainway 15 or 18 inches deep, in an unfrequented section of the city, which was then being developed, without further description as to how it is constructed, which runs across the street and is covered by a bridge a greater part of the distance, itself establishes negligence, which we cannot do.

Affirmed.

(173 N. C. 9)

JARVIS v. SWAIN. (No. 20.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

BOUNDARIES — CALLS — BEGINNING CORNER — REVERSING CALL.

Where the beginning corner in a description cannot be located, but the second corner can, the beginning corner may be established from the second corner by reversing the first call, though if the beginning corner is established the lines must be run from it.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 47-57.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by Lucy S. Jarvis against J. D. Swain. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action to try the title to a small piece of land claimed under a common source. The plaintiff claims under a deed calling for defendant's line. The defendant claims under one Latham. The description in the deed to Latham is as follows:

Beginning at a stake ninety-five (95) feet west of H. Ryan's line, and running south twenty (20) feet about two hundred thirty (230) feet to Pantego creek; thence east twenty (20) feet with said creek seventy-five (75) feet to a stake; thence north twenty (20) feet about two hundred thirty (230) feet (or so far that a line running west 20 north 75 feet will strike the beginning); thence west twenty (20) north seventy-five (75) feet to the beginning, containing seventeen thousand two hundred fifty (17,250) square feet, more or less.

The court charged the jury that the burden rested on the plaintiff to locate the line of that deed.

His honor, after reading the Latham deed, further charged the jury, among other things, as follows:

"(Now the plaintiff in this action contends that that stake was an imaginary point, that it is impossible to locate it, that it is no fixed ob-

ject that anybody, that there isn't any object which you could possibly locate, and therefore you ought to go to the next call to ascertain where it is, which is thence south 20 west about 230 feet to Pantego creek. The plaintiff contends that you should go down to Pantego creek, and I charge you as a matter of law that the point called for as Pantego creek is where Pantego creek was on the 1st day of January, 1899; that is, the date of the deed. He says, if you will go to where Pantego creek was in 1899, it would be about 4 feet south of that stump, and that reversing that call and running it would put you about the line X, and that running back to the Ryan line it would be about 95 feet, and he says that ought to satisfy you; that they have shown you evidence that there was a stump situated there about 4 feet from the edge of the water, that they have shown by the plaintiff's son that he sat on that stump and caught crabs, and that there has been erosions, and that that stump was a natural object, and that you ought to go back there and reverse that call, and that would show you where that line was, and that you ought to find it at the point X and not at the post, and running that distance the plaintiff says it will give you 230 feet or approximately 230 feet, and that you ought to find that to be the place, and that it will also run 200 feet in the deed calling from A back to B, and that you ought therefore to locate that line, and that the Latham line is the point X-B.)" To that part of the charge in parenthesis the defendant excepted.

"The defendant, on the other hand, contends that you ought not to so find. First, the defendant contends that you ought to find that at the time this land was sold that a stake was actually stuck there, and that he ran his entire line, and that within a short time thereafter he actually stuck this post one inch inside of the line both ways, upon which he afterwards placed a fence, and that the true line as actually marked out and called for in that deed was from the post to the point Y, and that you ought to find from that evidence that the true location of that line in 1899 and at the date of the deed of 1905 or the deed to Jones, which was further back than that, was at the point, the post P-Y. The defendant further says that even if you should take the river shore and go back and mark from that, that the river shore was not at that time down at the stump, but at the post, and that soon after he got the land he built the breakwater, and that the true line was at the point marked post, and that, if you start at the point marked post and run from that 230 feet back, you will go back to the post up there which he claims is on the line Y, to the post. He contends that you ought to find that he would not have built a breakwater there soon afterwards except within close proximity to the shore to keep his land from washing away, and that you ought to find that the true location of the shore was not down at the stump in 1899, and that you ought to find that the true shore line was at the point marked post just south of the old bulkhead. (How do you find, you cannot say how it was by answering that no, because the burden is on the plaintiff, the burden is to find the actual line as it was run and marked just at that time, don't make any difference who it helps or who it hurts, the burden being upon the plaintiff, if he has satisfied you where it was answer it.)" To that part of the charge in parenthesis the defendant excepted.

"Wherever you begin or wherever you don't begin, your work is to try to locate the line exactly as it was in that deed as made; that is, what you find the line to be in the deed when made. If that fence was on the line that was in actual contemplation of the parties and recognized as such at the time the deed was made, that is the line."

There was a verdict and judgment in favor of the plaintiff, and the defendant appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. John G. Tooley, of Belhaven, and Harry McMullan, of Washington, N. C., for appellee.

ALLEN, J. The determination of the controversy between the plaintiff and the defendant depends on the location of the Latham deed, and this has been found by the jury in accordance with the contention of the plaintiff under instructions free from error.

The principal exception relied on is upon the ground that his honor charged the jury that the proper way to locate the Latham deed was to begin at Pantego creek and reverse the call, but an examination of the record fails to disclose that he so charged. He did state, as one of the contentions of the plaintiff, that as the beginning of the deed was a stake it could be located by measuring from the creek, and he followed this with a full statement of the contentions of the defendant. If, however, he had told the jury that they could begin at the creek as it was when the deed was made and reverse the line to aid them in locating the beginning corner, it would not have been erroneous.

The rule is, in running the calls of a deed, to begin at the beginning corner if it is known or established, and to follow the calls in their regular order, and it is said in *Harry v. Graham*, 18 N. C. 76, 27 Am. Dec. 226, and approved in *Gunter v. Mfg. Co.*, 166 N. C. 166, 81 S. E. 1070, that there is no case in our reports where the court has given its sanction to the correctness of a survey made by reversing the lines from a known beginning corner; but it is equally well established that, if the beginning corner is uncertain and the second corner is known or established, the first line may be reversed in order to find the beginning, and the same rule prevails as to the other corners and lines. *Dobson v. Finley*, 53 N. C. 495; *Norwood v. Crawford*, 114 N. C. 513, 19 S. E. 349; *Clark v. Moore*, 126 N. C. 1, 35 S. E. 125; *Hanstein v. Ferrall*, 149 N. C. 240, 62 S. E. 1070.

In *Dobson v. Finley*, which has been frequently cited and approved, the beginning was at two pines on the south side of a hill, and the second corner was a pine, Thomas Young's corner. The two pines at the beginning had disappeared, and the beginning corner could not be found, but the pine at Young's corner was found and established, and the judge of the superior court permitted the jury to reverse the first line to find the beginning corner. This rule was approved by the Supreme Court, the court saying:

"Supposing the pine to be established as the second corner, could the first, a beginning corner, be located by reversing the course and measuring the distance called for, from the pine back; that is, on the reversed course? His honor ruled that the beginning corner could be fixed in this way. We agree with him. If the second corner is fixed, it is clear, to mathematical certainty, that by reversing the course and measuring the distance you reach the first corner; so there is no question about overruling either course or distance by measuring the line, and the object is to find the corner by observing both course and distance."

This authority is directly in point, except that the facts in this record are more favorable to the contention of the plaintiff than in the *Finley Case*, because here the beginning corner is at a stake, an imaginary point, while in the *Finley Case* it was at two pines.

There is no error.

No error.

(173 N. C. 14)

SEIP et al. v. WRIGHT. (No. 22.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. INJUNCTION \S 163(3) — PRELIMINARY INJUNCTION—CONTINUANCE UNTIL HEARING.

Where preliminary injunction has been granted, and there is a controverted question of fact, and it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff to dissolve it, the court generally will continue the writ until the hearing, at which controverted facts are for the jury.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 359, 360, 367.]

2. EXECUTION \S 75—ISSUANCE—TIME.

Where the parties agreed that judgment might be made up and signed for the term which closed September 8th, and the judgment was in fact signed and recorded on September 29th and 30th, respectively, computation of time for performance began from the last date, and not from the close of the term.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 164—170.]

Appeal from Superior Court, Currituck County; Whedbee, Judge.

Action by John Seip and others against J. O. Wright. Decree for complainants, and defendant appeals. Affirmed.

The former judgment directed that J. O. Wright, plaintiff therein, recover from the Provident Land Company, one of the defendants therein, 75 shares of the original issue of \$150,000 of its capital stock of the par value of \$100 per share, and that defendant deliver the stock to the plaintiff, and in the event that the defendant failed to deliver the stock "within 60 days after final judgment in said case, the plaintiff should recover of the said defendant and its codefendants in that case the sum of \$7,500, the value of the stock as assessed by the jury. Costs were also adjudged against the defendants. By consent of the parties, "the judgment was signed out of the county and out of term, but was to be recorded and filed as of September term, 1916." The court adjourned for the term on

September 8, 1916, and the judgment was signed on September 29, 1916, and sent to the clerk of the court of Currituck county, and was filed by him in the papers in the case on September 30, 1916. It further appears that on November 10, 1916, defendants in that action tendered to the plaintiffs therein certificate of stock No. 55 in the Provident Land Company for 75 shares, valued at \$7,500, which tender was rejected by the plaintiff, I. O. Wright, upon the ground that the tender was not made in time; that is, within 60 days after judgment. This action was then brought by the defendants in that suit to restrain the plaintiff (defendant herein) from proceeding under an execution which the clerk had issued, at his request, upon the judgment in the former case. The court held that as the stock was tendered by the plaintiffs herein, the time of the tender was immaterial, and continued the restraining order to the hearing. Defendant appealed.

Ehringhaus & Small, of Elizabeth City, and Thos. Ruffin, for appellant. Aydlott & Simpson, of Elizabeth City, for appellees.

WALKER, J. (after stating the facts as above). [1] The defendant contended in this court at the hearing that the certificate of stock tendered by the plaintiffs in this suit under the judgment in the other case was not for shares of the original issue of \$150,000, described in the agreement of the parties to the judgment. If this position is open to the defendants, in the present state of the pleadings, proofs, findings, and judgment of the court, we would hold against him, in the absence of further proof showing that it was not a part of that issue of stock, for we think that the proof, as it now stands, tends to show that the stock is of that character. But if there is any doubt of it, the most that we can say for the defendant is that it is a controverted question and one for the jury to decide, upon the evidence, at the final hearing; the usual rule being that in such a case the injunction, if it is the main relief demanded, will be continued to the hearing, when the truth of the matter can be ascertained and justice more certainly and fully administered. Where it will not harm the defendant to continue the injunction, and may cause great injury to the plaintiff if it is dissolved, the court generally will restrain the party until the hearing. *McCorckle v. Brem*, 76 N. C. 407, where serious questions are raised; *Harrington v. Rawls*, 131 N. C. 40, 42 S. E. 461; or where reasonably necessary to protect plaintiff's rights, *Heilig v. Stokes*, 63 N. C. 612. The court said, by Justice Hoke, in *Tlse v. Whitaker*, 144 N. C. 508, 57 S. E. 210:

"It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right; and sufficient to establish it, * * * a preliminary

restraining order will be continued to the hearing." *Hyatt v. De Hart*, 140 N. C. 270, 52 S. E. 781; *Harrington v. Rawls*, 131 N. C. 39, 42 S. E. 461; *Whittaker v. Hill*, 96 N. C. 2, 1 S. E. 639; *Marshall v. Commissioners*, 89 N. C. 103.

If the plaintiff has shown probable cause or it can reasonably be seen that he will be able to make out his case at the final hearing, the injunction will be continued, in another way of stating the rule. *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80; *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796; *Bynum v. Wicker*, 141 N. C. 95, 53 S. E. 478, 115 Am. St. Rep. 675; *Craycroft v. Morehead*, 67 N. C. 422; *Erwin v. Morris*, 137 N. C. 48, 49 S. E. 53. The judge held either that the question was not raised before him as to the character of the stock tendered by the plaintiff in this action, or that it was a part of the original issue of stock. If he did so decide, we would not be disposed to change his ruling upon this record, although we have the power to do so, or to find the facts originally in cases like this one. On a similar question in *Hyatt v. De Hart*, 140 N. C. 270, 52 S. E. 781, the Chief Justice said:

"Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error; and looking into the affidavits in this case we cannot say there was error below. The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will not dissolve the injunction, but will continue it to the hearing"—citing *Marshall v. Commissioners*, 89 N. C. 103.

What we have said here will not prevent the defendant from having this question passed upon at the final hearing, if there is any dispute about the fact.

[2] As to the other matter, we are of the opinion that the time within which the delivery or tender of the stock was required to be made should be counted, at the earliest, from the signing of the judgment. That was plainly the intention of the parties. The provision is that the stock should be issued to the defendant in this action "within 60 days after final judgment," and if not done, he should recover the \$7,500. There was no final judgment until the judge signed it under the agreement of the parties, although it was to be filed and recorded as of September term. This is usually inserted in such judgments, but it was not intended thereby to shorten the time within which the tender could be made. The time elapsing between September 8 and September 29, 1916, cannot be counted against the plaintiffs herein, because there was no judgment during that time, but merely an agreement that a judgment should be entered after the court had adjourned, the terms of which were not even fixed. If the judge had signed the judgment on the sixtieth day after the adjournment there would have

been, under defendant's contention, no time left for the tender, and it cannot be supposed that it was the purpose to destroy the plaintiff's right of tender by the mere fiction of having the judgment filed and recorded as of the term. Besides, the provision for the delivery of the stock was inserted in the judgment signed on September 29, 1916, and it would not be a reasonable view that it was intended to deduct 23 days already past from the 60 days then allowed in the judgment. It was easy to say that the tender should be made within 60 days after the adjournment of court, if that was the agreement, and the other expression was used to indicate that the running time should start from the actual date of signing the judgment instead of the fictitious date by relation to the September term of court. This is the fair and equitable view, we think, and is the natural and reasonable construction of the stipulation in the judgment. The object in having the judgment filed and recorded as of the term was to give it the form of regularity, rather than to curtail the stipulated time for tendering the stock. "The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict, the entry of it being a ministerial act which consists in spreading it upon the record." 23 Cyc. 835. The distinction between the rendition of a final judgment and the recording of it is clearly stated and applied in *Uhe v. Railroad Co.*, 4 S. D. 505, 57 N. W. 484, 489, and in *Blatchford v. Newberry*, 100 Ill. 489. The clause in the judgment under consideration as to the time of delivering the stock refers to the date when the judgment was actually rendered, and not to the date of recording it. It is difficult to conclude that the parties intended otherwise, and that time expired, before the judgment was given, should be counted.

The result is that there was no error in the decision of the court.

Affirmed.

(173 N. C. 23)

ROBERSON-RUFFIN CO. v. SPAIN et al.
(No. 57.)

(Supreme Court of North Carolina. Feb. 21, 1917.).

1. **PRINCIPAL AND SURETY** \S 65—**LIABILITY.**
Under Revisal 1905, \S 2342, both the principal and the surety, if the fact of suretyship does not appear on the face of the note, are primarily liable on the note.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. \S 105.]

2. **BILLS AND NOTES** \S 491 — **BURDEN OF PROOF.**

Where one whose name appeared on a note admitted execution and nonpayment, the burden is upon him to prove any matter in release.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1643-1648.]

3. **PRINCIPAL AND SURETY** \S 106—**RELEASE OF SURETY.**

The mere fact that one suing on a note stated that he would take it up and carry it without fixing a definite time did not prevent him from bringing action at any time, and did not release a surety who did not resort to the remedies afforded by Revisal 1905, \S 2271, 2846.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. \S 211, 212.]

Appeal from Superior Court, Edgecombe County; Whedbee, Judge.

Two actions by the Roberson-Ruffin Company against J. J. Spain and J. E. Bulluck. Judgment for plaintiff, and Bulluck appeals. No error.

G. M. T. Fountain & Son, of Tarboro, for appellant. W. O. Howard, of Tarboro, for appellee.

CLARK, C. J. [1] There were two civil actions on notes respectively for \$275 and \$240, begun in the recorder's court and tried on appeal in the superior court, where by consent the actions were consolidated. These notes were signed by the defendants J. J. Spain and J. E. Bulluck and were executed to Winslow Bros. for certain mules bought of them. The defendant Bulluck signed these notes as surety for Spain, but the suretyship does not appear on the face of the note. The defendant Bulluck contended that said notes were assigned by the payees to the plaintiff in pursuance of a contract between it and the defendant Spain that the notes would be held by the plaintiff until the succeeding fall, such agreement being without the knowledge or consent of the defendant Bulluck. Both Spain and Bulluck are primarily liable on said notes under our Negotiable Instrument Law. Rev. \S 2342; *Rouse v. Wooten*, 140 N. C. 557, 53 S. E. 430, 111 Am. St. Rep. 875, 6 Ann. Cas. 280.

[2] The defendant Bulluck having admitted the execution and nonpayment of the notes, the court correctly held that the burden was upon him to prove any matter in release. The action was brought within three years, and the statute of limitation is not pleaded.

[3] There is no evidence of any act on the part of the plaintiff company which would release the defendant Bulluck from the notes. The defendant Spain testified that the only agreement of the plaintiff was to "take up and carry the note till the fall." There was no evidence of any binding agreement not to sue on the note for any definite period, nor that Bulluck was misled by the plaintiff and was prevented from asserting his rights by a *quia timet* notice under Rev. \S 2846. There was an expression of an intention not to force collection till the fall. There was no payment of interest in advance for a stated time which would have been an implied promise. *Revell v. Thrash*, 132 N. C. 803, 44 S. E. 596. There was no express promise to release Bulluck, and no agreement of extension for a

"fixed and definite" period. The additional security taken by the plaintiff inured to the benefit of Bulluck and could not be to his detriment. On the face of the notes, the defendant Bulluck was primarily liable, and an extension of time to Spain would not release him, in the absence of proof that he was surety. Even if Bulluck was only secondarily liable to the knowledge of the plaintiff, he could be discharged only in one of the ways provided in Rev. § 2270—i. e., by the discharge of the instrument; by the cancellation of his signature by the holder; by the discharge of the principal by the valid tender of payment by the principal; by a release of the principal, without reserving the right of recourse against the surety; or by an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right for enforcement, without the assent of the surety and not reserving the right of recourse against him. The claim of Bulluck is under the last provision, and is not sustained by proof, and the court properly instructed the jury if they believed the evidence to answer the issue in favor of the plaintiff.

The mere fact that the plaintiff stated that he would "take up and carry the notes" without any agreement to do so for a definite and fixed period did not prevent the plaintiff from bringing an action, nor debar the defendant Bulluck from giving a quia timet notice under Rev. § 2846, which was his remedy unless he chose to pay the note himself and sue the principal. Rev. § 2271. The intention thus expressed to "carry the note" was no part of the assignment by Winslow to plaintiff, but the statement of a benign purpose on the part of the assignee towards Spain for no "fixed and definite" period. The witness testified that Ruffin for plaintiff said: "He would let me off until next fall, he reckoned. No distinct time was mentioned."

No error.

(178 N. C. 746)

STATE v. GULLEDGE. (No. 401.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. INDICTMENT AND INFORMATION §110(13) — LANGUAGE OF STATUTE—EMBEZZLEMENT—SUFFICIENCY.

In a prosecution of a bank president for embezzlement, it was not necessary to aver or prove that the property charged to have been embezzled had been committed to the custody of the defendant by the bank, nor to charge any breach of trust or confidence except that which grew out of the relation of the bank and its servant or agent, and a bill of indictment drawn almost in the exact language of the statute was sufficient; it is generally sufficient in an indictment for embezzlement to charge that defendant was prosecutor's agent; that he received the property of his principal by the terms of his employment; that he received it in the course thereof; and that he intentionally and wrongfully converted it to his own use, knowing that it was not his own.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 291-294.]

2. CRIMINAL LAW §798½ — VERDICT ON ITEMS OF BILL OF PARTICULARS — INSTRUCTION.

In a prosecution of a bank president for embezzlement, where a bill of particulars was furnished at defendant's request and for his information as to the items of money and property relied upon by the state, and to prove the embezzlement of which the state proposed to offer evidence, the court properly refused to instruct the jury to render a verdict of guilty or not guilty on each separate item of the bill of particulars, in order that the jury might pass on them separately, and properly refused to have the jury state specifically the items in the bill of particulars on which their verdict was based, since a bill of particulars is not part of an indictment, cannot be substituted therefor, and cannot supply a defect in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1801, 1838.]

3. INDICTMENT AND INFORMATION §121(1) — BILL OF PARTICULARS — DISCRETION OF TRIAL COURT.

The granting of a bill of particulars is within the discretion of the trial court.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 316.]

4. EMBEZZLEMENT §44(1) — CONVICTION — SUPPORT BY EVIDENCE.

In a prosecution of a bank president for embezzlement, it was sufficient to justify conviction if the evidence proved beyond reasonable doubt that defendant embezzled any money belonging to his bank as set forth in the bill of particulars.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67, 70.]

5. EMBEZZLEMENT §44(1) — GUILT — SUFFICIENCY OF EVIDENCE.

In a prosecution of a bank president for embezzlement, evidence held sufficient to sustain verdict of guilty.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67, 70.]

Appeal from Superior Court, Richmond County; Cline, Judge.

John W. Gullledge was convicted of embezzlement, and he appeals. No error.

H. H. McLendon, of Wadesboro, and Attorney General Manning and Assistant Attorney General R. H. Sykes, for the State. Vann & Pratt, of Monroe, for appellant.

BROWN, J. The defendant is indicted for embezzling \$6,500 and other large sums of money, the property of the Southern Savings Bank of Wadesboro, of which he was president. The bill charges that by virtue of his position, and while holding it, the defendant knowingly, willfully, fraudulently, and feloniously, and with intent to cheat and defraud, misapplied and appropriated to his own use the said sums of money. The defendant was convicted by the jury, and moved in arrest of judgment upon the ground that the bill of indictment does not sufficiently charge the offense, in that it does not charge that the money came into the possession of the defendant by virtue of his fiduciary relationship to the bank.

[1] The motion was properly overruled. The bill is drawn in almost the exact lan-

guage of the statute, and is practically the same bill as was passed on by this court in *State v. Wilson*, 101 N. C. 730, 7 S. E. 872, and sustained.

We think the bill does sufficiently aver that the defendant was the president of the bank, and that by virtue of his position received and feloniously appropriated the bank's money. It is not necessary to aver or prove that the property charged to have been embezzled had been committed to the custody of the defendant by the bank, nor to charge any breach of trust or confidence except that which grew out of the relation of the bank and its servant or agent. *State v. Wilson*, supra.

In an indictment for embezzlement it is generally sufficient to charge four averments: First, that the defendant was the agent of the prosecutor; second, that he received the property of his principal by the terms of his employment; third, that he received it in the course of his employment; and, fourth, that he intentionally and wrongfully converted it to his own use, knowing that it was not his own. *State v. Blackley*, 138 N. C. 620, 50 S. E. 310. These elements of the offense of embezzlement have all been charged in the bill, as well as supported by the evidence.

[2] The defendant excepts to the refusal of the court to instruct the jury to render a verdict of guilty or not guilty on each separate item of the bill of particulars in order that the jury might pass on them separately, and to his honor's refusal to have the jury state specifically the items in the bill of particulars upon which their verdict was based.

The ruling of the court was proper. A bill of particulars is not a part of an indictment. In this case it was furnished at the request of the defendant and for his information as to the items of money and property relied upon by the state, and to prove the embezzlement of which the state proposed to offer evidence. A bill of particulars cannot be substituted for a bill of indictment, nor can it supply a defect in the indictment. *State v. Van Pelt*, 136 N. C. 633, 49 S. E. 177, 68 L. R. A. 760, 1 Ann. Cas. 495.

"The object of a bill of particulars is to enable the defendant to properly prepare his defense in cases where the bill of indictment * * * is * * * so indefinite * * * that it does not afford defendant a fair opportunity to procure his witnesses or prepare his defense." *State v. Railroad*, 149 N. C. 508, 62 S. E. 1088.

[3] The granting of a bill of particulars is within the discretion of the trial judge. *State v. Hinton*, 158 N. C. 625, 74 S. E. 104; *State v. Dewey*, 139 N. C. 556, 51 S. E. 937.

[4] It was sufficient to justify a conviction if the evidence proved beyond reasonable doubt that the defendant embezzled any money belonging to the bank, as set forth in the bill of particulars.

[5] The motion to consult the state upon

the ground that there was no sufficient evidence offered to sustain the allegations of the bill was properly denied. The evidence tended to prove that the defendant was the president of the Southern Savings Bank, and that, as such president, he received sums of money and evidences of debt belonging to the bank; that he failed to account for the same, and appropriated the money to his own use.

There is evidence tending to prove that the defendant received and appropriated over \$14,000 in nine different items, set out in the bill of particulars, and submitted by the court to the jury, and that it was the property of the savings bank. There is most abundant evidence that the defendant knew that he was appropriating the funds of the institution of which he was the president, and that he used this money for his own benefit. The facts and circumstances fully justify the court in submitting the question of intent to the jury. He was given the full benefit of the opinion of this court in *State v. McDonald*, 133 N. C. 688, 45 S. E. 582, when his honor instructed the jury that they must find that the defendant intentionally and fraudulently converted this money to his own use.

A careful reading of the evidence must convince any impartial mind that its probative force is amply sufficient to justify the court in submitting the question of the defendant's guilt to the jury, as well as to justify the verdict of guilty which was rendered.

We have examined the exceptions to the evidence and the charge of the court, and we find no error. The case seems to have been carefully tried and submitted to the jury in a very clear and comprehensive charge, which is not only free from error, but very fair and just to the defendant.

No error.

(178 N. C. 696)

RICKS v. ATLANTIC COAST LINE R. CO.
(No. 16.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. NEGLIGENCE \Leftrightarrow 136(14)—QUESTION FOR JURY.

In an action against a railroad for death of a horse from lockjaw, caused by running a nail into its foot on the railroad's premises, question of the road's negligence held for the jury under the evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 303.]

2. DAMAGES \Leftrightarrow 188(3)—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

In such action, evidence held to show that the horse died from the effects of the nail in its foot.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 511.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by J. F. Ricks against the Atlantic Coast Line Railroad Company. From a judg-

ment for plaintiff, defendant appeals. No error.

This is a civil action, tried upon these issues:

(1) Was plaintiff's horse killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) Was plaintiff guilty of contributory negligence, as alleged in the answer? Answer: No.

(3) What damages, if any, is plaintiff entitled to recover of defendant? Answer: \$300.

From the judgment rendered, the defendant appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. Stewart & Bryan, of Washington, N. C., for appellee.

PER CURIAM. The defendant moved for a judgment of nonsuit: First, upon the ground that there is no sufficient evidence of negligence; second, that the negligence was not the proximate cause of the injury.

The evidence tends to prove that the plaintiff drove his double team, consisting of a horse and a mule, upon the premises of the defendant company up to a car for the purpose of unloading fertilizer. His horse stuck a nail in its foot, from which lockjaw ensued, causing its death. The nail was sticking up through a piece of plank under water and could not be seen by the plaintiff.

[1] The mere fact that a horse stuck a nail in its foot upon the premises of the defendant would not be sufficient evidence to hold the defendant guilty of negligence taken by itself, but the evidence in this case tends to prove that there was mud and water over the yard, and trash, and "that the general condition of the yard was bad." We think this evidence entitled the plaintiff to go to the jury, and that the question of negligence was submitted in a proper charge by the court.

[2] We fail to see any force in the contention that the evidence does not indicate necessarily that the horse died from the effects of the nail in its foot. The testimony proves that the horse had lockjaw immediately; that this lockjaw was caused by getting a nail in its foot; that the animal was treated for lockjaw and lived about nine days and died.

We are of opinion that there was no error. No error.

(173 N. C. 734)

STATE v. BURNETTE. (No. 1.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. CRIMINAL LAW §1001—SUSPENSION OF JUDGMENT—CONSENT OF DEFENDANT.

When defendant, on being convicted in the criminal court of the county of Pasquotank of unlawfully importing spirituous liquor and of having in his possession for sale more than one gallon of such liquor, consented to waive his right of appeal, and also consented to suspension of the judgments on the terms and conditions that he should report every three months for a year and show that he had not violated the law, he was bound by his consent thus given,

and the proceedings were regular and valid, and according to established precedents.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559.]

2. HABEAS CORPUS §105—COLLATERAL ATTACK OF PROCEEDINGS.

Where defendant, convicted of violating the law relative to the importation of intoxicants, etc., consented to suspension of sentence on certain conditions, to attack collaterally by writ of habeas corpus the proceedings whereby he was sentenced for violation of the terms of the suspension, defendant must show that the proceedings were absolutely void and of no effect, since a writ of habeas corpus cannot be made to perform the functions of a writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 93, 94.]

3. HABEAS CORPUS §113(12) — PRESUMPTIONS—OFFICIAL ACTS.

If the proceedings of a county court in seizing and sentencing a defendant for violation of the terms on which his sentence was suspended do not appear plainly on their face to be void, the Supreme Court, on appeal in habeas corpus proceedings, should presume that they are valid until the contrary is shown, since, where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114.]

4. CRIMINAL LAW §986 — SUSPENSION OF SENTENCE—ENFORCEMENT FOR VIOLATION OF TERMS—STATUTE.

Under Pub. Laws 1907, c. 180, creating and establishing the criminal court of the county of Pasquotank, presided over by a trial justice, the justice of such court could sentence a defendant for violation of the terms of his suspended sentence only in open court, while the court was regularly sitting for the transaction of its business, and he could not do so privately in his law office.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2510, 2517, 2520.]

5. HABEAS CORPUS §110—RIGHT TO ABSOLUTE DISCHARGE—VIOLATION OF TERMS OF SUSPENSION OF SENTENCE.

Though the proceedings of a county court in sentencing a defendant for violation of the terms of suspension of his sentence were not valid, the fact does not necessarily entitle defendant to absolute discharge on habeas corpus proceedings, as the court may hold him to bail that he may answer the allegation that he has violated his parole or the conditions of his release.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 99.]

6. HABEAS CORPUS §113(3)—APPEAL FROM JUDGMENT OR ORDER.

An appeal does not lie from a judgment or order in a habeas corpus proceeding brought by defendant in custody to inquire into the legality of his having been sentenced for violation of the terms of a suspended sentence.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 104; Appeal and Error, Cent. Dig. § 150.]

7. HABEAS CORPUS §113(12)—REVIEW OF EVIDENCE IN CRIMINAL CASE.

The Supreme Court cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 114; Appeal and Error, Cent. Dig. § 3400.]

Appeal from Superior Court, Pasquotank County; Bond, Judge.

Ed Burnette was convicted of importing intoxicants, etc., and from an order refusing to discharge him in habeas corpus proceedings, he appeals. Case remanded, with directions to proceed in the original case as indicated.

The defendant was charged before the criminal court of Pasquotank county with importing into the state from another state more than one quart of intoxicating liquor, and also with having in his possession a quantity of such liquor in excess of one gallon for the purpose of sale, contrary to the statute. The case was heard by the court, and the defendant was convicted. He was sentenced to work on the public roads in the first case for one month and in the second case for three months. He appealed, and afterwards abandoned his appeal, with the understanding that he should pay a fine of \$200 in the first case, which he did, and that judgment would be suspended in the other case, and he be required to appear on the 1st of April, 1916, and every three months thereafter for one year, and show that he had not violated the law regulating the importation and use of intoxicating liquors. Judgment was suspended accordingly. The following facts were found by the judge and stated in the case: The defendant, when three months were out, started to see the trial justice and to show that he had had no dealings with liquor, when he was met by the said trial justice and told that "it was all right and he could go." The defendant understood from this that he was released from further attending court. On the 1st day of August, 1916, while the defendant was at his work on the streets of Elizabeth City, he was taken into custody by one of the policemen of Elizabeth City and carried into the private law office of the trial justice, who is a practicing attorney in Elizabeth City, and after hearing certain statements of policeman was sentenced to the common jail of Pasquotank county, and in a few minutes was taken to the public roads and there worked with convicts. No testimony was produced of any selling or having for sale any liquor since the judgment was suspended. There was no hearing in court, except as above stated, and the defendant had no counsel to take any steps for his defense. The act creating the criminal court (chapter 180, Public Laws 1907) directs that the court shall be held at the courthouse or at the town hall. Said act is made part of these findings for reference. The defendant had been living in Elizabeth City from the time of his conviction to the time of his arrest, draying on the streets and passing by the policemen of Elizabeth City and the trial justice every day. He had not dealt with liquor from December 18, 1915, to August 1, 1916, so far as any evidence appeared. Nothing more

than enough to create some suspicion on the part of policemen.

The judge refused to discharge the defendant, and the latter appealed, and was released from custody on a bail bond of \$75 conditioned to abide the result of the appeal.

Aydlett & Simpson and C. W. Brown, all of Elizabeth City, for appellant. The Attorney General and Assistant Attorney General Sykes, for the State.

WALKER, J. (after stating the facts as above). [1] The Legislature, by Public Laws 1907, c. 180, created and established the criminal court of the county of Pasquotank, presided over by a trial justice, and gave it jurisdiction of criminal cases therein specified; the offenses charged against the defendant being of the prescribed class. When the defendant, upon his conviction in that court of unlawfully importing spirituous liquor into this state, and of having in his possession for sale more than one gallon of such liquor, consented to waive his right of appeal, and also consented to a suspension of the judgments, upon the terms and conditions stated therein, he was bound by his consent thus given, and the proceedings up to this stage of the case were regular and valid and according to established precedents. *State v. Crook*, 115 N. C. at page 760, 20 S. E. 513, 29 L. R. A. 260; *State v. Everitt*, 164 N. C. 399, 79 S. E. 274, 47 L. R. A. (N. S.) 848; *State v. Hilton*, 151 N. C. 687, 65 S. E. 1011; *State v. Tripp*, 168 N. C. 150, 83 S. E. 680. The matter is so fully considered in those cases that we deem it useless to attempt any further discussion of it. Defendant did not question the power of the court to suspend the judgments in the criminal prosecutions upon the terms imposed, but when he was brought before the justice of the criminal court for the purpose of enforcing the suspended judgments he sued out a writ of habeas corpus and attacked the validity of the sentence upon the ground that there was in law no real investigation of the question as to whether the defendant had violated the terms of the suspension.

[2] If those proceedings were merely irregular or erroneous, they cannot be assailed collaterally by the writ of habeas corpus, and in order to do so defendant must show that they are absolutely void and of no effect in law. *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603. It was there said:

"We cannot decide whether there was any merely erroneous ruling of the court or any irregularities in respect to judgment and procedure, as the writ of habeas corpus can never be made to perform the office of a writ of error or of an appeal. We are confined in our investigation to the question of jurisdiction or power of the judge to proceed as he did, and cannot otherwise pass upon the merits of the controversy. There must have been a want of jurisdiction over the person or the cause or some other matter rendering the proceedings void, as this is the only ground of collateral attack. The law in

this respect has been definitely settled, we believe, by all the courts."

See, also, *Ex parte Terry*, 128 U. S. 289, 9 Sup. Ct. 77, 32 L. Ed. 405; *Ex parte Savin*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; *Rapalje on Contempts*, § 155.

The court held in *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538, that a writ of habeas corpus cannot be made to perform the functions of a writ of error, and "to warrant the discharge of the petitioner, the sentence under which he is held must be, not merely erroneous * * * but absolutely void." In this case, therefore, the range of our inquiry is narrowed to the question of jurisdiction and the legal validity of the sentence in other respects.

[3] If the proceedings were either irregular or erroneous, the remedy is not by habeas corpus, and if they do not appear plainly on their face to be void, we should presume that they are valid, until the contrary is shown, as the principle is that:

"Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favor of their due execution. In these cases the ordinary rule is, 'Omnia presumuntur,' etc., everything is presumed to be rightly and duly performed until the contrary is shown." *Broom's Legal Maxims*, 909.

But while this is the general rule, we must inquire as to the jurisdiction of the court to proceed in the cause, and in doing so here we may properly start from the suspension of the judgment as there is nothing in controversy back of it.

[4] A careful perusal of the statute creating the criminal court of Pasquotank county leads us to the conclusion that the Legislature never intended that important proceedings, such as the one under review in this case, should be conducted by the trial justice (who is merely its presiding officer), except in open court, while the court is regularly sitting for the transaction of its business, and the order for the appearance of the defendant at stated intervals, under the suspended judgments, and his showing that he had obeyed the law as to the possession and transportation of liquor was intended to require his appearance in open court, and it was further the purpose that the investigation should be publicly conducted there, and the proceeding before the trial justice acting privately in his office, was not warranted by the law and was of no effect. It was not without some reluctance that the practice of suspending judgments upon certain conditions was sanctioned, and it was only done because of its being beneficial to the prisoner, and further because his rights may be properly safeguarded. The proceedings to enforce the suspended judgments should therefore be had in open court, where he will have fair and reasonable opportunity, with the aid of counsel, if he desires it, to show that he has not violated the terms of the suspension, and where his other rights may be preserved by a public hearing. The trial justice does not sit as

a committing magistrate to bind the prisoner over to court, but as the presiding officer of the court regularly organized as provided by the statute. He is but an integral part of the court, and in his individual person does not embody its corporate authority. The court must act as a court, and not merely the individual who is appointed by law to preside over it. The defendant was entitled to a public hearing in the court, and this he has not had. There was intimation substantially to this effect in *State v. Tripp*, 168 N. C. at pp. 152, 153, 83 S. E. 631, where it was said:

"The power of a court having jurisdiction to suspend judgment on conviction in a criminal case for determinate periods and for a reasonable length of time has been recognized and upheld in several decisions of our court, as in *State v. Everitt*, 164 N. C. 399 [79 S. E. 274, 47 L. R. A. (N. S.) 848], *State v. Hilton*, 151 N. C. 637 [85 S. E. 1011], *State v. Crook*, 115 N. C. p. 760 [20 S. E. 513, 29 L. R. A. 260], etc., and we see no good reason why it should not be intrusted to the sound discretion of these municipal courts. It may be well to note that, while it has been sanctioned in this state to a somewhat greater extent than it existed at common law, there has been decided intimation given in some of the cases that the practice should not be hastily enlarged, as it may be susceptible of great abuse to the injury of the citizen. Thus in *Hilton's Case* the court said: 'In this state, as shown in *Crook's Case*, supra, the power to suspend judgment and later impose sentence has been somewhat extended in its scope, so as to allow a suspension of judgment on payment of costs, or other reasonable condition, or continuing the prayer for judgment from term to term to afford defendant opportunity to pay the cost or make some compensation to the party injured, to be considered in the final sentence, or requiring him to appear from term to term, and for a reasonable period of time, and offer testimony to show good faith in some promise of reformation or continued obedience to the law. These latter instances of this method of procedure seem to be innovations upon the exercise of the power to suspend judgment as it existed at common law; and while they are well established with us by usage, the practice should not be readily or hastily enlarged or extended to occasions which might result in unusual punishment or unusual methods of administering the criminal law.'

[5] While the proceedings are not valid, this does not necessarily entitle the petitioner to an absolute discharge, as the court may hold him to bail in order that he may answer, in a proper way, the allegation that he has violated his parole or the conditions of his release. It does not appear that he reported to the court at each of the times appointed for his appearance, and showed that he had complied with the conditions of the suspension of judgment. We therefore direct that he give bond in the sum of \$100 for his appearance before the criminal court of Pasquotank county at a time to be fixed by that court for the investigation of the matter, when he may have the benefit of counsel, if desired, and a reasonable opportunity to be heard in his defense, and so that then and there the case may further proceed agreeably to the forms and requirements of the law. If the defendant does not furnish bail as

herein required, the criminal court may issue a warrant or capias to bring him before the court for the purpose of the investigation, giving him reasonable opportunity to be heard by counsel if desired and otherwise respecting his constitutional rights.

[6] An appeal does not lie from a judgment or order in a habeas corpus proceeding like this one, but the Attorney General very properly agreed to waive this irregularity and to treat the appeal as if it were a formal return to a writ of certiorari, which had regularly been issued from this court, upon application therefor by the petitioner. And we have so dealt with it. This course was taken and approved by us in *Ex parte McCown*, 139 N. C. 95, 51 S. E. 957, 2 L. R. A. (N. S.) 603. See, also, *In re Holley*, 154 N. C. 163, 69 S. E. 872; *State v. Dunn*, 159 N. C. 470, 74 S. E. 1014.

[7] As held in the case last cited, we cannot review the evidence or other matters in a criminal case in habeas corpus proceedings, but only the jurisdiction of the court and the validity of the judgment which is attacked, and we have not attempted to do so.

There was error in the ruling of the judge, and the case will be remanded, with directions to proceed in the original case as herein indicated. The state will recover costs in this court to be taxed by the clerk against defendant and his sureties.

Modified.

(173 N. C. 6)

RAWLS et al. v. ATLANTIC COAST LINE R. CO. (No. 19.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. CARRIERS \Leftrightarrow 98—CARRIAGE OF FREIGHT—DAMAGES—NOTICE OF DELIVERY.

A carrier which notified a consignee both by card and in person that the machinery necessary for the operation of his sawmill had arrived and would be delivered shortly, but which never delivered the machinery, is liable for the damages occasioned until the time it notified consignee the machinery could not be found, or at least for a reasonable time for the consignee to conclude that it was not to be found, since the giving of the notice was gross negligence and the consignee could not be expected to order other machinery when he was led to believe that the first would soon be delivered.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 396-426.]

2. CARRIERS \Leftrightarrow 94(4)—CARRIAGE OF FREIGHT—DAMAGES—ELEMENTS.

An action to recover the loss occasioned by the diminished output of plaintiffs' sawmill, and the expense of hiring an extra man because of a carrier's failure to deliver machinery after giving notice of its arrival, is an action for direct tangible damages; not for loss of profits.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 388-395, 456.]

3. JUDGMENT \Leftrightarrow 235—CARRIAGE OF FREIGHT—COPLAINTIFFS—RIGHT TO RECOVER.

The fact that an owner had sold his sawmill on the day he received notice from the carrier that certain necessary machinery had arrived does not prevent recovery, in an action by the former owner and the purchaser, of the

damages occasioned by the failure to deliver the machinery, though the contract of shipment was made by the original owner and the damage was sustained by the purchaser, since the latter can claim as assignee of the former and the carrier would be protected by any recovery against subsequent action by either plaintiff.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 414, 420.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by O. B. Rawls and another against the Atlantic Coast Line Railroad Company. From a judgment for plaintiffs for part of the amount claimed, they appeal. Reversed.

Ward & Grimes, of Washington, N. C., for appellants. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

CLARK, C. J. In September, 1914, the plaintiff Rawls who was engaged in the sawmill business ordered some repairs for his plant from Salem, N. C., which was promptly shipped. He testified that before the break in the machinery which this order was to repair he was cutting 7,000 to 8,000 feet of lumber per day, but after the break he could only get 3,000 feet per day, and was besides at the expense of an extra man to work on the carriage, at the cost of \$1.50 per day. The bill of lading reached the bank of Washington with draft attached, and he paid the same and was notified by the defendant by postal card that the shipment had arrived. On that day or the next he sold out his mill to the other plaintiff Clark, to whom he turned over the bill of lading, and the latter sent down to get the shipment which the defendant had notified them was there. Not getting it, in a few days he went down himself to see the agent and "told him what the stuff was, and why he needed it, and that he could not operate the sawmill without it." The agent said that it was around there somewhere, and he would look it up. After waiting some 30 or 40 days longer, during which time he tried to operate the mill without it, but at considerable loss, both the plaintiffs, Clark and Rawls, went to the agent, who then said that "he could not find the damn stuff, and the plaintiff would have to sue the damn railroad." Clark then at once wired for another shipment.

This action is brought to recover for the loss occasioned by the negligence of the railroad company in notifying the plaintiffs both by card and especially in person that the shipment was there, and for such loss up to the time when on notification the shipment could not be found the plaintiff Clark ordered other repairs to replace that which had been lost.

[1] It was gross negligence in the defendant to notify the plaintiffs, where personal application was made, with notice of the nature of the shipment and its necessity, that the shipment was there and could be found,

and the defendant is liable for the direct loss resulting from such misstatement up to the time it finally notified the plaintiffs that the machinery could not be found. Or at least for a reasonable time after he had been notified that the machinery was there and until he should have come to the conclusion that the information was incorrect. The plaintiffs could not be expected to order new machinery after the notification that it was there until notified that it was not or at least until there had been reasonable time to justify them in ordering new machinery by reason of the nonarrival.

The plaintiff Clark testified that when he called for the shipment he told the defendant's representative "what the stuff was, and what I want with it, and said I could not operate without it. * * * I said there has got to be something done about it; that I have run without that machinery as long as I can." He testified that the agent promised then and afterwards to make diligent search and immediate delivery, and that by reason of that express promise and only on that account he continued to operate the mill in its defective condition until finally he was driven to wire for a new shipment by express.

[2] It was in evidence for the plaintiffs that by reason of the defective condition of the machinery, owing to the lack of these repairs, the daily output of the mill was greatly reduced, and that they were at the expense of an extra man.

This action is brought to recover the cost of the shipment, which the court allowed, and the damages for the diminished output and extra labor, and such other tangible, calculable, and reasonably certain damages as resulted directly from the representation, relied on by Clark, that the shipment had been received and would be delivered, up to the receipt of the substituted shipment. This last item the court instructed the jury to disallow.

The plaintiffs are not seeking to recover the profits which the mill would have made, but the direct, tangible damages under the ruling in *Furniture Co. v. Express Co.*, 148 N. C. 87, 62 S. E. 145, 30 L. R. A. (N. S.) 483 and notes, 128 Am. St. Rep. 588, *Lumber Co. v. Railroad*, 151 N. C. 23, 65 S. E. 460, and *Peanut Co. v. Railroad*, 155 N. C. 148, 71 S. E. 71. The precise measure of damages is not before us because the court below instructed the jury to allow no damages except the value of the shipment with interest thereon and the freight they had paid. In this there was error.

[3] The defendant's brief states that the court so ruled because the plaintiff Rawls could not recover because he had sold out the mill to Clark before the shipment arrived,

and that Clark could not recover for the reason that he had not made the contract with the railroad company.

When, as Cervantes tells us, the illustrious Sancho Panza was governor of Barataria, the following question was submitted to him for judgment: There was a bridge as to which the lord of the river had made a regulation that whoever would pass over the bridge should "upon his oath declare his purpose in crossing it. If he swore truth he could pass on, but if he swore false he should be instantly hanged. One day a certain traveler declared on his oath that he had come to be hanged on the gallows. The predicament was thus presented that if he swore the truth, he could not be hanged, yet if he was not hanged he had not sworn the truth." It is not necessary to give the wise decision then made. The defendant evidently thinks that the plaintiffs are in the same dilemma; that the plaintiff Rawls cannot recover because he did not own the mill when the damage was done; and that the plaintiff Clark cannot recover because he did not make the contract of shipment.

But such predicament does not exist here. The defendant falsely represented to Clark that the machinery was there and thereby delayed him who, as it knew, was then the assignee of the bill of lading and also the owner of the mill, from ordering a new shipment whereby Clark was injured in the operation of the mill.

Clark also testified:

"I knew this stuff had been ordered; knew it would be according to our bargain. I bought the mill with the understanding that the stuff ordered was to be a part of it."

The plaintiff Clark was entitled to recover, as he did, the value of the shipment as assignee of the bill of lading and the freight he had paid thereon, and he was also entitled to recover for the negligence and misrepresentation of the defendant's agent in representing that the shipment was there, and that it would be looked up and delivered him, and the defendant was liable to him for the tangible direct loss sustained by Clark who, relying upon said representation, was induced to delay ordering another shipment of these needed repairs. The defendant by its negligence and misstatement caused damage and loss in the operation of the mill, if the jury believe the evidence. This loss was sustained either by Rawls or Clark, and it is immaterial, so far as the defendant is concerned, which, for both are parties plaintiff, and the judgment will be a protection against any further action, for the damage it has caused.

The court seems to have misconceived the ground of the plaintiff's action and in his instruction to the jury there was error.

(73 N. C. 1)

SWINDELL v. TOWN OF BELHAVEN et al.
(No. 17.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. MUNICIPAL CORPORATIONS \Leftrightarrow 279—PUBLIC DEBT — SUBMISSION TO POPULAR VOTE—“NECESSARY EXPENSES.”

Const. art. 7, § 7, provides that no municipal corporation shall contract any debt, except for “necessary expenses,” unless by majority vote of electors. Pub. Laws 1911, c. 86, § 1, subds. “a” and “b,” authorizes establishment of waterworks, etc., but provides that the debt contracted therefor shall be approved by popular vote. Pub. Laws 1915, c. 131, § 1, provides that, for the purpose of securing money for any purpose involving a necessary expense, the council or other governing body is authorized to issue bonds, etc., while section 2 provides that to secure money for any other municipal purpose bonds may be issued if approved by majority of voters. *Held* that, under the provisions of the Constitution and statutes, the defendant town, there being no restrictions in its charter, had power to issue bonds for the establishment of a system of electric lights, waterworks, and sewerage, without submitting the matter to vote of electors; such expenditure being included within the term “necessary expenses,” and the Laws of 1911 being repealed by the Laws of 1915.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 739.]

For other definitions, see Words and Phrases, First and Second Series, Necessary Expenses.]

2. STATUTES \Leftrightarrow 212—CONSTRUCTION—WORDS—PREVIOUS INTERPRETATION BY COURTS—EFFECT.

It will be presumed that words of a constitutional provision, which have been given a well-defined meaning by the Supreme Court in many unanimous decisions, have the same meaning in a legislative enactment.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 289.]

3. STATUTES \Leftrightarrow 225—CONSTRUCTION—REPUGNANCY.

Where two statutes applicable to the same subject are utterly inconsistent, the latter enactment must prevail to the extent of the inconsistency.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action for injunction by George L. Swindell against the Town of Belhaven and others. Judgment for defendants, and plaintiff appeals. Affirmed.

This action is brought to enjoin the defendant town and its commissioners from issuing \$60,000 in bonds for the establishment of a system of electric lights, waterworks, and sewerage. The defendant town has a population of 3,500 persons, and, according to the findings of the board of commissioners, it has no sufficient light system, so that it is frequently left in total darkness; it has no water supply system in consequence of which its citizens suffer great loss and inconvenience; and the health of its citizens is seriously menaced for want of a sewerage system. It is found that such things are a nec-

essary expense without which the municipality is seriously embarrassed in its health and comfort, as well as greatly retarded in its development.

Upon the final hearing of the restraining order, Whedbee, Judge, on November 23, 1916, rendered the following judgment:

“It is found as a fact by the court that the systems of electric lights, waterworks, and sewerage proposed to be installed in the town of Belhaven by the defendants, in the manner set out in the resolutions of the board of aldermen of the town of Belhaven, are necessary expenses for the said town. It is found as a fact that the bonds, in the sum of \$60,000 proposed to be issued by the defendant town, are to be issued for the purpose of providing the necessary and proper funds for the acquiring and installing the said systems of electric lights, waterworks, and sewerage. It is found as a fact that the present assessed value of real and personal property in the said town of Belhaven is as alleged in the complaint and admitted in the answer, and that the present taxes imposed by the said town are as alleged in the complaint and admitted in the answer. It is found as a fact that the present bonded indebtedness of said town is \$15,000. (It is found as a fact that said town has no floating indebtedness that will not be paid off by taxes now due said town. It is found as a fact that the present population of said town is about 3,500.) It is found as a fact that the issuance of the said \$60,000 of bonds of the said town have been duly and regularly authorized by the board of aldermen of said town, and that the said bonds, when issued in accordance with the resolutions of the defendant town, or board of aldermen thereof, will constitute valid and binding obligations of the said town.”

Thereupon his honor dissolved the restraining order and dismissed the action. Plaintiff appealed.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. John G. Tooley, of Belhaven, and Harry McMullan, of Washington, N. C., for appellees.

BROWN, J. [1] It is contended that there is no constitutional or statutory authority for the issue of the bonds. We think there is both. It is well settled that under article 7, § 7, of the Constitution, counties, cities, and towns and other municipal corporations are given authority to contract debts for the necessary expenses thereof without the sanction of a majority of the qualified voters. That section indirectly, but explicitly, permits the exercise by municipal corporations of the power of making provision for necessary expenses, free from the restraints imposed in other cases. *Conner and Cheshire* on Const. 315; *Gardner v. New Berne*, 98 N. C. 228, 3 S. E. 500; *Jones v. New Berne*, 152 N. C. 64, 67 S. E. 173. It is not necessary to submit the question to the qualified voters. *Smathers v. Com'rs*, 125 N. C. 487, 34 S. E. 554; *Evans v. Com'rs*, 89 N. C. 154; *McKethan v. Com'rs*, 92 N. C. 243; *Swinson v. Mt. Olive*, 147 N. C. 611, 61 S. E. 569. But the section does not confer unlimited power upon municipalities to contract debts ad libitum inde-

pendent of the control of the General Assembly. *Wharton v. Greensboro*, 146 N. C. 356, 59 S. E. 1043; *Burgin v. Smith*, 151 N. C. 561, 66 S. E. 607.

Not only is there constitutional authority for the contemplated issue of bonds, but there is direct legislative sanction. Chapter 131, § 1, of the Public Laws of North Carolina of 1915, provides:

"That for the purpose of securing money for any purpose or purposes involving a necessary expense, including the funding or refunding of obligations theretofore issued for any such purpose, the board of commissioners, council or other governing body of any city or town is hereby authorized to issue bonds of such municipality to such an amount as said board of commissioners, council or other governing body shall by resolution direct, said bonds to be of such form and tenor and denomination, and to bear interest at such rate not exceeding six per centum per annum, and the principal thereof to be payable at such time or times not exceeding thirty years from the date thereof, and such interest and principal to be payable at such place or places within or without this state as said board of commissioners, council or other governing body shall by resolution direct."

There is no requirement that a debt to be contracted for necessary expenses be approved by a majority of the qualified voters. That no such restriction was intended is made perfectly manifest by section 2 of the statute, wherein it is provided that, "in order to secure money for any other municipal purpose or purposes including the funding or refunding of obligations * * * issued * * * for any other municipal purpose," bonds may be issued, provided the issuance be approved by the majority of the qualified voters.

In the charter of Belhaven there are no restrictions upon the power to contract debts for necessary municipal expenses and no requirement that the proposition be approved by the qualified voters. Therefore the principle that where there is a statute of general application throughout the state, and another special to a given locality, passed on the same subject, and the two are necessarily inconsistent, the special statute will prevail, has no application here. *Bramham v. City of Durham*, 171 N. C. 196, 88 S. E. 347.

But it is contended that the words "necessary expense" in the act of 1915 refer only to the current annual expenses of conducting the municipal government and do not embrace such expenditures as those made for electric lights, waterworks, and sewerage; these being mere luxuries. They might have been so regarded many years ago in their incipency, but the luxuries of one generation have become the necessities of another. What would have sufficed for our ancestors would not begin to meet the needs of the twentieth century. These things naturally follow in the wake of an advancing civilization.

[2] This contention of the plaintiff is conclusively answered by the fact that the words "necessary expense" used in the statute of 1915 are identical with those in the

Constitution, art. 7, § 7, and are used in the same connection and in similar purport. These words have been construed and applied by this court in a great many unanimous decisions, and the meaning given to them was well known to the General Assembly. It must be, therefore, conclusively presumed that the words were used as interpreted and applied by this court.

The decisions are too numerous to cite, but may be found in the valuable work of Connor and Cheshire on the Constitution, p. 318. The substance of all of them is to the effect that necessary expenses do not mean expenses incurred for purposes absolutely necessary to the existence of the municipality, and that answers the plaintiff's contention as to the meaning of the statute. Without extended citation, it is proper to note that the very things provided for in the resolution of the board of commissioners have all been declared legitimate necessary expenses of cities and towns. *Waterworks and electric lights: Fawcett v. Mt. Airy*, 134 N. C. 125, 45 S. E. 1029, 63 L. R. A. 870, 101 Am. St. Rep. 825, overruling *Edgerton v. Water Co.*, 126 N. C. 93, 35 S. E. 243, 48 L. R. A. 444; *Mayo v. Washington*, 122 N. C. 5, 29 S. E. 343, 40 L. R. A. 163; *Charlotte v. Shepard*, 120 N. C. 412, 27 S. E. 109; *Thrift v. Elizabeth City*, 122 N. C. 31, 30 S. E. 349, 44 L. R. A. 427; *Davis v. Fremont*, 135 N. C. 538, 47 S. E. 671; *Bain v. Goldsboro*, 164 N. C. 103, 80 S. E. 256. *Waterworks plant and sewerage system: Greensboro v. Scott*, 138 N. C. 181, 50 S. E. 589; *Bradshaw v. High Point*, 151 N. C. 517, 66 S. E. 601; *Underwood v. Asheboro*, 152 N. C. 641, 68 S. E. 147. These decisions have been cited and approved so frequently that they have become a part of the warp and woof of our jurisprudence.

It is further contended that the act of 1911 authorizes the establishment by municipalities of waterworks and sewerage, electric lights, and gas plants, but requires that the debt contracted therefor be approved by popular vote (Pub. Laws 1911, c. 86, § 1, subds. "a" and "b") and that this statute is not repealed or modified by the act of 1915. It is true there is such statute, but the contention that it is not modified by the act of 1915 is untenable.

It is true that the act of 1915 declares:

"This act shall be in addition to any and all other statutes authorizing or permitting the issuance of bonds, and shall not be construed to repeal or supersede any of such statutes."

It is evident that the statutes referred to in the section are those "special statutes" applicable to particular cities and towns, referred to in *Bramham v. Durham*, supra, wherein it is held that such special statutes applicable to a given locality are not repealed by a statute of general application throughout the state solely because the two are inconsistent.

If it was not intended that the act of 1915

should supersede that of 1911, then there was no use in enacting it, for both acts cover exactly the same ground. It is evident that for some good reason the Legislature of 1915 saw fit to eliminate these important municipal necessities, as defined by this court, from the effect of the act of 1911. That act makes no distinction between debts contracted for necessary expenses and those contracted for other purposes. The act of 1915 makes that distinction very plainly. Section 1 provides that bonds may be issued for necessary expenses without approval by a majority of the qualified voters, and fixes rate of interest and the maturity of the bonds. Section 2 provides for issuing bonds for "any other municipal purpose" and requires the proposition to be submitted for approval to the qualified voters.

The contention that the "necessary expense" in the act of 1915 refers only to the current annual expense of running the municipal government is refuted by the fact that the act provides for issuing 30-year bonds for the necessary expenses, and no municipal authorities would issue 30-year bonds to tide over a mere temporary stringency which is generally relieved when the taxes are paid into the treasury. Long-term bonds are issued for permanent and substantial acquisitions, and not to supply mere temporary wants. That the two statutes are utterly inconsistent in their leading features and cannot stand together is manifest from a cursory reading. The act of 1915 draws a distinction between bonds for necessary expenses and those for other purposes, while that of 1911 does not. The act of 1915 provides for bonds the maturity of which must not exceed 30 years, while the limit in the act of 1911 is 50 years. The act of 1915 provides for public advertisement and competitive bidding and that the bonded debt shall not exceed 10 per cent. of assessed valuation of real and personal property. The act of 1911 contains neither of these valuable safeguards.

There are other differences which it is unnecessary to point out.

[3] The two statutes, being utterly inconsistent, cannot stand together. That being so, the last enactment must prevail to the extent that they are repugnant. This is true of acts passed at same session of the General Assembly. *Bramham v. Durham*, supra. But conceding that the two statutes may stand together, then the commissioners of Belhaven could proceed under either statute and the bonds would be valid. The decision we have arrived at, in our opinion, is not only supported by reason and overwhelming authority, but tends to maintain the credit of the municipalities of the state. We have no doubt that many of them have issued bonds for necessary expenses under the authority of the act of 1915, without submitting

the matter to a vote. The authorities that issued the bonds, as well as the purchasers who bought them, had a right to conclude that the words "necessary expenses" meant what we have so often said they did in innumerable decisions of this court. They had a right to rely on these decisions, and to overrule them now would inflict a deadly blow to the credit of all municipal governments in this state.

The judgment is affirmed.

(173 N. C. 748)

STATE v. McGLAMMERY. (No. 497.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. ADULTERY \Leftrightarrow 13—FORNICATION \Leftrightarrow 8—EVIDENCE.

In a prosecution for fornication and adultery, evidence of illicit conduct prior to the two years in question was competent in corroboration.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 28-30; *Fornication*, Cent. Dig. § 6.]

2. ADULTERY \Leftrightarrow 15 — FORNICATION \Leftrightarrow 10 — JURY CASE.

In a prosecution for fornication and adultery, case held for the jury under the evidence.

[Ed. Note.—For other cases, see *Adultery*, Cent. Dig. §§ 34-36; *Fornication*, Cent. Dig. §§ 8, 9.]

3. CRIMINAL LAW \Leftrightarrow 1056(1)—APPEAL—RESERVATION OF GROUNDS OF REVIEW—FAILURE TO REQUEST LIMITATION OF TESTIMONY.

Under rule 27 of the Supreme Court (81 S. E. xi), providing that it is not ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks at the time of admission that its purpose shall be restricted, on appeal in a prosecution for fornication and adultery defendant's exception was not well taken that the judge did not instruct the jury to consider the testimony of illicit conduct prior to the two-year period in question as corroborative only, and not substantive; defendant not having requested the limitation.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2668, 2670.]

Appeal from Superior Court, Wilkes County; Lane, Judge.

Coon McGlammary was convicted of crime, and he appeals. No error.

H. C. Caviness, of Wilkesboro, for appellant. The Attorney General and R. H. Sykes, Asst. Atty. Gen., for the State.

CLARK, C. J. [1] This was an indictment for fornication and adultery. The evidence of illicit conduct prior to the two years was competent in corroboration. *State v. Dukes*, 119 N. C. 782, 25 S. E. 786. The chief question presented is as to the sufficiency of the evidence of illicit acts within two years prior to the finding of the bill. Revisal, § 3147.

[2] The evidence in such cases is rarely direct, and we think there was sufficient to

justify the submission of the case to the jury. It was in evidence that the defendant is a negro, and the codefendant is a white woman, Creola Bullis; that she lived half a mile from McGlammery's mother's house, and that she had had three children, who were all black; the defendant within a year past had pictures of the children made by witness and paid for them and gave them to these children; that he had also paid for taking other pictures of them. Another witness testified that he passed Creola's house one night, and heard some one talking; that he knew Coon McGlammery's voice, and thought that it was him, but will not swear positively that it was; that he heard Creola's little boy say, "Mamma, did he come home drunk?" This was within the two years. The taking of the pictures above detailed was about a year before the trial.

It was further in evidence that the last child of Creola died about a month before the trial, and was born March, 1916, and that all her children were black. Another witness testified that he had seen Creola at the home of Coon McGlammery's mother, and that he had seen them there together in conversation. Another witness testified:

That "all of Creola's children were dark-skinned; that the last one was born about March, 1916; that she had no way that the witness knew of making a living; that he had seen both defendants at Coon's mother's house on Sunday; that Coon was the only colored man in that section or that was seen there."

There was testimony in denial of the charge, but the jury have found upon the above that the defendants were both guilty. The defendant Coon appealed from the judgment. This being the only colored man in that section, and the parties being seen together, taken with corroborative testimony of conduct prior to the two years, was sufficient to submit the case to the jury, in view of the color of the children and the fact that under the laws of this state there could have been no legal marriage between the parties.

[3] The exception of the defendant that the judge did not instruct the jury to consider the testimony prior to the two years as corroborative only, and not substantive, would have been good prior to the amendment of rule 27 of this court (164 N. C. 548, 81 S. E. xi) that it is "not ground of exception that evidence competent for some purposes, but not for all, is admitted generally unless the appellant asks, at the time of admission that its purpose shall be restricted." This rule was adopted in March, 1904, and has been sustained by uniform decisions of this court since that time. *Westfeldt v. Adams*, 135 N. C. 600, 47 S. E. 816; *Hill v. Bean*, 150 N. C. 437, 64 S. E. 212; *Tise v. Thomasville*, 151 N. C. 283, 65 S. E. 1007. Besides the judge did state that it was not substantive evidence.

No error.

STATE v. CLARK. (No. 49.)
(Supreme Court of North Carolina. Feb. 12, 1917.)

1. CRIMINAL LAW §741(1) — VERDICT—SUFFICIENCY OF EVIDENCE.

Evidence which merely shows it to be possible that the fact in issue was as alleged, or which raises only a conjecture that such was the case, is an insufficient foundation for verdict of guilty, and should not be left to the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1705, 1713, 1727, 1728.]

2. ARSON §40—QUESTION FOR JURY.

In a prosecution for arson, case held for the jury under the evidence.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 76.]

Appeal from Superior Court, Edgecombe County; Allen, Judge.

Wesley Clark was convicted of arson, and he appeals. No error.

As the prisoner moved to nonsuit the state, under the statute, upon the ground that there was no evidence of his guilt, it will be necessary to set forth a part of the testimony as given by the state's witnesses, which is as follows:

Nancy Buckner testified:

"I am 60 years of age. Have lived in Tarboro most of my life. Am a widow, my husband having been dead many years. On August 21, 1915, I owned a lot and dwelling house thereon, situated on corner of Water and Trade streets of the town of Tarboro. It was a one-story, three-room frame house, with ell and kitchen behind, and back and front porch, with fence around that portion on Water street, and porch of said house was right on Water street, the sill of which rested on ground. The lots along here dropped to the low grounds of the river, and the back part of the house was on posts or pillars high enough for me to walk under the same; my house fronted on Water street and was on the south side of the same. I kept firewood beneath the back part of the same. I rented two front rooms to Florence Peyton and her grandmother, Lidia Olus, and they, with Florence's child, slept there at nights, but worked out during the day. There had been no fire in the house that day except in the kitchen. I knew prisoner, Wesley Clark. He and his wife were living at that time on Albemarle avenue of the town, above the cotton yard, which is next street west from Trade. East of my house on side of Water street was an open space about 80 feet to next house. Florence Peyton slept in room next to cotton yard. On Saturday morning, August 21, 1915, I saw Wesley Clark in Florence's room. I ordered him out and told him not to come back there any more, and he said that I had nothing to do with his being in Florence's room and Lidia's room, their part of the house. He got mad and was quarreling, and said if he got mad something would be done; that he would belch, and everybody would know it. Told him not to belch in there or he might turn the house over. Appeared like he was mighty mad; said if he got mad every one would know it; that he would go to the electric chair for me. I told him that I would have him put out, and he said he would slay any one who would try to put him out. I told him to get out; I was tired of hearing him run his mouth. He left. This was about 9 o'clock a. m. Saturday, August 21, 1915. I saw Wesley again that night about 8 o'clock. He came up Trade street from river, but did not come nearer than street and did not speak. I

have not seen him since until case was tried to-day. He had been at my house before, and I had ordered him away, but he did not listen to me. That night my house was burned up just before day; think between 3 and 4 a. m. I was in bed, and Florence waked me up; ran outside, and fire was on outside of building next to cotton yard; fire was blazing up outside, and was over in a few minutes. I did not go back to see if fire was on inside; there was so much smoke. Alarm given and fire company came. The house was practically destroyed by flames. Had no insurance; my policy had lapsed. I was at house next morning about 10 o'clock, when Mr. McCabe and Bob Cosby came there. They found a frying pan on sill of the house next to cotton yard and a round box like you buy toilet powder in. We did not know what was in box. The frying pan was not mine; did not smell it; no children about it; don't know how long prisoner has been here; do not know what he does; known him right along. I don't know what he said would happen. Florence Peyton and her grandmother had been living with me two years or longer. Florence was single woman; had one child. No children born to her in my house. Had had quarrels with prisoner before this, but he kept on coming to my house. Wesley brought me a watermelon that Saturday morning."

Bert Shaw testified:

"I am a single woman and do washing. Came home early on morning of August 21, 1915, I think about 3 a. m. I saw Wesley Clark on the railroad in front of my house. The railroad ran along Albemarle avenue, a street of Tarboro. Electric light there, and saw him distinctly. He went and sat down on steps of William Ann Avis. Came home at 3 a. m. that morning from picnic. I was in buggy with two men; did not know them; I was tired, undressed, and went to bed and to sleep. My mother woke me at the sound of the alarm of fire. Don't know exactly what hour; did not get up or go to fire. William Ann Avis and the prisoner and his wife lived in the same house, double house with four rooms on Albemarle avenue. The railroad runs down the avenue. Cotton yard on railroad and in front of the house in which prisoner lived."

William Ann Avis testified:

"On August 21, 1915, I was living in four-room house on Albemarle avenue. I occupied two rooms of the house, and Wesley Clark and his wife occupied the other two. There was a lathed and plastered partition between us. I could hear them talk from my rooms, and they could hear me. I remember I was sick on the night that Nancy Buckner's house was burned and was up most of the night. About 3 a. m. I heard Wesley Clark leave his house, and about five minutes thereafter the fire alarm bell was rung. I called Wesley's wife, and when she came out she was fastening her dress. We went to the fire to Nancy Buckner's house. Wesley was not there. I did not see him, and have not seen him since. I have one bastard child now grown and married. I have no ill or bad feeling against Wesley Clark. The cotton yard was south of my house. Cotton yard was open, and ground path ran across same to Water street. I heard the fire alarm bell 5 minutes after Wesley went out of room. I have been sentenced to the county home for 60 days for cutting my husband and served my time."

Florence Peyton testified:

"I am 21 years old. Work at washing and ironing. Was born in New York. Lived a while at Chapel Hill. Have been here some time. I have had rooms with my grandmother, Lidia Olus, for two years or more at Nancy Buckner's house. Worked out and slept there. I had no fire in or about my room August 21st. There may have been a can of kerosene in my

room. About 9 a. m. that day I was asleep in my room and Wesley Clark woke me up. I asked him what he was doing in my room and I in my nightclothes. He said: 'Can't I talk to you? I have treated you too much like a lady to talk about me to my back to man at the spring.' I told him I had not talked about him to any man anywhere. He quarreled some. He pulled out his knife and drew it across my throat. I told him to cut my throat, and he said he did have a great mind to do it. He then went out of my room, and Nancy Buckner asked him what he was doing in there. He replied that it was none of her business, that he was tired of fooling with Tarboro negroes, and that he was going to belch, and everybody in Tarboro would know it. He said that he would go to the electric chair for Nancy. Nancy told him to get out, and he told her she could not put him out. She said she would send up town and have him put out. He said he would cut any one sent in cracks. He said he 'is all right. I have treated you too nice, and bad luck will follow your tracks.' He told me, 'You treat me wrong, and I would soon fall in hell.' Wesley left after that, and I have not seen him since until the trial. Wesley was never in my room before. There was nothing improper between us. He had never given me any money. I was never afraid of his cutting my throat. He has visited at Nancy's before. The New Year before she had him to come through the hall, and said it would give her good luck. I had no insurance. When I waked up that night my room was full of smoke; saw flames in wall. I aroused Nancy, went out, and fire was outside of house. My room was on the corner next to the cotton yard. The house was burned in a few minutes. There was so much smoke that I could not get back in the house to save anything. The fire occurred just before day; believe between 3 and 4 a. m. Fire company came after the alarm."

Lidia Olus testified:

"I am the grandmother of Florence Peyton, and at the time of the fire had rooms with her at Nancy Buckner's; was cooking for Mr. Savage. About 10 o'clock Saturday morning, August 21, 1915, Wesley Clark came by where I was working and said: 'Old Buck is mad with me; told me to get out of her house.' He said she was a mean negro. I told him not to pay any attention to that. He did not seem mad. I had lived at Nancy Buckner's two years or more, and Wesley Clark frequently visited the house. I worked out as a cook and stayed at Nancy's at night."

Paul McCabe testified:

"I am a member of Tarboro Fire Company and make reports to Raleigh. I was at fire at Nancy Buckner's Sunday morning, August 22, 1915. I was back there at 10 a. m. with Bob Cosby and L. E. Fountain. I found frying pan on sill next to Trade street, and also some burnt cotton under the house. The pan was about ten inches in diameter and two inches deep and would hold two quarts. I smelled oil on the same and on partly burnt bunches of cotton. The cotton appeared to be in balls or as if same had been compressed slightly. There was a train that passed Tarboro for Norfolk, Va., at 4 a. m. at this time. The cotton yard was about a half block away on north side of Water street, northwest from Nancy's house. Behind Nancy's house and along Water street the land sloped sharply to river low grounds, and they are overflowed at high water. Wind might blow cotton from cotton yard to back lots. Fire would burn up kerosene oil, but what I meant to say was that I smelt the odor of burnt oil."

There was other testimony to the effect that cotton could not be blown to place where fire started.

Bob Cosby testified:

"I was present on Sunday a. m. after fire at Nancy Buckner's house with Paul McCabe and L. E. Fountain. Saw the frying pan as described by Mr. McCabe, and saw where it was. It was where McCabe said it was. It had the appearance of being a new one and had never been used before; smelt of burnt oil. There was a train that passed Tarboro going to Norfolk via Hobgood about 4 o'clock in the morning."

P. F. Pulley testified:

"I am chief of police of Tarboro, and, at request of Sheriff Hyatt, I went last March to Norfolk for Wesley Clark. I knew him, and I found him in jail. I spoke to him. At first he did not speak, but later did. The only thing he said to me coming from Norfolk to Tarboro on the railroad cars was that, as the train was near or approaching Hobgood, Wesley looked out of the window and remarked that right along here is where I was at sunrise on the Sunday morning that I am charged with burning Nancy Buckner's house."

There was testimony that the prisoner had worked for Harry Anthony, in Halifax county, and that he walked to Anthony's home from Tarboro the morning on which the fire occurred, arriving there about 10 o'clock a. m. and a day before he was expected. He worked for Anthony for several months and was engaged in ditching. He gave as his reason for coming a day ahead that "he wanted to be on the job in time"; that he had money and could have come by train, but he preferred to walk. He arrived on Sunday.

The prisoner moved for a nonsuit, the motion was denied, and he excepted. There were other rulings to which he took exceptions, but they will be noticed hereafter. He was convicted by the jury and appealed from the sentence of the court.

Jas. M. Norfleet, of Tarboro, for appellant. The Attorney General and R. H. Sykes, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). It will be necessary to consider only one question, as the others are in our opinion, without any substantial merit. The prisoner, at the proper time, moved for a judgment of nonsuit upon the evidence, which the court refused to grant, and properly so, as there were facts and circumstances which tended to show his guilt. The crime of arson is one usually committed with great secrecy, and not infrequently under the cover and concealment of night. The state therefore, in most of the cases, is compelled to rely on circumstantial evidence for a conviction.

The undisputed facts in this case tend very strongly, though not unerringly, to implicate the prisoner as the guilty party. He had made threats against the owner of the house, Nancy Buckner, the day before the burning, which clearly implied that he would take the earliest opportunity to avenge what she had said and done to him. It is true that the threats were general in their character

and did not indicate that his purpose was to burn her house, but they were at least sufficient to show that he had a motive for the act. That the burning was the act of an incendiary appears from the manner in which it was done. The cotton was, no doubt, taken from the adjoining yard, where cotton was to be found, and saturated with oil or kerosene, which would soon start a fire, and this fact accounts for the short interval of time after the prisoner left his house and the fire alarm. The facts that he arose before day, at 3 o'clock in the morning, when there was no good reason for his doing so, and was seen by Bert Shaw on the railroad near the house at that early hour, under suspicious circumstances, and that he was not at the fire, but immediately after it was started he left afoot for another county, without apparently telling his wife or any one else where he was going, and that he stayed away and out of reach of the officers for many months, and was finally found in jail at Norfolk, where he was captured—these and other circumstances, while they may not produce absolute certainty of his guilt, are yet sufficient for the consideration of the jury. We said in *State v. Bridgers*, 172 N. C. —, 89 S. E. 804, at the last term, in a similar case:

"It does not appear that any other person had any motive to commit the crime, or the opportunity, but, on the contrary, the combination of motive, threat, time, place, and circumstance, as detailed by the witnesses, all tend to establish the guilt of the prisoner"—citing *Brown v. State*, 141 Ga. 5, 80 S. E. 320.

See, also, *State v. King*, 162 N. C. 580, 77 S. E. 301; *State v. Barrett*, 151 N. C. 665, 65 S. E. 894; *State v. Thompson*, 97 N. C. 496, 1 S. E. 921; *State v. Gailor*, 71 N. C. 88, 17 Am. Rep. 3.

The facts in this case are not substantially weaker than those in *State v. King*, supra, and *State v. Goings*, 101 N. C. 706, 7 S. E. 900, where convictions were sustained. Here we have the presence of the prisoner at a place very near the house that was burned, at an unusual hour; the occurrence of the fire almost immediately after he was seen; his sudden departure from his home when the alarm of fire was given; his absence for many months; and finally the motive to commit the incendiary act.

[1, 2] We are mindful of the rule that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises only a conjecture that it is so, is an insufficient foundation for a verdict of guilty, and should not be left to the jury (*Byrd v. Express Co.*, 139 N. C. 276, 51 S. E. 851; *State v. Vinson*, 63 N. C. 335), but this evidence is of stronger probative force than conjecture and furnishes a much more substantial basis for a conviction. It was for the jury to pass upon its weight, and they could reasonably infer the prisoner's guilt therefrom. *State v. Lytle*, 117 N. C. 803, 23 S. E. 476; *State v. Carmon*, 145 N. C. 481, 59 S. E. 657; *State*

v. Adams, 138 N. C. 688, 50 S. E. 765; State v. Walker, 149 N. C. 527, 63 S. E. 76; State v. McGlammer, 91 S. E. 371, at this term. These cases, and those already cited, fully sustain the ruling of the court. The evidence in this case is really stronger against the prisoner than it was in some of the cases we rely on where convictions were sustained.

The prisoner's explanation of his sudden departure from Tarboro for Halifax county at 3 o'clock in the morning was not a very credible one. He could have left much later in the day and reached the home of the witness Harry Anthony early in the afternoon of Sunday, the day before Anthony says he was expected by him. After making his threats, it was a singular coincidence that the prisoner should have left Tarboro at the very moment when the fire broke out. But it is not this fact, nor the motive or threats or any other single circumstance, taken singly or by itself, that tends to prove his guilt, but all of the facts, considered as a whole, and in relation to each other, which warranted the jury in deciding the issue against him. There was no reversible error in the other rulings.

No error.

(173 N. C. 21)

GALLOP & FISHER v. NORFOLK SOUTHERN R. CO. et al. (No. 25.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

1. CARRIERS — 187 — CONNECTING CARRIERS — DELAY IN DELIVERY — QUESTION FOR JURY.

In action for damage to shipment of potatoes, where defendant railroad negligently delayed furnishing cars after accepting the goods from a connecting carrier, *held*, that there was evidence to support allegations and motion to nonsuit was properly overruled.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 851, 852.]

2. CARRIERS — 173 — GOODS — DELAY — CONNECTING CARRIER — AUTHORITY TO MAKE THROUGH BILL OF LADING.

Where defendant steamship company issued a through bill of lading, and defendant railway company, the final carrier, accepted goods, the latter, when sued for delay in furnishing cars, cannot object that the initial carrier did not have authority to issue a through bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 760-763, 781-784.]

3. CARRIERS — 176 — INJURY TO GOODS — LIABILITY OF LAST CARRIER.

Where defendant railway company's delay in furnishing cars for transportation of potatoes shipped on through bill of lading of initial carrier caused damage, it was liable therefor; the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, par. 11, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) providing that, while initial carrier shall be liable, this shall not defeat other rights of action.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 766-774.]

4. CARRIERS — 196 — ACTION FOR INJURY TO GOODS — DEFENSE — ILLEGAL RATES.

In action for damages to shipment of potatoes caused by defendant railway company's

delay in furnishing cars, it is no defense that the freight rate was illegally discriminative.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 901.]

Appeal from Superior Court, Pasquotank County; Whedbee, Judge.

Action by Gallop & Fisher against the Norfolk Southern Railroad Company and another. Judgment for plaintiffs, and defendants appeal. No error.

William B. Rodman, of Norfolk, Va., and J. Kenyon Wilson, of Elizabeth City, for appellant Norfolk Southern R. Co. Ehringhaus & Small, of Elizabeth City, for appellant North River Line. Aydlett & Simpson, of Elizabeth City, for appellees.

CLARK, C. J. The plaintiffs residing at Jarvisburg Currituck county, N. C., shipped their produce by the North River Line and the Norfolk Southern Railroad to Northern markets. The North River Line operates its steamers from Jarvisburg and other nearby points to Elizabeth City, where it has a traffic arrangement with the Norfolk Southern to carry the freight brought by said line to Northern markets, sharing in the freight.

In June, 1915, the North River Line, in accordance with this standing arrangement, which began in 1911, delivered at Elizabeth City several hundred barrels of Irish potatoes, which require prompt shipment as the railroad company well knew. On this occasion there was a failure to furnish the cars on application so that the wharves of the defendant railroad company became congested, and the potatoes were left for several days exposed to the sun and weather, causing the plaintiffs serious damage which the jury have found was caused by the negligent delay of the defendant in not furnishing cars and not shipping the potatoes within a reasonable time after they were placed on the wharves of railroad company and notified that the potatoes should be shipped.

[1] There was evidence to support the above facts, and the court properly refused a motion to nonsuit. It appears that 300 barrels were received there in the early morning of June 8th, none of which left Elizabeth City until June 10th; that 300 barrels were received on the 9th and the remainder on the morning of the 10th, and that the defendant railroad could have shipped these in time and avoided the damage to plaintiffs' potatoes, if it had had the cars.

[2] The defendant contends that though the North River Line gave a through bill of lading for these potatoes it had no authority to do so at that time. This defense cannot avail, both because the defendant did accept and ship these potatoes on such through bills of lading, and, further, treating the shipments as delivered on their wharves at Elizabeth City as local shipments from that point, the liability of the defendant railroad

for the delay is the same. The only difference would be as to the rate in such case, or the division of it between the North River Line and the railroad company, as to which no point is made, and which in no wise affects the liability of the railroad company for the damage caused by its negligent delay in shipping. We have examined with care all the exceptions, and do not find that they require any discussion. The only serious question was one of fact, whether there was negligent delay on the part of the defendant in shipping these potatoes after they were placed on their wharves in Elizabeth City and the amount of the damage thereby sustained by the plaintiffs.

[3, 4] The Carmack Amendment provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and it shall be liable to the lawful holder for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass."

The same act further provides that the holder of such receipt or bill of lading shall not be deprived of any remedy or right of action which he had under the existing laws. This question is fully discussed in *Railroad v. Riverside Mills*, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 28, and does not require repetition. The defendant is liable to this action though not the initial carrier.

The point the defendant attempts to raise in this case is decided in *Kissenger v. Fitzgerald*, 152 N. C. 248, 67 S. E. 588, which holds that:

"If a rate of freight on an interstate shipment is forbidden by the United States statutes, this does not render the contract of carriage void, but the forbidden rate may be set aside."

The defendant's contention that if there was an illegal discrimination in the rate it would defeat the shipper from recovering damages for the negligence of the carrier cannot be sustained either on reason or precedent.

No error.

(106 S. C. 401)

DE LEON et al. v. DE LEON et al.
(No. 9615.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. WILLS §630(3) — CONSTRUCTION — VESTED REMAINDERS.

Testatrix's will provided that her estate be equally divided between her children L. C. and I. D. M., wife of F. P. M., the share of I. D. M. being left to H. H. D. and L. C. in trust for her and her heirs forever, to be in no way liable for the debts of her present or any future husband, further providing that should she die without issue, her portion should revert to L. C., if alive, but, if he died before her, her portion to revert to testatrix's single sisters, "the interest to be divided between them until

they all marry, then the principal to be equally divided between my sisters," except \$500 to F. P. M. and \$100 to each of testatrix's three godsons. *Held*, that it was testatrix's intention that the legacies or remainders bequeathed to the single sisters should become vested immediately upon testatrix's death, and that the words "my sisters" had reference to the single sisters, and should be construed in the sense of "my said sisters," such construction giving force and effect to all provisions.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1469.]

2. WILLS §706 — CONSTRUCTION ON APPEAL — PARTIES ENTITLED TO BENEFIT.

Parties to an action to construe a will, who did not appeal from the judgment, are not entitled to any benefit from the Supreme Court's construction of the will on appeal; they having been content to accept the shares accorded them under the will as construed by the circuit court.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1683.]

3. WILLS §706 — ACTION TO CONSTRUER — HARMLESS ERROR—TOO FAVORABLE DECREE.

Appellants, in suit to construe a will, are not entitled to modification or reversal of the decree of the circuit court, which was more favorable to them than the law allowed.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1683.]

Appeal from Common Pleas Circuit Court of Sumter County; S. W. G. Shipp, Judge.

Suit by Edwin W. De Leon and others against Perry M. De Leon and others. From the judgment, defendants appeal. Judgment affirmed.

H. A. Alexander, of Atlanta, Ga., for appellants. I. C. Strauss, of Sumter, for respondents.

GARY, O. J. This appeal involves the construction of a will. Miriam L. Cohen died in 1869, leaving of force her last will and testament, the second clause of which is as follows:

"I desire my estate equally divided between my children, Ludlow Cohen and Isabel D. Moses, wife of F. P. Moses, the share of Isabel D. Moses I leave to H. H. De Leon and Ludlow Cohen, in trust for her and her heirs forever, and to be in no way liable, for the debts of her present, or any future husband, and should she die without issue, then her portion to revert to Ludlow Cohen, should he be alive, but in case he dies before his sister, then her portion to revert to my single sisters, the interest to be divided between them until they all marry, then the principal to be equally divided between my sisters, except the sum of five hundred dollars I leave to F. P. Moses, also one hundred dollars to each of my godsons De Leon Moses, Lawrence Seixas and Harmon De Leon, Jr."

The property in question is personalty. Ludlow Cohen died in 1870, and prior to the death of his sister Isabel D. Moses, who died shortly thereafter, leaving no issue. At the time of her death and the death of the testatrix, there were four unmarried and two married sisters of the testatrix. None of the sisters who were unmarried at that time ever married. All questions of law and fact were referred to the master, who decided that the words "my sisters" meant "all my sisters,"

and that it was the intention of the testatrix to give the property to the married as well as the unmarried sisters, but that the unmarried sisters alone were entitled to the income during spinsterhood. The appellants' attorney contends that the single sisters took life estates; that their right to take in remainder was dependent upon the condition that they married; that inasmuch as the period of division "among my sisters" was fixed at the termination of the particular estate, at which time there could not possibly be in existence any single sister, the words, "among my sisters," necessarily meant "among my married sisters." He concedes that the rights of the appellants are dependent upon the question whether the limitation to the single sisters was a vested or a contingent remainder. And that is the issue which we will proceed to determine.

In a note to *Fearne on Rem.* 552, the rule is thus stated:

"Where a testator bequeathes a legacy to a person, at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit, the court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should in all events, have the principal, and on this ground holds such legacies to be vested. In the late case of *Hanson v. Graham*, 6 Ves. Jr., 239, this doctrine and the cases on it are fully discussed."

Turning to the case of *Hanson v. Graham*, *supra*, we find that the court quotes with approval the following language of Lord Mansfield, in 1 Burr. 228:

"Where an absolute property is given, and a particular interest in the meantime, as until the devisee shall come of age, etc., and when he shall come of age, etc., then to him, etc., the rule is that that shall not operate as a condition precedent, but is a description of the time, when the remainderman is to take in possession."

In a note to the case in 25 *English Ruling Cases*, 609, the annotator thus succinctly and correctly states the other principles, announced in *Hanson v. Graham*, *supra*:

"A gift to a person 'when' he attains a certain age is *prima facie* contingent, but may be controlled by context to convey the intention to postpone payment, and not the vesting. So that, where the testator gave to each of his three grandchildren legacies of a certain sum of consols, 'when they should, respectively, attain their ages of 21 years, or days of marriage (with consent), which should first happen,' and directed the interest of the sums of consols to be laid out at discretion of the executors, for the benefit of his said grandchildren, till they should attain their respective ages, etc., it was decided by Sir William Grant, M. R., that the intention was to postpone the payment merely, and that, although one of the grandchildren died at the age of 9 years, her legacy had vested and went to her personal representative."

In *Booth v. Booth*, 4 Vesey, Jr., 399, the testator, after bequeathing certain specific legacies, gave the residue of his estate to trustees, "upon trust to pay the dividends and produce thereof, as the same should, from time to time, become due, equally between his great nieces Phoebe Booth and Ann Booth, until their respective marriages, and

from and immediately after their respective marriages to assign and transfer their respective moieties or shares thereof unto them respectively." Phoebe died without having married. The question was whether she had the power to dispose of the property by will, which had been given to her by the testator. It was held that the estate given to Phoebe vested immediately, and passed under her will.

In distinguishing that case from *Batsford v. Kebbell*, 3 Vesey, Jr., 363, the Master of the Rolls used this language:

"I think it is equivalent to saying, in trust for them, to pay and dispose of the dividends and interest to them till their respective marriages, and then to assign and transfer the principal; for it is not merely a gift of the interest until marriage, stopping there and after the marriage, a gift of the principal; but it is impossible not to see that these words are equivalent to a gift of the principal. The testator considered it as given. He speaks of it as their shares of the residue. The day of their marriage is the time at which, they are to be put in actual possession of their shares. I cannot construe this otherwise than an absolute gift of the residue, qualified only thus, that until their marriage until when I suppose he thought they would not want it, they would not have the actual possession."

In the case of *Boone v. Sinkler*, 1 Bay, 369, 1 Am. Dec. 622, there was a bequest of a sum of money to the testator's niece, to be paid to her one year after her marriage, and in the meantime to remain in the executor's hands, he paying interest on the same. It was held that the legacy was vested.

In the case of *Mackie v. Alston*, 2 Desaus. 362, the testator devised and bequeathed his residuary estate, both real and personal, to his daughter forever, when she should attain the age of 21 years or day of marriage, whichever should first happen. The court said:

"The words he has used in the will and codicil are so strong as to show that the time the devise was to vest was annexed to the substance of the gift as to leave no room in the mind to doubt of his intention. The words 'when' and 'if' are not to be got over. The daughter was to have the estate 'when' she arrived at the age of 21, or was married. But 'if' she dies before the above-mentioned periods, then the estate is devised over."

It will be observed that in the meantime the income was not given to his daughter. Furthermore the vesting of the estate in the daughter was dependent upon the contingency of her attaining the age of 21 years or marriage; and therefore the time when the estate was to become vested was annexed to the substance of the gift, and not to its subsequent possession.

The appellants' attorney relies strongly on the case of *Cole v. Creyon*, 1 Hill, Eq. 311, 26 Am. Dec. 208, in support of the proposition that the interests of the single sisters were not vested but contingent. In that case the testator had a wife, but no children. He devised and bequeathed his entire estate to his wife for life, and at her death to his nephews and nieces, as follows:

"All the balance of said estate, real and personal, it is my will and desire, that it be equally divided between Henry and Elizabeth Cole's children, and Alexander Creyon, * * * to be retained in the hands of my executors, * * * until the age of twenty-one years, or days of marriage, which shall first happen; then to be made over to them lawfully."

Chancellor Harper, who delivered the opinion of the court, said:

"In the present case, I think it cannot be doubted that the remainder to the defendant Creyon was vested in interest immediately on the death of the testator. Fearn defines the fourth class of contingent remainders to be 'where the person to whom the remainder is limited is not yet ascertained, or not yet in being.' Certainly Alexander Creyon, named in the will, was a person ascertained and in being, and might have disposed of his remainder, or, if he had died during the continuance of the life estate, must have transmitted his interest to his representatives. But who the children of Elizabeth Cole should be at the death of testator's widow was uncertain and unascertained. It might have happened that all the children living at the time of the testator's death had died and others had been born before the termination of the life estate. * * * I think it, however, the more natural import of the words, when the bequest is to children at the death of the tenant for life, that those who then answer the description of children should be meant. * * * According to the construction we have made, one moiety is given to the defendant severally. To this he will be entitled when he attains the age of 21. The other moiety is given to the complainants as a class. This they will be entitled to distribute among the children then in esse, when the eldest shall attain the age of 21."

It will be noted that in the meantime the income was not given to the nephew and nieces, yet the court held that the remainder to Alexander Creyon was vested in interest immediately on the death of the testator, by reason of the fact that he was at that time a person ascertained and in being, and that, although his interest was vested at once, the right to the possession thereof was postponed until he was 21 years of age. The remainders to the children of Elizabeth Cole were held to be contingent, not because of uncertainty in the event, upon which they were to be entitled to their shares, but because, "who the children of Elizabeth Cole should be, at the death of testator's widow, was uncertain and unascertained." There is no such difficulty in the present case, and the same principle that required the court to construe the remainder to Alexander Creyon as vested is applicable to this case. The case of *Cole v. Creyon*, supra, instead of sustaining the argument of the appellants' attorney, is in harmony with the other authorities we have hereinbefore discussed.

[1] Our conclusions are that it was the intention of the testatrix that the legacies bequeathed to the single sisters should become vested immediately upon her death; that the words "my sisters" have reference to the single sisters, and are to be construed in the sense of "my said sisters"; that the forego-

ing construction gives force and effect to all the provisions of the will, whereas any other interpretation would be inconsistent with the intention of the testator.

[2, 3] The parties to the action who did not appeal are not, however, entitled to any benefit from the foregoing construction of the will, for the reason that they were content to accept the shares accorded them under the will as construed by the circuit court, and took no steps to reverse or modify the decree of that court. Nor are the appellants entitled to a modification or reversal of the decree for the reason that it was not prejudicial to their rights, as it was more favorable to them than the law allowed. *Shell v. Young*, 32 S. C. 462, 11 S. E. 299.

Judgment affirmed.

WATTS, FRASER, and GAGE, JJ., concur.

HYDRICK, J., did not hear the argument or participate in the decision of this case.

(106 S. C. 441)

READ v. ATLANTIC COAST LINE R. CO.
et al. (No. 9627.)

(Supreme Court of South Carolina. Feb. 17, 1917.)

CARRIERS ~~§~~381(4) — CARRIAGE OF PASSENGERS—EJECTION OF PASSENGER—TENDER OF FARE—OPPORTUNITY TO PURCHASE TICKET.

Evidence that the ticket office was closed at a time 35 minutes before the train actually departed, without evidence that it remained closed from that time until the departure of the train, is not sufficient to warrant a finding that the plaintiff, in an action for his ejection from the train, had no reasonable opportunity to purchase a ticket before boarding the train.

Appeal from Common Pleas Circuit Court of Berkeley County; R. W. Memminger, Judge.

Action by Frank Read against the Atlantic Coast Line Railroad Company and another. Judgment for the plaintiff against the named defendant, and that defendant appeals. Judgment reversed.

The complaint in the case was as follows:

The plaintiff above named, complaining of the defendants above named, alleges:

(1) That the Atlantic Coast Line Railroad Company is now, and was at the times hereinafter mentioned, a corporation duly organized and chartered by and under the laws of the states of South Carolina, North Carolina, and Virginia, and, as such, owns and operates lines of railroads in the state of South Carolina, having agents and officers therein, in the transaction of business.

(2) That W. W. Blount is now, and was at the times hereinafter mentioned, a citizen of the state of South Carolina, and resides at Charleston in said state.

(3) That Frank Read, the plaintiff above named, is now, and was at the times hereinafter mentioned, a citizen of the state of South Carolina, residing in the county of Berkeley.

(4) That heretofore, on the 10th day of April, 1914, the plaintiff above named presented himself at the ticket office of the defendant above named for the purpose of purchasing a ticket

good for transportation on train No. 79, from Moncks Corner to Otranto. That Otranto is a station on the line of said road, between Moncks Corner and Charleston, S. C. That the plaintiff was unable to secure a ticket when he applied for the same, and that he left the depot and returned in a short while, and that the train was then approaching the station at Moncks Corner, and that he called the attention of W. W. Blount, conductor on said train, to the fact that he had been unable to purchase a ticket and asked for a few moments in which to do so. That he thereupon undertook to purchase from the agent of the defendant company at Moncks Corner a ticket to Otranto, and, while he was in the act of purchasing said ticket, the said conductor gave signal for the train on which he desired to take passage to depart, and he, while the said train was in motion, found it necessary to enter the coach for colored passengers and pass through said coach into the proper coach.

(5) That, as the said train pulled away from Moncks Corner, the plaintiff above named was approached by the conductor of said train, W. W. Blount, who demanded his fare, and that the plaintiff handed to the conductor 40 cents in lawful money, the same being the fare from Moncks Corner to Otranto, and a ticket from Otranto to Charleston, which said ticket was accepted and punched by the said conductor.

And the plaintiff further alleges: That the said conductor, after having accepted the amount hereinabove named and the ticket hereinbefore referred to, demanded the sum of 15 cents, and the plaintiff declined and refused to pay such further fare; the amount which he had already paid being the fare from Moncks Corner to Otranto, and the ticket so presented and accepted from Otranto to Charleston being the necessary fare from Otranto to Charleston. That the plaintiff informed the conductor that he had attempted to purchase a ticket at Moncks Corner, but was unable to do so, as the office was closed, and that he presented himself at the ticket office a reasonable time before the arrival of the train for such purpose.

(6) That the conductor was rude to plaintiff, spoke to him in an angry, discourteous, and abusive manner, and raised his hand as if to strike plaintiff, and informed plaintiff and shouted at plaintiff that, unless he paid the additional 15 cents he would eject and expel him from the train and, without giving to plaintiff an opportunity to explain or discuss the situation, took hold of plaintiff in a rough, rude, and vindictive manner, tearing the clothing of the plaintiff, and jerked him around forcibly and violently, bruised and otherwise ill treated plaintiff, held him up to public scorn, ridicule, and criticism; the coach in which plaintiff was riding being occupied by many passengers, both male and female.

(7) That while plaintiff was being thus dragged around in said passenger coach of the defendant company, by the said conductor, a friend and relative of plaintiff, in order to save plaintiff from further punishment, offered to pay to the said conductor such sum as was demanded for the transportation of plaintiff to his destination, and the said conductor thereupon demanded payment of the further sum of 75 cents (which said sum was in addition to the amount already paid), which said sum of 75 cents was paid by said friend and relative (Joe Goldberg) and accepted by the said conductor; the said sum of 75 cents being the fare from Moncks Corner to Charleston.

(8) That by reason of the negligent, vicious, wanton, willful, and reckless acts of the defendants above named, in ill treating, assaulting, bruising, and humiliating plaintiff on train on which he was a passenger, he has been damaged in the sum of \$25,000.

Wherefore the plaintiff demands judgment

against the defendants in the sum of \$25,000 and costs of this action.

The answer of the Atlantic Coast Line Railroad Company was as follows:

The defendant Atlantic Coast Line Railroad Company, answering the complaint herein, says:

First. It denies each and every allegation contained in the said complaint not hereinafter specifically admitted or denied.

Second. Answering the first paragraph of said complaint, the defendant says that it is a corporation organized and chartered by and under the laws of the state of Virginia.

Third. It admits the allegations contained in the second and third paragraphs.

Fourth. Answering the fourth paragraph, the defendant admits that Moncks Corner and Otranto are stations on defendant's line of railroad; but, on information and belief, denies the remaining allegations of said paragraph.

Fifth. Answering the allegations contained in the fifth paragraph, the defendant says that the plaintiff, at the time mentioned in said paragraph, boarded defendant's train without a ticket and tendered to defendant's conductor, W. W. Blount, a sum of money which was 10 cents less than the legal cash fare from Moncks Corner to Otranto, offering the same for his transportation between said points. And defendant further admits that demand was made by the said conductor upon the plaintiff for the said sum of 10 cents, which demand was refused by the plaintiff. And, upon information and belief, the defendant denies the remaining allegations of said paragraph five.

Sixth. Answering the allegations contained in the sixth, seventh, and eighth paragraphs of the complaint, the defendant denies the same.

And having fully answered said complaint, defendant prays that the same may be dismissed, with costs.

Mordecai & Gadsden & Rutledge and Octavus Cohen, all of Charleston, for appellant. E. J. Dennis, of Moncks Corner, and W. Turner Logan, of Charleston, for respondent.

GARY, C. J. This is an action for actual and punitive damages, alleged to have been sustained by the plaintiff, through the wrongful acts of the defendants, in attempting to eject him, with force and violence, from the train upon which he was riding as a passenger, after he had tendered to the conductor the amount of fare allowed by law. The defendants, in justification of their acts, pleaded that the amount of fare tendered was insufficient, and that only such force was used as was necessary to eject the plaintiff from the train. The facts will more fully appear, by reference to the complaint and answer, which will be reported, except the formal parts thereof. The defendants made a motion for a nonsuit, also for the direction of a verdict; but both motions were refused. The jury rendered a verdict in favor of the plaintiff, against the Atlantic Coast Line Railroad Company, for \$5,000; and it made a motion for a new trial, whereupon the court ordered that a new trial be granted, unless the plaintiff would remit upon the record \$2,500 of the verdict, which remission was accordingly made.

The first question that will be considered

is whether there was any testimony tending to show that the plaintiff was denied a reasonable time, within which to purchase a ticket, by reason of the fact that the ticket office was closed.

The regular time for opening the ticket office was 12:05 o'clock; the train was scheduled to arrive at 12:33 o'clock; on the day in question, the train was delayed and failed to arrive until 12:53 o'clock. The plaintiff testified that he went to the ticket office to buy a ticket, about 35 minutes before the train actually arrived, and that the ticket office was then closed; that the bulletin showed the train was 20 minutes late, and he then had knowledge of such fact; that he returned to his store, which was near by, and did not go again to the station until the train was approaching; and that it was too late to buy a ticket. The plaintiff did not introduce any testimony whatever to show that the ticket office remained closed during any part of the time after he returned to his store and before the arrival of the train.

It is true there was testimony tending to show that the plaintiff went to the ticket office about 35 minutes before the train actually arrived, and that the office was then closed; but this did not tend to show that it remained closed thereafter until the train arrived; and the only reasonable inference from the testimony is that the failure of the plaintiff to buy a ticket was not the direct and proximate result of a wrongful act on the part of the railroad company, but because he did not use due diligence.

The motion for nonsuit should have been granted, and the judgment is, accordingly, reversed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 368)

MOSELEY v. CAROLINA, C. & O. RY. OF SOUTH CAROLINA et al. (No. 9607.)
(Supreme Court of South Carolina. Feb. 10, 1917.)

1. TRIAL \S 193(1)—INSTRUCTIONS—INVASION OF JURY'S PROVINCE.

It was not error for the court to tell the jury that his action in overruling motion for nonsuit was a matter of law, and not a matter from which the jury should draw inferences, where he did not further intimate what their verdict should be.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 436.]

2. TRIAL \S 234(4)—INSTRUCTIONS—INVASION OF JURY'S PROVINCE.

It was not error for the court to charge the jury the various conditions of their findings whereby the plaintiff would be precluded from recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 547.]

3. TRIAL \S 191(8) — INSTRUCTIONS—CHARGE ON FACTS.

In an action by a pedestrian injured at a railway station by a moving train, the instruc-

tion that the statutes require railway companies to ring the bell or blow the whistle continuously for a distance of 500 yards before passing over any public crossing, and, if it fails to do so, the jury could consider such failure on the issue of reckless operation and of punitive damages, was not objectionable as a charge on facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 430.]

4. TRIAL \S 251(8)—INSTRUCTIONS—RESPONSIVENESS TO ISSUES.

But refusal of such instruction was not prejudicial, where the plaintiff failed to allege negligent or reckless operation, since it was then not responsive to the issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 593.]

5. RAILROADS \S 282(13)—INJURY TO PERSON ON TRACK—INSTRUCTIONS.

Where an injured pedestrian in leaving a station walked diagonally across and between and along tracks in the trainyard where trains were constantly passing and was injured, the court sufficiently instructed on the railroad's duty to warn of approaching trains when it said that it was the duty of those in charge of the train to give notice at all points of known or reasonably apprehended danger.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 921.]

6. RAILROADS \S 400(8)—INJURY TO PERSON ON TRACK—DUTY TO WARN OF APPROACHING TRAINS—QUESTION FOR JURY.

It is a question for the jury what duties, if any, a railroad owed a pedestrian who crossed tracks diagonally and walked along and between the rails, and whether it gave such notice as was reasonable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1375.]

7. RAILROADS \S 274(5)—INJURY ON TRACK—NEGLIGENCE.

A railroad may assume that at a passenger station with five tracks on which trains continuously moved in both directions receiving and discharging passengers a pedestrian would take reasonable precaution against the approach of a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 872.]

8. APPEAL AND ERROR \S 1068(4)—HARMLESS ERROR—INSTRUCTIONS—EFFECT OF VERDICT.

Where the jury in an action by a pedestrian for injuries when struck by a train found no damages for plaintiff, a charge on the measure of damages could not in any view be prejudicial to the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Trial, Cent. Dig. § 558.]

Appeal from Common Pleas Circuit Court of Spartanburg County; T. S. Sense, Judge.

Action by Lillie V. Moseley against the Carolina, Clinchfield & Ohio Railway of South Carolina and another. Judgment for defendants, and plaintiff appeals. Affirmed.

The sixth request to charge was as follows:

(6) The statute law of South Carolina requires railway companies to ring the bell or blow the whistle continuously for a distance of 500 yards of trains before passing over any public crossing, and, if a railroad fails to give these signals, the jury would be warranted in considering the omission of the railroad to so give these signals in determining and considering the question of reckless operation of the train so failing to give the signals, and in de-

termining the question of punitive damages. *Mack v. Railway*, 52 S. C. 325, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Mason v. Railway*, 53 S. C. 70, 36 S. E. 440, 53 L. R. A. 913, 79 Am. St. Rep. 826; *Goodwin v. Railway*, 82 S. C. 321, 64 S. E. 242. I refuse to charge you 6. It is a charge on the facts.

The fifth and sixth exceptions referred to are:

(5) In refusing plaintiff's eighth request to charge, which was as follows:

"I charge you, gentlemen, that mental suffering and injury to a person's nervous system resulting directly and proximately from a physical injury, no matter how slight the injury may be, are such elements of damage as should be properly considered by the jury in determining damages. *Mack v. Railway*, 52 S. C. 334 [29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913]."

"I charge you further that you have a right to consider in estimating damages an attack of sudden fright or an exposure to imminent peril in determining damage to the nervous system. It has been held by the Supreme Court of your state in *Mack v. Railway* that a sudden attack of fright or an exposure to imminent peril might render one who was physically strong and vigorous weak and timid. It is for you to apply the facts in this case as you view them. *Mack v. Railway*, 52 S. C. 335, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. I refuse to charge 8, both sections. It is charging on the facts."

(6) That his honor erred in failing to charge the propositions of law contained in plaintiff's fifth, sixth, and eighth requests, in his own language, or to modify the said requests and charge them.

Gwynn & Hannon, of Spartanburg, for appellant. Sanders & De Pass and Jesse W. Boyd, all of Spartanburg, and F. Barron Grier, of Greenwood, for respondents.

WATTS, J. This action for the recovery of damages both actual and punitive for alleged personal injuries sustained by the plaintiff was tried before Judge Sease and a jury at the Spring term of court, 1916, for Spartanburg county, and resulted in a verdict in favor of the defendants. After entry of judgment plaintiff appeals, and by six exceptions alleges error on the part of the circuit court. In a general way the exceptions present the following propositions:

[1] 1. Was it error for the court to tell the jury that the action of the court in overruling the motion for nonsuit was a matter of law, and not a matter from which the jury should draw inferences? This exception is overruled as being without merit. The judge did not in any manner invade the province of the jury, and did not in any manner infringe on their province, and in no manner used any language that made him a participant in the decision of the facts upon which the issue depended. He cautioned the jury as he had a right to do, but he left the whole matter to them to determine upon the issues in the case and find what the facts were and in no manner intimated his opinion on the facts to the jury whose exclusive province it was to decide them.

[2] 2. Was it error for the court to charge the jury the various conditions of their findings whereby the plaintiff would be precluded

from recovery? We see no prejudicial error. The judge charged the legal propositions correctly in his own language and covered the law applicable to the case fully along this line in his own language, as he had the right to do, and the plaintiff could not have been prejudiced as complained of by this sound doctrine announced by the judge, and this exception is overruled.

[3, 4] 3. Was it error for the court to refuse to charge that the jury should consider, in determining whether they would award punitive damages, the facts, if established as facts in the case, that the city speed ordinance was being violated and the statutory signals were not given? (Third and fourth exceptions.) The judge did charge that a violation of the city ordinance was negligence per se. He was in error in refusing the plaintiff's sixth request. He refused it on the ground that it was a charge on the facts. It was not a charge on the facts, but embodied a sound proposition of law as laid down by this court, but, while it was a sound proposition of law, it was not prejudicial in this case. It was not responsive to the allegations of the complaint. There was no allegation on the part of the plaintiff of the negligent and reckless operation of the train. There was no allegation of failure to properly operate the train. The undisputed facts in the case show that the plaintiff was not struck at a public highway or traveled place within the statutes, but in the yards of the passenger station and sheds at Spartanburg, S. C. She had gone to the station to meet her sister, who was to arrive on the train from Greenville. The train arrived and left. Her sister did not come. She left the station and walked towards Magnolia street under the shed (a perfectly safe place). She continued walking under the shed until the Columbia train passed Magnolia street. She then turned and started diagonally across three tracks towards the far corner of the intersection of the third track with the crossing. She crossed the two first tracks, and she saw two trucks, one stationary and one in motion, coming towards her. She then got on the third track and walked on it in the middle of it. She took a few steps and saw the Carolina, Clinchfield & Ohio Railway train backing in, a short distance from her. She turned towards the Union Station to get off of the track, and while in the act of getting off was struck and knocked off by the rear coach of the backing train and knocked down. The evidence shows that the train that struck her was moving at the rate of from 4 to 6 miles an hour until it got within 8 or 10 feet of her, when the emergency brakes were applied, and it stopped within 10 or 12 feet after striking her.

[5] Under the facts in the case, when the judge charged the plaintiff's second request, which was, "It is the duty of those in charge of a train to give notice at all points of

known or reasonably apprehended danger," then he covered the law applicable to the facts of the case.

[6] The defendant was in the due course of the operations of its trains as the necessities of its business required, moving the engines and cars in the yard of the passenger Union Station for the purpose of receiving and discharging passengers, and it was for the jury to determine what duties, if any, under the circumstances, it owed the plaintiff, and whether or not it gave such notice at the point of injury as was reasonable.

[7] The defendant had the right to assume that at a passenger station with five tracks, trains coming in both ways continuously receiving and discharging passengers, a person would take reasonable precaution against the approach; yet the plaintiff gets, not between, but on, the track, knowing there was a continuous recurring movement of cars, without taking a reasonable precaution to guard herself against their approach. If she had remained at walking under the shed she would have been safe. Had she have crossed the tracks straight instead of diagonally, had she walked between the tracks instead of in the middle of the tracks, she would have escaped injury. The train was backing so slowly that any ordinary care on the part of the plaintiff would have enabled her to know the train was coming and to have stepped to place of safety.

Under the charge of his honor it was properly left to the jury to say under all of the circumstances of the case if any signal should be given at the place of the injury, to wit, in the yards of the passenger depot of the defendants.

[8] As to the fifth and sixth requests which complain of error as to the measure of damages the jury found no damages, and the charge of the judge as to the measure of damages could not in any view of the case be prejudicial to the plaintiff.

A careful examination of the whole record satisfies us that the verdict in the case is such that any fair-minded jury would find, and we do not see that any such error has been committed as was prejudicial to the plaintiff so as to warrant a reversal and grant a new trial.

All exceptions overruled.
Judgment affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 437)

STATE v. WILEY. (No. 9628.)
(Supreme Court of South Carolina. Feb. 17, 1917.)

1. CRIMINAL LAW §1172(1) — APPEAL — HARMLESS ERROR—INSTRUCTIONS.

Where counsel for accused admitted that he failed to detect the errors in the court's charge when it was read, but only discovered them af-

ter carefully examining the written charge furnished by the stenographer, the errors were harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154.]

2. CRIMINAL LAW §941(2)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — "CUMULATIVE EVIDENCE."

Newly discovered evidence, in a prosecution for murder, which would corroborate defendant's testimony, that deceased was armed and that he called defendant to the place of the difficulty instead of defendant following him, is not "cumulative," where defendant's testimony alone contradicted that offered by the state on those issues, augmenting or giving force to the evidence or increasing it by successive additions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2329.

For other definitions, see Words and Phrases, First and Second Series, Cumulative Evidence.]

3. CRIMINAL LAW §939(3) — NEW TRIAL — NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Lack of diligence by accused in securing the testimony at the former trial of witnesses present in court at that time is not shown, where he did not know that the witnesses were present at the difficulty, or had any personal knowledge of it, where the witnesses were white men and the defendant colored.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2319.]

4. CRIMINAL LAW §938(1)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — MATERIALITY.

In a prosecution for murder, where defendant's testimony alone contradicted evidence by the state that deceased was unarmed and that defendant followed him to the scene of the difficulty, newly discovered evidence of other witnesses corroborating defendant's testimony is material and would probably change the result.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317.]

Appeal from General Sessions Circuit Court of Union County; H. F. Rice, Judge.

George Wiley was convicted of manslaughter, and he appeals from the judgment of conviction and from refusal of his motion for new trial. Order denying new trial reversed, and new trial granted.

Macbeth Young, of Union, for appellant.
A. E. Hill, Sol., of Spartanburg, and John K. Hamblin, of Union, for the State.

WATTS, J. The defendant, George Wiley, was tried for murder at the February term of court, 1915, before Judge Smith and a jury, and found guilty of manslaughter and sentenced to serve a sentence of eight years at hard labor. Later a motion for a new trial was made before Judge Rice on the grounds of after-discovered evidence. This motion was refused and appeal taken to this court, the first being on exceptions made from the charge of Judge Smith, and the other from the order of Judge Rice refusing the motion for a new trial on after-discovered evidence.

As to the exceptions to the first appeal: They are three in number. At the hearing before this court, the first exception was

abandoned. The other exceptions must be overruled as being without merit and technical.

[1] The appellant's counsel frankly admitted at the hearing on appeal that he paid particular attention to the trial judge's charge at the hearing in the circuit court and failed at that time to detect any error in it and only concluded later, after carefully examining the charge when furnished by the stenographer with it, that there was error, and thereupon filed the exceptions relied on in here. This convinces us that there was no such error as was prejudicial to the defendant. If the distinguished counsel of appellant failed to detect any error, then the jury could not have been misled by the judge's charge to such an extent as to have prejudiced the defendant, and, while the charge was not strictly in accord with the principles laid down, it was harmless and in no wise prejudicial in the case, and these exceptions are overruled.

As to the exceptions to Judge Rice's order refusing the motion for a new trial, Judge Rice's order finds as to the evidence presented: (1) That the evidence is material. (2) That it could not with reasonable diligence have been obtained in time to present at the trial is doubtful, and that it was fatally defective in the third and fourth particulars which were: (3) It must not be merely cumulative. (4) Must be such that, if it had been presented at the trial, it would in all probability have changed the result, and secured the acquittal of the defendant.

[2] We think his honor was in error in finding that the evidence offered was merely cumulative. It was more than merely cumulative; it gives more testimony from disinterested witnesses and throws light on and elucidates the points at issue. "Cumulative evidence" is "augmenting or giving force" to the evidence or "increasing it by successive additions." The proposed new evidence was to contradict the state's evidence that the deceased was unarmed, and that defendant followed him, having previous to that time made threats against him, and to show that the deceased was armed, and that the defendant did not follow him, but was called by the deceased before defendant went where deceased was; that defendant made no threats. All the new evidence was in derogation of the state's testimony, and, under all facts and circumstances developed in the case, due diligence was exercised by the defendant and his counsel; the evidence was material, in that it corroborated the evidence of the defendant, who was the only witness in his behalf, who testified on the part of the defense as to the actual facts at the occurrence when the deceased was killed.

[3] The new evidence offered could not have been ascertained by the defendant or his counsel. The defendant did not know

that the witnesses, who now come forward, were present at the scene of the difficulty and eyewitnesses thereto within sight and hearing, and had no reason to believe, even when they were in court, that they were there other than as character witnesses. Davis and Mobley were white men, the defendant a humble colored man; and it would have been in poor taste for defendant or his counsel to have sought them out and inquired of them what they were there to testify to. They say they were on the premises where the homicide occurred and did what they could to suppress and conceal that fact. The defendant did not know they were there and had no reason to think or suspect that they were cognizant of any facts that took place that night, and no doubt, when they informed his counsel of what they knew, it was a great surprise both to the defendant and his counsel.

[4] We think the evidence offered was newly discovered material and would probably have changed the result of the trial, and not merely "cumulative," and we think his honor was in error in refusing the motion because the alleged newly discovered evidence was merely cumulative. The evidence offered as newly discovered is so directly applicable to the points at issue in the case, in that it gives more testimony and throws light and elucidates just how the killing took place, the condition of the parties, who was armed and who was not, who brought on the difficulty, and the mental attitude of the parties to each other, and whether or not there was a frame-up on the part of the state's witnesses to convict the defendant, that in our opinion it would amount to a denial of justice not to grant a new trial and allow the case to be retried in order that both the state and defendant get the benefit of the newly discovered evidence and arrive at a verdict with all the facts before them.

We think his honor's finding that the particulars mentioned in the third and fourth paragraphs are fatally defective should be reversed, and a new trial ordered.

New trial granted.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 279)

STATE v. GRICE. (No. 9578.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

CRIMINAL LAW — 775(3) — DEFENSE — ALIBI — INSTRUCTION.

In a prosecution for sale of liquor, in which the accused set up an alibi, instructions that, "The sole question for your determination is whether or not the accused sold one-half pint of whisky to * * * as alleged in this bill of indictment," and "take along with you the sole issue in the case, give the defendant the benefit of every reasonable doubt," and that if defendant was not at the place where he is alleged

to have sold the whisky, he could not have committed the crime, gave full effect to the defendant's alibi, since the alibi was merely the means of disproving the charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1834.]

Appeal from General Sessions Circuit Court of Richland County; Mendel L. Smith, Judge.

J. N. Grice was convicted of selling liquor, and he appeals. Affirmed.

A. W. Holman, of Columbia, for appellant. W. Hampton Cobb, Sol., of Columbia, for the State.

FRASER, J. The appellant was indicted for selling liquor. He pleaded not guilty and set up an alibi. His honor said to the jury:

"So go to your room; take along with you the sole issue in the case; give the defendant the benefit of every reasonable doubt."

The appellant contends that this prevented the jury from considering the alibi. This is the only question raised in this case. At another place in the charge, Judge Smith said:

"The sole question for your determination is whether or not the accused sold one-half pint of whisky to one J. F. Hinton, as alleged in this bill of indictment."

That was an accurate statement. The alibi was merely a means of disproving the charge. He told the jury that if the defendant was not at the place where he is alleged to have sold the whisky, he could not have committed the crime. Full effect was given to the alibi.

The exception is overruled, and the judgment is affirmed.

(79 W. Va. 528)

ALKIRE v. ALKIRE ORCHARD CO. (No. 3152.)

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §8(3) — EMPLOYMENT CONTRACT—TERMINATION.

A contract for work and labor which provides for a monthly salary to be paid by one party to the other and does not specify any term of employment, may be terminated at the end of any month by either of the parties thereto.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 10, 17.]

2. FRAUDS, STATUTE OF §53—EMPLOYMENT CONTRACT—TERM.

A contract of employment for one year, the term of such employment to begin at a date in the future, is such a contract as cannot be performed within a year, and to be binding under the provisions of section 1 of chapter 98 of the Code of 1913 (sec. 4171) must be evidenced by a writing signed by the party to be charged thereby, or his agent.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 69, 80, 92.]

3. FRAUDS, STATUTE OF §152(1)—JUSTICES OF THE PEACE—PLEADING.

In an action brought before a justice of the peace the statute of frauds need not be specially pleaded, but may be proven in defense of

such suit under an answer denying the plaintiff's right to recover.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 363, 364, 371, 372.]

4. WORK AND LABOR §28(1) — ACTION FOR COMPENSATION—BURDEN OF PROOF.

In order to a recovery for work and labor performed upon a quantum meruit, the party seeking such recovery must show that such work and labor was performed under such circumstances as will imply a contract to pay for the same, and must further show the extent and amount of such work and labor performed by him, and the reasonable value thereof.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. § 55.]

Error to Circuit Court, Mineral County.

Action by C. J. Alkire against the Alkire Orchard Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. H. Griffith, of Keyser, for plaintiff in error. Taylor Morrison, of Keyser, for defendant in error.

RITZ, J. In the year 1907 the defendant, Alkire Orchard Company, was formed. The plaintiff was active in the organization of this company. He was interested in it as a stockholder, and at its organization he was made its manager at a salary of \$50 a month. He continued to be its manager under an appointment from the board of directors from the time of its organization until the fall of 1912. His salary as manager had been increased from time to time, but in the fall of 1912 he conceived the idea that he was not being paid sufficient compensation for his services. The defendant company's board of directors would not agree with him at that time as to the amount of salary he should receive, and he left the service of the company. However, in March, 1913, the board of directors of the defendant company passed a resolution in the following words:

"On motion of Mr. J. H. Markwood, R. A. Welch was instructed to prepare a contract with Mr. C. J. Alkire, which was as follows: This agreement entered into this the 6th day of March, 1913, between the Alkire Orchard Co., a corporation of the first part and C. J. Alkire of the second part, witnesseth that the said party of the first part agrees to employ the said C. J. Alkire as manager of its orchards near Keyser at a salary of one hundred dollars per month, said salary to begin when said C. J. Alkire commences work. The said C. J. Alkire is to be under the direction and control of the directors of said company and to perform only such labor and expend such money as the said directors may instruct. The said party of the first part is to furnish feed for one horse for the said manager. In consideration of the above the said C. J. Alkire agrees to give his entire time to the management of the orchards of the party of the first part and to perform such labor and expend only such money as said directors may instruct him to expend and perform. In witness whereof the said party of the first part has caused this instrument to be signed by its president and attested by its secretary and its corporate seal to be affixed and the said C. J. Alkire has signed and sealed the same. On motion it was ordered that the secretary be instructed to employ a manager for the upper orchard and one for the lower orchard providing C. J.

Alkire does not accept the offer made to him this day by the company."

It will be observed that this resolution embodies a proposed contract to be entered into between the plaintiff and the defendant, by which the defendant again proposed to employ the plaintiff as its manager, at a salary of \$100 per month. This contract was never formally executed by the parties, but immediately upon the passage of this order by the board of directors of the company the plaintiff accepted the employment in accordance with the terms of this resolution and the proposed contract embodied in it, and entered upon such employment. During the remainder of the year 1913 he was regularly paid \$100 for each month of said year. The board of directors of said company on the 20th of January, 1914, passed a resolution as follows:

"On motion C. J. Alkire was made manager of the company at the same salary as last year."

Under this resolution the plaintiff continued in the service of the company, and was paid his salary regularly each month until December, 1914, when the board of directors, at a meeting at which the plaintiff was present, passed the following resolution:

"On motion it was ordered that from this date all work on the orchard be discontinued and that only Roy Simmons be employed to look after the orchard."

Defendant contends that under the resolution adopted by the board of directors in December, 1914, plaintiff's employment with it ceased at that time. Plaintiff contends, however, that under the contract, as shown by the minutes passed by the board of directors in March, 1913, he was employed for one year from the 1st day of March, 1913, to the 1st day of March, 1914, and that the resolution passed on the 20th day of January, 1914, had the effect of employing him for another year from the expiration of his first employment. Plaintiff admits that his only contract of employment with the defendant company for the year beginning March, 1913, is that embraced in the minute above quoted, and that he went to work under the arrangement therein stated without any other contract or agreement with the defendant company. The defendant refused to pay the plaintiff any salary for the months of January and February, 1915, which he claims was covered by his contract of employment. He brought his suit to recover salary for these two months at the rate of \$100 per month. Upon a trial of the case in the court below the defendant demurred to the evidence, and the court rendered judgment for the defendant upon such demurrer, and from this judgment this writ of error is prosecuted.

[1] Can the plaintiff claim a contract for one year under the arrangement set out in the minutes of the board of directors above referred to? It will be observed that the proposal made by the defendant company to the plaintiff under which he accepted em-

ployment in March, 1913, does not provide for the continuance of such employment for any particular time, but simply provides for his employment as manager at a salary of \$100 per month. He does not contend that at this time there was any understanding other than that expressed in the minutes of the board of directors above set out. From this it is quite clear that his employment was simply a monthly employment, and could be terminated at the end of any month, either by himself or by the defendant. Elliott on Contracts, § 176; Tubbs v. Cummings Co., 200 Mass. 555, 86 N. E. 921; Nichols v. Coolahan, 10 Metc. (Mass.) 449; Moss v. Decatur Land Improvement & Furnace Co., 93 Ala. 269, 9 South. 188, 30 Am. St. Rep. 55; Crone-millar v. Duluth-Superior Milling Co., 134 Wis. 248, 114 N. W. 432.

[2] He says, however, that in January, 1914, when the resolution above quoted was passed, retaining him as manager at the same salary as last year, there was an agreement with the board of directors that the employment under this resolution would commence on the 1st of March, 1914, and continue until the 1st of March, 1915. On the demurrer to the evidence we must take this statement as true, notwithstanding it is controverted. The defendant, however, says that, even if he did have such verbal contract with the directors of the company, the same cannot be enforced because of that provision of the statute of frauds which requires that any contract not to be performed within a year shall be in writing. Code, c. 98 (sec. 4171). The plaintiff's proof in regard to his verbal contract of employment is that it was made on the 20th day of January with the directors of the company at a meeting held on that day; that it provided for his employment as general manager of the company at a salary of \$100 per month, beginning on the 1st of March, 1914, and ending March 1, 1915. Is this agreement such an one as is required to be in writing by the provisions of section 1 of chapter 98 of the Code? It will be seen that while this contract was for a year's employment, still it was not to be performed within one year from the day it was made, because of the fact that the employment thereunder would not begin until some time after the making of the contract, thus extending the period of its completion beyond the period of one year from its making.

In *Lee v. Hill*, 87 Va. 497, 12 S. E. 1052, 24 Am. St. Rep. 666, a parol contract for personal services, made in August for the term of one year, to begin on the 1st day of the ensuing October, is held to be a contract not capable of being fully performed within a year, and hence not enforceable because not in writing.

In the case of *Parkersburg Mill Co. v. Ohio River Railroad Co.*, 50 W. Va. 94, 40 S. E. 328, a contract, providing for the carriage

by the defendant company of certain freights for one year at a certain rate, was in question. It appeared that the contract was made on the 10th of December, 1899, and provided for the carriage of all freights of the plaintiff of a certain class for the year beginning January 1, 1900, at a certain rate. The defendant refused to perform the contract, and charged a higher rate than that agreed upon. Upon a suit brought by the defendant to recover the excess charged the court held that the contract, having been made on the 10th of December, and the performance thereof not to be completed until the 31st of December of the following year, was not such a contract as could be performed within one year. The law is thus stated in the syllabus:

"A verbal agreement of which there is no note or memorandum in writing signed by the agent or party to be charged thereby and which is not to be fully performed within one year from and including the date of its making, comes within the inhibitions of the statute of frauds, and cannot be enforced by actions at law."

See, also, *Kimmins v. Oldham*, 27 W. Va. 258; *Miller v. Wisener*, 45 W. Va. 59, 30 S. E. 237; *Reckley v. Zenn*, 74 W. Va. 44, 81 S. E. 565; *McClanahan v. Coal & Mining Co.*, 74 W. Va. 543, 82 S. E. 752; 20 Cyc. 206; 29 Am. & Eng. Enc. of Law, 943.

The plaintiff, however, says that, even though the verbal contract relied upon by him is such as is required to be in writing under the provisions of the statute of frauds, the defendant, in order to take advantage of this statute, must specially plead it. This contention is answered by the case of *McClanahan v. Coal & Mining Co.*, supra. In that case it was held that the statute of frauds need not be specially pleaded, but may be relied upon under the general issue of non assumpsit. This being an action originating before a justice, certainly no greater particularity in pleading is required than is required in actions of assumpsit begun in the circuit court.

[3] Plaintiff contends that the statute of frauds relied upon by the defendant has no application to his contract, because of the minute made by the board of directors on the 20th of January showing his employment. Even if a minute of the board of directors of a corporation is such a memorandum in writing as will relieve against the statute of frauds (and upon this question we express no opinion), still the minute relied upon by the plaintiff for the purpose cannot have that effect. It is not a memorandum of any such contract as he sets up, but is a memorandum of a contract similar to the contract had with plaintiff in the previous year, which, as we have before seen, was a contract of employment by the month.

[4] Plaintiff further contends that, even though his employment had been terminated by the board of directors, and he was not employed under a contract during the months

of January and February, 1915, he should be allowed to recover for services which he actually performed for the company during those months. He says that he did some work for the company during those months in the way of moving some dead trees and straightening up around the orchard of the defendant. The extent of this work performed by him does not appear, nor is there any evidence whatever as to its value, nor can it be said that he did this work with the tacit approval of the board of directors of the defendant company, or under such circumstances as would imply a promise to pay for it, in the face of the resolution adopted by that board in December, 1914. Before the plaintiff can recover on the quantum meruit, it is necessary for him to show that he performed the services for the defendant under such circumstances as will raise the implication of a promise to pay for them. He would have to show the extent of the services he performed and the value thereof. He has shown none of these things, and there is no evidence upon which a finding could be based for the value of any services performed by him during the months of January and February. His contention that he should be allowed to recover on the quantum meruit, if he fails to recover on his contract, is therefore without merit.

The judgment of the circuit court of Mineral county is clearly right, and the same is affirmed.

(79 W. Va. 568)

MARLOW v. RINGER et al. (No. 3232.)

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW ¶89(1), 296(1)—
FRAUDULENT CONVEYANCES ¶3—STATUTES
¶82—DUE PROCESS—CLASS LEGISLATION—
FREEDOM OF CONTRACT.

Section 3a, c. 74, Code 1913 (sec. 3832), known as the Bulk Sales Law, is not invalid as class legislation, an illegal deprivation of property rights without due process of law, or an unlawful restraint upon the freedom or liberty of contract. It is a valid regulation in the exercise of the police power of the state to prevent and relieve from fraud against creditors.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 157, 825-829; Fraudulent Conveyances, Cent. Dig. § 5; Statutes, Cent. Dig. § 91.]

2. FRAUDULENT CONVEYANCES ¶47—BULK SALES—WHAT CONSTITUTES—"SALE OF MERCHANDISE IN BULK."

The transfer by a retail grocery merchant of a half interest in his business and stock of goods to another, in consideration of his placing in the store a quantity of goods equal in value to the stock then owned by the merchant, with a view to the formation of a copartnership to continue the business at the same location, constitutes a "sale of merchandise in bulk," within the purview of the Bulk Sales Law, "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business," and is void in toto as against

his creditors, except upon compliance with the conditions of that act.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 34.]

3. CONFUSION OF GOODS —12—BULK SALES —REMEDIES OF CREDITOR.

Where such void transfer has occurred, and the stock owned at the date thereof by the seller has become indistinguishably commingled with goods subsequently placed in the store by him and the purchaser to replenish the stock for current sales, a creditor of the vendor, whose claim antedated the sale agreement and is in part secured by a valid deed of trust on the fixtures and in part reduced to judgment against the debtor, may enforce the trust lien by a sale of the fixtures thereunder, and the judgment by a sale of the commingled assets under an execution levied thereon.

[Ed. Note.—For other cases, see *Confusion of Goods*, Cent. Dig. §§ 5-14.]

Appeal from Circuit Court, Wood County.

Suit by D. B. Marlow against J. T. Ringer and others. From decree for defendants, plaintiff appeals. Affirmed.

Thomas Coleman, of Parkersburg, for appellant. George H. Harris and Marshall & Forrer, all of Parkersburg, for appellees.

LYNCH, P. On this appeal from a decree sustaining the constitutional validity of the bulk sales statute of this state, and declaring void as against the creditors of J. T. Ringer the purchase by D. B. Marlow of an interest in a stock of groceries, it is necessary to determine whether that statute is within the legislative competency as not beyond the restrictions or limitations of any provision of the federal or state Constitution, and, if not repugnant to either, whether upon the facts presented the transaction between plaintiff and Ringer violates the provisions of the act.

For some time prior to September, 1913, Ringer was engaged in the retail sale of groceries in the city of Parkersburg. In that month he and Marlow agreed to unite in the formation of a partnership to continue the business at the same location, Marlow to purchase and place in the store a quantity of goods equal in value to the stock owned by Ringer, each of them to participate equally in the results of the joint enterprise.

Without the actual knowledge of Marlow, the merchandise and fixtures of Ringer then were incumbered with the lien of a deed of trust, duly recorded, executed by him to secure to his codefendant Wenmouth the payment of a \$450 note due at six months. Nor was he then aware that Ringer was also indebted to Wenmouth in two other notes antedating the trust deed, but not secured by any lien on the property. In the year 1915, the notes being past due and unpaid, Wenmouth attempted to enforce them by a sale under the trust, and by the levy of an execution issued upon a judgment obtained by him on the two unsecured notes. To enjoin such sales and commit the property to the custody of a receiver, and for other relief, Marlow brought

this suit; and from a decree applying to the Wenmouth indebtedness the \$275 realized from a sale of the merchandise and fixtures by the receiver appointed, he has appealed.

[1] In what respect the bulk sales statute, section 3a, c. 74, Code (sec. 3832), offends against constitutional requirements is not pointed out with any degree of definiteness. In general terms it is contended that the statute is an illegal deprivation of a right of property without due process of law, or an unlawful restraint upon the liberty of contract, or a special law in violation of section 39, art. 6, state Constitution. This is the language of the act:

"The sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser at least five days before the sale, make a written statement showing the nature and character of the sale and property to be sold and the price to be paid therefor, and unless the purchaser demands and receives from the seller a written list of names and addresses of creditors of the seller, with the amount of indebtedness due or owing to each and certified by the seller under oath, to be, to the best of his knowledge and belief, a full, accurate and complete list of his creditors and of his indebtedness; and unless the purchaser shall at least five days before taking possession of such merchandise or paying therefor, notify personally or by registered mail, every creditor whose name and address is stated in said list, of the proposed sale and of the price, terms and conditions thereof. Sellers and purchasers under this act shall include corporations, associations, copartnerships and individuals, but nothing contained in this act shall apply to sales by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy or by any public officers under judicial process."

The necessity for legislation of this character seems to be vindicated fully by the persistent efforts of state Legislatures to enact laws restricting sales of merchandise in bulk when not in the ordinary course of trade, except upon compliance with certain conditions prescribed by the various enactments. The earlier attempts to meet the real or preconceived urgency that impelled resort to relief against transactions of this character failed to secure judicial approval. Frequently they were condemned as enactments beyond constitutional authorization or limitation express or implied. The avoidances, however, were met finally and successfully by re-enactments deemed essential to avoid the judgment of organic condemnation pronounced and enforced by the courts, or by eliminating provisions previously held invalid. So that generally these statutes now are upheld as entirely free from constitutional interdiction, although the statutes of Ohio and some other states have not yet obtained the sanction of their appellate courts.

Unlike the act now considered, the acts of some of the states declare bulk sales of mer-

chandise only presumptively fraudulent, as among others do the statutes of Idaho, Oklahoma, and Oregon, while ours and others condemn such transactions as fraudulent and void as against the creditors of the seller except when the parties to the negotiations observe and conform to the publicity requirements, as do the statutes of Indiana, Maine, Montana, Texas, Michigan, Tennessee, Connecticut, and other states. See collation of cases in *Boise Association of Credit Men v. Ellis*, 26 Idaho, 438, 144 Pac. 6, L. R. A. 1915E, 917, note; *Johnson v. Belosky*, 263 Ill. 363, 105 N. E. 287, 37 Ann. Cas. 414, note. But whether they declare fraudulent and void, or presumptively fraudulent, sales of merchandise in bulk not made in due course, unless such provisions are observed, the courts generally have recently held the acts not objectionable on constitutional grounds. Many statutes expressed virtually in the same language as ours, notably those of Tennessee, Michigan, and Connecticut, have been upheld, as shown in the cases cited.

The principle underlying the later decisions is that a statute regulating sales of merchandise in bulk, and declaring them actually or presumptively fraudulent as to creditors if not made as therein authorized, is not subject to the ban of legislative incompetency as an improper exercise of the police power inherent in all governments, and not class legislation. With these decisions we are in complete accord, because they are sustained by sound and logical reasoning and supported by the decided weight of authority. Our statute does not in any wise contravene any constitutional provision having operative force and effect in this state. It is not in conflict with any provision of the Fourteenth Amendment of the federal Constitution, denying the right of the individual states to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws. In *Grocery Co. v. Kidd*, 151 Mich. 478, 115 N. W. 409, *Kidd Dater & Price Co. v. Muselman Grocer Co.*, 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839, *Young v. Lemieux*, 79 Conn. 434, 65 Atl. 436, 600, 20 L. R. A. (N. S.) 160, 129 Am. St. Rep. 193, 8 Ann. Cas. 452, and *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295, statutes upon the same subject and embodying the same language as ours were held valid by the appellate courts of those states, and the decisions affirmed by the Supreme Court of the United States.

Nor is the act amenable to the criticism that it is class legislation because its operation is limited to persons trading in merchandise only. If not objectionable on other grounds, a law is general, within the meaning of the constitutional requirement, when it applies alike and uniformly to all persons

engaged in the same line of business. If it does so apply, it is public and general, not special or local, in character and effect; and of its necessity, propriety and policy the Legislature only must judge. *Cooley, Const. Lim.* 554. As its application reaches and governs alike transactions in merchandise generally, it cannot reasonably be said to be class legislation. If it is general and uniform in its operation and effect upon all persons engaged in the same business, and serves a wholesome and salutary public purpose, and does not impose unreasonable restrictions upon the rights of the owners of the property employed to contract with reference to it or upon their use and enjoyment of it, a statute cannot be said to be repugnant to the Constitution; and to us it seems obvious our bulk sales statute does not offend against any of these essentials of a valid law. It is general and uniform in its operation, in that it relates to the same character of business transactions; it serves a salutary purpose, in that it is intended to prevent or relieve from fraud; and it does not impose undue restraint upon the freedom or liberty of contract, or the use and enjoyment of property or property rights by the owner. *Carriage Co. v. Sweet (Tex.)* 179 S. W. 257, L. R. A. 1916B, 970. The object to be attained was to prevent bulk sales of merchandise, because of the facility with which the disposal of such stock may secretly be effected by an insolvent owner to hinder, delay, or defraud his creditors. The generality of the litigation contesting the validity of these acts demonstrates their advisability and efficiency to serve their purpose. They obviously are not in excess of legislative competency.

[2] The next proposition urged by appellant is that, conceding its validity, the act does not inveigh against the transaction between him and Ringer. This proposition leads to the inquiry whether payment in goods of the same quality and character, equal in value to those in the store, constitutes a sale in bulk of a part of a stock of merchandise within the meaning of the statute. Evidently, the transaction was not entered into in the ordinary course of trade or in the regular and usual prosecution of Ringer's business; and it is not disputed that both parties wholly failed to comply with the conditions imposed by the statute to exonerate the transaction from its interdiction. Had these requirements been complied with, no charge of invalidity could successfully have been sustained. The purchase, if consummated without objection, would perhaps have been legal even as against Ringer's creditors, in the absence of liens of which the purchaser had actual or constructive notice. But we disavow any intention to adjudicate that question, as it does not now arise. The obvious effect of the transaction was to transfer to Marlow a one-half interest in the stock as it was at that time, and to Ringer a like share of the goods pur-

chased by Marlow. This realignment of interest, of course, did not work any impairment or diminution in the value of the property that could be subjected to the payment of Ringer's liabilities; indeed, apart from the statute, it may be said the purchase improved the condition of the concern to liquidate the liabilities of the partners, whether joint or several, and certainly to liquidate the liabilities of Ringer. But, whatever may be the alteration in the status of the joint or individual liabilities of the partners, the statute expressly condemns as fraudulent and void as to creditors of the seller, except upon the conditions prescribed, the sale in bulk of any part of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business. An interpretation in the effectuation of a release of the plaintiff from the embarrassment into which his ill-advised zeal has led him, however honest he may have been, would do violence to the plain language of the statute.

[3] That the plaintiff occupies the position of a mere trustee of the creditors of Ringer in respect to a moiety of the goods and fixtures in the store at the foundation of the copartnership is another contention not in accord with the plain provisions of the statute. As the authorities cited say, and the act itself declares, the transaction was in its inception fraudulent and void. It is void in toto, not merely voidable. It is without legal effect as against Ringer's creditors. However unfortunate may be the consequences, the conclusion seems inevitable that to the extent the transaction prejudiced the rights of creditors it is a nullity, although valid as between the immediate parties. The merchandise, however acquired, in the store on the date of the attempted foreclosure and the actual levy of the execution was the property of Ringer in virtue of the statute, and the proceeds thereof were applicable to the extinguishment of the liens thereon, as adjudged by the decree. The partnership never became effective as to Wenmouth, and to it no title to the property passed and none could vest in it, but the title remained in Ringer as it had theretofore reposed in him. The cases cited in support of the contention of trusteeship show the fact therein to be that after the purchase and before the institution of any proceeding to declare the transaction fraudulent under the statute the vendee resold the merchandise, and as to the proceeds of the resale he became such trustee. But, conceding that relation to have resulted, the property was held subject to sale to satisfy the liens created by the trust and levy. For although an effort was made to distinguish between the groceries in the store at the time of the original transaction, and those subsequently purchased and placed therein by Marlow, that attempt was ad-

judged abortive by the decree of the circuit court, and not erroneously in view of the conflict of testimony as regards that inquiry. Besides, there was such commingling of the merchandise as to render the whole of it chargeable with the liabilities preferred against it. *Mahoney v. Sams*, 128 Tenn. 207, 159 S. W. 1094; *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101, note; *Mercantile Co. v. Moon*, 49 Mont. 307, 141 Pac. 665; 20 Cyc. 628.

The conclusion also follows that Marlow is not entitled to be substituted to the rights of the Dana Company, whose bill for goods purchased from them and placed in the store after the formation of the partnership he paid out of his individual funds during the pendency of this suit. Neither that company nor the plaintiff acquired a lien on the property or any part of it by the levy of an execution or other legal process.

Nor does the proof render clear the basis for the contention that by his silence Wenmouth acquiesced in Ringer's denial, when asked by Marlow, that he was indebted for the stock of goods then in the store, and, by failure to assert his lien and indebtedness, is estopped to enforce them against the joint assets of the concern. Although Marlow does with assurance testify as to the verity of this conversation, he does not sufficiently overcome the testimony to the contrary to permit the application of the doctrine of estoppel, which the decree virtually denied, conceding its legal adaption to the facts if proved. On the party relying upon an estoppel devolves the burden of proof, and to avail he must by clear, precise, and unequivocal evidence establish the facts and circumstances upon which is based the principle he would apply. *Hast v. Railroad Co.*, 52 W. Va. 396, 44 S. E. 155; *Water Co. v. Browning*, 53 W. Va. 436, 44 S. E. 207. See, also, *Daly v. Sumpter Drug Co.*, *supra*.

The allowance to the attorney for the receiver, of which complaint is made, and the disallowance to plaintiff's attorney of all but \$25 of the \$75 requested by him for his services, are not so inequitable as to warrant a reversal of the decree for these causes only, or for the costs awarded by it.

We therefore affirm the decree, and award the usual costs against the appellant.

(79 W. Va. 541)

JONES v. BLANKENSHIP et al. (No. 2992.)
(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917.)

(Syllabus by the Court.)

1. MORTGAGES §151(6)—VENDOR AND PURCHASER §249, 260(2)—VENDOR'S LIEN—VALIDITY—PRIORITY.

A vendor's lien, expressly retained in his deed to indemnify the grantor against any loss he may sustain by reason of the failure of title to land, conveyed to him by his grantee.

valid, and has priority over subsequent judgment and trust-deed liens.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 318, 332-336; Vendor and Purchaser, Cent. Dig. §§ 650, 667-669.]

2. JUDICIAL SALES \Leftrightarrow 62—VENDOR'S LIEN—ENFORCEMENT—FUND.

Where it appears a suit is pending to determine the title to the land, against the loss of which such lienor is indemnified the court cannot properly disburse the fund arising from a sale of the land affected by such lien, until the termination of the suit and ascertainment of the lienor's loss, if any.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 123-125.]

3. EQUITY \Leftrightarrow 204 — PROCESS TO SUPPORT JUDGMENT.

It is error to decree affirmative relief upon the petition or answer of a defendant, against a codefendant, without his appearance thereto, or service of process issued thereon upon him.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 467.]

Appeal from Circuit Court, Logan County.

Suit in chancery by H. C. Jones against James Blankenship, Jr., and others, to enforce judgment lien against the lands of the defendant James Blankenship, Jr. Decree for defendant United States Coal & Oil Company, and plaintiff appeals. Reversed and remanded.

Chafin & Bland, of Logan, for appellant. B. A. Devol, of Frankfort, Ind., Auxier, Harman & Francis, of Pikeville, Ky., for appellee.

WILLIAMS, J. H. C. Jones brought this suit in chancery to enforce judgment liens against the lands of the defendant James Blankenship, Jr. Defendant failing to appear in obedience to process duly served, the bill was taken for confessed, and the cause referred to a commissioner to ascertain and report what lands he owned, the liens thereon, with their priorities, and by whom held, whether his land would rent for enough in five years to pay off the liens, and any other matters pertinent to the suit. The commissioner reported that defendant owned the surface of two tracts of land on Trace fork of Island creek in Logan county, one containing 188½ acres and the other 4 acres, a number of judgment and trust deed liens on the same, and by whom owned, and that the land was not of sufficient rental value to pay them in five years. He also reported that the United States Coal & Oil Company, a corporation, by virtue of a written option executed by defendant and his wife on the 13th of October, 1913, duly acknowledged and recorded on the 17th of October, 1913, giving it the right, on or before the 13th of December, 1913, to purchase the aforesaid land at the price of \$25 per acre, payable when a deed therefor should be delivered, had made a binding contract for the purchase of said land, by virtue of notice, duly given, of its election to take the land, and that said contract was prior to all other liens, except one

judgment in favor of J. B. Blankenship for \$292.69.

The land had been conveyed to defendant by plaintiff, by deed dated the 19th of February, 1913; the consideration, mentioned in the deed, being \$2,600 cash. On the same day defendant conveyed to plaintiff a tract of 103 acres of land, the consideration therefor not being made to appear in the record. In the first-named deed plaintiff made the following reservation:

"The grantor hereby reserves a vendor's lien on the property hereby conveyed to secure him against any loss that may be sustained on account of the loss of title or failure of title to the land conveyed by Julia A. Blankenship and James Blankenship to H. C. Jones, Ex'r, etc., by deed dated the 19th day of February, 1913, and not yet of record, said land being 103 acres, situate on Copperas Mine fork."

And the commissioner reported that a suit was then pending, which involved the title to the 103-acre tract, but that there was no evidence of the amount secured by said vendor's lien, and therefore he held it was not such a lien as affected the rights of the other lienors. Jones excepted to the report, and the court overruled his exception, and decreed the contract of purchase by the United States Coal & Oil Company was prior to all the other liens, except the J. B. Blankenship judgment, and decreed that, unless it should pay off that prior judgment, and the balance due on its contract of purchase to the general receiver of the court, within a specified time, the land should be sold, and appointed a special commissioner to execute the decree.

Plaintiff has appealed and assigns two errors: First, the refusal of the court to decree his vendor's lien to be a lien superior to all others reported; and, second, granting relief to the United States Coal & Oil Company on its petition without defendant's appearance thereto, or service of process thereon upon him.

[1] Respecting the first assignment, the failure of plaintiff's lien to show the amount for which it was retained, or that any amount would ever certainly become due, was not sufficient reason for rejecting it. The first point of the syllabus in *Knott v. Manufacturing Co.*, 30 W. Va. 790, 5 S. E. 266, defines an equitable lien as follows:

"Every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund therein identified, a security for a debt or other obligation, or whereby the party promises to convey, assign, or transfer the property as security, creates an equitable lien upon the property so indicated, which is enforceable against the property."

That definition is repeated in language almost identical, in point 4 of the syllabus in *Fidelity Ins., etc., Co. v. Shenandoah Valley R. R. Co.*, 33 W. Va. 761, 11 S. E. 58. The lien was not retained to secure the payment of a certain sum of money, or to secure an

indefinite sum, certainly to become due, but only to indemnify plaintiff against a possible loss, for which his grantee would be liable to him. The amount of such loss, or whether there would certainly be any loss at all, was not then ascertainable. A suit was then pending in which that matter would be determined. Mortgages and trust deeds given to protect persons against such contingencies are almost invariably sustained by the courts. Why, therefore, may not a grantor, in order to avoid the circuitous method of taking from his grantee a mortgage or deed of trust to indemnify himself, retain a lien, for the same purpose, in his deed of conveyance? There certainly is no good reason for distinguishing between the two methods of creating such lien, so far as it concerns its validity. A lien retained to indemnify the grantor against judgments, is held to be valid. *Morehead v. Horner*, 30 W. Va. 548, 4 S. E. 448. The maxim, "Id certum est quod certum reddi potest," applies to such cases. The pendency of the suit, involving the title to the 103 acres, sufficiently shows the materiality of plaintiff's lien; and the result of that suit will determine the contingency, and render the amount of plaintiff's lien ascertainable, provided he suffers any loss thereby. If he should lose all, or only some part, of the land, the amount of his lien could be ascertained according to the price he had agreed to pay defendant for the land. A lien retained to secure the faithful performance of a contract for maintenance and support of the grantor, or even of a third person, is held to be valid. *Johnson's Adm'r v. Billups*, 23 W. Va. 685. It has also been held, even where no lien is expressly retained, if it appears from the conveyance itself the maintenance and support was to be furnished on the land conveyed, an equitable charge or lien on the land was thereby created. *McClure v. Cook*, 39 W. Va. 579, 20 S. E. 612. The amount of plaintiff's lien is just as certain of ascertainment as were the liens for support, in the cases cited.

[2] Plaintiff does not object to the sale of the land, but complains only of the rejection of his lien. He is entitled to a lien, for his indemnity, upon the proceeds of sale in preference to all other liens reported, and to have the fund set apart and held for his protection, until the contingency is determined by the pending suit to test his title to the 103 acres of land. Until then the court cannot apply any part of the proceeds to the other and subsequent liens, but may direct that it be loaned out at interest, until plaintiff's loss, if any, is determined. It should then be applied, first to the satisfaction of plaintiff's lien, and next to the discharge of the other liens decreed, in the order of their priorities.

[3] Respecting the second assignment, it is unnecessary to determine whether the failure

of the United States Coal & Oil Company to have process issued on its petition and served on the defendant James Blankenship, Jr., is such an error as would entitle plaintiff, who is the only appellant, to a reversal. It is certainly error affecting said Blankenship, because the decree gives a codefendant affirmative relief against him on its petition, although he did not appear and was not summoned to answer said petition. It is error to grant affirmative relief to one codefendant against another, upon the prayer of his answer or petition, without giving such other an opportunity to be heard in respect thereto. *Dudley v. Buckley*, 68 W. Va. 630, 70 S. E. 376; *Woods v. Douglas*, 46 W. Va. 657, 33 S. E. 771; *Goff v. Price*, 42 W. Va. 385, 26 S. E. 287. Although this error may not affect appellant adversely, still it should be corrected for the protection of said Blankenship and the purchaser of the land under the court's decree, whether such purchaser be the petitioner or a stranger.

In so far as the decree denies relief to appellant and enforces the contract of sale to the United States Coal & Oil Company, without notice to defendant Blankenship, and directs the proceeds to be applied to the payment of other ascertained liens, before the amount of plaintiff's lien has been determined and provided for, it will be reversed, and in all other respects it will be affirmed, with costs to appellant against the United States Coal & Oil Company, and the cause remanded for further proceedings.

(79 W. Va. 532)

JONES v. ISLAND CREEK COAL CO.

(No. 3176.)

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917.)

(Syllabus by the Court.)

1. EASEMENTS §3(1) — GRANT—"EASEMENT APPURTENANT."

If an easement granted be in its nature an appropriate and useful adjunct of the dominant estate conveyed, having in view the intention of the grantee as to the use of such estate, and there is nothing to show that the parties intended it as a mere personal right, it will be held to be an easement appurtenant to the dominant estate.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8, 9, 11, 12.

For other definitions, see Words and Phrases, First and Second Series, Easement Appurtenant.]

2. MINES AND MINERALS §55(6) — RIGHT OF WAY—CONSTRUCTION.

Where a deed conveys the minerals in a tract of land with the privilege of using the surface for rights of way for tramroads, or other means of transportation necessary for the removal of such minerals, and the minerals from any other lands, it will be held that the parties intended that the minerals so conveyed should be mined or produced in connection with the minerals from other lands to be acquired by the grantee, and the easement created by the grant of the rights of way will be held to be appurtenant.

nant to the grant of the minerals contained in the land, it being reasonably necessary that the said minerals should be mined in connection with the minerals from other lands. The grant of such an easement will confer upon the grantee the right to construct a tramroad across the surface of the land containing the minerals granted, for the purpose of hauling timber across the same to be manufactured into lumber, to be used for the purpose of mining the minerals granted, as well as the minerals being produced by the grantee from other lands in connection with the minerals so granted.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 156, 163, 164.]

3. MINES AND MINERALS 55(6)—SURFACE RIGHTS—TIMBER.

The principal business of such grantor being the mining of coal, in case there is more timber upon the land being operated by him than is necessary for such coal mining purposes, such grantee will not be prohibited from hauling all of such timber across the land over which he has such easement upon such tramroads, and may sell the excess above that actually needed for mining purposes; this being merely incidental to the main business of producing the minerals from such lands.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 156, 163, 164.]

4. CONTRACTS 6—156—GENERAL WORDS—CONSTRUCTION.

Where general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature with those specified.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 737.]

Appeal from Circuit Court, Logan County.

Bill for injunction by Arthur S. Jones against the Island Creek Coal Company. Decree for complainant, and defendant appeals. Decree reversed, injunction dissolved, and bill dismissed.

B. A. Devol, of Frankfort, Ind., and Aulier, Harman & Francis, of Pikeville, Ky., for appellant. Chafin & Bland, of Logan, for appellee.

RITZ, J. On the 11th day of April, 1892, Ransom Curry, being the owner of a tract of 70¼ acres of land situate in Logan county, W. Va., conveyed the mineral under the same by deed of that date to U. B. Buskirk. In addition to the conveyance of the mineral contained in the lease there are certain other stipulations granting, or purporting to grant, to the said Buskirk certain rights in connection with the said real estate. Subsequently Curry conveyed 7 acres of the surface of this 70¼-acre tract to another party, and the plaintiff, Arthur S. Jones, has become the owner of this 7 acres of surface so conveyed out of the 70¼-acre tract by the said Curry. The deed from Curry to Buskirk contains the following provision:

"Together with the full and complete rights and privileges of every kind for mining, manufacturing, and transporting such coal, gases, salt water, oil, and minerals on, through, and over the said premises, and in particular the right of exploring for and extracting the said minerals, and also with full rights of way to, from, and over said premises by the construction and use

of roads, tramways, railroads, or otherwise, for the purpose of exploring, extracting, storing, handling, manufacturing, refining, shipping, or transporting all said materials, whether contained on the said premises or elsewhere, and for any other purpose whatsoever, and with the full right to take and use all water, stone, and timber except walnut, poplar, and oak over 12 inches in diameter found on said premises required for any purposes: Provided, however, that the said parties of the first part shall have the right to take for themselves such coal as they may need for the domestic use of their own family so long as they shall remain on the said premises; or in case said coal cannot be taken without inconvenience to the mining operations of the party of the second part, then the same shall be delivered by and received from said party of the second part free of charge."

The Island Creek Coal Company is now the owner of the rights conveyed to Buskirk by the said deed of April 11, 1892. In addition to the minerals contained in this tract of 70¼ acres of land, the defendant, Island Creek Coal Company, is the owner of the minerals underlying other lands adjacent to this 70¼ acres, as well as the surface of some of such other lands, together with the timber thereon. It appears from the record that the defendant has erected a sawmill upon its lands situate on the creek below plaintiff's land and near thereto, and that in order to get its timber from its lands, lying above the land of the plaintiff, to its mill, it is necessary to cross over this land of plaintiff. For this purpose the defendant began the construction of a tramroad across Jones' land, claiming that it had the right to so construct said tramroad and haul such timber over said land to its mill to be manufactured into lumber under and by virtue of the provisions of the deed from Curry to Buskirk above recited. The plaintiff thereupon filed his bill praying that an injunction be awarded him enjoining and inhibiting the defendant from constructing the said tramroad over the said 7 acres of land, and the circuit court granted said injunction and enjoined the defendant from constructing the tramroad over the said land for the purpose aforesaid, and from using the surface of the said land for any purpose other than for the purpose of removing the coal or other minerals from the 70¼-acre tract. The defendant shows that the timber which it desires to cut and haul over this land is to be used by it for its mining operations, so far as the same is required therefor, and that the remainder will be sold in the open market; that it will require from one-third to one-half of all of said timber for the conduct of the mining operations.

[2] The defendant contends that under the grant above recited in the deed from Curry to Buskirk it has the right to construct a tramroad, or tramroads, over this 70¼ acres of land for any purpose whatsoever, and that the circuit court of Logan county therefore erred in enjoining it from constructing the tramroad then under process of construction.

For a decision of this question it is necessary to construe the language contained in the deed from Curry to Buskirk recited above. It will be noted that the deed in express terms grants to Buskirk the right to have full rights of way to, from, and over said premises by the construction and use of roads, tramways, railroads, or otherwise for the purpose of exploring, extracting, handling, manufacturing, refining, shipping, or transporting all said minerals, whether contained on the said premises or elsewhere, and for any other purpose whatsoever. The circuit court of Logan county construed this deed to be a grant to Buskirk of the minerals on the land, and the right to use the surface of the land in so far as it was necessary to remove the particular minerals underlying this land. We think this construction is too narrow. By the very language of the grant rights of way are given, not only for the removal of minerals upon this land, but such minerals whether contained on this particular tract of land, or elsewhere. When we take into consideration the fact that the whole tract of land contains only 70¼ acres, it is quite clear that the intention of the parties was, at the time this deed was made, to operate the same and produce the coal therefrom in connection with adjoining tracts of land. They knew that the coal could not be produced from a 70¼-acre tract profitably, and for this reason the grant of the right to the use of the surface was made so that the party operating and producing the coal might use it as would become necessary in the production of the coal from such lands as he might acquire for the purpose of operation in connection with the tract of 70¼ acres of land. To place the construction upon this deed that was placed upon it by the circuit court would give no meaning whatever to the language used therein, "whether contained on the said premises or elsewhere." We are not to assume that the parties did not intend these words to have some meaning, nor should we assume that they intend them to have any other meaning than that ordinarily given to such language; and, giving these words their ordinary signification and meaning, we come to the conclusion that Curry intended to grant to Buskirk not only the minerals in this tract of 70¼ acres of land, together with the right to use the surface for extracting these minerals, but the further right to use the surface of this land in so far as it might be necessary in mining operations on other tracts of land mined and operated in connection with the 70¼-acre tract.

In *Griffin v. Coal Co.*, 59 W. Va. 480, 53 S. E. 24, 2 L. R. A. (N. S.) 1115, this court held:

"Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern."

This is such a familiar rule of construction that we need not cite authority to support it.

Of course, if the language used by the grantor in the deed purports to convey something in violation of some established legal rule, or that is not the subject of such a grant, then the grant would not be effective; and it is contended in this case that the grant cannot be effective as creating an easement appurtenant to any greater extent than it may be necessary to exercise it in the removal of the minerals from the 70¼-acre tract, and that, in so far as it granted any rights or attempted to grant any rights to Buskirk in excess of this, it was an easement in gross, and that such rights were not assignable by Buskirk, and could not be exercised by the defendant. These rights to construct tramroads or other means of transportation over the 70¼ acres of land cannot be construed to be in any sense an easement in gross. They are granted in connection with the granting of the minerals in the land, and they are appurtenant to the minerals granted. As has been before observed, it was considered necessary by the parties, in order to the enjoyment by Buskirk of the minerals granted, to convey to him rights of way for tramroads or other means of transportation necessary in the removal of these minerals as well as any such minerals from any other lands. Unless the minerals in this land could be produced in connection with the minerals in adjoining tracts, then the grant of the minerals in this land to Buskirk would be of little value, and unless Buskirk had the right to use the surface of this land in connection with the mining operations upon other lands which he might acquire to be operated in connection with this land, then he would be unable to carry on his mining operations in a practicable way. It is apparent from the situation presented here that the parties contemplated when they made this deed that the grant should be an easement appurtenant to the minerals granted in this land, to be used in the production of these minerals in conjunction with those from other lands, and this because the minerals in this land could only be profitably produced in connection with like minerals from other lands. Such was the holding of the District Court of the United States for the Northern District of Alabama in the case of *In re Oak Leaf Coal Co.*, 225 Fed. 126.

[1] In the case of *Smith v. Garbe*, 86 Neb. 91, 124 N. W. 921, 136 Am. St. Rep. 674, 20 Ann. Cas. 1209, the court held:

"Whether an easement in a given case is appurtenant or in gross is to be determined mainly by the nature of the right and the intention of the parties creating it. If it be in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the grantee as to its use, and there being nothing to show that the parties intended it to be a mere personal right, it will be held to be an easement appurtenant to the land, and not an easement in gross."

Applying this doctrine to the case at bar, we find that, if the use granted is in its nature an appropriate and useful adjunct of

the estate conveyed, to wit, the coal in the land, and there is nothing in the instrument showing that it was intended as a mere personal right, then it will be held as an easement appurtenant to the estate conveyed. As before noted, the right to use the surface of this land for the purpose of producing coal from other lands operated in connection with the coal on this 70¼ acres is a very useful and necessary adjunct. There is nothing in the deed to show that the parties intended that this right should be personal to Buskirk. This being true, we must conclude that the right to construct tramroads or other means of transportation across the surface of this land for the purpose of mining and producing the minerals from other tracts of land is an easement appurtenant to the minerals in the 70¼-acre tract of land granted to Buskirk by Curry. In *Goodwillie Co. v. Commonwealth Electric Co.*, 241 Ill. 42, 89 N. E. 272, the court said:

"Where the dominant and servient estates are clearly defined in an easement contract and the easement is beneficial to the dominant estate the easement is appurtenant, and not in gross, and it is not necessary that the dominant and servient estates be contiguous or that the right of way granted shall terminate on the dominant estate."

See, also, *Sanxay v. Hunger*, 42 Ind. 44; *White v. Railroad Co.*, 156 Mass. 181, 30 N. E. 612; *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958; *Lidgerding v. Zignego*, 77 Minn. 421, 80 N. W. 360, 77 Am. St. Rep. 677; *Reise v. Enos*, 76 Wis. 634, 45 N. W. 414, 8 L. R. A. 617; *Ballinger v. Kinney*, 87 Neb. 342, 127 N. W. 239; *Russell v. Heublein*, 66 Conn. 486, 34 Atl. 486; *Stovall v. Granite Co.*, 116 Ga. 376, 42 S. E. 723. From these decisions it clearly appears that the grant of an easement will not be construed to be in gross if it can be fairly construed to be appurtenant to the estate of the grantee.

In 14 Cyc. p. 1201, it is stated:

"Easements by express grant or reservation must be limited to the matters contained in the deed. Nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment. The extent of the rights acquired must therefore depend upon the construction placed upon the terms of the grant, and in construing such instruments the court will look to the circumstances attending the transaction, the situation of the parties, and the state of the thing granted to ascertain the intention of the parties. In cases of doubt the grant must be taken most strongly against the grantor."

It will be noted from this quotation that nothing passes by implication as incident to the grant except what is reasonably necessary to its fair enjoyment. In this case the situation of this land is such that it is reasonably necessary to the fair enjoyment of the grant of the minerals that the grantee of them shall have the right to remove minerals from other lands over the surface of this land, and if it can be said that such is the case then the grant of rights of way over the 70¼-acre tract of land for the pur-

pose of removing coal from other tracts, as well as from this tract, will be held to be an easement appurtenant to the ownership of the minerals in this tract of land and to be enjoyed by the owner of these minerals.

The defendant contends that it is entitled to build a tramroad over the 70¼ acres of land for any purpose whatsoever. We cannot give assent to this contention. While it may be said that this is the language of the grant, we conclude that the particular enumeration of the purposes for which rights of way were granted to Buskirk by Curry were not varied or enlarged by the subsequent general clause "and for any other purpose whatever," but must be confined to such purposes as are reasonably necessary to the production of the coal from such lands as may be owned and intended to be operated by the defendant in conjunction with the tract of 70¼ acres.

[4] The rule of construction in cases like this is laid down in *Elliott on Contracts*, § 1532, to be:

"The doctrine of *ejusdem generis* is applied in cases where there is a doubt as to the intention of the parties, and as a rule for the construction of contracts is stated to be that, when general words are used in a contract after specific terms, the general words will be limited in their meaning or restricted to things of like kind and nature (*ejusdem generis*) with those specified."

See, also, 13 Cyc. 631, where the rule is stated to be:

"And a particular description which is clear and explicit and is a complete identification of the property intended to be conveyed will not be varied or enlarged by a more general and less definite description; as in such a case the former will be considered as expressing the intent of the parties rather than the latter."

See, also, *Darnell v. Wilmoth*, 69 W. Va. 704, 72 S. E. 1023.

Applying these conclusions to the case in hand, we find that the defendant has the right to construct such a tramroad over the land of the plaintiff as may be reasonably necessary for its use in procuring timber from other lands to be sawed into lumber for use in its mining operations upon the 70¼-acre tract of land, or upon its other lands operated or intended to be operated in conjunction therewith.

[3] It is shown, however, that the defendant does not contemplate using all of the lumber manufactured from the timber on its lands in its mining operations, but that its purpose is to sell so much thereof as remains after it has met the demand of such mining operations. It is clear from the record that the chief business and purpose of the defendant is to produce coal from its lands lying around this 70¼-acre tract, and that it proposes to sell part of such lumber only because it does not need all of it in such mining operations. The sale of this surplus lumber in the market is simply an incident of the mining operations, and is done to prevent the waste of any part of the company's property. Would it be equitable to say that

this defendant must lose part of the timber upon its lands because all of it cannot be used for mining purposes, or else that it must waive its right of way over this 70¼-acre tract? We are of opinion that the sale of the surplus lumber is a mere incident to its operations as a mining concern, and the fact that all of the lumber which it is proposed to manufacture from timber, to be hauled over this tramroad, will not be used in actual mining operations, should not bar the defendant from building the tramroad and transporting thereover the timber owned by it.

It follows from what has been said that the decree of the circuit court of Logan county complained of will be reversed, the injunction dissolved, and plaintiff's bill dismissed.

(79 W. Va. 549)

GILKISON v. GORE et al. (No. 3157.)

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917.)

(Syllabus by the Court.)

1. CURTESY §9(2)—EXTENT—EQUITY OF REDEMPTION.

Where husband and wife purchase land jointly and it is conveyed to them jointly, the grantor reserving in the deed a lien for the unpaid purchase money, represented by their joint note, and about the same time both join in a deed of trust conveying the property to a trustee to secure another sum represented by their joint note, borrowed to make the cash payment on the property, and the wife dies leaving said lien debts and other joint and individual debts unpaid, the husband is entitled to curtesy only in the equity of redemption and not in the whole estate in said land.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 23.]

2. CURTESY §12(7) — HUSBAND'S PAYMENT OF DEBTS—SALE OF LAND.

If after decree of sale in a suit by the wife's administrator against her heirs and others to subject her interest in said land to pay her debts the husband pays off and discharges such lien debts and all other debts of the decedent, and then, claiming by subrogation to the rights of their creditors, brings a new suit against her administrator and heir, seeking to subject to sale to pay her share of said debts her moiety in said lands, he is not entitled to have her interest in said land sold subject to his curtesy. Standing in the shoes of the lien creditors, if he would enforce his rights under the liens, the whole interest of the wife should be sold free of his curtesy and he be reimbursed out of the purchase money for the wife's share of said lien debts, and his curtesy interest in the residue be ascertained and paid to him, and the residue, so far as necessary, applied on account of her share of the unsecured debts, and the balance paid to the heir.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 57.]

3. CURTESY §12(7)—SUBJECTION TO DEBTS.

In this State the curtesy of the husband in his wife's land is not subject to her general debts, but to the lien debts thereon only, existing thereon when his curtesy becomes consummate by her death.

[Ed. Note.—For other cases, see Curtesy, Cent. Dig. § 57.]

4. CONTRIBUTION §6—PAYMENT OF WIFE'S DEBTS—DECREE.

A husband, after decree of sale of his wife's interest in their joint lands to pay her debts, and subsequent payment thereof by him, is not estopped by such decree from thereafter suing her estate for contribution and to subject her interest in the joint lands to pay her share of the debts so discharged by him, the decree dismissing the first cause reserving to him the right to seek contribution from her heirs by suit for subrogation to the rights of creditors against her estate or by any other suit he might deem proper.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 10-12.]

Appeal from Circuit Court, Logan County.

Suit by L. W. Gilkison against Eli Gore and others. Decree for defendant Eli Gore, and plaintiff appeals. Decree reversed, and cause remanded.

Chafin & Bland, of Logan, and Campbell, Brown & Davis, of Huntington, for appellant. Greene & Hogsett, of Logan, for appellee.

MILLER, J. [1] When the facts are as assumed in the first point of the syllabus, the concrete case presented, the husband on the death of the wife is entitled to curtesy not in the whole estate, but in the wife's equity of redemption only, and if he redeems the land, as he may, by paying the lien debts, he stands in the shoes of the lien creditors, but with no greater rights. Under section 15, chapter 65, Barnes Code 1916, "If a married woman die seized of an estate of inheritance in lands, her husband shall be tenant by the curtesy in the same." And by the last provision of said section it is not necessary, as at common law, that they have "issue born alive during the coverture." And it has been decided that under this statute a husband has no curtesy initiate on the birth of issue or at any time in his wife's lands during coverture. Such estate only comes into being on her death, and attaches only to the estate, legal or equitable, of which she may so die seized. *Guernsey v. Lazear*, 51 W. Va. 323, 41 S. E. 405; *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166; *Campbell v. McBee*, 92 Va. 68, 22 S. E. 807; *Banta v. Smith*, 41 Ind. App. 364, 83 N. E. 1017; *Hoy v. Varner*, 100 Va. 600, 42 S. E. 690.

[2, 3] What a wife dies seized of, where the facts are as assumed, and as in the case at bar, is an estate in the equity of redemption. This is the only estate she leaves, and it is the estate of inheritance which descends to her heirs, subject to the estate by the curtesy of the husband, given by the statute. *Hoy v. Varner*, supra, 100 Va. 600, 42 S. E. 690.

In this case the fact that the husband and wife were liable jointly, and stood in the relation of principal and surety for their respective shares of the lien debts, gave the husband no greater rights as tenant by the curtesy. The liens created and existing at her death made them superior to his curtesy,

then become consummate, and left her at her death seized only of the equity of redemption, and the fact that he was her surety for her share of the debts, and paid those debts, as stated, gave him no greater rights as tenant by the curtesy, against the heir to whom the equity of redemption descended on the death of the wife.

In the case at bar there were general debts also for which husband and wife were jointly liable, contracted mainly in improving the joint property, but secured by no liens. The effect of the decree appealed from is to charge the deceased's moiety also with the payment of her share of those debts as prior and superior to the plaintiff's curtesy; for the decree is that the half interest of the decedent be sold to pay the one half of all the debts including the general debts paid by the plaintiff, free of his curtesy, plaintiff and defendant Gore to share in the surplus proceeds on the basis of a life estate therein in the former and the remainder in the latter. Is this a correct interpretation of our law on the subject? As to the lien debts we have already held that the decree is right. But as to the general and unsecured debts we think the court below was in error. Counsel for the appellee defends the decree upon certain provisions of our Code, sections 1, 2, and 3, chapter 63, prescribing the property rights of a married woman, owned by her and acquired from any person other than her husband, before and after marriage, and her right of disposition thereof; section 3, chapter 86, making real estate of any person dying intestate, etc., assets for the payment of his debts; and section 15, chapter 65, Barnes Code, 1916, giving curtesy to the husband in lands of which his wife may die seized of an estate of inheritance, whether they had issue born alive as at common law or not. We are also cited in support of this contention to *Miller v. Hanna*, 89 Neb. 224, 131 N. W. 226, Ann. Cas. 1912C, 573, with note page 577, and 8 R. C. L. 410, sections 23 and 24. The Nebraska case involved the construction of a statute which gave to the husband an estate by the curtesy in his wife's lands subject to her debts, and the cases cited in the opinion, and in the note supporting the principal case, involved the same or similar statutes. Our statute does not in specific terms subject the curtesy of the husband to the payment of her debts. True, a wife may by her contracts, under the statute, subject her property to the payment of her debts, and the same, and the rents, issues and profits thereof during her life time, may be sold by decree for the payment thereof; and by deeds or contracts, her husband joining therein, she may encumber her real estate, and render such liens at the time of her death superior to his curtesy. But we can find no warrant in any statute for subjecting his curtesy, consummate on her death, to her general debts. We think the

effect of our statute, section 15, of said chapter 65, was to abolish tenancy by the curtesy initiate, but as to tenancy by the curtesy consummate, the husband takes such estate on the death of the wife free from all, except specific liens then existing thereon. It is only in those states like Nebraska, where the statute specifically renders the curtesy of the husband subject to the wife's debts, that the contrary rule has been established. 8 R. C. L. 410, and note. *Miller v. Hanna*, supra, and note.

[4] It is further urged in support of the decree that the plaintiff is concluded by a former decree in the suit of decedent's administrator against him and Gore, adjudging decedent's land to be sold unless the debts, lien and general, should be paid as therein provided, but which debts were substantially paid off by him and released, and the cause dismissed on that showing by a decree which reserved to Gilkeson the right "to seek contribution from the heirs of said Brooke Gilkeson, deceased, by suit for subrogation to the rights of said creditors against the estate of said Brooke Gilkeson, or by other action or suit he may deem proper." It is argued that because the reservation was not also to seek contribution by right of subrogation against the estate of said decedent, he is cut off from that relief as prayed for in his amended bill by the principle of *res adjudicata*. We do not think this point has any merit. The reservation was comprehensive enough to warrant relief against the wife's estate, even if it amounted to an adjudication.

We are, therefore, of opinion to reverse the decree and to remand the cause with direction to enter and execute a decree in accordance with the principles herein enunciated and by further proceedings according to rules and principles governing courts of equity.

(79 W. Va. 449)

WOODCOCK v. BARRICK et al. (No. 3136.)

(Supreme Court of Appeals of West Virginia.

Jan. 23, 1917. Rehearing Denied

Feb. 27, 1917.)

(Syllabus by the Court.)

1. JUDGES \S 46—DISQUALIFICATION.

A judge of a court in this state is not disqualified to preside in a cause pending in his court, either by section 9, chapter 112, Code 1913 (sec. 4556), as amended by chapter 71, Acts 1915, or by the terms or spirit of section 11 of said chapter (sec. 4558), because one or more of the parties to such cause is counsel for such judge in another cause pending in his court, or in some other court.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. \S 213.]

2. APPEAL AND ERROR \S 1043(5)—HARMLESS ERROR—DISSOLUTION OF INJUNCTION.

The continuance of a motion to dissolve an injunction, on the motion of the party enjoined, the injunction remaining in force, is addressed to the sound discretion of the court, and will not amount to reversible error unless plain-

ly prejudicial to the interests of some party affected thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4119.]

3. COURTS —18— JURISDICTION — SITUS OF REAL PROPERTY—CONVEYANCES.

The courts of one state may by decree compel persons subject to its jurisdiction to make personal conveyances of land in another state, and to do any other act which without reference to the decree would affect the land according to the *lex rei sitæ*. In such cases the conveyance and not the decree passes the title.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 50-68.]

4. ABATEMENT AND REVIVAL —8(2)— AN-OTHER ACTION PENDING—ISSUES.

The pendency of a suit for partition in the courts of the state where land is situated, and a decree of partition therein, reversed on appeal by an appellate court, and remanded for further proceedings, will not estop or preclude the grantor in one of the deeds involved in said partition suit from maintaining a suit in the courts of another state where the deed was made and where the parties thereto reside, to obtain a decree requiring a reconveyance of the land to him upon the ground of fraud and deceit practiced by the grantee in obtaining such deed, unless this question was fully presented by pleadings and proof, and actually adjudicated in such partition suit.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 50.]

5. ATTORNEY AND CLIENT —143—COMPENSATION.

Where after his employment an attorney at law procures from his client a deed or contract for land or personal property, the subject of his employment, or for greater interests therein than his original contract called for, whether fraudulently or otherwise, he may be compelled at the election of his client to reconvey the real estate, or surrender for cancellation the contract for the personal property.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328-331.]

Appeal from Circuit Court, Wetzel County.

Suit by William R. Woodcock against Charles W. Barrick and another. From decree for defendants, plaintiff appeals. Reversed, decree entered for plaintiff, and cause remanded.

Thayer M. McIntire, of New Martinsville, for appellant. E. H. Yost, of New Martinsville, for appellees.

MILLER, J. The object of the bill was, first, to have cancelled and set aside as clouds on plaintiff's title a contract of June 24, 1913, between plaintiff and defendant Barrick, procured by Barrick, and supposed to contain the terms of his employment by plaintiff, as an attorney at law, to represent him in certain litigation begun or threatened, and in respect to his interests in the estate of his uncle, the late Edwin M. Stewart, a one half interest in which contract was, on June 28, 1913, assigned by Barrick to defendant Yost; and also to obtain a decree requiring said Barrick and Yost to reconvey to plaintiff all his right, title and interest in and to all the property mentioned and described in seven several paper writings purporting to

have been made and executed by plaintiff to them, all dated June 30, 1913, as follows: First, a deed purporting to convey to defendants jointly, "in consideration of the sum of one dollar and other good and valuable considerations, paid and settled," the receipt whereof is thereby acknowledged, all his (plaintiff's) "right, title, interest and claim in and to all the real estate, oil, gas and other minerals of which Edwin M. Stewart died seized and possessed, situate in Jackson Township, Monroe County, Ohio"; also "all the oil and gas royalty, or oil royalty, or gas royalty, that has been produced from the lands aforesaid, from the date of the death of the said Edwin M. Stewart, to wit: from the 2d day of April, 1912, up to this date, together with full power and authority to the said parties of the second part, the said Charles W. Barrick and E. H. Yost to sign, execute, acknowledge and deliver in my name any receipt, order or division order or other paper necessary to be signed in order for the said Charles W. Barrick and E. H. Yost to receive and receipt for all of said oil royalty and gas royalty that I may be entitled to as one of the heirs of the said Edwin M. Stewart, deceased."

Said deed also contains this provision:

"But this conveyance is made upon the express agreement that the said parties of the second part are to settle and account to me for one half of all the proceeds of my interest in the estate aforesaid."

Second, six other papers, all of them, except the first, which recites no consideration, purporting to be "for value received," and without reservation or exception, purporting to assign to defendants respectively all plaintiff's right, title, interest and claim, (1) to a certain sum of \$401.72, in the hands of W. H. Boyd and T. J. Moffett, under an agreement of October 17, 1912; (2) certain bonds and stock owned by the said Edwin M. Stewart at his death; (3) three shares of the capital stock of the Dollar Savings & Trust Company, of Wheeling, West Virginia, standing in the name of said Stewart at his death; (4) ten shares of the capital stock of the National Exchange Bank of Wheeling, West Virginia; (5) thirty shares of sixty seven shares of the common stock of the Columbus Street Railway Company, also owned by said decedent; (6) one first mortgage six per cent. gold bond, No. 33, of the Mound Coal Company, of Wheeling, West Virginia; and all of said several assignments purporting also to constitute said defendants plaintiff's true and lawful attorney for him and in his name, place, and stead, to make transfers of said stock, bonds, etc., and with power of substitution, etc.

The interests of the plaintiff in said real and personal property, as alleged, was an undivided fourteen one thousand and eightieths ($14/1080$), and the grounds alleged for the relief prayed for are substantially: First,

that at the time said several contracts, deeds, and assignments purport to have been made and executed the relationship of attorney and client had already been established between plaintiff and defendants, and that the properties purporting to be conveyed or assigned constituted the subject matter of their said employment, and that plaintiff has the right, at his election, to rescind or nullify said deeds and contracts, which for the reasons alleged he has elected to do: Second, that plaintiff's original contract, first with defendant Barrick, and afterwards with Yost also, after assignment by Barrick to him of a half interest therein, was that for their services for representing his interests in said properties and in recovering the same, they were to be paid by plaintiff one half of the net proceeds realized by him from the property so recovered; that at the time of said purported conveyances no services had been rendered by said defendants, and notwithstanding the recitals in said papers no consideration was ever paid plaintiff by defendants therefor: Third, that at the time plaintiff signed said first contract with defendant Barrick, of June 24, 1913, after his employment, as aforesaid, Barrick, as a means of procuring the same, falsely represented that it was intended simply to secure him his fees as agreed for services to be rendered, and that plaintiff relied on the reading and interpretation thereof by said Barrick, and trusted in him, and did not read the same himself; that subsequently, and but a few days later, namely, on June 30, 1913, when plaintiff was procured by said Barrick to sign and acknowledge an absolute deed to Barrick and Yost, of that date, for all of said real estate and royalty interests, and with the provision for an accounting only by the grantees to him for a half interest in the proceeds of said property, and the making of said several assignments of the same date purporting to sell and transfer to them his interest in said personal property, Barrick falsely represented to him that they, with a number of other papers, were simply notices to the corporations or other persons affected of his (plaintiff's) interest in said stocks and bonds, and of defendants' right to represent him in reference thereto, and that he so read some of them to plaintiff, who trusted him, and did not read them himself, and that plaintiff was not advised to the contrary nor of the claims made by defendant under said deed and assignments until shortly before the beginning of this suit; and that respecting the interest of plaintiff in the estate of his mother Mary Woodcock and of his father George B. Woodcock, referred to in said agreement of June 24, 1913, plaintiff then had no interest therein and made no claim thereto, and did not agree to assign or transfer to defendants any such interest therein: and Fourth, that defendants, claiming under said alleged contract, deed, and assignments, first intervened by a so called cross-petition in a certain suit in partition,

in Monroe County, Ohio, brought by John L. Woodcock against plaintiff, themselves, and others, to partition said real estate, and oil and gas interests, setting up in accordance with the allegation of the plaintiffs' petition therein, that plaintiff and themselves were owners in fee simple of interests in said land and oil and gas interests, in the proportion of seven one thousand and eightieths ($\frac{7}{1080}$) to plaintiff, and seven twenty one hundred and sixtieths ($\frac{7}{2160}$) respectively to each of themselves, and that the decree or order of partition, pronounced by said court, on January 31, 1916, on the pleadings therein, so ascertained and adjudged their respective interests in said property; but that defendants on their own behalf had appealed from said decree, claiming in their own right, the entire interest of plaintiff in said real estate, and that on the 19th day of January, 1916, defendants as plaintiffs had filed a new and independent petition in the Court of Common Pleas, of said Monroe County, Ohio, omitting plaintiff as a party plaintiff or defendant thereto, alleging themselves to be each seized and possessed of seven one thousand and eightieths interest in said property, and entitled to partition in that proportion, or the entire interest of plaintiff in said real estate, and sought partition thereof on that basis, notwithstanding the facts alleged in the cross-petition in said former suit, and the decree therein; and it now appears, not from the record of said first suit, but from the admissions and claims of counsel for defendants herein, that the Circuit Court for said Monroe County, upon the appeal by said Barrick and Yost, reversed the decree of the Court of Common Pleas, and held, according to the opinion of Pollock, Judge, who pronounced the opinion of the court, that defendants Barrick and Yost were seized and possessed of all the rights which plaintiff had in the property described in the petition, and subject only to the provision for an accounting of the proceeds thereof contained in the said deed of June 30, 1913, this notwithstanding the record of the proceedings in the case presented here by defendants with their so called plea in equity does not show any pleadings or issue by plaintiff or defendants involving the rights of the parties under said pretended deed, but only the rights of the parties as alleged in the petition and the cross-petition filed by Barrick and Yost on behalf of themselves and plaintiff herein.

The present bill also alleges that defendants have intervened in a certain attachment proceeding in Wetzel County, West Virginia, involving plaintiff's rights to certain property and money therein, and by virtue of some or all of said contracts or deed and assignments, are claiming against plaintiff's creditors all of said property and money, in their own right.

Upon the prayer of said bill in addition to the other prayers thereof plaintiff obtained an injunction restraining and inhibiting de-

defendants from prosecuting the said action in Monroe County, Ohio, and from prosecuting their claim to the money paid into court in the suit pending in the Circuit Court of Wetzel County, and also from in any other way conveying or encumbering said real estate and personal property until the further order of the court.

The bill further alleges in substance that said supposed contract, deed, and assignments were without consideration, and were so fraudulently and deceitfully procured, and that no consideration whatever was ever paid by either Barrick or Yost therefor, and were so procured not for the purpose of faithfully representing plaintiff, but for the fraudulent purpose of wrongfully defrauding and cheating him out of his property, and that their acts and conduct in reference to the property, and in pretending to prosecute and defend said suits had been acts of misrepresentation, and that the entire consideration for all of said contracts, deed, and assignments had failed.

Upon a petition filed by plaintiff in March, 1916, a rule in contempt was awarded against defendants for alleged violation of the said order of injunction, which rule was answered by defendants, denying violation thereof, but admitting the perfecting of their appeal from the said decree of partition, and it would now seem from briefs of counsel, that pending said injunction they also actually obtained a hearing on and reversal in their favor of said decree of partition, although this fact does not otherwise appear from the record.

Defendants, though summoned, filed no answer to the bill, and none of the allegations thereof have been put in issue by the pleadings. They have contented themselves with the filing of their plea to the jurisdiction, and of former adjudication by the judgment or decree of the Court of Common Pleas, of Monroe County, Ohio, in said partition suit, and thereby have challenged the jurisdiction of the Circuit Court of Wetzel County, West Virginia, and vouched the record of said suit and the judgment or decree of partition pronounced therein on January 31, 1916, in support of the said plea, but not the supposed decree of reversal by said circuit court; and as to said personal property they aver that the same is in custodia legis in the Circuit Court of Wetzel County, and is subject also to the jurisdiction of the probate court of said Monroe County, Ohio, in the settlement of the accounts of William F. Stewart, trustee.

Plaintiff did not stand alone on the allegations of his bill, taken for true on default of defendants to answer the same, but took evidence supporting the allegations thereof relating to the manner of obtaining said contract, deed, and other papers, and of the false representation of Barrick as to the character and effect of said papers, which together with the facts and circumstances alleged or ad-

mitted, with reference to the proceedings in other courts, satisfy us beyond doubt that plaintiff is entitled in part to the relief prayed for, unless the plea of the pendency of the suits in Ohio, or the former adjudication therein should prevail.

The court below, however, does not appear to have disposed of the case on the issue presented by the plea; for as the decree recites, the court "on its own motion" dismissed the bill of complaint for want of equity therein, and wholly dissolved the injunction.

[1] Preliminary to the main questions, the first point of error is, that the court erred in overruling plaintiff's motion for a change of venue. This motion was based upon the fact that the defendant Yost was attorney of record for the Judge of the court in two suits, one then pending in said court, in which one Long was plaintiff and the Judge and another were defendants; the other the bankruptcy proceeding of the Judge then pending in the District Court of the United States for the Northern District of West Virginia, and that by reason thereof he was disqualified to preside in the trial of this cause. It is not claimed that section 9 of chapter 112, Code 1913 (sec. 4556), as amended by chapter 71, Acts of 1915, relating to the subject disqualified the Judge to preside in the cause, but that this statute is not exclusive of other grounds such as those relied on in this case, and it is contended that by analogy, section 11, of said chapter (sec. 4558), relating to special judges, is applicable, namely, that:

"No special judge shall be eligible to serve in any case in which he has been or may be selected to act if at the time of such election, or afterwards, the relation of client and attorney shall exist between him and any party to the cause wherein he has been or may be selected, whether such relationship shall be in a cause pending in the same, or any other court of this State."

We do not see that this statute relating to special judges is applicable in terms or in spirit to the question presented here. The relationship of attorney and client, urged in this case, does not disqualify the judge from presiding in a case where his attorney may be a party. If it is possible to assume that because of such relationship a judge would be so unduly influenced and biased in favor of an attorney employed by him, such fact ought to address itself to the consideration of the judge himself, and if conscious of such influence and prejudice he would thereby be enabled to certify on the record that he was so situated in reference to the case that in his judgment rendered it improper for him to preside therein, and excuse himself from presiding. So we overrule the point.

[2] Two other preliminary points of error are made: First, that the court adjourned the hearing of the defendants' motion to dissolve the injunction. As this ruling of the court did not prejudice the plaintiff, the injunction remaining in force, and as such motions are conceded to be addressed to the

sound discretion of the court, we also overrule this point. The other point of error is that the court erred in dismissing the rule for contempt. As this proceeding has reached the law side of the court, and is quasi criminal, we do not think the act of the court therein is a proper question for consideration on this appeal. And that point is likewise overruled.

[3] Now as to the fourth point of error, the one presenting the main questions involved, namely, that the court erred in dismissing plaintiff's bill and awarding costs against him. The first question is, does the pendency of the partition suits in Ohio, or the decree of partition therein, reversed on appeal by the circuit court, preclude or estop plaintiff from prosecuting this suit? Plaintiff and defendants are and were at the time of said contracts citizens and residents of Wetzel County, West Virginia, where the contracts purport to have been executed. It is conceded, however, that in so far as said contracts or deeds relate to the real estate located in Ohio, the courts of this state would have no jurisdiction to set aside, vacate, or annul them, or remove them as clouds upon the title to the land located in that state, and that the object of the bill for that purpose cannot be attained; that to obtain such relief resort must be had to the courts of the state where the land is situated.

But respecting the other form of relief sought, it is contended that as the parties to the deed and contract reside in this state, where they were made, and as to both forms of relief, so far as they relate to the personal estate, the circuit court had complete jurisdiction, upon the grounds alleged, to require defendants to reconvey all said real estate or other property to the plaintiff, or to cancel the contract or require the defendants to reconvey all the personal property.

It is well settled, not only by the decisions of this court, but by the highest courts of other jurisdictions, that the courts of one state may compel persons subject to its jurisdiction to make personal conveyances of land in another state, and to do any other act, which without reference to the decree would affect the land, according to its *lex rei sitæ*, and that in such cases that it is the conveyance made in performance thereof and not the decree which passes the title. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 368; *Poindexter v. Burwell*, 82 Va. 507; *Guerrant v. Fowler*, 1 Hen. & M. 5; *Tenant's Heirs v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979. And this court held in *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932, point 2 of the syllabus, that:

"A court having jurisdiction in personam may require the defendant to do, or refrain from doing, beyond its territorial jurisdiction, anything which it has power to require him to do or omit within the limits of its territory."

So we think there can be no question as to the jurisdiction of the court in the premises.

[4] The next question is does the pendency of the partition suits in Ohio, or the decree of the Common Pleas Court therein, admitted to have been reversed by the circuit court, and the cause remanded for further proceedings, estop or preclude plaintiff from maintaining this suit? It is not pretended nor does the record in the Ohio court show, that the issues presented by the bill in this cause were pleaded or adjudicated by the decrees or orders pronounced in those suits. But it is contended that the court there had jurisdiction to settle and determine all questions of title as between the plaintiff therein and his co-defendants, and that as the plaintiff here was represented in those suits by defendants and by Lynch & Lynch, attorneys, whom they associated with them, in a so called cross-petition, and which petition alleged that the cross-petitioners were seized and possessed of interests in said real estate, in the proportions decreed by the decree of partition appealed from by them, and did not set up by any cross-pleading and ask to have adjudicated the rights which he seeks to have vindicated in this cause, the questions here presented are *res adjudicata*, and that his bill was properly dismissed.

Unless the decrees of partition of the Ohio court, reversed by the appellate court, necessarily involved and adjudicated the rights of the plaintiff, it is not a question whether the Ohio court could have adjudicated these rights upon proper pleadings, for we know from the record pleaded that no pleadings by the plaintiff here, or on his behalf, specifically put in issue the facts alleged and relied on in the bill in this cause, and unless the law of the land required plaintiff to intervene in the Ohio court, and that court with jurisdiction of the partition suit withdrew to itself the right to settle and determine all rights of title between plaintiff and co-defendants, and all rights, or rights of action, pertaining thereto, then plaintiff cannot be estopped by the decree or order of the Ohio court from maintaining this suit, for the limited purposes indicated. Moreover, the record in the Ohio court shows that the so called cross-petition filed on behalf of the plaintiff and defendants in this cause was dismissed for want of security for costs, and the appeal from that decree prosecuted by defendants here was hostile and antagonistic to the rights of plaintiff as adjudged by the decree appealed from. Plaintiff here alleges, and it is not denied, that he had no notice of the pendency of the said suit in the Ohio court, until about the time of the entry of said decree, and that he promptly thereafter brought this suit.

The question then recurs, are the judgments or decrees of partition in the Ohio court an adjudication of the rights of the

plaintiff here? We do not think so. Assuming that all the deeds and contracts relating to the real estate were properly pleaded, and were before that court, nothing could have been adjudicated by this decree except that partitioners upon the face of the deeds were entitled to interests as conveyed and in the proportions decreed. True everything must be regarded as settled by the final decrees in these cases, which were or could have been presented under the pleadings, but nothing more. To bar further action the demand must have been the same and the cause of the demand the same. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 850; *Biern v. Ray*, 49 W. Va. 129, 38 S. E. 530; *Dent v. Pickens*, 50 W. Va. 382, 40 S. E. 572.

A point made on behalf of the plaintiff here is that because of the want of jurisdiction of the person of defendants by the Ohio court, defendants being residents of West Virginia, personal service upon them in Ohio could not have been had, and the court there could not have acquired jurisdiction to settle the question here presented. But it has been decided by this court, and it is well settled elsewhere, that:

"Equity may, upon service of process on a non resident by publication, remove cloud from title to land within its jurisdiction by a decree, binding only in rem." *Tennant v. Fretts*, supra.

Counsel for defendants refer to sections 12026 and 12028 of the General Code of Ohio, and in connection therewith cite some decisions of the courts of that state, including *Roberts v. Remy*, 56 Ohio St. 249, 46 N. E. 1066, to support their contention that the Ohio court would have jurisdiction to settle conflicting claims of title between the plaintiff and co-defendants in the petition. The statutes referred to simply give right of partition and are not unlike the provisions of our own code in relation thereto. But the question we have is not one of power or authority, but whether the Ohio court had exclusive jurisdiction, and we do not think that either the statutes or the decisions cited support the proposition of exclusive jurisdiction contended for. As already indicated, the controversy here is not limited to the real estate in Ohio; it involves certain personal estate also, supposed to be covered by the contracts or assignments under which defendants are not only asserting title to the personal estate in the courts of Ohio, but in this state also, and according to the decisions cited the circuit court of Wetzel County has jurisdiction to compel reconveyance of the land and surrender or cancellation of the contracts fraudulently obtained for the personal estate. When such relief has been given and the reconveyances made, plaintiff will have the right to interpose such deed or deeds of conveyance against any claim or claims of title by defendants under their deeds or contracts, notwithstanding the decree of partition in the Ohio court.

[5] The final question then is, was the bill properly dismissed for want of equity? We are of opinion that it was not. The two grounds of equity were, the right of rescission based on the relationship of attorney and client existing at the time said deed and contracts were so procured. The bill alleges and it is not denied that this relationship was established before the defendant Barrick procured said contract, deed, and assignments, and besides, the evidence of the plaintiff supports this contention. It is argued that the contract of June 24, 1913, simply carries into effect the previous contract of employment, but as alleged in the bill, and not denied, that contract was not that plaintiff would convey and transfer to Barrick or his co-defendant Yost a one half interest, or the whole interest, in plaintiff's property, but that for services which they agreed to render, plaintiff would pay them one half of the proceeds arising out of the property recovered. The contract of June 24, 1913, and the subsequent deed and assignments procured on June 30, 1913, were quite different in effect from the original contract of employment. They purported to grant and convey larger interests than defendants were entitled to under that contract. They divested plaintiff entirely of all right of title to the property, and subjected him to the will of defendants and the danger of their insolvency. Whether defendants performed any service under the contract entitling them to any of the property so acquired may be doubted. The bill alleges that they did not and the allegation is not denied; and so far as we can see from what was done by defendants in the Ohio court, it was rather more antagonistic to the interest of the plaintiff than a faithful representation of those interests. True, they filed a so called cross-petition, but it strikes us that petition is misnamed, and besides they allowed it to be dismissed for want of security for costs. There appears to have been no controversy between the plaintiff in the partition suit and the defendants or plaintiffs in the cross-petition; both represented the interests of the parties thereto to be the same, and the decree of partition, reversed on appeal, so adjudged. Defendants may possibly be entitled to some compensation for their services in the suit of G. O. Woodcock against William R. Woodcock, in which the plaintiff therein recovered judgment against defendant for \$362.00, and costs. But we do not decide that question; nor do we think it sufficient to defeat plaintiff's rights to relief. According to the decisions of this court and because of the relationship of attorney and client, plaintiff is entitled, regardless of any rights of the defendants, to avoid the contract, deed, and assignments, to compel reconveyance of the real estate to him, and the surrender and cancellation of said assignments of personal property. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806.

And we are furthermore of opinion that

upon the grounds of fraud and deceit practiced in the procurement of said contract, deed, and assignments, by the defendant Barrick, plaintiff is entitled to like relief.

Our conclusion, therefore, is to reverse the decree, and enter such decree here as we think the circuit court should have entered, perpetuating the injunction, and requiring the defendants and each of them to make, execute, and deliver to the plaintiff, a deed reconveying to him all the right, title, and estate in and to the lands, and in the oil and gas royalties and rights mentioned and described in his contract with Barrick, dated June 24, 1913, and in the subsequent deed of June 30, 1913, properly acknowledged for record, and that the said several assignments of personal property as described herein be and the same are hereby set aside, cancelled, and annulled, and that they be surrendered by defendants to plaintiff, and that this cause be remanded to the circuit court with directions to execute this decree by proper proceedings to be had herein, and further proceeded with in said court according to the principles herein enunciated and further according to the rules and principles governing courts of equity; and that plaintiff also recover his costs in this court and in the circuit court in this behalf expended.

(79 W. Va. 89)

WATTS BROS & CO. v. FRITH et al.
(No. 3015.)

(Supreme Court of Appeals of West Virginia.
Oct. 24, 1916. Rehearing Denied Jan.
10, 1917.)

(Syllabus by the Court.)

1. TRUSTS §77—RESULTING TRUSTS—CREATION.

As a general rule payment of the purchase money or some part thereof, or assumption of some obligation therefor, at or before the sale and conveyance of the land to the grantee, is a pre-requisite to the establishment of a resulting trust, and the subsequent payment or the assumption thereof will not, by relation, attach such trust to the original purchase.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 109.]

2. TRUSTS §89(5)—ESTABLISHMENT—SUFFICIENCY OF EVIDENCE.

To establish such resulting trust such prior payment or assumption of payment of the purchase money must be shown with certainty and exactness.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 137.]

Appeal from Circuit Court, Mercer County.

Bill in equity by Watts Bros. & Co. against W. O. Frith and others. From a decree for plaintiff, defendant Anna O. Frith appeals. Affirmed.

Ross & Kahle, of Bluefield, and Hartley Sanders, of Princeton, for appellant. McNutt, Ellett & McNutt, of Princeton, for appellee.

MILLER, J. The decree appealed from, in accordance with the allegations and prayer of the bill, adjudges that the deed of October 10, 1913, from the defendants W. O. Frith and Anna O. Frith, his wife, to the defendant T. J. Effinger, trustee, conveying certain real and personal property in trust to be re-conveyed by said trustee to the said Anna O. Frith, and the deed from said Effinger, trustee, to the said Anna O. Frith, of the same date, conveying the same property to her, in accordance with the deed to him, were each made to hinder, delay and defraud the creditors of said W. O. Frith, and especially the plaintiff, Watts Brothers & Company, in respect to their judgment, and that the same should be and they were thereby set aside and held for naught.

The answers of defendants, while admitting the purchase by and conveyance of said land to the said W. O. Frith, and the apparent ownership by him of all said personal property, alleges ownership thereof by Mrs. Frith, by way of a resulting trust, it being alleged that her money paid for all of said property, and that the title was taken by her husband in trust for her, and that he has not and never had any interest therein which was liable to be charged with his debts.

We have carefully examined all the evidence adduced on the issues thus presented, and we cannot say that the decree is not supported by the proof. In the first place the recitals in the deed from Frith and wife to Effinger, trustee, which estops them, do not support their theory of a resulting trust in favor of Mrs. Frith, but quite the contrary. The tract of ninety-three and one-third acres, known as the Stafford farm, was conveyed to W. O. Frith, September 26, 1910, the lot on Main Street, Princeton, in April, 1911, and the lot in the Bee Addition to the same city, in June, 1911, the first, three years, and the second and third lots over two years before the conveyance of the property to Mrs. Frith. The personal property conveyed to her consisted of a printing plant and all accounts payable due to the Princeton Progress Printing Company, the name under which the business was conducted by said W. O. Frith. In fact the deed shows a purpose and intention on the part of Frith to convey to his wife every vestige of property standing in his name, and put it beyond the reach of these attacking creditors. A significant recital in this deed, is, not that said real estate was purchased entirely with the money of Mrs. Frith, but that the same was purchased "largely with money belonging to the said Anna O. Frith," and that "said property is therefore, to a large extent, and to the extent of a certain unascertained undivided interest therein her sole and separate property, and should be deeded and held by her to the extent of her said undivided interest therein." Another pertinent recital,

under a whereas, is, that "said W. O. Frith is desirous of paying by means of conveying *his property* in fee to the said Anna O. Frith certain debts and obligations due from himself to the said Anna O. Frith above referred to, which consists of loans made by her and endorsements made by her, which in addition to being mentioned above, are herein-after set out." The deed then proceeds to recite many debts as owing by said W. O. Frith, among them a three thousand dollar note, on which Mrs. Frith is endorser, and which is secured by a deed of trust on her property; a note of twelve hundred dollars, on which she is also endorser; a note for sixteen hundred dollars, endorsed by Frank Wall, and which is shown to be the last deferred payment on the Stafford farm, together with many other debts, which need not be specifically referred to.

Besides these admissions in the deed there is the positive evidence of two witnesses that prior to the making of these deeds W. O. Frith declared to them that plaintiff's debt was not just and that sooner than pay it he would convey his property away, and beyond their reach, or would spend a large amount to defeat them from recovery thereof. Checks and notes were admittedly issued by W. O. Frith in payment of the property, not one of which is produced, and we have no evidence in the record of the particulars respecting the sources of the payments made by W. O. Frith.

[1] What conclusion should be drawn from these facts? Plainly that Mrs. Frith paid no part of the purchase money at or before the sale and conveyance of the property to her husband; she was no party to the contract; nor did she within that time assume any obligation for the purchase money. This as a general rule is sufficient to deny her the benefit of a resulting trust, for a subsequent payment will not, by relation, attach a trust to the original purchase. *Murry v. Sell*, 23 W. Va. 475; *Shaffer v. Fetty*, 30 W. Va. 248, 4 S. E. 278; *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329; *Moore v. Mustoe*, 47 W. Va. 549, 35 S. E. 871, 81 Am. St. Rep. 812, and the many other cases cited in 13 Va. & W. Va. Enc. Dig. 279.

[2] Another fact must be drawn from the evidence, namely, that the money afterwards advanced by Mrs. Frith was, if any, by way of a loan to her husband to pay the purchase money. Exactly how much money was so advanced is not shown. The deed contradicts the theory that she paid it all. We have decided that no resulting trust can be raised in favor of a wife from payment by her of a part of the purchase money on land bought by her husband in his own name, unless it be shown with certainty and exactness, what part was paid by her. *Pickens v. Wood*, 57 W. Va. 480, 50 S. E. 818. The

deed of Frith and wife to Effinger, trustee, calls her payments "borrowed money," and describes her interest as an "unascertained undivided interest," and his desire of re-paying her by conveyance of the property in fee, and there is absolutely no evidence of the exact amount of money paid. To establish a resulting trust the evidence must be clear and unequivocal. *Cassady v. Cassady*, 74 W. Va. 53, 81 S. E. 829.

The evidence we think clearly establishes an intent to hinder, delay and defraud plaintiffs in the collection of their debt, and our conclusion is to affirm the decree.

(79 W. Va. 471)

APPALACHIAN MARBLE COMPANY v.

MASONIC TEMPLE ASS'N et al.

(No. 3230.)

(Supreme Court of Appeals of West Virginia.
Jan. 30, 1917.)

(Syllabus by the Court.)

1. EVIDENCE ~~34~~, 35—JUDICIAL NOTICE—LAWS OF FOREIGN STATE—LAWS OF UNITED STATES.

Judicial notice will be taken of the laws of a foreign state, or of the United States, by the courts of this state, by virtue of the provisions of section 4, c. 13, Barnes' Code (Code 1913, § 333).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 35, 49, 50, 51; Appeal and Error, Cent. Dig. § 2959.]

2. AFFIDAVITS ~~15~~—EVIDENCE ~~44~~—AUTHENTICATION OF LIEN STATEMENT—AUTHORITY TO NOTARY PUBLIC OF ANOTHER STATE—JUDICIAL NOTICE.

The certificate of the clerk of a court of record of the state of Tennessee, appended to an affidavit which verifies a mechanic's lien, to the effect that the officer taking said affidavit and administering said oath was at said time a notary public, duly commissioned and qualified as such, and that his signature thereto is genuine, is a sufficient authentication of such affidavit; it being judicially known that a notary public in the state of Tennessee is authorized to administer an oath.

[Ed. Note.—For other cases, see Affidavits, Cent. Dig. §§ 61-64; Evidence, Cent. Dig. § 66; Appeal and Error, Cent. Dig. § 2959.]

3. MECHANICS' LIENS ~~158~~—FILING AMENDMENT.

As a general rule a mechanic's lien filed under the laws of this state cannot be amended after the time limit for filing such a mechanic's lien has expired.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 275-278.]

Appeal from Circuit Court, Wood County.

Suit in equity by the Appalachian Marble Company against the Masonic Temple Association and another. Decree for defendants, and plaintiff appeals. Decree reversed, and cause remanded.

Abijah Hays and Smith D. Turner, both of Parkersburg, for appellant. L. N. Tavenner, of Parkersburg, for appellees.

RITZ, J. Appalachian Marble Company brought its suit in equity in the circuit court of Wood county against Masonic Temple

Association and the Prescott Construction Company, having for its purpose the enforcement of a mechanic's lien which had theretofore been filed by the plaintiff against the real estate of the defendant Masonic Temple Association.

The defendant Prescott Construction Company, under a contract with the defendant Masonic Temple Association, constructed for it on its real estate situate in the city of Parkersburg a building. In the construction of this building the plaintiff furnished certain material and did certain work as a subcontractor of the defendant Prescott Construction Company. After it ceased to work and furnish such material, and within the time required by law, it gave notice to the owner of the property that it claimed a mechanic's lien, and within the time provided by law it filed such lien in the office of the clerk of the county court of Wood county. It then instituted this suit for the purpose of enforcing said lien against the real estate of the defendant Masonic Temple Association. The defendant Prescott Construction Company demurred to the bill, and the demurrer was sustained, and the bill dismissed.

[2] The affidavit to the mechanic's lien was made by an officer of the plaintiff company in Knox county, Tenn., and there is appended thereto a certificate of the clerk of the county court of said Knox county, the same being a court of record, certifying that the party whose name is signed to the jurat was at the time he signed the same a notary public duly appointed and qualified as such, and that his signature to the said jurat is genuine. The point is made that this certificate is not a compliance with the provisions of section 81 of chapter 130, Barnes' Code (Code 1913, § 4887). This section provides that such an affidavit as this shall be deemed duly authenticated if it be subscribed by the officer taking it, and there be annexed to it a certificate of the clerk or other officer of a court of record of the state in which the same is taken, under the official seal of such court, verifying the genuineness of the signature of the officer before whom the oath or affidavit was taken, and his authority to administer an oath. It will be observed that the certificate of the clerk of the county court of Knox county appended to the affidavit in this case does not in express words say that the party who took the affidavit was at the time authorized to administer an oath, but simply says that he was a notary public duly commissioned and qualified as such, and that his signature is genuine. It is insisted, however, that because of the provisions of section 4 of chapter 13, Barnes' Code (Code 1913, § 333), that judicial notice will be taken of the laws of Tennessee, and that when this is done it will be observed that a notary public was at said time authorized to administer an oath, and that the certificate is

therefore in effect that required by the statute.

[1] Section 4 of chapter 13, Barnes' Code, provides that, whenever it becomes material to ascertain what the law of another state or country or of the United States is, or was at any time, the court, or judge, or magistrate shall take judicial notice thereof, and may consult any printed book purporting to contain the same. The certificate required to be made by the clerk of a court of record and to be appended to the jurat subscribed by the officer taking the oath, as will be seen from the statute above quoted, requires two things to appear therefrom: First, that the signature of the officer subscribing the jurat is genuine; second, that he was at the time of making the same authorized to administer an oath. In this case there is no question about the certificate being sufficient as to the first requirement. Its sufficiency as to the second requirement depends upon the construction to be given to this statute. If we are to say that nothing short of a literal declaration by the officer making the certificate that the officer taking the oath was authorized to administer oaths is required, then it is not sufficient. If, however, a certificate the legal effect of which is that the officer taking the oath was authorized at said time to take the same is sufficient, then this certificate meets the requirements of the act. The authority of an officer to administer an oath depends upon the ascertainment of certain facts, the principal of which are his due appointment and qualification. If his due appointment and qualification to a certain office is shown, then it follows as a matter of law that he has or that he has not the authority to administer an oath, depending upon whether the law does or does not confer such authority, and a certificate going further than certifying the fact of his due appointment and qualification would be simply a declaration of the law based upon the ascertained fact of his due appointment and qualification.

It will be seen from section 4 of chapter 13 that the courts of this state will take judicial notice of the law of foreign states. When we do this we find that, if the statement of fact contained in this certificate is true, it is a compliance with the requirements of the statute, because a notary public under the laws of Tennessee was at the time of taking the certificate authorized to administer an oath.

[3] The court below held this certificate insufficient, and the plaintiff asked leave to amend its lien by supplying a new certificate, but this leave was denied it by the circuit court, and this is complained of as error. We do not think the circuit court erred in this regard. A mechanic's lien so imperfect as to render it ineffective to secure to the party taking it the benefits of such lien cannot be amended after the ex-

piration of the time within which notice must be given to the owner of the property and the mechanic's lien filed so as to make it comply with the requirements of the law. A party asserting a mechanic's lien must within the time required by law have placed upon the records such a complete statement as is effective to give him the benefit of a lien against the real estate of the owner for the amount due him for work and labor performed, or material furnished, and an incomplete or insufficient mechanic's lien filed within the time provided for the filing of such liens cannot be supplemented after such time has expired by the filing of additional statements or additional affidavits so as to make it have an effect which it would not otherwise have had. *Boisot on Mechanics' Liens*, § 463; *Rockel on Mechanics' Liens*, § 123.

It follows from what has been said that the decree of the circuit court of Wood county must be reversed, and the cause remanded, with directions to overrule the demurrer, and further to be appropriately proceeded with, with costs in this court to the appellant against the appellee the Prescott Construction Company.

(146 Ga. 431)

POUND v. SMITH et al. (No. 235.)
(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. TRUSTS — 17, 18(3) — EXPRESS TRUST — CREATION — WRITING.

Under the facts of this case it was error to allow an amendment by the plaintiffs, praying that the title to land be decreed in them, with remainder over to the survivor, based upon an alleged parol agreement to that effect.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 18.]

2. SPECIFIC PERFORMANCE — 114(1) — PLEADING — SUFFICIENCY.

The allegations and prayers were not sufficiently definite to raise the question of specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 356, 366, 367, 370.]

3. TRUSTS — 371(1) — IMPLIED TRUST — ENFORCEMENT.

The petition, pruned by demurrer, is sufficient in its allegations to constitute a suit to enforce an implied trust, and for this relief the prayers are broad enough.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 588, 599.]

4. JUDGMENT — 248 — BASIS IN PLEADINGS — REVERSAL.

The verdict and the decree based thereon awarded to the plaintiffs the entire interest in a lot of land. Under the pleadings and the evidence they were entitled to only a two-thirds interest. For this reason the judgment of the trial court must be reversed.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 434.]

5. APPEAL AND ERROR — 302(3) — MOTION FOR NEW TRIAL — GROUNDS — EVIDENCE.

A ground of a motion for a new trial, assigning error upon the admission of evidence,

will not be considered, unless the evidence is sufficiently set forth for the question of its admissibility to be determined without reference to other parts of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1747.]

6. NONSUIT — REFUSAL.

The refusal of the court to grant a nonsuit was not error.

7. IMPLIED TRUST.

It was not error for the court to charge the law in regard to implied trusts.

Error from Superior Court, Hancock County; J. B. Park, Judge.

Action by the Misses Treasle and Acquillian Smith against J. M. Pound, as administrator of the estate of John T. Smith, deceased. From order that grounds of demurrer be sustained as to all parts of petition and prayer for reformation of deeds, and overruled as to dismissing petition and as to other matters therein contained, defendant brings error. Reversed.

Misses Treasle and Acquillian Smith filed their petition against J. M. Pound, as administrator of the estate of their brother, John T. Smith, in which they prayed for reformation, specific performance, injunction, and general relief. The defendant filed his answer, and also a demurrer. The demurrer was sustained as to certain grounds, but as to others it was overruled. The court allowed the plaintiffs to amend their petition. Upon the trial a verdict was returned, awarding to the plaintiffs one of the two tracts of land in controversy. A motion for a new trial was overruled, and the defendant excepted to this, as well as to the other rulings adverse to him.

The material allegations of the petition are as follows: J. M. Pound, as administrator of the estate of John T. Smith, deceased, under an order of the court of ordinary, is proceeding to sell at public outcry two described tracts of land. This land is the property of the plaintiffs. They together with their brother, John T. Smith, contracted with E. F. Pound, now deceased, to purchase one of the tracts of land described, and later contracted with him to purchase the other tract. At the time of the purchase the plaintiffs and their brother were residing on one of the tracts, and it was agreed that they would purchase both tracts, and that the same should be held and owned "in common by them during their lives, and that the survivors should take the fee to the entire property." After the purchase as agreed upon, the plaintiffs and their brother resided and farmed upon the lands, each working thereon for their common benefit, and from the proceeds of the property and the results of their joint labor it was paid for. The sisters, being illiterate and inexperienced in business affairs, each year turned over the crops as they were gathered to their brother, to market, with the instruc-

tion and understanding that the money arising therefrom should be paid on the purchase price of the lands which they had bought. The sisters labored in the field, side by side with their brother, and performed all the domestic duties. They practiced "the most rigid economy, never reserving one penny of compensation, except their meager purchase of wearing apparel, in order that every cent from said crop and other proceeds from said land should be applied to the purchase money of said land." One of the sisters, Treasle Smith, paid in actual cash, at the time of the first purchase, "\$350 on the purchase price of the land, and at subsequent times her earnings as a midwife were contributed to the payment of the land. Until after his death the plaintiffs did not know that the titles to the land were made to their brother individually, as he had concealed this fact from them during his life, though they had intrusted him to make the payments upon the land, and to have the deeds executed to the three jointly, in accordance with their agreement.

If the title be permitted to stand as it is, and the land be administered as the estate of their brother, the plaintiffs will be defrauded of their right and title thereto. The vendor of the land is dead, and his estate has been administered, and the administrator discharged. Should the land be sold by the administrator of their brother's estate, the plaintiffs will suffer irreparable loss. The prayers are as follows:

"(a) That the said two deeds hereto attached be reformed in conformity with the agreement between these petitioners and their said brother, Jno. T. Smith, expressing the grantees therein as petitioners and the said Jno. T. Smith jointly, for their natural lives, with remainder over to the survivors.

"(b) That the title to the said land be decreed to the petitioners for their natural life, with the remainder over to the survivors.

"(c) That the said J. M. Pound, administrator of the estate of said Jno. T. Smith, be perpetually restrained and enjoined from administering said land as the property of estate of said Jno. T. Smith, or from any wise interfering therewith in his capacity as administrator aforesaid.

"(d) For such other and further relief as petitioners in equity are entitled to."

In his answer the defendant contended that the brother, John T. Smith, was the sole owner of the land, which he had paid for from his own resources; that there was no concealment of his ownership; but that the deeds to both tracts of land were properly recorded in the clerk's office, and therefore were notice to all who might want to know of their contents.

The grounds of demurrer to the petition were the following:

"(1) There is no cause of action alleged.

"(2) There is no cause of action alleged by which a court of law or equity would be authorized to reform a deed or deeds.

"(3) That petitioners have no legal or equitable right to have the title to land described in petition to be decreed to them for their natural lives, with remainder over to survivors. They

have no such right of a specific performance against this defendant.

"(4) If petitioners have any cause of action at all, it would be a suit for damages for fraud and deceit. Defendant further demurs and moves to dismiss paragraph 3 of petition, because, if petitioners intend to claim the property described in the foregoing paragraph, the claim should have been filed with the ordinary of Hancock county, as the law provides for claims in such cases.

"(5) The petition does not allege or set forth a mutual mistake by the parties to the deeds which petitioners pray to have reformed.

"(6) The petition does not allege any mistake by either E. F. Pound or John T. Smith, the parties named in the deeds.

"(7) The petition alleges concealment, deceit, and fraud on the part of John T. Smith, and no mistake on the part of E. F. Pound.

"(8) Defendant specially demurs and moves to dismiss petition, because petitioners have no legal or equitable right to have the contracts reformed, which were made and entered into by other parties; and petitioners, not being parties to the contract, have no legal or equitable right to reform a contract making them parties thereto.

"(9) Defendant specially demurs and moves to dismiss paragraphs (a) and (b) in prayer, because no contract is alleged to have been made with E. F. Pound as grantor on one part, and petitioners and John T. Smith jointly as grantees on the other part, for their natural lives, with remainder over to survivors."

The court ordered that the grounds of demurrer be sustained as to all portions of the petition and prayer for reforming the deeds, and that they be overruled as to dismissing the petition, and as to other matters therein contained.

The amendment to the petition, as allowed, was as follows:

"Strike section (a) of the prayer of the petition, and substitute in lieu thereof the following: 'That this court decree the title conveyed by E. F. Pound and J. M. Pound, executor of the estate of E. F. Pound, to Jno. T. Smith to conform to the contract existing between the said Jno. T. Smith and plaintiffs, and that said land was held by the said Jno. T. Smith in trust for himself and the plaintiffs for the term of their natural lives, with remainder over to their survivor, and that said land is not subject to be administered as the estate or any part of the estate of the said Jno. T. Smith.'"

R. L. Merritt, of Sparta, and Evans & Evans, of Sandersville, for plaintiff in error. Burwell & Fleming and J. W. Lewis, all of Sparta, for defendants in error.

GILBERT, J. (after stating the facts as above). All that portion of the plaintiffs' petition and the prayers thereof which sought to reform the deeds from Pound to John T. Smith was stricken on demurrer, and properly so, because it was not alleged that the agreement between the plaintiffs and their brother was concurred in by Pound, the vendor from whom they purchased the land. Civil Code 1910, § 4579.

[1] 1. It cannot be determined definitely from the language of the judgment on the demurrer whether the allegations and the prayer with reference to decreeing title to the land in the plaintiffs for their natural lives, with remainder over to the survivor,

were stricken or not. The court, after ruling on the demurrer, allowed the plaintiffs to amend their petition by substituting for the prayer for reformation of the deeds a prayer in the words quoted at the close of the statement of facts. The defendant objected to the allowance of this amendment, and to the overruling of this objection he excepted. This ruling was error. The prayer sought the reformation of an alleged parol contract by decreeing a remainder over to survivors. To do this would be to reform a parol contract into an express trust. All express trusts must be created or declared in writing. Civil Code 1910, § 3733.

[2] 2. No question is properly made by the petition as to the right of the plaintiffs to have specific performance of their contract, as against their brother's administrator. The rule is that:

"The plaintiff in an equitable petition must not only allege facts which will show that he is entitled to relief, but by his prayers must indicate the nature of that relief."

There was no prayer for specific performance. "The plaintiff in an equitable petition will never be granted any relief unless there is a prayer asking for the specific relief sought, or unless there is a prayer for general relief and the nature of the case is such that under the prayer for general relief some character of relief may be granted which is consistent with the case made by the petition and with the specific prayers therein." *Copeland v. Cheney*, 116 Ga. 685, 687, 43 S. E. 59, 60. The prayer for general relief in this case is not sufficiently specific to embrace a prayer for specific performance, and for that reason we will not consider the contentions of the plaintiffs for this relief.

[3] 3. The petition, thus pruned by demurrer, is sufficient in its allegations to constitute a suit to enforce an implied trust, and for this relief the prayers are broad enough.

[4] 4. According to the allegations of the petition, the two sisters and their brother agreed to purchase the two tracts of land in controversy. It was a part of their agreement that the title should be taken in the three jointly, with the right of survivorship. The contract was in parol. The sisters paid their share of the purchase money. The brother, disregarding the agreement, took the title in himself alone. Under these circumstances the law implied a trust in favor of the sisters to the extent of their interest. Civil Code 1910, § 3739(1). The law, in thus implying a trust, simply makes the grantee in the deed the trustee for the benefit of those whose money was used in the purchase of the land. The legal title was in the brother. The beneficial interest was in the three purchasers. Accordingly, the plaintiffs would be entitled, on proof that they had paid their share of the purchase money, to a decree that the administrator of their deceased brother be declared to hold the land in trust

for their benefit to the extent of their interest, to wit, two-thirds.

The jury returned a verdict, awarding to the plaintiffs the whole of one of the tracts of land, whereupon the court decreed the whole interest in this tract to the plaintiffs for and during "their natural lives, with remainder to the survivor of the two in fee." This verdict is not in harmony with the pleadings and facts of the case. For this reason the judgment of the court must be reversed. The plaintiffs are not entitled to the whole interest, nor could a reversatory interest be decreed.

The motion for a new trial contains many assignments of error, but it is not necessary to pass upon them in detail. The charges of the court complained of were subject to one of the criticisms made, which was that the plaintiffs in any event would only be entitled to a two-thirds interest, whereas, the court instructed the jury, if they found for the plaintiffs, that they might award them the whole interest. On another trial the instructions of the court will, of course, be in accord with the rulings above made in this particular.

[5] 5. The assignments of error in regard to the admission of evidence were not sufficiently full and specific for this court, without looking to the brief of evidence, to say that the trial court erred for any of the reasons assigned. *Georgia Northern Ry. Co. v. Hutchins*, 119 Ga. 504, 46 S. E. 659; *Baxter v. Camp*, 126 Ga. 354, 54 S. E. 1036.

[6, 7] 6, 7. The refusal of the court to grant a nonsuit was not error. Nor was it error to charge the law in regard to implied trusts.

Judgment reversed. All the Justices concur.

(146 Ga. 439)
DEAL v. GEORGE et al.
(No. 237.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(*Syllabus by the Court.*)

1. TRIAL §252(5)—ACTION—INSTRUCTION.

The facts of this case showed prescriptive title in the plaintiff. The defendants failed to show that any of the land in dispute was covered by the deeds introduced by them. The defendants failed to show possession by any of the grantors of the land in dispute. Such being the case, it was error to instruct the jury in regard to the law applicable to disputed land lines between coterminous owners.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 600.]

2. ADVERSE POSSESSION §113—EVIDENCE—DEEDS.

Certain deeds were admitted over objection. On another trial these deeds, or either of them, should be admitted when shown to cover any part of the land in controversy, or they should be rejected if such materiality is not shown.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 669, 671-681.]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Proceedings between C. M. Deal and J. D. George and others. Judgments for George and others, and Deal brings error. Judgments reversed.

Glessner & Collins, of Blakely, for plaintiff in error. Walter G. Park, of Blakely, for defendants in error.

GILBERT, J. Judgments reversed. All the Justices concur.

(146 Ga. 402)

HOLMES et al. v. BROWN. (No. 229.)
(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. TRADE UNIONS — MEMBERS — RIGHTS OF.

The rights of a member of an unincorporated society are defined by the constitution and the rules of the association, and arise out of private contract. If a member has been suspended by virtue of a sentence imposed by a trial held in violation of the constitution and by-laws of the association, and the suspended member is thereby denied the right to participate in certain benefits payable out of a fund raised by dues and assessments, equity will enjoin the enforcement of such illegal sentence and the interference by officers of the association with his rights as a member until he is given a hearing in accordance with the constitution of the association.

[Ed. Note.—For other cases, see Trade Unions, Cent. Dig. § 3.]

2. INJUNCTION — SCOPE OF ORDER.

The order of the court in the case at bar is not to be construed as a final determination of the suspended member's status, but as a temporary injunction against the enforcement of the suspension until his status is fixed by a final trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. Brown against Martin Holmes, president of the Bricklayers', Masons', and Plasterers' International Union of America, and others. Plaintiff was granted an interlocutory injunction, and defendants bring error. Affirmed.

The Bricklayers', Masons', and Plasterers' International Union of America, a voluntary association, has a local union, known as Lodge No. 6, in the city of Atlanta. The plaintiff was a member of the local union, and was suspended for nonpayment of a fine which he alleges was imposed upon him by the local lodge without notice and in violation of the constitution and by-laws of the union. He filed a petition against the local union and its officers for an injunction against the defendants' refusing to treat him as a member and refusing to accord to him the rights, privileges, and benefits incident to membership. On an interlocutory hearing the court passed the following order:

"Pending a trial of said cause, and upon payment of all such dues and assessments, not including the fine, the defendants are enjoined

and restrained from interfering with the plaintiff in the enjoyment of all his rights and interests as a member of the Bricklayers', Masons', and Plasterers' International Union of America, Subordinate Union No. 6, of Georgia, until such time as the original charges upon which the plaintiff was suspended are tried by said subordinate union in accordance with its by-laws and rules, and the plaintiff found guilty; this order not to be construed as preventing said union from trying the said Brown upon said charges."

The defendants excepted to this interlocutory judgment.

T. J. Ripley, W. M. Bailey, and Bryan, Jordan & Middlebrooks, all of Atlanta, for plaintiffs in error. Wm. M. Smith and John S. Highsmith, both of Atlanta, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] The judge was authorized to find, from the evidence submitted at the hearing, that the plaintiff became a member of the union about 14 years prior to the trial. He preferred certain charges against another member, but was unable to sustain them because those members who furnished the information were intimidated from testifying by persons outside of the union. Upon his failure to sustain the charges brought by him the plaintiff in turn was accused of maliciously preferring an unfounded charge against a member, and was tried and fined \$50 at a meeting at which he was not present, and without any written charge against him. About a month after his trial and sentence, as soon as he discovered it, the plaintiff wrote to the judiciary board of the association, complaining of the sentence, and received a reply that under the constitution of the union it would be necessary for him to pay such fine imposed by the local union before an appeal could be entered, and that the 30-day limit provided for appeals would not be enforced against him. He was unable to pay the fine, and made several unsuccessful attempts to be heard by the local union. He repeatedly offered and tendered dues to the union by going to the door of the local union and demanding admission and stating that he was present and desired to pay dues, and upon every occasion admission and the privilege to pay dues was denied him. He had paid dues after his alleged suspension on one occasion, which were accepted by the union. The constitution and by-laws of the international union provide that no member shall be tried except upon a written charge stating the specific offense against the accused member, and that the trial shall be had on a stated day; if the member refuse to be present, he shall be notified of the time when the trial shall occur. Upon conviction and sentence the same operates as a suspension of all benefits and privileges until compliance with the terms of the sentence, with a right of appeal to the judiciary board on

payment of the fine. The constitution and by-laws further provide for a beneficiary and mortuary fund maintained on a mutual plan, for the benefit of members who have been connected with the union for a period longer than 6 months; for a pension system providing for a benefit to members who have reached the age of 60 years, and who have been in continuous good standing for a period of 20 years; and for a disability benefit to members of 10 years' standing.

Although the petition does not in terms pray for a reinstatement of the suspended member, it must be conceded that such is the essence of the prayer for an injunction against the defendants' interference with his rights and benefits as a member. The local union had suspended him from membership, and he could only become entitled to the rights of a member by a restoration to membership. He could not be restored by a mandamus proceeding, since that remedy is appropriate when addressed to officers of a corporation, being predicated on the proposition that, since corporations derive their existence from the state, it is an efficient means by which the courts may compel corporations to obey the laws and constitutions of their organizations and enforce the rights of their members. *State v. Medical Society*, 38 Ga. 608, 95 Am. Dec. 408; *Savannah Cotton Exchange v. State*, 54 Ga. 668. In the case of unincorporated societies, the constitution and by-laws of the association form a contract between the members, and the rights of a member arise out of private contract. A member of a voluntary association should avail himself of his remedies within the organization according to his contract, as against any attempt to exclude him from the organization. When these remedies are exhausted, a member who has been disfranchised, suspended, or expelled in violation of the constitution and by-laws may appeal to a court of equity for the protection of his property rights incident to membership; and the courts generally hold that, if it is necessary to the protection of such rights, a court of equity has jurisdiction to compel his reinstatement. *Messico v. Giuliano*, 190 Mass. 352, 76 N. E. 907; *Wrightington on Unincorporated Associations*, § 56.

[2] The plaintiff presented evidence of an invasion of a property right by excluding him from participation in the benefits of the association and from the fund raised by dues and assessments. He was wrongfully suspended if his trial occurred without notice and in his absence and without a written charge being made against him. Under these circumstances the plaintiff would be entitled to equitable relief, unless in the grant of such relief a mandatory injunction is essential. Our statute declares:

"An injunction can only restrain; it cannot compel a party to perform an act. It may re-

strain until performance." Civil Code 1910, § 5499.

The barrier against the plaintiff obtaining his rights incident to membership is the local union's enforcement of an illegal sentence, if the plaintiff's version of the matter be the truth of the case. He has tendered and offered to pay all back dues, but the officers of the local union are constrained to reject his tenders because of the sentence which they pronounced against him. If they are restrained from enforcing this sentence by order of court, and restrained from denying his rights as a member after he has tendered all of his dues, the plaintiff will be entitled as a member to a member's rights. The court found as a conclusion of fact that the evidence authorized an inference that the plaintiff had been illegally tried and sentenced, and that he had tendered all of his dues in arrears; in other words, his status was that of a lawful member of the union. In the court's order the plaintiff was required to pay these dues to the local union, and upon compliance with this condition by him the union was temporarily enjoined from interference with his rights as a member. The order does not finally adjudicate the plaintiff's status as a member, and should not be construed as so doing.

Judgment affirmed. All the Justices concur.

(146 Ga. 396)

SPRADLIN et al. v. KRAMER.

(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. BILLS AND NOTES — 541 — JUDGMENT — LIEN—EVIDENCE.

While it is the better practice, it is not essential, in suits upon notes secured by deed, to specify or declare a lien on the face of the pleadings or the judgment therein, in order to sell the land under execution by filing a deed reconveying the land, and to subject it to the special contract lien. The proof of the special lien "may be made aliunde the face of the judgment or the pleadings on the note sued."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1928.]

2. BANKRUPTCY — 196 — JUDGMENT — LIEN — TIME.

Where a general judgment in such suit is obtained, and within four months next after the rendition thereof, but more than four months after the date and record of the security deed, the debtor is adjudged a bankrupt, the judgment is not, on account of § 67(f) of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1913, § 9651]), invalid and ineffective for the purpose of bringing the property to sale to pay the debt and to subject the property in accordance with the special lien.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316.]

Error from Superior Court, Heard County; R. W. Freeman, Judge.

Action by Mrs. Ruth Kramer against J. L. Vaughan. Judgment for plaintiff with execution and levy, and from the overruling of their motion to dismiss the levy, J. W. Sprad-

lin, Sr., and another except and bring error. Affirmed.

Mrs. Ruth Kramer obtained a judgment in personam in the city court of Carrollton upon a promissory note against J. L. Vaughan. An execution issued and was levied upon certain designated lands. A claim was filed by J. W. Spradlin, Sr., and J. W. Spradlin, Jr.; and they made a motion to dismiss the levy. By consent of counsel for both parties the question of law made by the claim was passed upon in vacation. The court overruled the motion to dismiss the levy, and the claimants excepted. The following is, in substance, the agreed statement of facts: Mrs. Kramer held a promissory note against J. L. Vaughan, together with a deed to the land in controversy, to secure the note. She obtained a general judgment upon this note against Vaughan (who at the time was insolvent), no reference being made in the judgment to the security deed, and no special lien being set up. Within four months after the date of this judgment Vaughan was adjudicated a bankrupt. After this adjudication a deed was made by Mrs. Kramer reconveying the lands in dispute to Vaughan for the purpose of levy and sale, which deed was duly recorded. The note and claim of Mrs. Kramer was not proved in bankruptcy, nor was the property in question administered by the trustee as a part of the estate of the bankrupt. Prior to the judgment in favor of Mrs. Kramer Vaughan had parted with his title and possession of the land in controversy by selling it to the claimants in this case, who purchased bona fide and for value. The note sued upon by Mrs. Kramer was given in renewal of one originally made in favor of her deceased husband. In his will her husband bequeathed to his wife, among other things—

"all notes, accounts, and judgments that might be owing me at the time of my death, together with all lands, wherever situated, of which I may die seised and possessed, which said lands have been sold by me and bond for title given to the purchaser, and the purchase money or any part thereof due me at the time of my death, my purpose being to convey such purchase-money notes to my said wife, together with the security I may hold therefor, and give her full power and authority to execute to the purchaser deeds in accordance with such bonds as I may have given; in case of payment to her, or in case she elects to sue, give her full authority to either bring suit for the land or to sue upon the purchase-money notes and execute to the purchaser, and have same recorded in the office of the clerk of the superior court where the land may lie, a deed for the purpose of levy and sale, as per the requirements of the law in such cases made and provided."

Smith & Smith, of Carrollton, and Hall & Jones, of Newnan, for plaintiffs in error. S. Holderness and C. E. Roop, both of Carrollton, for defendant in error.

GILBERT, J. (after stating the facts as above). [1] 1. The petition contained no prayer for enforcement of the special lien em-

braced in the contract. The judgment against Vaughan was general. He was adjudicated a bankrupt within four months from the rendition of the judgment on the notes. A deed of reconveyance was duly executed, delivered, and recorded as provided by the Civil Code. Did the bankruptcy render the judgment against Vaughan void? To answer this question is to decide this case. The judgment of the trial court on the motion to dismiss the levy answered the question in the negative, and in this view we concur. Indeed, the question is not an open one in this state. It is true that bankruptcy discharges a lien of a judgment as against other property; but the judgment is effective for the purpose of bringing the property to sale to pay the debt and to subject the property in accordance with the special lien.

In *Napier v. Saulsbury*, 63 Ga. 477, it was said:

"A judgment intended to have a special lien on specific property, such as a lien upon land for purchase money, ought to describe the property."

Failure to describe the property in the judgment or to refer to the same either in the judgment or in the pleadings will not have the effect of depriving the creditor of his special lien as agreed upon in the contract, since such lien is not derived from the judgment, nor does the judgment add anything to its force and effect.

"The effect of [section] 67f of the National Bankruptcy Act is not to avoid the levies and liens therein referred to against all the world, but only as against the trustee in bankruptcy and those claiming under him, in order that the property may pass to and be distributed among the creditors of the bankrupt." *McKenney v. Cheney*, 118 Ga. 387, 45 S. E. 433.

In analogous cases it has been uniformly held that a court of bankruptcy acquires no jurisdiction of exempt property. *Smith v. Zachry*, 121 Ga. 467, 49 S. E. 236; *Id.*, 123 Ga. 290, 57 S. E. 513; *Evans v. Rounsaville*, 115 Ga. 634, 42 S. E. 100. A security deed passes title. Civil Code 1910, § 3306; *Groves v. Williams*, 69 Ga. 614.

When Vaughan was adjudicated a bankrupt he had no legal title to the land, and therefore the bankruptcy court acquired no jurisdiction of this property or of the lien thereon. Cases cited by the plaintiff in error as holding to the contrary, upon examination, will be found not to conflict with the ruling herein made. They apply to liens acquired "by legal proceedings." The lien in this case was not thus acquired, but was obtained by virtue of the contract many months prior to the proceedings in bankruptcy. The authorities cited apply to such liens as attachments, laborer's liens, and the like, which take effect from the date of the levy or filing.

"The liens rendered void by section 67f are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption." *Chicago, etc., R. Co. v. Hall*, 229 U. S. 511, 516, 33 Sup. Ct. 885, 887 (57 L. Ed. 1306).

It follows from the foregoing that all that is absolutely essential to the establishment of a special lien in favor of the holder of the note the payment of which is secured by a deed is that there shall be an execution issued upon a judgment rendered on the note, a deed from the original creditor to the defendant in *fi. fa.* made, filed, and recorded, and a levy upon the property therein described. *Marshall v. Charland*, 109 Ga. 306, 309, 34 S. E. 671. See *Coleman v. Slade*, 75 Ga. 61, 71; *McAlpin v. Bailey*, 76 Ga. 687; *Bennett v. McConnell*, 88 Ga. 177, 14 S. E. 208; *Maddox v. Arthur*, 122 Ga. 671, 675, 50 S. E. 668; *Gillespie v. Hunt*, 145 Ga. 490, 493, 89 S. E. 519; *Harvard v. Davis*, 145 Ga. 580, 89 S. E. 740.

The case of *Austin v. Georgia Loan & Trust Co.*, 115 Ga. 1, 41 S. E. 264, cited by counsel for the plaintiff in error, was considered by this court in the case of *Maddox v. Arthur*, *supra*, and it was there held that the rulings in the two cases did not conflict.

[2] 2. The ruling in the second headnote requires no elaboration.

Judgment affirmed. All the Justices concur.

ATKINSON, J., concurs in the judgment.

(146 Ga. 436)

GILES et al. v. COOK. (No. 236.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. INJUNCTION \S 121 — PLEADING — AMENDMENT — PRAYER FOR PROCESS.

The petition was addressed to the superior court of one county, and the prayer for process was to answer at the superior court of another county. The clerk attached process, directing appearance at the superior court to which the petition was addressed. In a second original petition the name of one of the defendants was not set out. These irregularities were cured by amendment at the interlocutory hearing for injunction, which was before the appearance term of the case; and no exception was taken to the allowance of the amendment. The rule nisi for a hearing of the interlocutory injunction directed service of the petition on the defendants, which was effected. *Held*, that it was not erroneous, under these circumstances, to hear and determine the application for interlocutory injunction.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. \S 253-261.]

2. JUDGMENT \S 443(1) — SETTING ASIDE — EQUITY — FRAUD.

A court of equity may set aside a judgment procured by fraud. Where, after a distress warrant has been levied, the landlord and tenant agree on a settlement whereby the property levied on is to be delivered to the landlord and accepted by him in extinguishment of the tenant's indebtedness, and the settlement is carried out according to its terms, and where the tenant, in disregard of the accord and satisfaction and without notice, files a counter affidavit averring a right to recoup a large sum against the landlord, and the issue formed by the counter affidavit is heard without notice to the landlord, resulting in a judgment against the

landlord, such judgment may be vacated by the landlord as having been obtained by fraud.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. \S 785, 836.]

3. EXECUTION \S 171(3) — INJUNCTION PENDENTE LITE — DISCRETION OF COURT.

Under the conflicting evidence the judge did not abuse his discretion in granting a pendent lite injunction to restrain the enforcement of such a judgment by execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 500, 501, 504, 505.]

Error from Superior Court, Taylor County; S. P. Gilbert, Judge.

Proceeding by E. W. Cook against George Giles and others to cancel judgment and to enjoin execution thereon. Injunction pendent lite granted, and defendants except and bring error. Affirmed.

E. W. Cook filed a petition addressed to the superior court of Taylor county against George Giles, alleged to be a resident of Taylor county, and J. J. Bull & Son, alleged to be residents of Macon county, praying for cancellation, on account of fraud, of a judgment obtained in the city court of Oglethorpe by George Giles against the plaintiff, Cook, and for injunction against the progress of an execution based on the judgment. The following was alleged: Giles was a tenant of the plaintiff, who foreclosed a distress warrant against him. The warrant was levied, and the plaintiff undertook to assist the sheriff in the gathering of the crop. Pending this arrangement a settlement was made between the plaintiff and the tenant, by the terms of which the tenant agreed to turn over to the plaintiff all the property under levy, in settlement of the tenant's indebtedness, which agreement was executed by the plaintiff taking possession of the property. Several months thereafter the tenant disregarded the settlement and interposed a counter affidavit, in which he averred a right to recoup against the plaintiff a large sum of money. The distress warrant and counter affidavit were duly returned for trial to the city court of Oglethorpe. The plaintiff was not liable to the tenant on the alleged recoupment, and had no notice that his tenant, after the settlement with him, had filed a counter affidavit, and that the distress warrant and counter affidavit had been returned to the city court of Oglethorpe for trial, nor was he aware of the pendency of the suit and the resultant judgment until about two weeks prior to the filing of this petition. Giles has transferred the judgment to his codefendants, who represented him in obtaining it, and who had knowledge of the facts under which it was rendered. The petition concluded with a prayer for process against the defendants, directing them to appear at the next term of the superior court of Macon county. The petition was duly verified and presented to the trial judge, who granted a rule nisi, calling on the defendant to show cause why an injunction pendent lite should not be granted.

ed. Process was attached to the petition by the clerk, directing all the defendants to appear at the next term of the superior court of Taylor county. At the interlocutory hearing the defendants moved to dismiss the case for irregularities in the process and in the service, and also filed their demurrers and answers. The court, after hearing evidence, granted a temporary injunction, and the defendants excepted.

J. M. Moore, of Montezuma, and J. J. Bull & Son, of Oglethorpe, for plaintiffs in error. Jule Felton, of Montezuma, for defendant in error.

EVANS, P. J. [1] 1. It is apparent that in the prayer for process the petitioners inadvertently substituted Macon for Taylor county. The petition was addressed to the superior court of Taylor county. It was a suit in that county. The judgment excepted to was rendered at an interlocutory hearing anterior to the appearance term. The court allowed an amendment, substituting the word "Taylor" for "Macon" in the prayer for process, and also allowed the second original to be amended by striking the words "et al.," and putting in the name of one of the transferees of the execution; and no exception is taken to these orders. The defendants were not before the court at chambers by virtue of the process, but by virtue of the order of the judge which directed a copy of the petition and order to be served on them. The irregularity of the process was really not before the court on the interlocutory hearing. The defendants were actually served with the petition and order, and resisted the grant of an interlocutory injunction on its merits, and the irregularities in the matter of service and process did not deprive the court of jurisdiction to pass on the grant or refusal of a pendente lite injunction.

[2] 2. The jurisdiction of courts of equity to vacate judgments obtained by fraud is too well recognized to require discussion. Civil Code 1910, § 5965. Judgments which may be vacated in equity on the ground of fraud are not confined to judgments rendered by the superior court. It has been held that a judgment of the Supreme Court may be set aside in equity, for fraud, in a proper case. Wade v. Watson, 133 Ga. 608, 66 S. E. 922. When the plaintiff and his tenant made an accord and satisfaction, there was no case in court. The plaintiff had a right to rely upon the tenant's acquiescence in the settlement until he had some contrary notice. It would be a fraud on the part of the tenant to afterwards file a counter affidavit, converting the landlord's process, which had become extinguished as process because of the settlement, into mesne process so as to form an issue to be tried by the court, without giving him some notice of that fact. If this was true, as alleged by the landlord, he presented a case

for equitable interference with the judgment, and its enforcement by an execution based upon it, at the instance of an assignee with notice.

[3] 3. There was a sharp conflict of evidence on many of the issues of fact presented by the plaintiff's petition. There was evidence to support the allegations of the plaintiff's complaint, and the trial judge did not abuse his discretion in preserving the status until these issues of fact could be determined by a jury.

Judgment affirmed. All the Justices concur, except GILBERT, J., disqualified.

(146 Ga. 440)

JAMES et al. v. MELTON et al.

MELTON et al. v. JAMES et al.

(No. 238.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. MOTION FOR NEW TRIAL—DISMISSAL.

The motion to dismiss the motion for new trial was properly overruled.

2. NEW TRIAL \S 7—GROUNDS.

The excerpts from the charge to the jury upon which error was assigned stated correct principles of law applicable to the case as made by the pleadings and evidence. The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 18.]

Error from Superior Court, Early County; W. C. Worrill, Judge.

Action between D. W. James and others and W. M. Melton and others. Judgment for defendants, and both parties except and bring error. Judgment affirmed on both bills of exceptions.

Yeomans & Wilkinson, of Dawson, and Little, Powell, Smith & Goldstein, of Atlanta, for plaintiffs in error. C. L. Glessner and W. G. Park, both of Blakely, for defendants in error.

HILL, J. Judgment affirmed on both bills of exceptions. All the Justices concur.

(146 Ga. 400)

WRIGHT et al. v. H. B. EHRlich & CO.

(No. 228.)

(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. BANKRUPTCY \S 142, 211—CREDITORS' SUIT—RIGHT OF TRUSTEE—ACTION.

Where one conveys his property to another under circumstances which render the conveyance void, and shortly thereafter is adjudicated a bankrupt, the right to have the property referred to brought to sale as a part of the assets of the bankrupt's estate is in the trustee in bankruptcy; and individual creditors cannot maintain a suit to have the void conveyance canceled and the property brought to sale to satisfy their demands, without showing that they have moved in the bankruptcy court to have the trustee proceed against the property or that he has

refused to take steps to subject the property and administer the same as a part of the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 222, 321, 323.]

2. BANKRUPTCY §211—CAUSE OF ACTION—JURISDICTION OF STATE COURT.

Applying this ruling to the facts of this case, it was error to refuse to dismiss the plaintiffs' petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323.]

Error from Superior Court, Decatur County; E. E. Cox, Judge.

Action by H. B. Ehrlich & Company against C. C. Wright and another. Motion to dismiss petition overruled, and defendants except and bring error. Judgment reversed.

H. B. Ehrlich & Co. brought their action against C. C. Wright and Mrs. Susan Wright. The material portions of the petition are as follows: C. C. Wright is indebted to petitioners in the sum of \$785.20, besides interest. In the year 1910, C. C. Wright was the owner of a certain described tract of land, and on July 1st of that year he did execute to Mrs. Susan Wright, his mother, a warranty deed to this land, and this was subsequent to the creation of the debt to petitioners. While said deed purports to have been made in consideration of the sum of \$2,000, in fact there was no consideration for it other than natural love and affection. At the date of the execution of the deed, Wright was insolvent and is now insolvent; this fact was known to the grantee, and the deed was in pursuance of a conspiracy between C. C. Wright and his mother, for the purpose of hindering and delaying and defrauding the creditors of C. C. Wright. On November 28, 1910, C. C. Wright filed a voluntary petition in bankruptcy. On December 1, 1910, he was duly adjudicated a bankrupt. He did not put the land referred to in the schedule of his assets. His personal property scheduled was of the value of \$450, which he claimed under an exemption. The indebtedness scheduled by the bankrupt was about \$5,000. He has never procured a discharge from the bankruptcy court, and the statute of limitations is now a bar to his right to a discharge. Petitioners have never proved their claim in the bankruptcy court, nor participated in the bankruptcy proceedings in any way. In September, 1914, petitioners sued out an attachment returnable to the November term, 1914, of the superior court, for the purpose of collecting their debt against Wright, which attachment was levied on the land described. C. C. Wright was in possession of the plantation referred to on the day of the execution of the deed to his mother, and has since continued in possession and control of said premises, renting the land to tenants and collecting the rents exclusively for his own use. Petitioners pray that the deed from C. C. Wright to Mrs. Susan Wright be delivered up and canceled as null and void, that the

defendants be enjoined from disposing of the property, for the appointment of a receiver, for judgment against the land levied on under the attachment, that the land be sold to satisfy petitioners' demand, and for general relief.

When the case was called for a hearing, the defendants moved orally to dismiss the petition, "upon the ground that the same failed to set out any cause of action, and upon the further ground that the declaration showed on its face that the plaintiffs had no right in law to proceed in this cause of action against the defendants for the relief sought in the petition." The court overruled this motion, and defendants excepted.

R. G. Hartsfield and T. S. Hawes, both of Bainbridge, for plaintiffs in error. Harrell & Wilson and Will H. Krause, all of Bainbridge, for defendant in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court erred in overruling the motion to dismiss the petition. The contentions of the plaintiffs in error, as made by them in their motion to dismiss, are sound. They contend (and the defendants in error do not take issue with them upon this contention) that the deed from C. C. Wright to his mother, under the facts alleged, was void or voidable; if the deed was void, title to the land vested in the trustee in bankruptcy; if voidable, the right to have it declared void was in the trustee in bankruptcy; and the trustee alone had the right in the first instance to proceed against the property. Treating the deed of C. C. Wright to his mother as void, as it must be held to be under the allegations of the petition, title to the property of the bankrupt was vested, as we have just said, in the trustee in bankruptcy. Collier on Bankruptcy (10th Ed.) §92; Beasley v. Smith, 144 Ga. 377, 87 S. E. 293. And the right to move to have the deed declared void, and to convert the property into the assets of the bankrupt's estate, is the right and duty of the trustee in bankruptcy. If the trustee in bankruptcy, after knowledge of the facts showing that the property in question is a part of the assets of the bankrupt to be administered, should take no steps to set aside the deed, or should refuse to proceed to set aside the deed and to take possession of the property, thus leaving the bankrupt in the possession and enjoyment of the same, these creditors, petitioners, might take steps in the bankruptcy court to have the trustee proceed to subject the property, or they might, upon showing that he failed to proceed, themselves move to bring the property to sale; but, until it is shown that the trustee in bankruptcy fails or refuses to move in the premises, creditors cannot, by direct proceedings against the debtor and his property, subject the property to their indi-

vidual claims. It was therefore error for the court to overrule the motion to dismiss, thereby adjudging that the creditors, the defendants in error, had the right to maintain their action.

Judgment reversed. All the Justices concur.

(146 Ga. 373)

ROGERS v. SMITH et al.

HAMILTON v. ROGERS.

(No. 204.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. EXECUTION \S 271—BONA FIDE PURCHASER—RIGHTS.

A bona fide purchaser of real estate, without notice, at a sheriff's sale based upon a judgment of the superior court, where the execution and sale are regular and in compliance with law, secures as good title as the defendant in *fa. fa.* had, and his title is not affected by secret equities.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 769-780, 782.]

2. ADVERSE POSSESSION \S 74 — EXECUTION \S 275(2)—SALE—TITLE—PRESCRIPTION.

Where land is sold under an execution based upon a void judgment, no title passes. But the purchaser at such sale holding the sheriff's deed has color of title; and if in good faith he enters into possession and holds the land adversely for seven years, he has a good title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 443-447; Execution, Cent. Dig. \S 16, 148, 345, 792, 793.]

Error from Superior Court, Milton County; H. L. Patterson, Judge.

Suit by Mrs. Julia A. Rogers against Truman Smith and Mrs. J. W. H. Hamilton, administratrix, now Mrs. Frank S. Talbert. Judgment directing verdict for defendant Hamilton and for plaintiff, and plaintiff brings error, and from the overruling of a motion for a new trial, defendant Hamilton brings cross-error. Affirmed in part, and reversed in part.

Mrs. Julia A. Rogers filed suit against Mrs. J. W. H. Hamilton, administratrix, now Mrs. Frank S. Talbert, for the recovery of lot of land No. 478 and a fractional part of lot No. 51, each of said lots containing 40 acres, more or less. The plaintiff based her claim to lot 478 on a deed from her husband, A. L. Rogers, dated February 21, 1889, and recorded March 3, 1904, and upon a deed from A. L. Rogers, dated July 3, 1901, and recorded March 3, 1904. She based her claim to fractional lot 51 on the last-named deed.

A. L. Rogers executed deeds to both of these lots, to secure notes for money borrowed. The notes secured by deed to lot 478 were sued on to judgment in the superior court of Milton county. A reconveyance by quitclaim was duly filed, the execution issuing from the judgment was levied, and after proper advertisement the lot was sold to J. W. H. Hamilton, the deceased husband of the

defendant. The notes secured by deed to the fractional lot 51 were sued to judgment in the justice's court. The amount sued for on these notes exceeded the jurisdiction of the court. A reconveyance was made by quitclaim to A. L. Rogers for the purpose of having the levy made. Subsequently the levy was made, and after being duly advertised this lot was sold to J. W. H. Hamilton. Hamilton paid the amount for which the land was sold, and received the sheriff's deed. The deed to lot No. 478 was recorded on February 4, 1903, and that as to lot No. 51 was recorded on April 9, 1903.

The court directed a verdict for the defendant as to lot 478, and the jury returned a verdict for the plaintiff as to the fractional lot 51. The plaintiff excepted to the direction of a verdict by the court as to lot 478. The defendant made a motion for a new trial as to fractional lot 51, which was overruled, and she excepted.

Geo. F. Gober, of Atlanta, G. B. Walker, of Alpharetta, and W. I. Heyward, of Atlanta, for plaintiff in error. G. A. Johns, of Winder, for defendants in error.

GILBERT, J. (after stating the facts as above). Hamilton, the purchaser of the two pieces of land at the two sales, was not the vendee in either of the security deeds. He was a stranger, not connected with the grantee in the transactions in any way, so far as the record discloses. He paid the purchase-money in accordance with the agreement at the public sale, and went into possession without fraud, and without notice of any irregularity or illegality in the proceedings by virtue of which the sheriff sold or undertook to sell. Mrs. Hamilton, now Mrs. Talbert, defended, claiming lot 51 by virtue of prescription under a void sheriff's deed as color of title based upon possession for more than seven years; and lot 478 under a valid sheriff's deed, and by prescription.

[1] 1. As to lot No. 478, the title of Mrs. Hamilton, now Mrs. Talbert, was ample without the aid of prescription; and therefore the court did not err in directing a verdict for her as to that lot. The judgment of the superior court, the execution issued thereon, and the sale of the lot by virtue thereof were regular and in compliance with law. The purchaser received a valid deed to the land, without notice of any secret equity of Mrs. Rogers, who had knowledge of the sale prior thereto, but allowed the same to proceed without disclosing her equity, and only filing her deed for record more than a year after the sale of the lot by the sheriff and the record of the sheriff's deed.

[2] 2. The judgment of the justice's court was void. The principal sum sued for exceeded the jurisdiction of the court. The execution issued on said judgment and the sale thereunder were void, and no title passed by

virtue thereof. *Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926. The purchaser at such a void sale has two remedies. He may be subrogated to the rights of the vendee in the security deed, or he may rely upon prescription; and if he has in good faith been in possession of the land under such color of title for seven years or more, he has a good title by prescription. *Powell on Actions for Land*, 523, § 392; *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351; *Gittens v. Lowry*, 15 Ga. 336; *Burkhalter v. Edwards*, 16 Ga. 593, 60 Am. Dec. 744; *Hester v. Coats*, 22 Ga. 56; *Millen v. Stines*, 81 Ga. 655, 8 S. E. 315; *Street v. Collier*, 118 Ga. 470, 45 S. E. 294; *McLendon v. Shumate*, 128 Ga. 531, 57 S. E. 886; *Floyd v. Ricketson*, 129 Ga. 668, 59 S. E. 909; *Harris v. Black*, 143 Ga. 501, 85 S. E. 742; *Winn v. Bridges*, 144 Ga. 497, 87 S. E. 665.

It is contended by counsel for Mrs. Rogers that "every question in this case was determined upon these identical *fi. fas.*, and between the same parties as to another piece of land," in the case of *Hamilton v. Rogers*, 126 Ga. 27, 54 S. E. 926. The question of prescription was not involved in that case; and, considering only the issues there made, the court ruled that the purchaser was subrogated to the rights of the holder of the security deed.

3. The pleadings and evidence raised the question of prescription as to lot No. 51; and since we have held that the purchaser at such a void sale could prescribe on the void deed obtained from the sheriff, it follows that it was erroneous for the court to refuse to submit that issue to the jury, and for this reason it was error for the court to overrule the motion for a new trial.

The judgment directing a verdict in favor of the defendant as to lot 478 is affirmed, the judgment refusing a new trial as to lot 51 is reversed. All the Justices concur.

(146 Ga. 382)

WILKINS v. WILKINS. (No. 224.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. DIVORCE — 245(1) — DECREE — REVISION.

After the termination of a suit for permanent alimony and the rendition of a final decree therein, not excepted to, the decree allowing alimony passes beyond the discretionary control of the trial judge, and he has then no authority either to abrogate it or to modify its terms, unless the power to do so is reserved in the decree. The power to revise and review allowances of alimony, which is vested in the judges of the superior courts by Civ. Code 1910, § 2978, applies exclusively to the revision and review of allowances of temporary alimony. *Coffee v. Coffee*, 101 Ga. 787, 28 S. E. 977.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 692, 695.]

2. DIVORCE — 269(2) — FAILURE TO PAY ALIMONY — CONTEMPT.

Failure to pay permanent alimony as provided in a final decree granting such alimony

may be punished as for a contempt of court. *Briesnick v. Briesnick*, 100 Ga. 57, 28 S. E. 154; *Van Dyke v. Van Dyke*, 125 Ga. 491, 54 S. E. 537.

3. DIVORCE — 269(9) — ALIMONY — MODIFICATION OF DECREE — CONTEMPT.

In this case, the respondent did not make any attack on the validity of the decree, but, without denying any of the allegations of the petition, sought to purge the contempt by showing: (1) That his attorney who had filed his plea failed to notify him when the case was assigned for trial, and that without notice to him the case was tried in his absence, and he did not learn of the decree until after the court had adjourned; (2) that if he had known of the trial he could have proved the adultery of his wife, and that the wife had been guilty of adultery after the decree; (3) that he is pecuniarily unable to pay the amount of alimony specified in the decree. Certain affidavits were attached to the respondent's answer in regard to his earnings, and also in regard to the adultery of the woman after the decree. *Held*, that it was not made to appear that the decree reserved any right in the trial judge to abrogate or modify any of its terms, and unless reversed or set aside it is conclusive between the parties as to the right of the plaintiff to alimony.

(a) The respondent could not go behind the judgment and set up adultery of the woman to defeat alimony.

(b) The case differs from *Jennison v. Jennison*, 136 Ga. 202, 71 S. E. 244, Ann. Cas. 1912C, 441, which had reference to punishment for contempt for failure to pay temporary alimony in which it did not appear that the respondent knew of the adulterous character of his wife before the order was granted.

(c) The evidence relating to the ability of the respondent to comply with the terms of the decree specifying sums to be paid weekly to the plaintiff did not require a finding that the respondent was unable to pay the amount.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 760.]

4. CONTEMPT PROCEEDINGS.

Applying the foregoing principles, there was no error in adjudging the respondent in contempt.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Suit by Hattie Wilkins against Joseph Wilkins. Decree for plaintiff awarding permanent alimony, and, from proceedings adjudging him in contempt for failure to pay such alimony, defendant brings error. Affirmed.

Twiggs & Gazan, of Savannah, for plaintiff in error.

ATKINSON, J. Judgment affirmed.

(146 Ga. 416)

CORNELISEN v. CITY OF ATLANTA. (No. 231.)

(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — 733(1) — GOVERNMENTAL FUNCTIONS — PARK — LIABILITY — STATUTE.

Where a city maintains a park primarily for the use of the public, intended as a place of resort for pleasure and promotion of health of the public at large, its operation is in virtue of the governmental powers of the municipal-

ity, and no municipal liability would attach to the nonperformance or improper performance of the duties of the officers, agents, or servants of the city in respect to keeping the park safe for use by members of the general public. It would not affect the public character of the duties of the officers, agents, or servants of the city that a purely incidental profit might result to the city from its operation or management of the park.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1547.]

2. MUNICIPAL CORPORATIONS \Leftrightarrow 851—MAINTENANCE OF PARK—REVENUE—LIABILITY—STATUTE.

But if the city, having charter authority, maintain the park primarily as a source of revenue, the duty of maintaining it in a safe condition for the use for which it is intended would be ministerial, and municipal liability would attach for breach of such duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1808.]

Certified Questions from Court of Appeals.

Action by Martin Cornelisen against City of Atlanta. Judgment for defendant, and plaintiff brings error. Questions certified by Court of Appeals. Questions answered.

Geo. H. Gillon and Dean E. Ryman, both of Atlanta, for plaintiff in error. J. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

ATKINSON, J. The Court of Appeals has requested instruction upon certain questions of law, the nature of which is sufficiently disclosed in the headnotes, they being intended as answers to the questions, and from the following discussion:

[1] In Civil Code, § 897, it is declared that:

"Municipal corporations are not liable for failure to perform, or for errors in performing, their legislative or judicial powers. For neglect to perform, or for improper or unskillful performance of, their ministerial duties, they are liable."

This section is a codification of principles of the common law (*Collins v. Mayor, etc., of Macon*, 69 Ga. 542; *Rivers v. City Council of Augusta*, 65 Ga. 376, 33 Am. Rep. 787; 2 *Thomp. Neg.* 731), and, being in the Code of 1895, which was adopted by the Legislature, has the effect of a statute (*Central of Ga. Ry. Co. v. State*, 104 Ga. 831, 31 S. E. 531, 42 L. R. A. 518); but the language is somewhat confused. It would seem at first impression, from reading the first sentence of the section alone, that it was intended that there should be implied liability for breach of every duty that did not involve exercise of "legislative or judicial powers"; but, if so, why go forward, and in the second sentence declare expressly that there should be liability for breach of "ministerial duties," and why, in preceding sections 893 and 896, should it have been declared that no liability should attach for torts of policemen or other officers, or, in the absence of statute requiring a municipality to perform an act, there should be no liability for exercising

their discretion in failing to perform it? No such construction should be placed on the first sentence of section 897. The whole section should be construed together in connection with its cognate sections, and as intending to declare that municipal liability should attach only for neglect to perform, or for improper or unskillful performance of, "ministerial duties."

This construction would leave intact the common-law doctrine, frequently applied in this state before and since adoption of the Code, of nonliability for conduct of officers, agents, and servants of municipal corporations in respect to duties devolving upon them in virtue of the sovereign or governmental functions of the municipality. This doctrine has been applied in *Love v. City of Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, a case based on negligence of the driver of a garbage cart in the employment of the board of health; *Watson v. City of Atlanta*, 136 Ga. 370, 71 S. E. 664, a case based on negligence of the driver of an ambulance for a city hospital; *Rogers v. City of Atlanta*, 143 Ga. 153, 84 S. E. 555, a case based on negligence of a fireman in cutting a hole in a floor while engaged in extinguishing a fire, and into which the plaintiff stepped; *Mayor, etc., of Savannah v. Jordan*, 142 Ga. 409, 83 S. E. 109, L. R. A. 1915C, 741, Ann. Cas. 1916C, 240, a case based on negligence of an inspector of the sanitary department in furnishing the driver of a garbage cart of the city with a defective vehicle, the axle of which broke and injured the driver. In those instances the duty was purely of a public nature, intended for the benefit of the public at large, without any pretense of private gain to the municipality; and, because it was such, no liability would attach, as a general rule. An exception to the general rule exists in the case of streets and sidewalks, which in the recent case of *Ackeret v. City of Minneapolis*, 129 Minn. 190, 151 N. W. 976, L. R. A. 1915D, 1111, Ann. Cas. 1916E, 897, was referred to as, "an illogical exception" to the general rule; but the exception is recognized in that state, as in this state. To the same effect is *Harper v. City of Topeka*, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032.

The general rule of nonliability above stated has no application where the duties, under proper charter authority, relate to branches of municipal endeavor which are private in their nature, primarily for revenue and promotion of municipal welfare. The case of *Mayor, etc., of Savannah v. Culens*, 38 Ga. 335, 95 Am. Dec. 398, was an action for personal injury. The city maintained a market house in which it rented stalls to vendors of marketable produce. The plaintiff, while attending the market as a customer at one of the stalls, stepped into a hole in the floor that the city had negligent-

ly allowed to exist, and sustained an injury. Her action for damages was sustained. In the course of the opinion, it was said:

"The market was the property of the corporation, from which it derived a revenue, in the way of rents. Why was it not just as much bound to keep that safe as a merchant is the floor of his store? To keep the market in a safe condition, it being property, and used by the city for its revenues, was a private duty."

The same principle was applied in the cases of *City Council of Augusta v. Mackey*, 113 Ga. 64, 38 S. E. 339, involving the neglect of duty of an officer of a city in maintaining city waterworks, and *Sedlmeyr v. City of Fitzgerald*, 140 Ga. 614, 79 S. E. 469, involving failure of duty of officers of the city in maintaining electric wires connected with the city's electric light plant. In each of these cases, the duty upon which municipal liability was founded was of a private nature, and "ministerial," within the meaning of section 897, *supra*. This court has not before been called upon to deal with the question of municipal liability for injury to a person in a park, but the foregoing principles are applicable in cases of that character. If the park is primarily for the use of the public, intended as a place of resort for pleasure and promotion of health of the public at large, its operation is in virtue of the governmental powers of the municipality, and no municipal liability would attach to the nonperformance or improper performance of the duties of the officers, agents, or servants of the city in respect to keeping the park safe for use by members of the general public. See, also, *Bisbing v. Asbury Park*, 80 N. J. Law, 416, 78 Atl. 196, 33 L. R. A. (N. S.) 523; *Blair v. Granger*, 24 R. I. 17, 51 Atl. 1042; *Park Commissioners v. Prinz*, 127 Ky. 460, 105 S. W. 948; *Clark v. Waltham*, 128 Mass. 567; *Steele v. Boston*, 128 Mass. 583; *Russell v. Tacoma*, 8 Wash. 156, 35 Pac. 605, 40 Am. St. Rep. 895; *Dill Mun. Corp.* (5th Ed.) §§ 1657-1659.

[2] But if the city, having charter authority, maintain the park primarily as a source of revenue, the duty of maintaining it in a safe condition for the use for which it was intended would be ministerial, and municipal liability would attach for breach of such duty. If in other respects the park was for public use, as indicated above, it would not change its character if the city licensed a third person to maintain bath houses, spring boards, and the like, in one of the lakes in the park at which bathers might be entertained and bathing suits supplied upon the basis of a charge therefor. In *Blair v. Granger*, *supra*, it was held that:

"A city, maintaining a public park for purposes other than business, is not liable for an accident occurring on a parkway, which is not a public highway, through the negligence of itself or its employes, even though a purely incidental profit results to the city from the management of the park"—citing the case of

Curran v. City of Boston, 151 Mass. 505, 24 N. E. 781, 8 L. R. A. 243, 21 Am. St. Rep. 465.

The principle was also applied in *Watson v. City of Atlanta*, *supra*, based on negligence of the driver of an ambulance of the city hospital, where fees were incidentally charged. All the Justices concur.

(146 Ga. 376)

GREER et al. v. JACKSON. (No. 219.)

(Supreme Court of Georgia. Jan. 11, 1917.)

(Syllabus by the Court.)

1. CORPORATIONS \S 263(1)—UNPAID SUBSCRIPTIONS—ACTION BY RECEIVER—PETITION—RECEIVER'S AUTHORITY.

The court did not err in overruling the nineteenth ground of the demurrer, as follows: "This defendant demurs specially to the first, second, third, and sixth paragraphs of the plaintiff's petition, because the same fails to set forth or exhibit the court proceedings and orders under which he claims to be acting and which he alleges supply his authority for bringing and prosecuting said suit."

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1129, 1133-1139, 1141½.]

2. CORPORATIONS \S 263(1)—UNPAID SUBSCRIPTIONS—ACTION BY RECEIVER—JOINDER OF PARTIES DEFENDANT.

Where a receiver of a corporation is appointed at the suit of a shareholder proceeding on his own behalf and on behalf of other stockholders, and not on behalf of creditors, such receiver cannot in one suit proceed against all of those who have not paid their subscriptions.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1065.]

3. CORPORATIONS \S 263(1), 265(5) — UNPAID SUBSCRIPTIONS — ACTION BY RECEIVER — VENUE—MISJOINDER OF PARTIES.

It was error not to sustain the grounds of demurrer relating to the venue of the action and to misjoinder of parties.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1065, 1110, 2275.]

4. DEMURRER—RULINGS.

The foregoing rulings render it unnecessary to pass upon the overruling of the other grounds of demurrer.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by A. W. Jackson, permanent receiver of the Union Trust Company, against R. L. Greer and others. Judgment for plaintiff, and defendants bring error. Reversed.

Atkinson & Born, H. C. Peeples, Dillon & Burress, H. W. Dent, and Owens Johnson, all of Atlanta, for plaintiffs in error. Jones & Chambers and Anderson, Slate & D'Orr, all of Atlanta, for defendant in error.

GILBERT, J. On April 16, 1914, the Poplar Lodge Company filed in the superior court of Fulton county a petition against the Union Trust Company, alleging that both were corporations, that petitioner was a stockholder in the latter, and that the petition was on behalf of the plaintiff, and "on behalf of all others similarly situated who may hereafter

elect to join herein." The other allegations of the petition were, in substance, as follows: The defendant company was chartered by the secretary of state, with an authorized capital of \$100,000, and its charter was subsequently so amended as to authorize a capital stock of \$1,000,000. The defendant placed its stock on the market and sold \$100,000 worth "or other large sum" by a stock salesman. The salesman was paid 25 per cent. for his services. Very little of the stock was ever paid for. Such payments as were made in most instances were one-third cash and notes for the balance. Practically all of the cash went into the pockets of the salesman. A great part of the notes were due, and payment was refused, the subscribers claiming misrepresentation, and that the officers were making no bona fide effort to collect the subscriptions. A great many stockholders were demanding that their subscriptions be canceled and their notes returned, threatening receivership proceedings on refusal. Stockholders who exchanged real estate for stock were threatening receivership proceedings unless their purchases were rescinded. The purpose of the organization was to do a mortgage loan and trust business. The company is earning very little. The officers are grossly mismanaging the business. While earning practically nothing, the expenses are \$1,800 per month. Mismanagement and reckless expenditures are inflicting injury to stockholders and creditors of the company. Under existing conditions, by reason of dissension among stockholders, success of the company is impossible; and, unless a court of equity intervenes, stockholders and creditors will suffer irreparable injury. The officers are managing the affairs of the company in their own interest, and opposed to the interest of the stockholders. The prayers were for equitable relief, including the appointment of a receiver. After a hearing the court appointed A. W. Jackson permanent receiver of the Union Trust Company.

The receiver filed a petition setting forth the following facts: He had collected in all assets, and paid out the same, leaving no funds on hand. The company has numerous unsecured creditors, "the aggregate amount thereof being about \$5,000." The company owed the receiver and counsel representing "petitioning creditors" a sum undetermined. The unpaid subscriptions amounted to about \$100,000. The unpaid subscriptions are assets of the company for the payment of debts. The receiver was advised that a great many of the subscriptions were insolvent. The subscribers reside in different counties, and in order to do complete equity it is necessary to bring all subscribers before this court. The prayer was for an order authorizing the receiver to file suits against all subscribers for their unpaid subscriptions in the superior court of Fulton county. The court passed an order authorizing the receiver to file the suits, providing how they should be served,

requiring all defendants to file appearances at a named term of Fulton superior court, and directing that "when said suit is filed as hereunder ordered the same shall be considered with and made a part of the original bill now pending in this court of Poplar Lodge Company v. Union Trust Company." Suit was filed by the receiver against a large number of subscribers, among whom was R. L. Greer. No formal order was taken consolidating this suit with the original suit. R. L. Greer entered his special appearance and moved to dismiss the suit of the receiver, relatively to himself, upon the ground that he does not reside in Fulton county, but does reside in Macon county, for lack of privity between himself and any of the codefendants, and because the superior court of Macon county alone would have jurisdiction of the movant. Greer also filed general and special demurrers based upon 19 grounds, subsequently amended by adding a twentieth.

The court overruled the motion to dismiss, and the general and special demurrers as originally filed, on all of the grounds therein taken. The ground of demurrer added by amendment was sustained. Greer excepted. There is no exception to the judgment sustaining the demurrer as to the ground added by amendment, though the briefs of counsel for the defendant in error refer to such a bill of exceptions.

It will conduce to a clearer understanding of the conclusions reached in this case to state at the outset that this is not a suit by creditors to collect debts due by the defendant corporation. Nor can it be said that it is a suit in their behalf or for their benefit. The parent suit is brought by a stockholder of a corporation, and the language of the petition permits of no doubt as to its purpose. It alleges in unmistakable terms that the suit is brought "on its own behalf, and on behalf of all others similarly situated who may hereafter elect to join therein." Save stockholders, there are no others similarly situated. The petition seeks to enjoin the officers from changing the status of the stock and stock subscriptions, and to have the court take charge and administer the affairs and assets and disburse the same through a receiver of its own appointment. This is the alpha and omega, the beginning and the end, of the projected juridical journey.

[1] 1. The nineteenth ground of the demurrer complains that the petition "fails to set forth or exhibit the court proceedings and orders under which he claims to be acting, and which he alleges supply his authority for bringing and prosecuting said suit." Undoubtedly it would have been better practice in the sense of exactness to have made such exhibits, but formalism must yield to utility. The trial court had the entire proceedings before it, and treated the same as one case, and looked to the whole in entering judgment on the demurrer. The order of the court authorizing suit recited that:

"When said suit is filed as herein ordered, the same shall be consolidated with and made a part of the original bill and suit now pending in this court of Poplar Lodge Company v. Union Trust Company."

Tested by the rule of reason, it does no violence to construe this order as resulting in a consolidation as soon as the subsequent proceedings were filed. Besides, on a broader principle, it would conserve no useful purpose, be the cord that binds never so slender, to sever the harmonious whole into separate units. Law has its origin in wisdom and prudence, and, "when practicable, it will conserve its own work, the work of its magistrates and ministers, and that of suitors in its court, and their counsel." This demurrer was therefore properly overruled.

[2, 3] 2, 3. The petition is silent as to the identity of the creditors and the amount due to each. For all the court may know the entire amount of indebtedness may be that due to the officers who are charged with mismanaging the company's affairs in their own interest and opposed to the interest of the stockholders, and for court expense incurred by reason of the litigation now under consideration. Nothing is more certain than that the record discloses no single creditor, nor any combination of creditors who are moving to collect debts due by the Union Trust Company. In so far as the record speaks, if there be any creditor, he has not concerned himself about collecting his debt. He is not included as a petitioner, and the petition makes no provision for his inclusion in the future.

There was a special demurrer in this case calling for detailed information in regard to the identity of the creditors and the amounts due them. This demurrer should have been sustained by the trial court. However, we have not placed the reversal of this case upon the failure of the court to sustain this special demurrer, because, if this defect had been cured by amendment, it would not be sufficient to restore the life of the petition as to Greer.

Properly considered, it is impossible to learn from the petition of the Poplar Lodge Company what is the purpose of collecting in the unpaid subscriptions, if such there be. This petition does not allege that the sums sought to be collected are to be used in the due course of business. Indeed, the very opposite would seem a necessary conclusion, since the allegations in regard to the mismanagement and the dissensions and the attitude of the stockholders all would presage business chaos.

It was error to overrule the motion of the defendant Greer raising the question of venue, and his special demurrer complaining of misjoinder. Section 2251 of the Civil Code of 1910, relied upon by the defendant in error, has application to suits of a totally different character. It applies to suits "to recover a debt due by" corporations. It is for the

benefit of creditors in each case. No principle is more firmly established, as well in law and equity as in reason and justice, than that the capital stock, including unpaid stock subscriptions, is an asset of a corporation, and constitutes a trust fund for the payment of its debts. This Code section, while authorizing a joint suit in cases to which it is applicable, also provides that the recovery must not exceed the amount of the debt sued for, thus excluding from its purpose and authority suits by a corporation against its subscribers on their subscription contracts. The right of a corporation to sue on contracts for unpaid stock subscription is undeniable. *Hendrix v. Academy of Music*, 73 Ga. 437. We do not rule that a proper suit could not legally proceed against Greer, had it been filed in the county of his residence.

In *Hale v. Allinson*, 188 U. S. 77, 23 Sup. Ct. 252, 47 L. Ed. 380, the court said:

"The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of * * * jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

Continuing, the court argues as follows:

"Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only a part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except that there is a common plaintiff, who has similar claims against many persons. But as each of these persons became liable, if at all, by reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A. to aver that his signature to the subscription list was a forgery; what connection has that averment with B.'s contention that his subscription was made by an agent who had exceeded his powers, or with C.'s defense that his subscription was obtained by fraudulent representations or with D.'s defense that he has discharged his full liability by a voluntary payment to the receiver himself, or with E.'s defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. * * * The costs of witnesses will not in any degree be diminished; and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

Defendants in error present a formidable array of authorities for the purpose of sustaining their contention in regard to jurisdiction. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412; *Dalton, etc., Railroad Co. v. McDaniel*, 56 Ga. 191; *Boyd v. Robinson*, 104 Ga. 793, 802, 31 S. E. 29; *Morgan v. Gibbian*, 115 Ga. 145, 41 S. E. 495; *Allen v. Grant*, 122 Ga. 552, 558, 50 S. E. 494; *Spratling v. Westbrook*, 140 Ga. 625, 79 S. E. 536. To these might have been added *Carlisle v. Ottley*, 143 Ga. 797, 85 S. E. 1010, and *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777. An examination of these authorities will show that in every case the suit was brought by a creditor, or by some person such as a trustee in bankruptcy, as representative of a creditor; and all of them are in perfect harmony with the provisions of section 2251 of the Code of 1910. The authorities relied upon are therefore not applicable to the facts of this case.

On the other hand, counsel for the plaintiff in error have requested us to review and overrule the cases of *Allen v. Grant*, *Spratling v. Westbrook*, and *Carlisle v. Ottley*, supra. This request has been previously made and refused by this court in a case to which they were applicable. *Chappell v. Lowe*, 145 Ga. 717, 89 S. E. 777. As already pointed out, however, these cases have no application to the facts of this case.

[4] 4. The effect of the foregoing rulings is to render it unnecessary to pass upon the overruling of the other grounds of demurrer.

Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 425)

MOATE et al. v. RIVES. (No. 234.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 684—EJECTMENT—PARTIES—TENANT—ESTOPPEL.

A judgment in ejectment is binding on the actual parties, but it may also bind others. Where the defendant in the suit has leased a portion of the land to a tenant who claims no other interest in the land except as tenant of the defendant, and where such tenant has actual notice of the pendency of the suit against his landlord, he will be bound by the judgment. But if the plaintiffs in the ejectment suit induce the tenant not to interfere in such suit, on the assurance that they will recognize his right to remove a building erected on the land, and they subsequently sue the tenant for that part of the land on which the building rests, the tenant will not be estopped by the former judgment from setting off his improvements under Civ. Code 1910, \S 5587.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1207.]

2. EJECTMENT \S 143—IMPROVEMENTS—RIGHT OF TENANT—STATUTE.

A tenant who leases land from one in the bona fide possession thereof under adverse claim of right may set off, in an action brought against him by the true owner, the value of permanent improvements bona fide placed thereon by himself.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 502-508.]

3. EJECTMENT \S 143—IMPROVEMENTS—GOOD FAITH—KNOWLEDGE OF OPPOSING CLAIM.

One may be the possessor of land in good faith, though aware of an opposing claim (where such knowledge would not of itself impute bad faith), if he enters in full confidence of his title or the title of one under whom he immediately claims; but his knowledge of an opposing claim of title is a circumstance to be considered by the jury in determining his good faith.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 502-508.]

4. APPEAL AND ERROR \S 1047(1)—PREJUDICIAL ERROR—EVIDENCE—LIMITATION OF EFFECT.

The ruling of the court upon the scope and effect of the evidence referred to in the fourth division of the opinion was too restrictive, and constituted harmful error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4146, 4150-4152.]

Error from Superior Court, Hancock County; J. B. Park, Judge.

Action by J. M. Moate and others against W. H. Rives. Judgment for defendant, motion for new trial overruled, and plaintiffs bring error. Reversed.

W. H. Rives leased from the Georgia Railroad & Banking Company a small area of land for the purpose of constructing thereon a storehouse. He agreed to pay an amount for ground rent, and reserved the right to remove the building, contracted to be erected thereon, within 30 days after the termination of the lease. The following provision appears in the lease contract:

"Whereas the title of the party of the first part to the premises here leased is disputed by other persons (the rightfulness of the claim of title by such person is, however, denied by the party of the first part), it is distinctly covenanted and agreed by the parties hereto, that should the title of the party of the first part fail, the party of the second part shall not hold or attempt to hold the party of the first part liable to the party of the second part in any manner for any damages that he may receive as tenant, or by reason of having erected his building on the leased premises, growing out of the failure of the title of the party of the first part."

Rives constructed a building on the leased premises. Subsequently the heirs of J. W. Moate instituted an action of ejectment against the Georgia Railroad & Banking Company to recover a tract of land which embraced the premises leased by the railroad company to Rives. The plaintiffs recovered in that action. Afterwards the same plaintiffs brought an action to recover the premises in possession of Rives, which he had leased from the railroad company. In his plea Rives denied the title of the plaintiffs, but admitted that he entered into possession of the land as tenant of the railroad company, and that plaintiffs had recovered the premises from the railroad company prior to the institution of the present action. He averred that he did not defend that action because he was assured by the plaintiffs that they would not contest his right to remove the house in the event they prevailed; that under his contract with the railroad company

the house which he built on the premises never became a part of the land, but was personalty, and he was entitled to remove the same under his contract with the railroad company; that he entered in possession of the land under his lease contract in good faith, believing that the railroad company had the true title, and made permanent improvements, moving a storehouse upon the premises; and, if the plaintiffs be entitled to recover the land, he asked to set off the value of his permanent improvements. The court submitted the issue in the form of a special verdict, directing a finding as to the right of the plaintiffs to recover, as to the actual monthly rental value of the property with the improvements and without the improvements, and the present cash value of the land with the improvements and without the improvements, and whether the defendant made the improvements in good faith. The plaintiffs, being dissatisfied with the verdict, moved for a new trial, which was refused, and they excepted.

Burwell & Fleming, of Sparta, for plaintiffs in error. R. L. Merritt, of Sparta, and Sibley & Sibley, of Milledgeville, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The trial developed that the defendant did not claim any interest in the land in controversy beyond that acquired by virtue of his lease contract with the Georgia Railroad & Banking Company. Under that contract he was a tenant at will, entitled as against his lessor to remove the building from the land within 30 days after the termination of his tenancy. That relation existed at the time of the institution of the ejectment suit by the plaintiffs against the railroad company. The defendant, though not a party, knew of the suit against his landlord by these plaintiffs to recover a tract of land, which included the premises involved in the present controversy. The judgment in an ejectment suit is binding on the actual parties, but it may also bind others. A judgment for the plaintiff not only binds the defendant, but also his tenant who claims no other interest in the land except to occupy it as a tenant. Moreover, the tenant, the defendant in the present action, admits that he knew of the pending suit against his landlord, but excused himself from taking part therein, because of assurances of the plaintiffs that his title to the house and his right to remove it would be respected by them in the event they prevailed in the suit. Unless he was prevented by the conduct of the plaintiffs from making the defense he now seeks to avail himself of, he would be concluded by that suit. *Rodgers v. Bell*, 53 Ga. 94; *Powell on Actions for Land*, § 424. As to the conduct of the plaintiffs in this regard the evidence was in conflict, and, in the absence of any complaint of the court's instruction on this

phase of the case, it will be presumed that this issue was properly submitted.

[2] 2. Our Code makes a distinction, in regard to setting off improvements against mesne profits, between one who is bona fide in possession under claim of right and a mere trespasser. In the latter case, mesne profits are not to be reduced below the sum which the premises would have been worth without such improvements; in the former case, no limit is fixed. Civil Code, §§ 5671, 5587; *Dean v. Feely*, 69 Ga. 804 (5a). Section 5587 of the Civil Code provides that:

"In all cases where an action has been brought for the recovery of land, the defendant who has bona fide possession of such land under adverse claim of title may set off the value of all permanent improvements bona fide placed thereon by himself or other bona fide claimants under whom he claims; and in case the legal title to the land is found to be in the plaintiff, if the value of such improvements at the time of the trial exceeds the mesne profits, the jury may render a verdict in favor of the plaintiff for the land and in favor of the defendant for the amount of the excess of the value of the improvements over the mesne profits."

Is this statute applicable to one who improved land as the tenant of another, when sued in ejectment by the true owner of the land? The statute, by its terms, applies to such defendants as have "bona fide possession of such land under adverse claim of title." The railroad company could not have set off the value of permanent improvements erected by its tenant; and, unless the tenant is allowed to set off in the present action the value of permanent improvements made by him, he would lose them. The statute is a liberalization of the rules of the common law, and is designed to protect bona fide possessors of land under an adverse claim of title to the extent of the value of the permanent improvements made on the land, in case the true owner of the land recovers the land. There is such a nexus between the landlord and his tenant as to give the latter a status, so as to enable him, if the landlord has bona fide possession under adverse claim of title, to avail himself of the statute where he is separately sued by the true owner.

[3] 3. It is contended that the tenant was not such a bona fide possessor as to entitle him to the benefits of the statute, on account of the clause in his lease contract with the railroad company, reciting that the railroad's title was disputed by other persons, the rightfulness of which claim was denied by the railroad company, and because of the covenant that if the title of the railroad company should fail the tenant should not hold the railroad company liable in damages by reason of having erected his building on the leased premises, or otherwise on account of the failure of the title of the railroad company. These provisions of the lease contract do not conclusively refute the defendant's claim that he was a bona fide possessor. All that the defendant is charged with is notice, not that any particular individual was disputing the

title, but that some one was asserting an adverse title which his landlord solemnly stated was spurious and invalid. It has been held by this court that the statute declaring that notice sufficient to excite attention and put a party on inquiry is notice of everything to which it is afterwards found such inquiry might have led will not prevent a purchaser of land, who has knowledge of a mere rumor that the title to the land he was buying was bad, from becoming a purchaser in good faith. *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801; *Black v. Thornton*, 31 Ga. 659. Again, there is a statute to the effect that, when any person has bona fide and for a valuable consideration purchased property and has been in possession of it a certain number of years, the same shall be discharged from the lien of any judgment against the person from whom he purchased. Civil Code 1910, § 5950. Under this statute it was held that a person may be a bona fide purchaser of land, notwithstanding he purchased with notice of a lien of a judgment. Such notice, being only prima facie evidence of mala fides, may be rebutted by showing good faith towards the judgment creditor, but it is a circumstance to be considered with the other evidence on the question of the bona fides of the purchase and possession. *Danielly v. Colbert*, 71 Ga. 218. In the present case the tenant erected the improvements before the institution of the suit against the railroad company; and the facts are not like those in the case of *Richards v. Edwardy*, 138 Ga. 690, 76 S. E. 64, where the defendant made the improvement pending an action of ejectment against him, and where he was denied the benefit of the statute because he had full notice of the defect in his title and of the rights of the plaintiff in the action against him. So we conclude that one may be the possessor of land in good faith though aware of an opposing claim (where such knowledge would not of itself impute bad faith), if he enters in full confidence of his title or the title of one under whom he immediately claims; but his knowledge of an opposing claim of title is a circumstance to be considered by the jury in determining his good faith. *Sartain v. Hamilton*, 12 Tex. 219, 62 Am. Dec. 524. In the instant case the defendant submitted evidence authorizing an inference that, when he contracted with the railroad company and constructed a storehouse upon the land, he believed that the railroad company, which was in adverse possession of it, had title to the land, and had the lawful right to lease the premises to him; and therefore he was entitled to avail himself of the statute so as to recover the value of permanent improvements made by him in good faith.

[4] 4. The record of the suit to recover land, brought by the same plaintiffs against the Georgia Railroad & Banking Company,

eventuating in a judgment, was introduced in evidence; and also the lease contract from the railroad company to the defendant. Objection was offered to the introduction of this contract; and the court, in allowing such evidence, stated in the presence of the jury as follows:

"I will let that in for the purpose of the jury taking into consideration in passing on the question as to whether or not the defendant holds under the Georgia Railroad & Banking Company. I hold, as a matter of law, that the plaintiffs, if entitled to recover at all in this case, will be entitled to recover only the rental value as shown from the evidence in this case that the land was worth."

This positive limitation on the plaintiffs' right of recovery and the evidential value of the lease contract was harmful error. The plaintiffs contended that the defendant did not act in good faith in putting the improvements on the land. An important factor of such contention was that the defendant's contract, by virtue of which he constructed the storehouse, put him on notice that the railroad company was not the true owner of the land. When the court limited the scope of the evidence as he did, he denied to the plaintiffs the consideration by the jury of this fact on the question of the bona fides of the defendant in making the improvements. Under the facts of this case, we regard this incident of the trial as highly prejudicial to the plaintiffs' rights.

Judgment reversed. All the Justices concur.

(19 Ga. App. 233)

COX v. STATE. (No. 7758.)

(Court of Appeals of Georgia. In Banc. Feb. 2, 1917.)

(Syllabus by the Court.)

1. JUDGES §29 — JUDGE OF CITY COURT — POWERS—JURISDICTION.

While, under the provisions of article 6, § 5, par. 1, of the Constitution of this state, in any county where there is a city court, the judge of that court and of the superior court of the county may "preside in the courts of each other in cases where the judge of either court is disqualified to preside," no authority is conferred either by the Constitution or by statute upon the judge of a city court to originate a proceeding in a superior court by assuming to act as the judge of the superior court.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 140-142, 144-152; Dec. Dig. §29.]

2. CRIMINAL LAW §905—NEW TRIAL—DISCRETION OF JUDGE.

An extraordinary motion for a new trial institutes an entirely new case, requiring discretionary action on the part of a judge having jurisdiction thereof to bring it into actual existence as a cause in the courts.

(a) The granting of a rule nisi by a judge having authority upon an extraordinary motion for a new trial, filed at the time contemplated by law, amounts to a grant of authority to file the same, and is as effectual as if the permission had been expressly conferred by a special order or by precise recitals in the rule nisi itself.

(b) In a county where there is a city court, the judge of that court, when the judge of the

superior court in whose circuit the county is included is disqualified because of relationship, cannot assume to act as a judge of the superior court and grant a rule nisi on an extraordinary motion for a new trial, and thereby authorize or ratify the filing of such a motion in the superior court, and thus originate a proceeding in that court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2128, 2133, 2404, 2405; Dec. Dig. § 906.]

3. CRIMINAL LAW § 1022 — REVIEW — VOID PROCEEDINGS.

Where an extraordinary motion for a new trial in the superior court is presented to a judge of a city court, who signs the rule nisi, the entire proceeding being void ab initio, the judgment of a judge of the superior court dismissing the same will not be reviewed by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2581, 2582; Dec. Dig. § 1022.]

Error from Superior Court, Mitchell County; W. E. Thomas, Judge.

T. U. Cox was convicted of voluntary manslaughter, and he brings error. Affirmed.

See, also, 17 Ga. App. 727, 88 S. E. 214.

At the April term, 1915, of Mitchell superior court, T. U. Cox was convicted of voluntary manslaughter, Hon. W. E. Thomas, judge of the superior courts of the Southern circuit, presiding on account of the disqualification of Judge E. E. Cox of the superior court of Mitchell county. A motion for a new trial was overruled by Judge Thomas, and his judgment was thereafter affirmed by this court, and the remittitur made the judgment of the lower court. During the April term of Mitchell superior court, counsel for the movant, T. U. Cox, requested Judge Cox, who was then presiding, to allow Hon. R. D. Bush, judge of the city court of Camilla in Mitchell county, to take the bench and preside as a judge of the superior court for the purpose of passing upon a disqualified case. Judge Cox physically yielded the bench, whereupon Judge Bush assumed it, and, without any request from Judge Cox to preside therein, an extraordinary motion for a new trial was presented to him in behalf of the said defendant, T. U. Cox, and Judge Cox having entered thereon the fact of his disqualification on account of his relationship to the movant, Judge Bush thereupon over objection by the solicitor general, granted a rule nisi ordering the solicitor general to "show cause before the court at the courthouse at Camilla, Ga., on the 6th day of May, 1916 (to which time the court stands open for the purpose of trying case), why the new trial should not be granted." The bill of exceptions recites that: "On the last-mentioned date [May 6th], the superior court of said county being still in session, movant appeared for the purpose of presenting said motion to Judge Bush, but on said day and date his Honor Wm. E. Thomas, judge of the superior courts

of the Southern circuit, appeared in court and went upon the bench and undertook to take jurisdiction of said motion"—announcing in substance that he had been requested by Judge Cox, the regular presiding judge of the said superior court, to preside for him upon that date in certain cases in which Judge Cox was disqualified, among which cases was the extraordinary motion for a new trial filed by T. U. Cox. Judge Thomas further announced that before going upon the bench he had discussed this extraordinary motion with Judge Bush, the judge of the city court of Camilla, and the latter had stated in substance that he had no personal desire to hear and determine the motion, but wished only to discharge his duty under the law, whatever that might be; that "Judge Bush did not decline to exercise jurisdiction in the matter, but simply stated that he did not personally care to act upon the motion"; and thereupon Judge Thomas announced that for the reasons stated by him he would take jurisdiction of said motion, and, over the objection of counsel for movant, he assumed such jurisdiction, called the case, and set it down for a hearing before him at a future date before the next regular term of the court. After Judge Thomas had vacated the bench and made his exit from the courthouse, Judge Bush of the city court of Camilla again took the bench, assumed jurisdiction of the case, and set it for a hearing at the next term of Mitchell superior court, over objection by the solicitor general as to his authority so to do.

When the cause came on to be heard before Judge Thomas at the time and place set by him, counsel for the movant appeared, "solely for the purpose of making a special appearance and objection to Hon. William E. Thomas taking jurisdiction in said case, and to object to said motion being heard and determined at this time and place, because of its having been continued [by the subsequent order of Judge Bush] to the October term, 1916, of said court." Judge Thomas overruled the objections of counsel for movant, and thereafter sustained a motion, previously filed on April 13, 1916, by the solicitor general, to dismiss the extraordinary motion for a new trial, for various reasons set forth therein as follows: The motion to dismiss the attempted extraordinary motion was urged upon the grounds that the judge of the city court of Camilla was without authority or jurisdiction to pass any order in the nature of a rule nisi therein, and that such an order signed by him, which required the solicitor general to show cause why the motion should not be granted, was absolutely null and void; that the motion, being an extraordinary motion, could not be entertained by any court or be filed of record until it was first judicially determined whether or not it set forth good and suffi-

cient reasons why the same had not been made during the term at which the trial was had, or why the grounds thereof had not been set forth in the original motion for a new trial filed at the term when the trial was had, and the judge of the city court of Camilla was without authority to assume jurisdiction over it for the purpose of granting a rule nisi or passing upon the reasons why the grounds of the motion were not incorporated in the original motion; that the said extraordinary motion did not constitute a case pending in the superior court of Mitchell county until a rule nisi had been granted thereon and it had been judicially determined by the court whether the motion might be filed at a term subsequent to the trial term; and the judge of the city court of Camilla was without authority or jurisdiction to preside in the superior court in the cause until the case had been filed in court after an adjudication upon the question whether it should be filed or not, and until the motion became a case in court by filing; that the motion had never been ordered filed by a superior court judge or any other judge of competent jurisdiction, and the filing thereof without such an order was ineffective, and the motion, therefore, was not a case in court, and was subject to be dismissed and stricken from the superior court; that, the motion having been set down for hearing and determination at Valdosta on May 27, 1916, before Hon. William E. Thomas, judge of the superior courts of the Southern circuit, by an order duly passed by Judge Thomas on May 6, 1916, in open court at Camilla, at the April adjourned term, 1916, of Mitchell superior court, while presiding therein by request of the judge of that court, and counsel for the movant, T. U. Cox, appearing before Judge Thomas on said May 27, 1916, solely for the purpose of insisting upon his disqualification to preside therein and after such objections had been overruled, declining to present his motion to the court for hearing, and refusing to offer it to the court for adjudication on the merits, or to offer any evidence in its support, and wholly refusing to prosecute it before the court, the motion should be dismissed for want of prosecution.

To the judgment dismissing the extraordinary motion the defendant excepts; counsel for the movant insisting that Judge Bush, "having assumed jurisdiction of said motion, had full power and authority to hear and determine the same," and that Judge Thomas erred in refusing and declining to hold that he was himself disqualified to act upon the motion, and erred in disposing of it on May 27, 1916, and in not continuing it until the October term, 1916, of Mitchell superior court, in accordance with the order granted by Judge Bush, after the date May 27th had been fixed by Judge Thomas.

Little, Powell, Smith, & Goldstein, of Atlanta, Pottle & Hofmayer, of Albany, and Chas. Watt, Jr., of Camilla, for plaintiff in error. Johnson & Warren and W. H. Haggard, all of Camilla, R. C. Bell, Sol. Gen., of Cairo, and F. A. Hooper & Son, of Atlanta, for the State.

WADE, C. J. (after stating the facts as above). [1] 1. The authority of the judge of a city court to preside in cases in the superior courts of this state is derived from the following provision of the Constitution:

"In any county within which there is, or hereafter may be, a city court, the judge of said court and of the superior court may preside in the courts of each other in cases where the judge of either court is disqualified to preside." Article 6, § 5, par. 1, of the Constitution of Georgia (Civil Code, § 6519).

At first blush it might appear that the construction of this part of the Constitution is necessarily involved in the decision of this case. The amendment to the Constitution adopted in 1916 (Acts 1916, pp. 19-22) provides that the Supreme Court shall have jurisdiction "in all cases that involve the construction of the Constitution of the state of Georgia or of the United States, or of treaties between the United States and foreign governments; in all cases in which the constitutionality of any law of the state of Georgia or of the United States is drawn in question," etc. It is apparent that if the Supreme Court has jurisdiction in this case, under the above-quoted section from the amendment, it must be because the case is one that involves the construction of the Constitution of Georgia. It is therefore of interest first to determine when a case pending in this court may be said to involve a construction of the Constitution of the state, within the meaning of this provision of the amendment. The original amendment (Civ. Code 1910, § 6506) creating the Court of Appeals provided that this court should exercise certain jurisdiction "except that where, in a case pending in the Court of Appeals, a question is raised as to the construction of a provision of the Constitution of this state or of the United States, or as to the constitutionality of an act of the General Assembly of this state, and a decision of the question is necessary to the determination of the case, the Court of Appeals shall so certify to the Supreme Court," and the last-named court would thereupon determine the question. The language of the amendment of 1916, conferring jurisdiction upon the Supreme Court in all cases, whether coming on writs of error to the Court of Appeals or to the Supreme Court, "that involve the construction of the Constitution," is apparently equivalent to the language employed in the amendment creating the Court of Appeals which required that court to certify to the Supreme Court a question raised in any case as to the construction of a provision of the

Constitution, where a decision of the question was necessary to the determination of the case. Speaking broadly, since under our form of government the Constitution of the United States and the Constitution adopted by the sovereign people of this state together furnish the foundation upon which the entire structure of our laws rests, and consequently the one Constitution or the other is "involved" in every case coming before the trial courts for determination, or before the appellate courts for review, it is obvious that neither the provision in the original amendment establishing the Court of Appeals and requiring that court to certify to the Supreme Court questions involving the construction of a clause of the Constitution where necessary for a determination of a case, nor the provision in the amendment of 1916 conferring upon the Supreme Court exclusive jurisdiction "in all cases that involve the Constitution of the state of Georgia or of the United States," was intended to cover cases where *no distinct question was raised in the record* as to the proper meaning or construction of the Constitution of the United States or of this state, and where the right claimed or denied depended upon a plain and unambiguous provision of either Constitution.

To hold that the Court of Appeals must lose jurisdiction over all cases where any right or privilege asserted or denied depended for its allowance or refusal upon the construction of plain and unambiguous language in the Constitution, though no question as to the construction of such constitutional provision was raised, would be practically to enable any litigant (not relying upon a construction of the Constitution to support his contentions) to select the appellate forum in which he might prefer his case to be determined. If the mere insistence that a particular constitutional question was involved would be sufficient to give exclusive jurisdiction over a case to the Supreme Court, it would be easy to inject into any case a constitutional question of that kind, by contending that some perfectly plain provision of the Constitution, which perhaps had not been previously construed by the Supreme Court, because susceptible of but one construction, should have some special or strained construction given to it, and thus create a constitutional question in the case. The practical effect of the language employed by the amendment of 1916 is apparently to confer automatically upon the Supreme Court exclusive jurisdiction over every case coming to that court or to this court which properly involves the construction of the Constitution of this state or of the United States, instead of permitting this court to certify the constitutional questions involved, while retaining the case itself for decision. However, it is not for the Court of Appeals to construe an amendment to the Constitu-

tion any more than to construe the original Constitution itself, and hence what is said on this particular point is merely remarked in passing. The able discussion by Judge Powell of the question when a construction of the Constitution is involved, which may be found in the case of *Fews v. State*, 1 Ga. App. 122, 58 S. E. 64, is of interest in this connection, and the following language is especially apropos to the point now under consideration:

"A case that involves merely the applicability of a concededly unambiguous clause of the Constitution to a given state of facts raises no question of construction. Likewise, where a clause in the Constitution has been construed by the Supreme Court as having a certain meaning and intentment, and such fixed judicial construction is unchallenged, there is still no question raised as to the construction of a clause of the Constitution."

Paragraph 1 of section 5 of article 6 of the Constitution of Georgia (Civil Code, § 6519) reads as follows:

"In any county within which there is, or hereafter may be, a city court, the judge of said court and of the superior court may preside in the courts of each other in cases where the judge of either court is disqualified to preside."

There being no statutory provision authorizing the judge of a city court to preside as a judge of a superior court, the paragraph of the Constitution quoted above furnishes the only warrant authorizing him so to act, and the authority therein conferred may not be extended by implication. It declares that the judge of a city court may "preside" for a judge of the superior court "in cases" where the judge of the latter court is disqualified to preside. This language is seemingly too plain and unambiguous to require any interpretation or construction, and distinctly authorizes a judge of a city court to *preside* in cases in the superior court, without suggesting in the remotest manner any grant of authority to such a judge to *originate* in his judicial capacity, acting as a judge of the superior court, where the regular judge of that court is disqualified, a proceeding of any kind in the latter court. Though measured by the rule laid down in the *Fews Case*, *supra*, it seems evident that the language employed in this paragraph of the Constitution is too plain to involve or require interpretation, and, therefore, that no constitutional question is "involved," even if the question were distinctly and clearly made in the record as to the proper construction of this section, it is not necessary to declare what its plain meaning is, for the Supreme Court has already construed this section of the Constitution in a case which in principle decides the precise point in this case. So that, under the ruling in the *Fews Case*, *supra*, that "if the particular question of construction sought to be raised has been passed upon directly by the Supreme Court, such question will not be certified to the Supreme Court for repetition of its former decision," it cannot be said that a present construction of the Constitution is

involved. In *Edmondson v. State*, 123 Ga. 194, 51 S. E. 301, the Supreme Court held:

"Neither under the act of 1885 (Acts 1884-85, p. 475, § 30), nor under the constitutional provisions allowing the judge of the superior court to preside in the city court in cases where the judge of the latter is disqualified to preside, did the judge of the superior court of the Macon circuit have authority to administer an oath and attest an affidavit made as a basis for an accusation in the city court of Macon, on the ground that the judge of the latter court was disqualified from attesting the affidavit because of relationship to the defendant. A judgment based upon such an affidavit and accusation should be arrested on motion."

It will be observed that there is a distinct ruling in that case that a judge of the superior court had no authority to take and attest an affidavit upon which an accusation was based in a city court, where the judge of the city court was disqualified from acting by reason of relationship to the defendant. As was said by Mr. Justice Lumpkin:

"This is not *presiding* [italics ours] in a case in the city court, within the meaning of the Constitution."

The Supreme Court therefore, has construed this paragraph of the Constitution, and has declared that the authority conferred by it upon a judge of a superior court is only the authority to "preside" in a city court, and has distinctly ruled that the judge of the superior court could not attest an affidavit which furnished the basis for an accusation in a city court, or, in other words, do judicially anything necessary to originate a proceeding in a city court. If the authority thus conferred upon a judge of the superior court is merely authority to preside in a city court, equally true must it be that the authority it confers upon a judge of a city court is merely to preside in a superior court. In other words, the effect of the ruling by the Supreme Court is that neither a judge of a superior court nor a judge of a city court can do anything but preside for each other, and that neither can originate a proceeding in the court of the other by assuming to act as a judge of that court.

[2, 3] 2. Without attempting any extended discussion of the rules obtaining where an ordinary motion for a new trial is made, it may be said that as far back as the case of *Graddy v. Hightower*, 1 Ga. 252, it was held that:

"When the term of the court at which the judgment was rendered has passed, and no application made and recorded at that term, the record in the cause having been finally made up, the court has no power to grant a new trial, except in some peculiar and extraordinary cases."

In *Cox v. Hillyer*, 65 Ga. 57, and numerous cases since, the Supreme Court has clearly indicated what is generally necessary to constitute an extraordinary motion for a new trial presented at a later term than the term at which the trial was had. One well-recognized difference between an ordinary motion for a new trial and an extraordinary motion for a new trial is that the former

may be filed as a matter of right, and the rule nisi is granted therein as a matter of course by the presiding judge; whereas in an extraordinary motion for a new trial, the trial judge should exercise his discretion and may refuse to entertain the motion and breathe into it the breath of life by granting the rule nisi, unless it appears to him that enough is therein set forth to warrant at least a stay of proceedings and call for a full and more thorough consideration. In *Harris v. Roan*, 119 Ga. 379, 46 S. E. 433, it was said that:

"When an alleged extraordinary motion for a new trial is entirely without merit, it is proper for the judge to decline to entertain the same and to refuse to grant a rule nisi thereon."

And it was further held that the Supreme Court will not by mandamus compel a judge to certify to a bill of exceptions assigning error upon his refusal to entertain an extraordinary motion for a new trial and grant a rule nisi thereon when it appears that the motion is without merit. As was said by the writer in *Griffin v. Brand*, 18 Ga. App. 643, 90 S. E. 90, in his special concurrence:

"Of course, where the judge declines to entertain an extraordinary motion for a new trial which is entirely without merit, the Supreme Court or this court will not by mandamus compel him to certify a bill of exceptions assigning error upon such refusal."

See cases there cited.

From *Harris v. Roan*, supra, as well as from many other cases, it is apparent that the trial judge should exercise his discretion in granting or refusing a rule nisi in an extraordinary motion for a new trial. As was said by Powell, J., in *Seaboard Air-Line Ry. v. Reid*, 6 Ga. App. 13, 20, 63 S. E. 1130, 1131:

"Where the party has had one review by the higher court and a decision has been made against him, and he seeks to obtain from the judge of the court below a second bill of exceptions, the reviewing court will make a preliminary examination into the errors complained of, and will not grant the mandamus nisi unless the contentions of the applicant present such a show of merit as to raise a fairly debatable question as to their validity."

From the statement of facts in the case last quoted from it appears that after examining the application for an extraordinary motion for a new trial, the trial judge refused to grant a rule nisi; a bill of exceptions complaining of this ruling and judgment was then presented to him, which he declined to certify, and application for a mandamus nisi was made to this court, and the application was refused. So it is clear under that ruling also that the judge granting or refusing a rule nisi on an application for an extraordinary motion for a new trial should exercise his discretion. See, also, *New England Mortgage Security Co. v. Collins*, 115 Ga. 104, 41 S. E. 270 (1). It was said in *East Tennessee, Virginia & Georgia Railroad v. Whitlock*, 75 Ga. 82, that:

"The motion for new trial in extraordinary cases . . . was intended in a great degree

to take the place of a bill in equity for a new trial."

And since the judge to whom such an application is made should exercise his discretion, or, in other words, exercise a judicial and not a mere clerical or administrative function in granting or refusing a rule nisi thereon, it cannot be logically insisted that such a motion has any force or vitality until such discretion has apparently been exercised, or until a judge *having authority* under the law to vitalize or originate a proceeding in the court in which the motion is made has judicially acted therein. As was determined in the Edmondson Case, *supra*, *originating* a proceeding in the superior court and *presiding* in a case in that court are entirely different. Since the judge of the city court of Camilla had no authority to originate a case in the superior court of Mitchell county by assuming to act as a judge of the superior court, the proceeding based upon his action in granting a rule nisi on an extraordinary application for a new trial was void ab initio; and therefore the action of the judge of the superior court who undertook to dismiss such a wholly void proceeding was not error, and cannot furnish sufficient ground for complaint in this court, regardless of the precise facts under which he assumed jurisdiction. However, from the record it would appear that if the rule nisi on the extraordinary motion had been in fact granted by one having authority, the judge of the superior court who thereafter set it for a hearing and dismissed the motion would have had, and should have retained, jurisdiction to pass upon the motion.

We think it obvious that the original case which had been tried and determined and brought to this court, and in which the judgment of this court had been made the judgment of the lower court, was certainly not pending at the time the extraordinary motion was presented to the judge of the city court, and therefore that judge had no authority to commence a new case in the superior court by signing a rule nisi; but if the other horn of the dilemma should be selected, it is clear that, under the facts in the record, the judge of the superior court of an adjoining circuit, who had been requested by the judge of the superior court of Mitchell county to preside in the case, and had accordingly presented himself and assumed jurisdiction, could not be deprived of his jurisdiction by a subsequent order, passed by another judge, not requested to preside, while he was still in office, able and ready to dispose of the motion.

Furthermore, if the attempted extraordinary motion in this case was merely an additional proceeding in the original case, and was therefore a "pending" case when the judge of the city court was requested by counsel for plaintiff in error to assume jurisdiction of the same (as argued by counsel for

movant), that judge was not requested to preside by the disqualified judge of the superior court, and there is no existing provision of law which would allow one of the parties in a pending case to select the judge to pass thereon.

Judgment affirmed.

JENKINS and GEORGE, JJ., concur.

(19 Ga. App. 207)

COOK et al. v. ROBINSON. (No. 7417.)
(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917.)

(Syllabus by Editorial Staff.)

SALES ~~6~~442(15) — REMEDY OF SELLER — BREACH OF WARRANTY—INSTRUCTIONS.

In a suit for the purchase price of a motor-car used by plaintiff for several months before it was returned to defendant, the measure of damages for defendant's breach of warranty was the difference between the purchase price of the car and its market value on the date of the purchase, so a charge that if the car was worthless, then the purchaser would, as damages, be entitled to recover the entire purchase price, but if there was a breach of warranty and car was of some value, then the purchaser would be entitled to recover the difference between that value and the purchase price, was erroneous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1800; Dec. Dig. ~~6~~442(15).]

Error from City Court of Oglethorpe; R. L. Greer, Judge.

Action between W. M. Cook and others and Ed Robinson. There was a judgment for the latter, and the former bring error. Reversed.

John B. Guerrey, of Montezuma, for plaintiffs in error. Jule Felton, of Montezuma, for defendant in error.

LUKE, J. The suit was for \$400, the purchase price of an automobile sold by the defendant to the plaintiff. The record discloses that the car was sold on April 4, 1914, and was kept and used by the plaintiff until some time in August of the same year, when it was returned to the defendant. The suit was not filed until 1915, and was tried at the October term of that year. Under these facts it was error for the court to give the following charge to the jury:

"I charge you that if you believe from the evidence that the property, the car, was worthless, was worth nothing at all, then, as damages for the breach of warranty, Robinson (the plaintiff) would be entitled to recover the full amount of the purchase price to be paid for it. If you believe, however, that there has been a breach of warranty on the part of Cook (the defendant), and that Robinson is entitled to recover, and if you believe the car is of some value, that it has a value in spite of the defects alleged, then determine what that value is, and the plaintiff will be entitled to recover the difference between that value and the purchase price agreed to be paid."

The court should have instructed the jury that the measure of damages (if any damage

had been sustained by the plaintiff) was the difference between the purchase price of the automobile and its market value on the day it was purchased.

Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 296)

STATE MUT. LIFE INS. CO. et al. v. FORREST. (No. 7354.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. INSURANCE \S 146(3)—POLICY—CONSTRUCTION AGAINST INSURER.

Insurance policies are prepared and proposed by the insurers; and, where such a contract is capable of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured. Especially is this true where, as in this case, the construction insisted upon by the company would work a forfeiture of the policy, while the other will preserve the obligations of both the company and the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 295.]

2. INSURANCE \S 179½—LOAN AGREEMENT—CONSTRUCTION.

The policy involved in this case contains a loan clause, wherein the company agrees to loan the insured, at his option, stated amounts of cash, upon the policy as sole security; the company further agreeing that any such "loan may be renewed annually, if interest be paid for one year in advance." The insured obtained such a loan, and died four months and eight days after its maturity, without having either renewed or repaid it. The company now insists that, under these facts, it is entitled to charge against the loan value of the policy a full year's interest. *Held*, that since the policy makes no provision for such a case, the amount of interest to be charged is controlled by the rules of law applicable to written obligations to pay in general; that is to say, the company is entitled only to the contract rate of interest for the actual time of its forbearance. No more can be charged against the loan value of the policy so as to reduce the amount thereof available for other purposes under the policy; and no more can be charged against the liability of the company, if any, which accrued upon the death of the insured.

3. INSURANCE \S 367(1, 2, 3) — AUTOMATIC NONFORFEITURE CLAUSE—CONSTRUCTION.

The "automatic" nonforfeiture clause of the policy stipulates that "the company, upon failure of the insured to pay any premium, will charge the premiums as they fall due as loans against the policy until the loan value is consumed." The insured died four months and eight days after the due date of an annual premium, leaving the premium wholly unpaid, and leaving the policy without a sufficient loan value to pay a full annual premium. The company insisted that under these facts the "automatic" clause was inoperative to sustain the policy or keep it of force for any length of time, notwithstanding it may have had some small loan value remaining; and that such a construction is made imperative by a provision of the loan clause requiring the payment in advance of a full annual premium before the insured could obtain a cash loan. *Held*:

(a) The obligation of the company under the "automatic" clause, to charge the unpaid premiums against the loan value of the policy "until the loan value is consumed," entitled the in-

sured not only to such full years of insurance as the available loan value was sufficient to cover, but also to such fractional part of a year as any remaining loan value then available for such purpose might cover, continuing the policy in full force until its stated loan value should become wholly exhausted.

(b) The "automatic" clause, under its own express provisions, could become operative only "upon the failure of the insured to pay any premium." It cannot, therefore, be nullified by ingrafting thereon through a process of alleged construction the contradictory provision of the loan clause that, before obtaining a cash loan, "premiums under this policy shall be paid in full up to the end of the policy year when the loan is obtained." The last-quoted provision is a limitation upon the loan clause only, applies to cash loans only, and does not affect the charges to be made "as loans" under the provisions of the "automatic" clause.

(c) In order, however, for this policy to have been sustained by its own loan value and the provisions of the "automatic" clause for the period of time in question, it was necessary that the loan value be sufficient to cover the interest as well as the principal debt, both as to the cash loan obtained under the loan clause and as to the charges made as loans under the "automatic" clause.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 935, 938.]

4. INSURANCE \S 367(1) — LIFE INSURANCE — GRACE CLAUSE—CONSTRUCTION.

The grace clause of this policy refers to premiums only, and does not affect the cash loan or the accrual of interest thereon. But it applies with equal force to any premium, whether annual, semiannual, or quarterly, and whether paid in cash under the premium clause or by allowing the company to charge it as a loan under the provisions of the "automatic" clause. The fact of the payment, rather than the method thereof, together with the expiration of the period for which the premium was paid, fixed the date when the grace clause became operative, if it ever became operative under the facts of this case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 935.]

5. INSURANCE \S 367(2) — LIFE INSURANCE — LOAN VALUE—APPLICATION TO PREMIUMS—TIME.

Considering this policy as a whole, its loan value, as fixed in the table of values incorporated in the policy, was, at the time of the death of the insured, sufficient to cover the amount of the loan, and also the amount of the unpaid premiums for that part of the policy year preceding the death of the insured, with interest upon both the loan and the unpaid premiums, and therefore, under the provisions of the "automatic" clause, the policy was in full force at the time of the death of the insured, subject only to such charges.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 938.]

6. INSURANCE \S 360(1), 364, 367(1, 3), 370—SIX MONTHS' NONFORFEITURE CLAUSE—NATURE AND CONSTRUCTION—TENDER.

The policy provides: "If the insured makes written application within six months after default in payment of premiums, the company will extend the policy as a term policy for its full amount * * * as stated in the table on the third page hereof." The insured died within six months after the maturity of the eighth annual premium, without having paid it, and without having made any written or other application in accordance with the above-quoted provision of the policy. *Held*:

(a) The privilege so extended the insured is not a mere gratuity personal to the insured

alone, but it is a property right which on his death survives to his beneficiary or legal representative, as the case may be.

(b) The provisions of the policy relating peculiarly to the continuation of the insurance risk become inapplicable and immaterial when the policy is converted into a death claim by the death of the insured.

(c) Upon the death of the insured within the period covered by this clause of the policy (where the extended insurance would have run beyond that period), his legal representative was entitled to hold and sue upon the original policy as a death claim against the company for the full amount of its face value.

(d) The insured having died before the expiration of his right to pay up his indebtedness to the company, which would have entitled him to the full benefit of the seven years and four months extended insurance provided by the table, this right also survived to his legal representative; and, where such payment was made by her, or was legally tendered, or where she was excused by law from making such tender, such indebtedness cannot operate to defeat or nullify the provisions of the "six months" clause of the policy by shortening the term of extended insurance as fixed by the table.

(e) "A formal tender is unnecessary where express declarations are made by the party to whom money is payable that he will not accept if tendered. The law takes one who makes such a statement at his word, and does not, thereafter, require the doing of a vain thing." And "tender may be made by an agent or friend at the instance of an interested party."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 924, 931, 935, 940.]

7. INSURANCE — 629(1)—ACTION—PETITION—DEMURRER.

The trial judge did not err in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1580.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by C. M. Forrest, administratrix, against the State Mutual Life Insurance Company, and others. Judgment for plaintiff, overruling demurrer to petition, and defendants bring error. Affirmed.

Alex C. King, of Atlanta, and Maddox & Doyal, of Rome, for plaintiffs in error. Barry Wright, of Rome, and Sheppard Bros., of Edgefield, S. D., for defendant in error.

LUKE, J. This case arose as an action on a life insurance policy. It comes to this court on questions of construction. The policy was issued on January 19, 1907, for \$5,000, in consideration of an annual premium of \$190.40, payable in advance, the insured being allowed the privilege of paying a semiannual premium of \$99 or a quarterly premium of \$50.45, as he might elect at the time for paying any premium. The policy contains the following special provisions:

Grace clause: "An extension of thirty days will be allowed in the payment of any premium, except the first, and the company agrees to accept any premium, without interest charge, if tendered within thirty days of the time of default, during which thirty days the policy will remain in force."

Loan clause: "After this policy has been in force two years, the company will loan thereon, as sole security, the amount stated in the table

on the third page thereof, at not more than five per cent. per annum, payable in advance. The loan shall be made in accordance with the company's loan agreement; the amount of loan available at any time shall include any previous loans then unpaid, and premiums under this policy shall be paid in full up to the end of the policy year succeeding the date when the loan is obtained. The company agrees that the loan may be renewed annually, if interest be paid for one year in advance."

"Automatic" nonforfeiture clause: "If the insured shall fail to pay any premium when due, and if there is no indebtedness to the company, the insurance will automatically continue from such due date as term insurance, if premiums have been paid for three months, for thirty days; if for six months, for forty days; if for nine months, for fifty days; and for the period specified in the table on the third page in the table hereof, if premiums have been paid for one year. If premiums have been paid for two or more years the company, upon failure of the insured to pay any premium, will charge the premiums as they fall due as loans against the policy until the loan value is consumed, and this policy shall thereby continue in full force. At any time while the policy is thus sustained, the payment of premiums may be resumed, without medical re-examination, and the accumulated debits may be paid or stand as a loan against the policy."

"Six Months" nonforfeiture clause: "If the insured make written application within six months after default in payment of premiums, the company will extend this policy as a term policy for its full amount; or, upon surrender of this policy, will issue a participating paid-up policy, or will pay the cash surrender value, as stated in the table on the third page hereof under the respective heads."

The table referred to in the foregoing clauses is printed in the body of the policy under the heading, "Table of Cash Loans and Guaranteed Surrender Values." It is there based upon a policy for \$1,000, with a stipulation that certain figures therein shall be increased or diminished in proportion to the sum for which the policy may be issued. Reproducing that table on the basis of this policy, for the period here in point, we have the following:

Table of Cash Loans and Guaranteed Surrender Values.

End of Policy Year.	Cash Loan.	Cash Value.	Participating Paid-Up Insurance.	Extended Insurance.	
				Years.	Months.
1st	\$—	\$100.00	\$—	0	3
2nd	200.00	100.00	190.00	1	6
3rd	300.00	200.00	380.00	2	1
4th	405.00	300.00	560.00	4	5
5th	510.00	405.00	740.00	5	9
6th	620.00	510.00	940.00	6	7
7th	730.00	620.00	1095.00	7	4
8th	840.00	730.00	1265.00	8	5

The plaintiff's petition contains the following material allegations: The first seven annual premiums were paid as they fell due, carrying the policy in full force to January 19, 1914. Under the loan clause the insured, during the year 1913, borrowed from the

company the sum of \$592.87, paying the interest thereon in advance and making the principal due January 19, 1914. On May 27, 1914, the insured died, without having renewed or paid the loan, and without having paid any part of the eighth annual premium. On July 1, 1914, the plaintiff notified the defendants of the death of the insured, and demanded the usual form for making proof of his death. The defendant, however, refused to furnish such forms, claiming that the policy had lapsed prior to the death of the insured. The plaintiff, nevertheless, prepared such proofs and furnished them to the defendant, together with proof of her appointment as administratrix of the estate of the insured, and demanded payment of the amount due under the policy; but the defendant refused to pay. On July 6, 1914, the plaintiff, through her attorney, offered to pay to the receiver of the company all indebtedness which the insured owed the company at the time of his death, and demanded the benefit of the extended insurance provided by the "six months clause" of the policy; but the defendant has continually persisted in the original position taken by it, namely, that the policy had lapsed prior to the death of the insured, and that it was no longer of force. The other allegations of the petition, based upon section 2549 of the Civil Code, are unimportant here. To this petition the defendant interposed a demurrer, insisting upon a construction of the several clauses of the policy above set forth, which, if sound, would leave the plaintiff without any cause of action.

The plaintiff contends (1) that she is entitled to recover under the provisions of the "automatic" clause, because the loan value of the policy was sufficient to sustain it from its seventh anniversary to the death of the insured; and that even if the loan value was sufficient to sustain the policy only to a time within 30 days of such death, then the grace clause, in connection with the "automatic" clause, would prevent a forfeiture of the policy. The defendant contends, on the other hand, that even if the policy did have some small loan value left after the cash loan was obtained, the amount of it was insufficient to pay both interest on the loan and the premiums on the policy in accordance with the terms of the policy, because any amount of such loan value would be ineffective under the "automatic" clause of the policy, unless it should be sufficient to pay both a full year's premium on the policy and a full year's interest on the outstanding loan; and it contends that in no event would the insured be entitled to tack the benefits of the grace and "automatic" clauses in order to cover the period in point.

The plaintiff contends (2) that, without regard to either the grace or the "automatic" clause of the policy, she is entitled to recover under the "six months" clause, because the death of the insured occurred within six

months after the due date of the unpaid premium; and, in this connection, she further contends that the conduct and attitude of the defendant, taking the position that the policy had lapsed and refusing the parol application of her attorney and his offer to pay the outstanding indebtedness, not on the ground that the application was in parol or the tender was not legal, but on the ground that it recognized no such right or rights. In her, excused her from the useless formality of making a written application under the "six months" clause, or making any additional tender of payment of the loan, even if under other circumstances it might be necessary for the legal representative of the insured to make such payment or such written application. The defendant contends, on the other hand, that the privileges provided by the "six months" clause of the policy were personal to the insured and terminated upon his death, notwithstanding he died before the expiration of the period covered by this clause; and that, even if the privileges under this clause had survived him, the plaintiff had not complied with the condition precedent to the rights it provided by making "written application within six months." These contrary contentions arise solely from the different constructions which opposing counsel would place upon the policy in question.

[1] 1. The rules of law applicable to the construction of a policy of insurance are too well settled to admit of discussion. They were fixed by early decisions in this state, and have never been departed from. Where a provision in such a contract is clear and unambiguous, if it is within the law it will be enforced as it is written; but where it is capable of being construed in two ways, that interpretation which is most favorable to the insured will always be placed upon it. Civil Code, §§ 2475, 2499, 4268 (4); Insurance Co. v. Ross, 63 Ga. 199; Mass. B. & L. Ass'n v. Robinson, 104 Ga. 256 (2), 30 S. E. 918, 42 L. R. A. 261; Warwick v. Knights, 107 Ga. 121, 82 S. E. 951; Arnold v. Empire, 3 Ga. App. 685 (1), 60 S. E. 470; Hall v. Royal Fraternal Union, 130 Ga. 820 (1), 61 S. E. 977.

[2] 2. What interest is the company entitled to charge, under the facts of this case, on the loan it made to the insured? It is necessary that this question be decided, for the reason that such interest must be deducted from the loan value of the policy, and may therefore materially affect the amount available for other purposes under the policy. So, we would first ask, what is there in the policy, if anything, to take the case out of the general rule? The loan clause, which is set out in full in the foregoing statements of facts and which contains all of the provisions of the policy here in point, does not contain the loan agreement, but does contain a provision as follows:

"The company agrees that the loan may be renewed annually, if interest be paid for one year in advance."

But the plaintiff's petition, which as against the demurrer must be taken as true, alleged that the loan matured on the due date of the unpaid premium, and that the loan was neither paid nor renewed. The petition, therefore, shows a set of facts for which the policy does not provide. The policy itself provides for but two contingencies: (1) payment and (2) renewal; whereas, according to the plaintiff's petition, the insured neither paid nor renewed the loan. So we would next ask: By what rule of law or reason can the company now claim a full year's interest for less than a half year's use of its money? We know of no authority for so doing, and the plaintiffs in error have cited none. We therefore hold, without hesitation, that, under the facts of this case, the amount of interest which the company is entitled to charge against the loan value of the policy—or to deduct from the amount of the death claim, as for that matter—is controlled by the general rules of law applicable to any other creditor who holds a note that is neither paid nor renewed upon its maturity; that is to say, the company is entitled to the contract rate of interest for the actual time of its forbearance, and no more than that.

This case differs from the *McEachern Case*, 15 Ga. App. 222, 82 S. E. 820, in so far as this point is concerned, in that here the policy was not delivered to the company, the loan agreement is not made to appear, and nothing else appears to add to, take from, or otherwise vary the provisions of the policy by making the loan agreement a part of it. Each case must be decided upon its own facts as they appear in the record; and this court cannot, and does not, now attempt to say what are the rights of either party as fixed by the loan agreement or any affirmative action which the company may have taken in accordance with its provisions.

[3] 3. Upon the failure of the insured to pay the eighth annual premium, or any part thereof, in cash, was it necessary that the available loan value of the policy should be equal to a full year's premium, with interest thereon, in order for the "automatic" clause to prevent immediate forfeiture of the policy? A decision of this question is necessary, for the reason that the amount of the loan value available in connection with the automatic clause is clearly insufficient to cover a full year's premium with interest thereon. That the company is entitled to interest on a premium paid only by allowing it to be charged as a loan against the policy is settled by the decision of the Supreme Court in *MacIntyre v. Cotton States Life Ins. Co.*, 82 Ga. 478 (1), 9 S. E. 1124. And it is conceded by the plaintiff that the amount of the loan value available under the "automatic" clause is only such sum as remains after deducting from

the amount fixed by the policy the total amount of the cash loan and interest thereon. So the question is then narrowed down to this: If the policy did have some loan value, but not enough to cover a full year's premium with interest, did the insured forfeit the value which admittedly did remain, or did that value continue the policy of force, pro tanto? Upon the answer to this question depends the answer to the first question; and this answer must be found in the terms of the policy itself.

Looking alone to the "automatic" clause of the policy here in point, the question admits of but one answer, namely, that the insured was entitled to the benefits of whatever amount of loan value may have been available, whether it was more or less than a full year's premium. The company's express obligation under that clause is to "charge the premiums as they fall due as loans against the policy until the loan is consumed." Thus the company's obligation did not cease when such loan value became less than a full year's premium, and could not then cease, because the loan value had not then been consumed.

But every contract must be so construed as to give effect to all its parts and provisions, where such construction is reasonably possible, and the whole contract should be looked to in arriving at the construction of any part. Civ. Code 1910, § 4268 (8). By reason of this rule of law and because premiums under the "automatic" clause are charged as "loans," the company now insists that the insured could not be entitled to the benefit of having any premium charged as a loan, unless the facts were such as to entitle him to a cash loan under the provisions of the loan clause. The particular provision of the loan clause insisted upon is, that before a cash loan can be obtained, "premiums under this policy shall be paid in full up to the end of the policy year succeeding the date when the loan is obtained." We think such a contention is not maintainable under any rule of law, reason, or common-sense construction. It is not necessary to point out the necessarily apparent distinction between a cash loan under the loan clause and a so-called loan under the automatic clause of the policy. But looking to the automatic clause we see that it prescribes but one condition upon which it shall become operative, namely, "upon the failure of the insured to pay any premium." And not only this provision, but the entire automatic clause, would be absolutely nullified, left a mere group of meaningless words, if it should be held, as insisted by counsel for the company, that premiums could not be charged as "loans" in accordance with the provisions of this clause, until, as provided for obtaining a cash loan, premiums were paid in full to the end of the policy year. The above-quoted provision of the loan clause is thus clearly a limitation upon that

clause only, applies to cash loans only, and does not affect charges to be made "as loans" under the provisions of the "automatic" clause. There is but one valid purpose which grace clauses and nonforfeiture clauses can serve, and that is to prevent a lapse of the policy immediately upon the failure of the insured to pay the stipulated premium, and no construction will ever be put upon any of them which totally destroys the benefits that they are designed to preserve.

[4] 4. The fourth headnote needs no elaboration. Nonforfeiture provisions of insurance policies sometimes expressly stipulate that "no grace will be allowed under this provision," and where the meaning of the policy is thus made clear it will be enforced as written. *Perkins v. Empire Life Ins. Co.*, 17 Ga. App. 658, 87 S. E. 1094. But there is nothing in the policy involved in this case to imply that the insured forfeits his rights under one clause by availing himself of the benefits under the other; and where the policy is capable of being construed in two ways, that interpretation must be placed upon it which is most favorable to the insured.

[5] 5. What was the loan value of the policy in question following its seventh anniversary? According to the table of values incorporated in the policy it was, at the end of the sixth year, the sum of \$620. But following the sixth anniversary, the insured borrowed \$592.87, thereby reducing the loan value to \$27.13. Under the rulings above announced, this remaining loan value, in connection with the automatic clause, was certainly sufficient to carry the policy of force until the sum of \$27.13 was consumed, which would be well past the seventh anniversary of the policy, when, according to the same table, the loan value became \$730. And a mathematical calculation shows that the sum of \$730 exceeds the sum total of the loan (\$592.87), a semiannual premium (\$99), together with the contract rate of interest (5 per cent. per annum) on both from their due date, January 19, 1914, to the death of the insured, May 27, 1914, and this is true without regard to the provisions of the grace clause.

But the defendants contend that, because the insured failed to pay an annual premium of \$190.40 at the end of the seventh year, the loan value did not upon the arrival of that anniversary increase in the sum of \$110, as appears from the table of values. Upon this contention, we have carefully considered the table and every provision of the policy pertaining thereto. The table itself affords but one index pointing to the loan value of the policy at any period of time or under any set of facts, and that index is the number of the last preceding anniversary of the policy, the seventh anniversary pointing clearly to the figures \$730. And the provi-

sions of the policy outside the table authorize no change whatsoever in the values as stated in the table, except only such as result from the consumption of those values in accordance with the purposes for which they were created and written into the policy. Upon this point, the policy is not ambiguous. It does not reasonably admit of any construction other than that the loan value of the policy at the time of the death of the insured was \$730, less such items as could properly be charged against the value as hereinbefore pointed out.

[6] 6. The rulings announced in the sixth headnote are sufficiently full and explicit. They are controlled by the decisions of this court in *Veal v. Insurance Co.*, 6 Ga. App. 721 (2), 65 S. E. 714, *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 3 Ga. App. 685 (5, 6), 60 S. E. 470, and authorities there cited, and *McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820.

[7] 7. From what is said above, the plaintiff is, under the allegations of her petition, entitled to recover of the defendant, not only because of the provisions of the "automatic" nonforfeiture clause, but also because of the provisions of the six months clause. The trial judge therefore did not err in overruling the demurrer to the petition.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 429)

NATIONAL PENCIL CO. v. PINKERTON'S DETECTIVE AGENCY. (No. 8251.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. PARTNERSHIP \S 213(2) — SUIT IN FIRM NAME—PROOF OF PARTNERSHIP—STATUTE.

Where partners sued in their firm name, the partnership need not be proved, unless denied in a verified plea. This was true where the original petition alleged that the partnership was a corporation, and the partnership was alleged in an amendment to the petition.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. \S 408, 409.]

2. DETECTIVES \S 5—ACTION FOR SERVICES— EVIDENCE.

It was not error for the court to repel as evidence in this case "certain portions of the argument made by the solicitor-general of the Atlanta circuit on August 23 and 25, 1913, at the trial of Leo M. Frank for murder in Fulton superior court." The rejected matter was so clearly inadmissible that no discussion is necessary to show that the ground of the motion for a new trial based upon its rejection is absolutely without merit.

[Ed. Note.—For other cases, see *Detectives*, Cent. Dig. \S 3.]

3. EXCLUSION OF EVIDENCE.

The court did not err in ruling out of the evidence the testimony of the witness Pierce, or in refusing to allow him to answer a certain question propounded to him, such testimony being a conclusion of the witness, argumentative

in its nature, and irrelevant to the issues in the case.

4. TRIAL \S 255(12), 259(1)—INSTRUCTION—REQUEST.

It was not error, in the absence of a timely written request, for the court to fail to charge that "it was the duty of the plaintiff in conducting this investigation into the murder of Mary Phagan to act honestly and in good faith, and to deal honestly and in good faith with the defendant." The court did instruct the jury as follows: "If you should find that this contract existed, and to the extent that it existed that the plaintiffs entered into this work, then the plaintiffs were bound to exercise reasonable diligence in the performance of the work." Section 3581 of the Civil Code declares that "an agent for hire is bound to exercise, about the business of his principal, that ordinary care, skill, and diligence required of a bailee for hire." The court substantially charged in the language of this statute, and under the facts of the case this was sufficient. It is, of course, implied in every contract that both parties thereto should "act honestly and in good faith," and it is not necessary for the court to charge such an elementary principle of law, unless particularly requested to do so.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 638, 648, 650.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Suit by the Pinkerton's Detective Agency against the National Pencil Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Alexander, of Atlanta, for plaintiff in error. Robt. O. & Philip H. Alston, of Atlanta, for defendant in error.

BROYLES, P. J. 1. The Pinkerton's National Detective Agency brought suit against the National Pencil Company to recover the value of alleged services rendered under a contract entered into between them. In the original petition the plaintiff was alleged to be a corporation, and this allegation was admitted in the defendant's answer. At the trial term the plaintiff amended its declaration and alleged that it was a partnership. This amendment was allowed by the court with the consent of the defendant, and the latter made no answer to it. The case was tried and resulted in a verdict for the plaintiff for the full amount sued for.

[1] Counsel for the plaintiff in error strongly insists before this court that the verdict is not supported by the evidence, because there was no proof introduced to sustain the allegation of partnership made in the amendment to the plaintiff's petition. There were various letter heads and bill heads of the plaintiff which were put in evidence, and also attached to the original petition, upon which appear the following words:

"Pinkerton's National Detective Agency: William A. Pinkerton, Chicago, Allen Pinkerton, New York, principals."

Under the ruling in *American Cotton College v. Atlanta Newspaper Union*, 138 Ga. 147, 74 S. E. 1084, these letter heads might

possibly be considered as some evidence of the partnership. Conceding, however, that this evidence was insufficient to show the fact of partnership, we do not think that a reversal of the judgment must follow. Section 3166 of the Civil Code provides that:

"Partners suing or being sued in their firm name, the partnership need not be proved unless denied by the defendant, upon oath, on plea in abatement filed."

Counsel for the plaintiff in error contends, however, that this section of the Code applies only to a case where the partnership was alleged in the original petition, and he insists that the very language of the section designating the plea of "no partnership" as a "plea in abatement" shows that it was so intended. It is true that ordinarily a plea in abatement must be filed at the first term, but in *Long v. McDonald*, 39 Ga. 186, it was held that an answer denying the existence of a partnership was a plea in bar, and, although sworn to, was not a dilatory plea, which is required to be filed at the first term. This ruling was expressly approved in *Solomon v. Creech*, 82 Ga. 445, 9 S. E. 165. See, also, *Crockett v. Garrard*, 4 Ga. App. 360, 61 S. E. 552, and *Dobbs v. Mixon*, 11 Ga. App. 789, 76 S. E. 166. Under these decisions it would seem that the defendant had a right to file his plea of no partnership at the trial term, especially since the fact of partnership had not been alleged by the plaintiff until that term. It is true that in *Crockett v. Garrard*, supra, Judge Powell criticizes the decisions in the *Long* and *Solomon* Cases, doubting the applicability of the provisions of section 3166, supra, to the particular facts of those cases, but he distinctly says:

"The criticism we are now about to make is not that the actual principle applied in these cases is incorrect."

In our judgment, the instant case comes within the rulings of the Supreme Court in the *Long* and *Solomon* Cases, supra. It follows that, if the defendant had a right to file his plea of "no partnership" at the trial term, and he failed to do so, he will not be permitted thereafter to complain that the fact of the plaintiff's partnership was not shown by the proof.

We are aware that the Supreme Court, in several decisions, has held that the provisions of section 5539 of the Civil Code, requiring a defendant to admit, deny, or explain why he does not admit or deny each paragraph, under penalty of having the allegations in the petition treated as prima facie true, relate to the answer to the original petition only, and not to the answer to an amendment to the petition, and that the failure of a defendant to answer an amendment does not authorize the court or the jury to treat the allegations in the amendment as being admitted. See *Hudson v. Hudson*, 119 Ga. 637, 46 S. E. 874; *Watson v. Barnes*, 125

Ga. 733, 54 S. E. 723; *Brown v. Atlanta R. Co.*, 131 Ga. 259, 62 S. E. 186; *Brown v. Tomberlin*, 137 Ga. 596, 73 S. E. 947.

Not one of these cases, however, involves the question now under discussion, and the Supreme Court stated merely the general rule as to a failure to answer an amendment to a petition. In a case like the instant one we think that the provisions of sections 3166 and 5539 of the Civil Code should be construed together, and that it should be held that a failure to deny the plaintiff's allegation of partnership, although made in an amendment to the petition, amounts to an admission of its truth. To hold otherwise would, in our judgment, be contrary to the provisions of section 3166 of the Civil Code. That section is derived from the act of 1841 (*Cobb's Digest*, p. 590), and the preamble to that act plainly shows that it was the intention of the Legislature in passing it to abolish the harsh technical rule that theretofore had been forcing the courts of this state to hold that partners suing as plaintiffs could not recover unless upon the trial they adduced proof of their partnership, even where the fact of partnership was not denied. The spirit of this legislation would be largely destroyed, and in many cases the intent of the Legislature would be absolutely defeated, if it were now held that partners suing as plaintiffs, who in their original petition inadvertently characterized their firm as a corporation, but who by amendment corrected this misnomer and alleged their partnership (such amendment being consented to by the defendant, and the allegation of partnership therein made not being denied by it), could not recover unless they adduced proof of their partnership. We are therefore clearly of the opinion that in such a case it should be held that the general rule that the failure of a defendant to answer an amendment to a petition cannot be treated as an admission of the truth of the allegations made therein does not apply to an amendment by plaintiff partners alleging the existence of their partnership. In other words, it is evident that such an amendment is an exception to the general rule just stated, and that in a case like the one at bar the failure of the defendant to deny the existence of the partnership amounts to an admission of the same. This ruling is in line with those of other jurisdictions.

"Matter added by way of amendment, to which the defendant makes no opposition, must be deemed to be admitted where the adverse party omits to move to amend his answer so as to deny it." 1 *Standard Enc. Procedure* 930 (E); *McCloskey v. Goldman*, 62 Misc. Rep. 462, 115 N. Y. Supp. 189.

However, if this holding be an extension of the rule hitherto of force in this state, we think it a legitimate and just one, and one necessary under the exigencies of the case. Under the facts of the instant case it could

not possibly make any difference to the defendant whether the plaintiff was a partnership or a corporation. This was not even a collateral issue in the case, and has not the slightest bearing upon its merits; there being no contention or intimation that as a matter of fact the plaintiff was not a legal partnership with the right to sue and to be sued.

[2-4] The cause was fairly tried; the verdict is amply supported by the evidence; no error of law appears; and we see no reason why the judgment of the lower court should be reversed.

Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 334)

HILL v. REYNOLDS. (No. 8062.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. CONSPIRACY §—14—RESPONSIBILITY—STATUTE.

Where a conspiracy is shown, the act of one becomes the act of all, in so far as the furtherance of the conspiracy is concerned; and each is as fully responsible for the acts of the others in carrying out the common purpose as if he himself had committed the acts. *Pen. Code* 1910, § 1025; *Horton v. State*, 66 Ga. 690; *Byrd v. State*, 68 Ga. 661(1); *Handley v. State*, 115 Ga. 584, 41 S. E. 992.

(a) This rule of law applies with no less force to an action for the resulting tort than to a prosecution for the resulting crime, and applies alike in all cases, whether the alleged tort amounts to a crime or not. *Foster v. Thrasher*, 45 Ga. 519; *McEwen v. Springfield*, 64 Ga. 160 (3).

[Ed. Note.—For other cases, see *Conspiracy*, *Cent. Dig.* § 14.]

2. CONSPIRACY §—43(12)—FRAUD—PLEADING AND PROOF.

Where it is alleged in a petition that two or more persons conspired to defraud and did defraud the petitioner, and his action is brought against only one of them to recover for the tortious acts of all, proof of the conspiracy is necessary only in order to charge the conspirator sued with responsibility for the acts of those not sued. A failure to establish the alleged conspiracy does not necessarily defeat the action or constitute a fatal variance between the allegations and the proof; but, if enough of the petition is proved to establish a good cause of action against the defendant alone, without regard to the acts of those named as his coconspirators, the plaintiff is entitled to recover, notwithstanding his failure to establish the alleged conspiracy. The gravamen of the action in such a case is the injury done, and not the conspiracy to do it. *Civ. Code* 1910, § 5573; *Slaughter v. State*, 113 Ga. 284 (2), 38 S. E. 854, 84 Am. St. Rep. 242; *Dixon v. State*, 116 Ga. 186 (8), 42 S. E. 357; *Butler v. Duke*, 39 Misc. Rep. 235, 79 N. Y. Supp. 419; *Lefler v. Fox* (Sup.) 92 N. Y. Supp. 227; *Miller v. John*, 111 Ill. App. 56.

(a) The evidence touching the alleged conspiracy being conflicting, the trial judge did not err in instructing the jury in accordance with this rule of law.

[Ed. Note.—For other cases, see *Conspiracy*, *Cent. Dig.* § 90.]

3. EVIDENCE \S 253(1)—**LETTERS—STATUTE.**

There being evidence to authorize a finding by the jury that a conspiracy had existed as alleged, and it appearing from the uncontradicted testimony of the plaintiff that, during the existence of the conspiracy, one of the conspirators had referred the plaintiff to a third person, a stranger to the suit, for certain information connected with the subject-matter of the conspiracy, it was not error to admit in evidence letters from the third person, pertaining to such information, the defendant's objection being that "said letters were personal letters written by said [third person] to the plaintiff," and that "they are ex parte statements, and defendant has had no chance to cross-examine the witnesses." Civ. Code 1910, § 5778(1).

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 994, 995, 1002.]

4. INSTRUCTIONS.

The court did not err in instructing the jury that the defendant contended, among other things, that if the alleged trade was made at all, it was made entirely with those alleged by the plaintiff to be coconspirators, and that the defendant had nothing whatever to do with the contract. Such an instruction was in accord with the defendant's testimony in his own behalf.

5. MOTION FOR NEW TRIAL.

The evidence authorized the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Action between J. L. Hill and J. E. Reynolds. Judgment for Reynolds, and Hill brings error. Affirmed.

Wm. Wynne and I. T. Irvin, Jr., both of Washington, Ga., for plaintiff in error. S. H. Sibley, of Union Point, and W. A. Slaton, of Washington, Ga., for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 306)

MAY v. SUBERS. (No. 7427.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1051(3), 1058(3) — **EVIDENCE** \S 155(10)—**ADMISSIONS—ADMISSIBILITY—REVIEW—HARMLESS ERROR.**

"When an admission is given in evidence, it is the right of the other party to have the whole admission and all the conversation connected therewith." Civil Code of 1910, § 5783. Nevertheless, in a suit by an executrix to recover certain personal property from another, there was no error in excluding a self-serving declaration made by the surviving party to a contract under which the possession of the property in dispute was held by him, which attempted to set up an additional claim or demand against the deceased party to the contract, as a basis for his adverse possession. The defendant's admission of possession related to an independent substantive fact, was not made to the deceased person, and had no reference to any "transactions or communications" with him, whereas the additional statements made at the same time set up an alleged agreement directly between the survivor and the deceased.

(a) Besides, it appears from the record that the defendant admitted in his plea that he held

the property in possession, and there could be no harmful error in allowing evidence as to another admission to that effect, though the remainder of the conversation connected with the admission was excluded.

(b) It likewise appears from the approved brief of evidence that the witness Custer did in fact testify that at the time the defendant admitted to him that he was in possession of the property in dispute, the defendant asserted the existence of the additional demand against the estate of the deceased which he afterwards set out in his plea.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4164, 4167, 4186, 4202-4204; Evidence, Cent. Dig. § 455.]

2. WITNESSES \S 164(6) — **COMPETENCY—DECEASED PERSONS.**

There was no error in excluding a certain check payable to "J. I. S.," together with the testimony of the drawer to the effect that the "J. I. S." written thereon was intended for J. I. Subers, the deceased party to the contract that the defendant sought to establish. Nor was there any error in excluding the testimony of the surviving party that the estate of J. I. Subers was indebted to the witness in the sum alleged by him in his plea. Unless connected by the parol evidence of the surviving party to the contract with the deceased, the check was irrelevant, and, under the provisions of the Civil Code of 1910, § 5858 (1), his testimony was inadmissible to identify the check as an evidence of indebtedness against the deceased, secured by the property in dispute, or to set up any demand against his estate, based upon transactions or communications with the deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 689, 690.]

3. DIRECTION OF VERDICT—PROPRIETY.

Under the legal testimony in this case there was no error in directing a verdict for the plaintiff; nor did the court thereafter err in overruling the motion for a new trial.

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Action between R. H. May and Z. B. Subers, executrix. There was a judgment for the latter, and the former brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error. W. V. Custer, of Bainbridge, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 330)

NOBLES v. STATE. (No. 7885.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1064½—**APPEAL—MOTION FOR NEW TRIAL—CONSIDERATION.**

Where a motion for new trial contains a ground which is not approved or certified as true by the trial judge, the ground not approved will not be considered by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676, 2887, 2948.]

2. CONVICTION—AFFIRMANCE.

The evidence authorized the verdict, and the charge of the court was full and fair.

Error from City Court of Dublin; J. B. Hicks, Judge.

B. E. Nobles was convicted of violating the prohibition law, and he files a motion for a new trial. Judgment affirmed.

Fred Kea, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

LUKE, J. B. E. Nobles was convicted of violating the prohibition law, and filed a motion for new trial. One of the grounds of the motion for a new trial is as follows:

"Because the court erred in not charging the jury the written request of the defendant, giving him the benefit of a charge to this effect: 'Gentlemen of the jury, I further charge you, where more than two quarts of whisky is found in a buggy occupied or driven by two or more persons, it would not be prima facie evidence that all of the whisky belonged to one of the parties.'"

The trial court's approval of grounds of the motion for a new trial was in the following terms, to wit:

"The averments of fact contained in the above motion are hereby approved as true, except that I do not remember the request to charge having been tendered during the trial. Mr. Kea, counsel for the defendant, however, swears that he did present it."

[1] The ground assigning error upon the court's refusal to charge is not approved by the trial court, as required by section 6090 of the Civil Code of 1910. *Landrum v. Landrum*, 145 Ga. 307, 89 S. E. 201.

[2] The other assignments of error, urged by counsel for the plaintiff in error in his brief are without merit, and the evidence fully authorized the verdict.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 319)

PEEPLER et al. v. BERRIEN COUNTY BANK. (No. 7612.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. ALTERATION OF INSTRUMENTS ⇨30—MATERIALITY—QUESTION FOR COURT.

The materiality of an alleged alteration of a promissory note is a question of law for the court.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 264-270.]

2. ALTERATION OF INSTRUMENTS ⇨20—EFFECT—MATERIALITY.

An alteration in a promissory note must be made with the intent to defraud before it will void the entire contract.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 158-189.]

3. ALTERATION OF INSTRUMENTS ⇨30—DIRECTING VERDICT—EVIDENCE.

Under no view of the evidence could the defendants' plea be sustained, and the court did not err in directing a verdict for the plaintiff.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 264-270.]

Error from City Court of Nashville; C. A. Christian, Judge.

Suit by the Berrien County Bank against T. M. Peeples and others. Judgment for plaintiff on directed verdict, and defendants bring error. Judgment affirmed.

Jos. A. Alexander and W. D. Bule, both of Nashville, for plaintiffs in error. W. R. Smith, of Nashville, for defendant in error.

LUKE, J. Berrien County Bank instituted suit against T. M. Peeples, as principal, and N. T. Peeples and I. C. Avery, as sureties, on promissory note originally executed and delivered to Farmers' State Bank of Nashville, and held by the plaintiff as purchaser for value before maturity. The note was for \$1,856.50, and above the figures in the left-hand corner of the note appeared a notation as follows: "Discount \$192.00." The defendants admitted the execution of the note, but pleaded that it was infected with usury, for which a set-off was prayed by the maker; the sureties alleged that they had no knowledge of the usury charged, and pleaded that they were thereby discharged as sureties. The defendants further pleaded that the plaintiff was not the holder of the note for value; that the note had been changed, in that a "discount of \$192 was added," and that this was a material alteration and a forgery. After the introduction of evidence by both sides, the court directed a verdict in favor of the plaintiff, and to this the defendants except, upon the grounds that the evidence showed that the note had been altered, and that it was infected with usury, known to the plaintiff at the time of purchase.

Under no view of the evidence did the defendants sustain their plea of usury.

[2] Did the notation, "Discount \$192.00," amount to a material alteration of the note? "If a written contract be altered intentionally, and in a material part thereof, by a person claiming a benefit under it, with intent to defraud the other party, such alteration voids the whole contract, at the option of the other party. If the alteration be unintentional, or by mistake, or in an immaterial manner, or not with intent to defraud, if the contract as originally executed can be discovered and is still capable of execution, it will be enforced by the court. If the alteration be made by a stranger, and not at the instance or by collusion of a party or privy, if the original words can still be restored, the contract will be enforced." Civil Code of 1910, § 4296.

[1, 3] The materiality of an alteration is a question of law for the court to pass upon. Civil Code of 1910, § 4297. This contract was not changed in its terms by the simple notation, "Discount \$192.00." The evidence in no way sustaining the plea of the defendant as to the ownership of the note or the plea of

usury, and the materiality of the alleged alteration being a question of law for the court, and the court having correctly determined that the alteration alleged, if an alteration at all, was not material, a direction of a verdict in favor of the plaintiff will not be disturbed. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 332)

SUTTON v. STATE. (No. 7963.)

(Court of Appeals of Georgia. Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW §913(1) — NEW TRIAL—
GROUNDS.

The only grounds of the motion for a new trial are the general grounds, and exceptions to excerpts from the charge of the court, on the ground that the charge was not warranted by the evidence. The defendant's statement and the evidence authorized the instructions complained of, and there was evidence that authorized the verdict. The court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2137-2139, 2141, 2142, 2145.]

Error from Superior Court, Dooly County; W. F. George, Judge.

Action by the State against Hardy Sutton. Judgment for plaintiff, and defendant brings error. Affirmed.

Powell & Lumsden, of Vienna, for plaintiff in error. Jos. B. Wall, Sol. Gen., and Jesse Grantham, both of Fitzgerald, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and BROYLES, P. J., concur.

(19 Ga. App. 294)

BROYLES v. YOUNG. (No. 7125.)

(Court of Appeals of Georgia. Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. EXECUTION §76 — ISSUANCE — DUTY OF
CLERK—DIRECTION.

The clerk of the superior court may issue a *fi. fa.* at any time after a verdict is rendered and judgment entered thereon (Civil Code 1910, § 8020), but there is no statutory provision in this state imposing upon such a clerk the duty of issuing executions without express direction from the plaintiff or his counsel. See, in this connection, 17 Cyc. 986, and cases there cited.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 146, 171, 174.]

2. CLERKS OF COURTS §72—DUTIES—LIA-
BILITY—ACTION.

Where a judgment was rendered against a defendant and his surety in a bail trover proceeding, and the clerk of the superior court issued an execution thereon against the principal defendant only, which was so entered upon the execution docket, and loss resulted to the plaintiff because of the failure of the clerk to include the surety by name in the execution and also in the docket entry thereof, the plaintiff in execution has no right of action against the clerk for damages, unless it further appears

that the clerk failed or refused to properly issue and docket the execution after express direction given to him by the plaintiff or his attorney; and this is true notwithstanding the clerk of the superior court is liable in damages for a failure to perform his official duty or for improper or neglectful performance thereof. *Markham v. Ross*, 73 Ga. 105; *Luther v. Banks*, 111 Ga. 374, 36 S. E. 826.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 119-126.]

3. CLERKS OF COURTS §72—ISSUANCE AND
DOCKETING OF EXECUTION — DILIGENCE —
LIABILITY.

One in whose favor a judgment is rendered has the right, by himself or through his counsel, to control it and direct whether execution shall issue thereon, and where he fails to give any direction, it is not the duty of the clerk to issue an execution, and if the clerk, without such direction, issues an execution, and the execution is defective, the plaintiff cannot recover damages against him because of the negligent doing of a thing not required of him by the law, and especially is this true where the consequences of the negligence of the clerk could have been avoided by the exercise of ordinary care on the part of the plaintiff or his counsel in ascertaining whether the execution so issued conformed to the judgment upon which it was predicated. See *Nicholas v. Tanner*, 117 Ga. 223, 43 S. E. 489.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. §§ 119-126.]

4. SUSTAINING CERTIORARI—ERROR.

The judge of the superior court erred in sustaining the certiorari.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between Arnold Broyles and A. B. Young. Judgment for Young, and Broyles brings error. Reversed.

Harvey Hatcher, of Atlanta, for plaintiff in error. Bachman & Simmons, of Atlanta, for defendant in error.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 339)

TANNER et al. v. PEOPLE'S BANK OF
CARROLLTON. (No. 8134.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1001(1)—QUESTION
OF FACT—VERDICT.

There being evidence to authorize the verdict, this court cannot say that the verdict is contrary to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3983.]

2. NEW TRIAL §41(8)—GROUNDS—CHARGE
OF COURT.

A new trial will not be granted because of excerpts from the charge of the court in which there was no error that would mislead the jury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 71.]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Suit by the People's Bank of Carrollton against C. M. Tanner, C. L. Walker, and oth-

ers. Verdict against the named defendants, their motion for new trial overruled, and they bring error. Affirmed.

B. F. Boykin and S. Holderness, both of Carrollton, for plaintiffs in error. W. C. Wright, of Newnan, and Leon Hood and R. D. Jackson, both of Carrollton, for defendant in error.

LUKE, J. People's Bank of Carrollton instituted suit against J. R. Adamson, J. M. Walker, C. M. Tanner, and C. L. Walker, alleging that on July 12, 1912, Walker Lumber & Manufacturing Company executed and delivered to it a promissory note for \$5,000.58, indorsed by J. R. Adamson, J. M. Walker, C. M. Tanner, and C. L. Walker, and on October 11, 1912, executed and delivered to it a promissory note for \$1,020; that Walker Lumber & Manufacturing Company subsequently was adjudicated a bankrupt, and that the plaintiff received in dividends from the estate of the bankrupt, as a credit upon these two notes, the sum of \$2,534.38; that the note for \$5,000.58 was intended by the plaintiff to be a renewal of the balance due upon two other promissory notes executed by said Walker Lumber & Manufacturing Company, and indorsed by J. R. Adamson, C. M. Tanner, J. M. Walker, and C. L. Walker, one dated March 22, 1911, and due November 22, 1911, for \$4,213.34, and the other dated July 8, 1911, and due October 22, 1911, for \$1,050; that said note of \$5,000.58 was not to be accepted in renewal of the two notes for \$4,213.34 and \$1,050, unless the note for \$5,000.58 was indorsed by C. M. Tanner, and it was the express agreement and understanding between the plaintiff and Walker Lumber & Manufacturing Company that the \$5,000.58 note would not be accepted in such renewal unless so indorsed; that at that time J. R. Adamson was president of the plaintiff bank, and was also secretary and treasurer of the Walker Lumber & Manufacturing Company, and delivered said note for \$5,000.58 to the plaintiff, claiming it to be a renewal of the balance due upon the \$4,213.34 and \$1,050 notes; that plaintiff did not accept said note for \$5,000.58 unless it bore the genuine indorsement of C. M. Tanner; that petitioner is advised and informed that C. M. Tanner denies what purports to be his indorsement thereon; that, while plaintiff claims that said note bears the genuine indorsement of C. M. Tanner, yet, if it should develop or be adjudicated that said C. M. Tanner did not in fact indorse it or authorize such indorsement so as to bind him, then and in that event the plaintiff shows that said two notes for \$4,213.34 and \$1,050, with credits thereon, which notes are now held by plaintiff, are still valid and subsisting obligations and binding on C. M. Tanner,

as he indorsed each of said notes, and that said notes were not to be surrendered or canceled unless said note for \$5,000.58 was delivered to petitioner bearing the genuine indorsement of C. M. Tanner; that if said note for \$5,000.58 should be found and adjudicated not to have been indorsed by C. M. Tanner the plaintiff prays judgment for the balance due upon the \$4,213.34 and \$1,050 notes. Copies of all the notes were attached to petition.

The defendant Tanner pleaded that for want of sufficient information he could not admit or deny that the \$5,000.58 note was given as a renewal of the other two notes, but he denied that it was not to be accepted by the bank in renewal unless indorsed by him. He alleged that the bank was to accept and did accept said \$5,000.58 note without his indorsement, and that the notes for \$4,213.34 and \$1,050 were delivered to Walker Lumber & Manufacturing Company; that the indorsement on the \$5,000.58 note was not his signature, and that the same was not his act or deed, and that the said indorsement was a forgery; that in January, 1912, the finance committee agreed to loan Walker Lumber & Manufacturing Company \$7,000 without his indorsement; and that there was usury in the notes, unknown to him, that would discharge him. The defendant J. M. Walker pleaded that there was usury unknown to him in the notes, etc.

The jury found that the indorsement of C. M. Tanner appearing on the \$5,000.58 note was not the act of C. M. Tanner, that this note, unless it bore the genuine indorsement of C. M. Tanner, was not received as a renewal of the two notes for \$4,213.34 and \$1,050, and that there was no usury in the notes, and found a verdict against the defendants Tanner and C. L. Walker for the balance due on the \$4,213.34 and \$1,050 notes. These defendants filed a motion for a new trial which was overruled, and they excepted.

[1] 1. The evidence on the part of the bank tended to sustain the case as laid; the evidence on the part of the defendants tended to sustain their defenses. The jury were the sole arbiters of the facts, and their verdict gives credence to the contentions of the plaintiff. There being evidence which would authorize the verdict, this court will not set it aside.

[2] 2. In view of the evidence, the excerpts from the charge of the court are not subject to the criticisms made in the motion for a new trial. The charge contains no error calculated to mislead the jury.

The court did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, O. J., and GEORGE, J., concur.

(19 Ga. App. 332)

POLK v. STATE. (No. 7977.)(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)*(Syllabus by the Court.)***1. CRIMINAL LAW — 1153(2)—WITNESSES — 40(2)—COMPETENCY—CHILD—REVIEW.**

It is left to the sound discretion of the trial court to determine whether or not a child of tender years is a competent witness; and where the court examines a child as to its knowledge of the nature and sanctity of an oath and decides that it is competent to testify, this court will not interfere, where it does not appear that such discretion has been abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3061; Witnesses, Cent. Dig. § 98.]

2. CHARGE OF COURT—CRITICISM.

The charge of the court, when considered as a whole, fairly and fully presented the legal issues in this case, and the excerpts complained of are not subject to the criticisms urged in the motion for new trial.

3. CRIMINAL LAW — 1159(5)—PLEA OF INSANITY—FINDINGS—EVIDENCE.

In a trial where the defendant files a special plea of insanity at the time of trial, this court will not set aside a verdict finding against the plea, unless it appears that the evidence demands a finding in favor of the plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3078, 3079.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

C. F. Polk was indicted for murder, his special plea of insanity was found against him, his motion for new trial was overruled, and he brings error. Affirmed.

See, also, 89 S. E. 437.

Jno. T. Allen and Jno. A. Sibley, both of Milledgeville, for plaintiff in error. Edward R. Hines, Sol. Gen., pro tem., of Milledgeville, for the State.

LUKE, J. C. F. Polk was indicted in Baldwin superior court for the offense of murder. He filed a special plea of insanity at the time of trial as follows:

"This defendant, through his attorneys at law as aforesaid, avers that he, the said C. F. Polk, is now an insane person and so afflicted with insanity that he is not a fit person to be put upon trial for the offense of murder, and that his mental condition is such that he is incompetent and unable to make a proper defense of the crime of which he is charged, and that he is unable to assist his counsel in making such defense thereof."

This issue having been submitted to a jury, and the jury having found against the plea, the defendant filed a motion for a new trial, which was overruled by the court, and to the judgment overruling the motion he excepts.

[1] 1. The defendant excepts to the ruling of the court in permitting a witness eight years old to testify. The witness was examined in open court and seemed to understand the sanctity of an oath, and the court decided that the witness was competent. The competency of a witness is left to the sound discretion of the court, and this court will

not interfere, where it does not appear that such discretion has been flagrantly abused. *Beebee v. State*, 124 Ga. 775, 53 S. E. 99.

[2] 2. The charge of the court, when considered as a whole, was full and fair to the defendant, and not subject to the criticisms urged.

[3] 3. Under the evidence this court cannot say that a verdict was demanded in favor of the special plea of insanity. Where the issues are fairly submitted to the jury, in a case of this kind, and the trial court approves the verdict, this court will not interfere with the finding of the jury, unless a different verdict is demanded.

The court did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 438)

WILK v. CITIZENS' & SOUTHERN BANK. (No. 8300.)(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)*(Syllabus by the Court.)***1. BILLS AND NOTES — 516—ACTION—EVIDENCE.**

This was a suit on a note executed and delivered by the defendant to a bank which, by proper indorsement, transferred it to the plaintiff bank. The evidence authorized a finding that the note was so indorsed and transferred before its maturity, and remained thereafter in the possession of the plaintiff, that the latter was a bona fide holder of the note for value, and that the defendant's plea of payment was not sustained by the proof. Accordingly the verdict for the plaintiff for the full amount sued for was supported by the evidence.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1800-1806.]

2. APPEAL AND ERROR — 173(5)—REVIEW—ISSUES.

Counsel for the plaintiff in error contend in their brief that the transaction under which the note was transferred to the plaintiff bank was void under the provisions of section 2360 of the Civil Code of 1910. No such issue was made by the pleadings, nor does the record show that it was raised upon the trial of the case or in the motion for a new trial. This question therefore will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1087, 1110, 1111, 1113, 1119.]

3. APPEAL AND ERROR — 1078(6)—ASSIGNMENTS OF ERROR—CONSIDERATION—ABANDONMENT.

There is no complaint of any error of law, other than the complaint that the verdict is contrary to the law. What purports to be an amendment to the motion for a new trial, adding a seventh ground, appears in the record. It specifies, as a ground for a new trial, failure on the part of the court to charge the law relative to a bona fide holder of a note, irrespective of any request of the defendant so to charge. This purported amendment is not signed by the defendant or his counsel, is not approved by the court, and in the bill of exceptions is not specified as a part of the record. Nor does the bill of exceptions specify the charge of the court as a material part of the record, and the

charge has not been sent up with the record. In addition, this purported amendment to the motion for a new trial is not referred to in the brief of counsel for the plaintiff in error, and even if it could otherwise be considered, is therefore treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261.]

4. MOTION FOR NEW TRIAL—RULING.

The court did not err in overruling the motion for a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by the Citizens' & Southern Bank against Max Wilk. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. & N. M. Reynolds and Salem Dutcher, all of Augusta, for plaintiff in error. Alexander & Lee and Wright & Wright, all of Augusta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 335)

LACEWELL v. EASTERN TENNESSEE POWER CO. (No. 8096.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

TRIAL §169—DIRECTED VERDICT—EVIDENCE.

Under the undisputed evidence in this case, the verdict for the defendant was demanded; accordingly the court did not err in directing a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action between J. F. Lacewell and the Eastern Tennessee Power Company. Judgment for the Company, and Lacewell brings error. Affirmed.

Wm. E. Mann and J. A. Longley, both of Dalton, for plaintiff in error. Maddox, McCamy & Shumate, of Dalton, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 335)

HUNTER v. TEASLEY. (No. 8087.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. BILLS AND NOTES §505—ACTION—EVIDENCE—FRAUD.

The court did not err in excluding testimony offered to show that the note sued upon was obtained by fraud, since this testimony did not connect, or tend to connect, the holder of the note with the alleged fraud. The proof offered as to circumstances attending the execution of the note did not tend to throw light on the question as to whether the holder knew at the

time he acquired the note that it was without consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1717, 1718.]

2. DIRECTED VERDICT—NOTE.

There was no error in directing a verdict in favor of the plaintiff.

Error from Superior Court, Forsyth County; H. C. Hammond, Judge.

Action by J. I. Teasley against J. T. Hunter. Judgment for plaintiff, and defendant brings error. Affirmed.

Geo. F. Gober and W. I. Heyward, both of Atlanta, for plaintiff in error. J. P. Brooke, of Alpharetta, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 336)

DALTON EXCELSIOR CO. v. KEEBLE. (No. 8097.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. DAMAGES §187 — DIMINISHED EARNING CAPACITY—EVIDENCE.

In order to ascertain or form an estimate as to the diminished earning capacity of the plaintiff in an action for damages on account of personal injuries, it is not essential that the jury trying the case should have before them the standard mortality tables. Merchants' & Miners' Transportation Co. v. Corcoran, 4 Ga. App. 654, 62 S. E. 130.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509.]

2. DAMAGES §130(1)—EXCESSIVE DAMAGES — PERSONAL INJURY.

A verdict for damages on account of personal injuries cannot be held to be excessive when it is not so large as to be manifestly the result of prejudice or bias, or corrupt motive. Merchants' & Miners' Transportation Co. v. Corcoran, supra.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 357, 363, 364, 366, 370.]

3. CHARGE OF COURT—ERROR.

The excerpts to the charge of the court complained of, when considered in the light of the charge as a whole, are not erroneous.

4. APPEAL AND ERROR §1006(3)—OVERRULING MOTION FOR NEW TRIAL.

The evidence authorized a verdict in favor of the plaintiff, and this being the second verdict in his favor, and having the approval of the trial court, the judgment overruling the defendant's motion for new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3952.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by Bruce Keeble against the Dalton Excelsior Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. E. Mann, of Dalton, for plaintiff in error. M. C. Tarver and Geo. G. Glenn, both of Dalton, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 264)

NEWSOME v. TRAVELERS' INS. CO.
(No. 8244.)(Court of Appeals of Georgia, Division No. 2.
Feb. 1, 1917. On Motion for Rehearing,
Feb. 16, 1917.)*(Syllabus by the Court.)*

1. INSURANCE — 646(6) — ACCIDENT INSURANCE — CAUSE OF DEATH — PRESUMPTION.

In an action upon an accident insurance policy, where it is apparent from the evidence introduced that the death of the insured was the result of external and violent means, and the issue is as to whether it was due to an accident, within the meaning of the policy, or to some cause excepted by the policy, the presumption is in favor of accident, and against the facts bringing the case within any of the exceptions of the policy, such as insanity of the insured, intentional injury inflicted by a third person, lack of due care and diligence, self-inflicted injuries, and suicide. 1 Corpus Juris, p. 495, § 278; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 8 Sup. Ct. 1360, 32 L. Ed. 306; Butero v. Travelers' Ins. Co., 96 Wis. 536, 71 N. W. 811, 65 Am. St. Rep. 61; Travelers' Ins. Co. v. Wyness, 107 Ga. 534, 589, 590, 34 S. E. 113; Newsome v. Travelers' Ins. Co., 143 Ga. 785, 85 S. E. 1035; Allen v. Travelers' Protective Ass'n, 163 Iowa, 217, 143 N. W. 574, 48 L. R. A. (N. S.) 600.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1659-1662, 1664.]

2. INSURANCE — 645(5), 668(11) — ACCIDENT INSURANCE — CAUSE OF DEATH — QUESTION FOR JURY — VARIANCE.

The evidence introduced by the plaintiff, showing that the death of the insured was caused by external and violent means, raised the presumption that the death was also accidental, and, together with the admissions in the answer, was sufficient to carry the case to the jury; and the court erred in awarding a nonsuit.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1642-1644, 1745, 1763, 1764.]

3. EXCLUSION OF EVIDENCE — ERROR.

The court did not err in excluding evidence, as complained of in the bill of exceptions.

Error from Superior Court, Fulton County;
J. T. Pendleton, Judge.

Action by Mrs. J. D. Newsome against the Travelers' Insurance Company. Judgment for defendant, on motion for nonsuit, and plaintiff brings error. Reversed.

See, also, 143 Ga. 785, 85 S. E. 1035.

J. F. Golightly and Gus Russell, both of Atlanta, and J. C. Newsome, of Gibson, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, for defendant in error.

BROYLES, P. J. [1] The plaintiff's evidence showed that the death of the insured was caused by a visible and external wound in his chest, which had been inflicted by some sharp instrument. No other fact or circumstance as to how the wound was caused was shown, except the statement (contained in a letter written by the plaintiff and addressed to the defendant, notifying it of the death of the insured) that the insured "died * * * from being stabbed by a negro on the streets." This statement by the plaintiff must be taken

as being prima facie true, as against her interests. Fair v. Metropolitan Life Ins. Co., 5 Ga. App. 708, 63 S. E. 812; Hill v. Aetna Life Ins. Co., 150 N. C. 1, 63 S. E. 124. It is clear that, in the absence of the statement just quoted, the plaintiff's proof, together with the presumption of accident arising therefrom, and the admissions in the defendant's answer as to the proof of death, etc., was sufficient to carry the case to the jury; nothing having been shown except that the death of the insured was caused by violent and external means. The case then narrows to this question: Did the additional proof, that the death of the insured resulted from his "being stabbed by a negro on the streets," overcome and destroy the presumption of law that the wound causing his death was accidentally, and not intentionally, inflicted? A little reflection will, in our opinion, show that the question must be answered in the negative. It is entirely possible that the negro stabbed the insured without intending to do so. He may have been standing or walking upon the street, with an open knife in his hand, and have accidentally fallen, or been shoved, against the insured, or he may have stabbed the insured, without any provocation on the part of the latter, mistaking him for some one else. In either of such events, the stabbing would have been an accident within the meaning of the provisions of the insurance policy. Newsome v. Travelers' Ins. Co., supra; Travelers' Ins. Co. v. Wyness, supra; Gaynor v. Travelers' Ins. Co., 12 Ga. App. 601(4), 77 S. E. 1072.

[2, 3] The fact that the petition contained averments that a negro stabbed the insured, mistaking him for another person, and intending to injure that person and not the insured, and that the insured had done nothing to provoke the negro's act, did not obligate the plaintiff to sustain the averments by proof, as they were not necessary to set out a cause of action. It is true that the Supreme Court, when this case was before it (143 Ga. 785, 85 S. E. 1035) on exceptions to the judgment sustaining a general demurrer to the petition, ruled that the petition (which contained such averments) was not subject to general demurrer; but it did not hold that the petition, without these allegations, would have been so subject. In such a case, a cause of action is set out when the plaintiff shows that the death of the insured was caused by external and violent means; such proof, together with the presumption of accident arising therefrom, and the further presumption that the accident occurred in the manner as stated in the declaration, is sufficient to carry the case to the jury, and it is not necessary to prove the facts and circumstances surrounding the injury or death of the insured, even though such facts and circumstances are set forth in the petition. The burden is then upon the defendant to show

that the injury was intentionally inflicted. 1 Corpus Juris, 489, 490, 491, 493, 495, 497, 498. See, also, the other authorities previously cited. In other words, the legal presumption of accident that arose when the plaintiff showed that the death of the insured was caused by external and violent means was not neutralized or overcome by proof of the mere additional fact that death resulted from his being stabbed by a negro on the streets, as no legal presumption then arose that the stabbing was intentional.

In our judgment the court erred in awarding a nonsuit.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

On Motion for Rehearing.

BROYLES, P. J. No principle of law is better known than that the plaintiff must recover, if at all, upon the case as made by his pleadings; and, ordinarily, to recover he must prove all the material allegations made in his petition, and, though he may have gone into unnecessary details in stating his case, he must nevertheless, as a general rule, prove the details set out in the petition. These last rules, however, do not apply to that class of cases where a presumption of law arises in favor of the plaintiff on proof of certain facts. In such cases, when these facts are proved, the plaintiff need not prove the other material allegations in his petition; for the facts already shown by him have raised a presumption of law in his favor against the defendant, and this presumption, together with the facts proved, make out a prima facie case for the plaintiff, and the burden is then shifted to the defendant to rebut this presumption and to disprove the case. In this class of cases the presumption raised by law is intended to assist the plaintiff in making out his case, by presumptively supplying evidence which otherwise it would be incumbent upon him to adduce. For instance, in a suit for personal injuries against a railway company, when the plaintiff shows that the injuries sued for were caused by the running of one of the defendant's cars, the law immediately raises a presumption that the defendant was negligent, and further that it was negligent as charged in the plaintiff's petition; and this is true even where it is alleged, in different counts, that the railroad was negligent in several different ways, the presumption then being that the defendant was negligent in some one of the ways alleged in the petition. Likewise, in a suit upon an accident insurance policy, like the case at bar, although the plaintiff cannot recover unless it is shown that the death of the insured was due to "external, violent, and accidental means," yet, when the plaintiff proves that the death was caused by external and violent means, the law instantly raises the pre-

sumption that it was also accidental, and, further, that the accident occurred in the manner set forth in the plaintiff's petition; and thus the plaintiff in this case is relieved by the law itself from the burden of proving her allegation that the death of the insured was "accidental," and that the accident occurred in the particular manner set out in her declaration. When she proved that the death of the insured was caused by a visible and external wound, this proof, together with the presumptions arising therefrom, was sufficient to carry the case to the jury; and the court erred in awarding a nonsuit.

Motion denied.

(19 Ga. App. 347)

TOWALIGA FALLS POWER CO. v. FOSTER. (No. 8141.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917.)

(Syllabus by the Court.)

1. DAMAGES \S 158(2)—WATERS AND WATER COURSES \S 77—ACTION FOR NEGLIGENCE—EVIDENCE.

The evidence admitted over objection was material and relevant to the issues in the case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 441; Waters and Water Courses, Cent. Dig. \S 65, 66.]

2. TRIAL \S 193(2) — WATERS AND WATER COURSES \S 76, 77—ACTION FOR INJURY—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE—DAMAGES.

The instructions of the court excepted to are not, for any of the reasons assigned, erroneous. The evidence is sufficient to support the verdict, and the court did not err in denying the motion for a new trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 437; Waters and Water Courses, Cent. Dig. \S 64-66.]

Error from Superior Court, Butts County; W. E. H. Searcy, Jr., Judge.

Suit by W. H. Foster against the Towaliga Falls Power Company. Judgment for plaintiff, motion for new trial overruled, and defendant brings error. Affirmed.

Cleveland & Goodrich, of Griffin, Persons & Persons, of Forsyth, and W. E. Watkins, of Jackson, for plaintiff in error. C. L. Redman, of Jackson, for defendant in error.

GEORGE, J. Foster brought suit against the Towaliga Falls Power Company, and alleged that the defendant several years before the filing of the suit, erected a dam across the Towaliga river, in Monroe county, thereby causing "the water in said river to flow up said river and its tributaries for several miles, creating a pond of backwater" over a large area of land, and submerging therein large quantities of timber, logs, trees, brush, and vegetable matter, causing the same to decay; that the said pond created and generated "impure and poisonous air, miasma, and malaria, and mosquitoes in

great numbers, rendering the country thereabout unhealthy, and causing and transmitting miasma and malaria"; that the plaintiff and his family resided, during the years 1911 and 1912, and for many years prior thereto, on a farm owned by his mother in the fork of Cabin creek and Towaliga river; that "the dwelling in which plaintiff and his family resided was within less than one-half mile from the backwater in said pond; that said pond of water was backed on two sides of said dwelling"; that his premises were "permeated with impure and poisonous air, miasma, and malaria, and * * * infected with said mosquitoes, rendering said premises unhealthy and unfit for residential purposes"; that, on account of the conditions described in the petition, he was stricken with malarial fever, on the 1st day of August, 1911, and remained sick until the filing of his petition; that his business was farming, and the value of his services was \$100 a month, and he was unable to attend to his business for the period of 16 months; that during the said time he experienced great pain and suffering; that his wife was also made sick, her sickness being caused by the unsanitary condition of the said pond and by the bites of the mosquitoes and by breathing the said impure and poisonous air; that for 16 months his wife was unable to perform her accustomed duties as a housewife, and he lost thereby \$800, the value of her services; that by reason of the sickness of his wife and himself he expended \$200 for medical treatment and drugs; that the said pond, in its present condition and in its condition during the years of 1911 and 1912, is a nuisance; that prior to 1911 and 1912 the home occupied by the plaintiff "was healthy and a desirable place to reside"; and that he and his wife were, prior to the wrongs complained of in the petition, healthy and free from malaria. Damages were laid in the sum of \$5,000, or other large sum, on account of the described sickness of the plaintiff and his wife, and on account of the great pain and suffering experienced by him from his sickness. The jury found for the plaintiff in the sum of \$1,500, and the defendant filed a motion for new trial, which was overruled, and it excepted.

[1] 1. In grounds 1, 2, and 3 of the amendment to the motion for a new trial, exceptions are taken to the admission of certain evidence offered by the plaintiff. The evidence objected to is to the effect that the water in the river was backed by the building of the dam, and covered a large area of land, from which the brush and timber had not been removed, resulting in the decay of the brush and timber and causing the water to stagnate and mosquitoes to breed, and producing offensive odors; that in 1911 and 1912 mosquitoes in great numbers were on the pond of the defendant company; and that, prior to the erection of the dam and

the raising of the water in the river, no mosquitoes were known to exist in the swamp. The specific objection urged was that the evidence referred to conditions existing generally and in all parts of the pond of the defendant. The evidence was not confined to the condition of the pond nearest the plaintiff's home, but evidence of the general condition of the pond was, under the pleadings in this case, properly admitted in evidence.

2. Complaint is further made of the ruling of the court in permitting Dr. Phillips, a witness for the plaintiff, to testify that a person living near a pond and breathing bad odors and impure air would be thereby depressed and rendered more susceptible to malarial fever, because his power of resistance to the bite of the mosquito would be lessened or reduced. We think this evidence was admissible under the pleadings in this case. While the medical testimony introduced by the plaintiff was to the effect that malarial fever could only be transmitted by the mosquito, the foul and offensive odors arising from the pond are alleged in the petition to be one of the causes producing the sickness of the plaintiff and his wife. It was competent for him to prove that this condition of the pond, as well as the mosquitoes, either caused, or contributed to cause, the injuries set forth in his petition. The impure air arising from the pond cannot, under the evidence in this case, be considered as the direct and sole cause of his illness; but, according to the testimony of the physician, it contributed to cause the sickness to both the plaintiff and his wife.

3. The charge complained of in ground 5, based upon the physician's testimony referred to above, was not, for any of the reasons assigned, erroneous, and was properly adjusted to the facts of the case.

4. Grounds 6 and 7 were addressed primarily to the discretion of the trial judge. Counsel for the plaintiff in error have properly abandoned them in this court.

[2] 5. The court charged the jury as follows:

"In some torts the entire injury is to the peace, happiness, or feeling of the plaintiff, and, in estimating these damages, no rule for fixing or estimating them can be prescribed, except the enlightened conscience of fair and impartial jurors. The amount to be recovered, if any, is such as shall be assessed by fair and impartial jurors, acting from their enlightened conscience as to what would be fair and just to both parties." And further charged that "general damages are such as the law presumes to flow from the tortious act, and may be recovered without proof of any amount."

The plaintiff in error contends that these instructions are error for the following reasons: (1) That plaintiff did not claim damages for injury to peace, happiness, or feeling; (2) that there were no acts of aggravation, either in the act or intention, shown by the evidence in the case; and (3) that, under the facts of the case, general damages,

In addition to damages for lost time, loss of services of the wife, and medical expenses, were not recoverable. We think they were. In the case of *Swift v. Broyles*, 115 Ga. 885, 42 S. E. 277, 58 L. R. A. 390, the Supreme Court said:

"Undoubtedly, it was [the plaintiff's] right to receive additional compensation for any annoyance or discomfort occasioned by the air in and about his dwelling house being permeated with noisome gases and offensive odors discharged from defendant's fertilizer plant. * * * Where there is such a wrongful interference with 'the comfortable enjoyment of property by a person in possession, no precise rule for ascertaining the damage can be given, as, in the very nature of things, the subject-matter effected is not susceptible of exact measurement; therefore the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance.'"

See, also, *Jones v. Royster Guano Co.*, 6 Ga. App. 506, 65 S. E. 361(1).

6. The court charged the jury as follows:

"If you find, from the evidence, that the sickness of the plaintiff and his wife (if you find they were sick) was caused, as alleged in his petition, by malarial fever caused by the unsanitary condition of said pond, and from the bite of mosquitoes, which transmitted to him, and also to his wife, malaria, and by breathing said impure and poisonous airs from the pond of the defendant company, and not from elsewhere, you would be authorized to find for the plaintiff."

Exception is taken to this charge on the ground that the court therein intimated and expressed an opinion "that the pond of the defendant was in an unsanitary condition, and that it produced impure and poisonous airs, and that it produced mosquitoes." We do not think that the judge in this charge intimated or expressed any opinion on the disputed issues in this case, and certainly the jury could not have so construed the charge.

The evidence supports the verdict; and since the petition charged that the plaintiff's injuries resulted not alone from the bite of the particular mosquitoes claimed to cause or transmit malaria, but from the breathing of foul and impure air arising from the pond of the defendant, and due to the decaying vegetable matter negligently left therein by the defendant, the court properly admitted evidence to the effect that impure air and foul and poisonous odors arising from such condition would reduce the power of resistance of one brought constantly in close proximity thereto, and render such person more susceptible to malaria; and the court correctly gave to the plaintiff the benefit of such contention upon the trial of the case. Under the pleadings and the evidence the jury were authorized to find that the impure and poisonous air arising from the defendant's pond, and the bite of the mosquitoes coming therefrom, either caused, or contributed to cause, the fever from which he suffered. There

was no error in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 368)

PHILIP CAREY CO. v. SHEPPARD.
(No. 8196.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. ATTACHMENT \Leftrightarrow 276—JUDGMENT \Leftrightarrow 17(11)
—APPEARANCE—DISMISSAL OF ATTACHMENT.

The giving of a replevin bond by the defendant in attachment converted the suit from an action in rem to an action in personam, and as completely authorized the rendition of a common-law judgment against the defendant in attachment as if the action had been begun in the usual form, followed by personal service. Where, by the giving of such a bond, the defendant in attachment effected a general appearance in the suit, even the dismissal of the attachment would not operate to dismiss the suit. *Cincinnati Ry. Co. v. Pless*, 3 Ga. App. 400, 60 S. E. 8. See, also, *Camp v. Cahn*, 53 Ga. 558; *Bruce v. Conyers*, 54 Ga. 678, 680.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 973-978; Judgment, Cent. Dig. § 33.]

2. ATTACHMENT \Leftrightarrow 217, 241—EXECUTION \Leftrightarrow 166 — JUDGMENT—VALIDITY—OBJECTIONS—AFFIDAVIT OF ILLEGALITY.

By amendment the plaintiff struck the verdict and judgment as against the property levied upon and the surety on the replevin bond, and conceding that the levy was defective because of insufficient description of the property, or because it failed to allege the ownership thereof in the defendant in attachment, such defects were amendable and could not affect the general verdict and judgment rendered against the defendant alone. *Askew v. Melvin*, 144 Ga. 348, 350, 87 S. E. 278. After judgment, the main defendant cannot complain that an attachment is void, though the surety on the replevin bond may. *Planters' Bank v. Berry*, 91 Ga. 266, 18 S. E. 137. The defendant in attachment having in effect acknowledged service by the giving of the replevin bond, and the verdict and judgment being general only and against the defendant alone, the irregularities complained of furnished no sufficient ground for an affidavit of illegality.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735-752, 829-838; Execution, Cent. Dig. §§ 485, 486.]

3. JUDGMENT \Leftrightarrow 384—VACATION—DILIGENCE—MOTION.

The court properly refused to set aside the judgment, as it did not appear that due diligence was exercised by the movant in ascertaining or seeking to ascertain the status of the attachment proceedings and in making proper defenses thereto. "The movant must show not only generally and inferentially, but by precise and specific averment, that he has been without fault or has exercised due diligence, or, if negligent, that his negligence was excusable," and the motion must also set forth fully the facts relied upon to constitute the proposed defense, except in cases where the judgment is absolutely void. *Pryor v. American Trust Co.*, 15 Ga. App. 822, 84 S. E. 312.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 727-732.]

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action between the Philip Carey Company and E. S. Sheppard. Judgment for the latter, and the former brings error. Affirmed.

Henry L. Graves, of Social Circle, Bachman & Simmons, of Atlanta, and Clarence J. Taylor, of Morgan, for plaintiff in error. Smith & Miller, of Edison, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 216)

JONES et al. v. MARIL. (No. 7545.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 1, 1917. Rehearing Denied
Feb. 16, 1917.)

(Syllabus by the Court.)

1. GARNISHMENT §166 — NATURE OF PROCEEDINGS—STATUTE.

A garnishment proceeding makes a case separate and distinct from that in aid of which it is instituted. It involves different parties, different issues, and a different cause of action; it requires a special place on the docket, and a separate trial on the merits; and, where instituted in aid of a pending action, it cannot be tried until the main case is disposed of by a final judgment. Civil Code 1910, §§ 5269, 5281, 5292; Hammett v. Morris, 55 Ga. 644; Bank v. Mayer, 89 Ga. 108, 14 S. E. 891(1); Railroad v. Brown, 3 Ga. App. 561, 60 S. E. 319.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 308-314.]

2. GARNISHMENT §85, 187 — PARTIES DEFENDANT—STATUTE.

The defendant in the main case is not a party to a garnishment which is undissolved; and in such a case he will not be heard to complain of the judgment rendered in favor of the plaintiff against the garnishee. Civil Code 1910, § 5280; Connally v. Rice, 77 Ga. 312; Foster v. Haynes, 83 Ga. 240, 14 S. E. 570; Leake v. Tyner, 112 Ga. 919, 38 S. E. 343.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 150-154, 359-364.]

3. GARNISHMENT §124—PARTIES.

The garnishee has no concern with the merits of the controversy between the plaintiff and defendant any further than to see that, before judgment against himself on the garnishment, there is a judgment against the defendant in the main case which is so far free from invalidity as not to be void. He will not, therefore, be heard to complain of a judgment in favor of the plaintiff and against the defendant alone. Civil Code 1910, § 5292; Exchange Bank v. Freeman, 89 Ga. 771, 15 S. E. 693.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 249.]

4. NEW TRIAL §112—PARTIES—JOINT MOTION.

Where, as in this case, the garnishment is undissolved, and two separate judgments are rendered in favor of the plaintiff, one against the defendant in the main case and the other against the garnishee in the garnishment case (both cases being tried by the judge without a jury), such defendant and the garnishee are not joint parties to either proceeding, and will not be permitted to consolidate the two distinct proceedings by uniting in a motion

which they denominate as their "joint and separate motion for a new trial," wherein they complain that the separate judgment against each of them was contrary to law and without sufficient evidence to support it. Such a proceeding does not bring into question the sufficiency of the evidence to support either of the judgments thus complained of. Bones v. Bank, 67 Ga. 339; Pupke v. Meador, 72 Ga. 230; Western Assurance Co. v. Way, 98 Ga. 746, 27 S. E. 167(4); Morgan v. Latham, 111 Ga. 835, 36 S. E. 99.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 233.]

5. NEW TRIAL §154—MOTION—RULING.

Such a joint motion for a new trial was a mere nullity, and should have been dismissed as such in the trial court; but, no ruling upon this point having been invoked by the plaintiff, the trial judge did not err in attaining substantially the same result by overruling the motion. Rich v. Kiser, 61 Ga. 370; Morgan v. Latham, 111 Ga. 835, 36 S. E. 99.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 812, 813.]

6. APPEAL AND ERROR §15—WRIT OF ERROR—DISMISSAL.

The sole assignment of error in the bill of exceptions being based upon the judgment of the trial court overruling such a void motion for a new trial, the writ of error must be dismissed. Bones v. Bank, 67 Ga. 339; Pupke v. Meador, 72 Ga. 230; Western Assurance Co. v. Way, 98 Ga. 746, 27 S. E. 167(4); Erwin v. Ennis, 104 Ga. 861, 31 S. E. 444; Hicks v. Walker, 105 Ga. 480, 30 S. E. 383; Haralson County v. Pittman, 105 Ga. 513, 31 S. E. 183; Walker v. Conn, 112 Ga. 314, 37 S. E. 403; Wells v. Coker, 113 Ga. 857, 39 S. E. 298.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 59, 60.]

Error from City Court of Savannah; Davis Freeman, Judge.

Garnishment proceedings between B. S. Jones and others and J. Maril. Judgment for the latter, and the former bring error. Writ of error dismissed.

Shelby Myrick, of Savannah, and Payne & Jones, of Atlanta, for plaintiffs in error. Morris H. Bernstein and David S. Atkinson, both of Savannah, for defendant in error.

LUKE, J. Writ of error dismissed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 320)

KNIGHT v. FORBES. (No. 7615.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917. Rehearing Denied
Feb. 27, 1917.)

(Syllabus by the Court.)

1. MONEY RECEIVED §1 — NATURE OF ACTION.

"An action for money had and received lies in behalf of the plaintiff to recover his money in the hands of a defendant who, in equity and good conscience, has no right to retain the same" (Rhodes & Son Furniture Co. v. Jenkins, 2 Ga. App. 475[1], 58 S. E. 897), and such an action "needs for its support no actual contractual relation, for the law will imply a quasi contractual relation to uphold it, whenever the circumstances so require." Citizens' Bank of

Fitzgerald v. Rudisill, 4 Ga. App. 37, 60 S. E. 818.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1.]

2. PLEADING \S 248(4) — AMENDMENT — NEW CAUSE OF ACTION.

A fair construction of the suit as originally brought makes it an action of assumpsit against the defendant individually, and not as agent, for money had and received which the plaintiff delivered to the defendant for the purpose of obtaining for the plaintiff a policy of insurance from a company for which the defendant was an agent; and the amendment, setting up an agreement, made by the defendant in his individual capacity, to return the money if the insurance company declined to issue a policy by a certain time, did not set up a new and distinct cause of action from that set forth in the original petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701-706, 708½.]

3. DEMURRER—OVERRULING.

The trial judge did not err in overruling the demurrer to the plaintiff's petition.

Error from City Court of Valdosta; J. G. Cranford, Judge.

Action between R. E. Knight and J. D. Forbes. There was a judgment for the latter, and the former brings error. Affirmed.

Franklin & Langdale, of Valdosta, for plaintiff in error. E. K. Wilcox, of Valdosta, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 336)

ROUNSAVILLE v. CAMP. (No. 8120.)
(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. VERDICT—CONCLUSIVENESS.

There is nothing in the record to authorize a holding that the verdict was so excessive as to justify the inference of gross mistake or undue bias.

2. TRIAL \S 256(1) — INSTRUCTIONS — NECESSITY OF REQUESTS.

There is no substantial merit in the second ground of the amendment to the motion for a new trial, in which instructions to the jury as to damages for the alleged assault are complained of. The expression "other damages" could not have misled the jury, and there was no request for any fuller or more precise instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628, 633.]

3. DEFENSES—ASSAULT AND BATTERY.

The prosecution of the defendant for the offense of assault and battery, and the resulting fine against him, were not pleaded as a defense to this suit, or in mitigation of damages; and, no request for a charge on this line having been made, and no punitive or exemplary damages being sought by the plaintiff, there is no merit in the third ground of the amendment to the motion for a new trial.

4. APPEAL AND ERROR \S 1078(1) — WAIVER OF ERRORS.

The fourth, fifth, and sixth grounds of the amendment to the motion for a new trial will not be considered. "Grounds of error not covered by the brief or the argument of counsel for

the plaintiff in error will be treated as abandoned. The general statement in the brief that grounds not referred to or argued are nevertheless not abandoned will not be sufficient to change the rule above announced. Courts of review have the right to expect assistance from counsel by citation of authority or argument, and will be apt to accept the inference that the lack of interest by counsel is due to a conviction of the lack of merit." Youmans v. Moore, 11 Ga. App. 66, 74 S. E. 710(4). See, also, White Sewing Machine Co. v. Horkan, 17 Ga. App. 48, 86 S. E. 257(7); Muse v. Hall, 18 Ga. App. 651, 90 S. E. 222; Jefferson v. City of Perry, 18 Ga. App. 690, 90 S. E. 366; James v. Boyett, 19 Ga. App. —, 91 S. E. 219. The mere statement in the brief of counsel for the plaintiff in error that "we insist upon the fourth, fifth, and sixth grounds of the amended motion for a new trial, upon each and all of the grounds therein stated," amounts to no argument in support of these grounds, and affords no assistance to the court in considering the same, and amounts to an abandonment thereof by the plaintiff in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between R. B. Rounsaville and C. W. Camp. There was a judgment for the latter, and the former brings error. Affirmed.

Maddox & Doyal, of Rome, for plaintiff in error. Eubanks & Mebane, of Rome, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 323)

MEINHARD-FEIRST-DOYLE CO. v. DE LOACH. (No. 7642.)
(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. FACTORS \S 21—DUTIES OF.

In the absence of any contract whereby factors were bound to hold cotton as instructed by the customer, the factors were not bound so to hold it, where the customer failed to deposit the margins necessary to hold it after he had been notified to do so.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 21.]

2. FACTORS \S 45 — ACTIONS — EVIDENCE — SUFFICIENCY.

Under no view of the evidence in this case was the defendant entitled to prevail; but the evidence, together with the admissions in the defendant's plea, demanded a verdict in favor of the plaintiff for the full amount sued for. The plaintiffs' motion for a new trial should therefore have been sustained.

[Ed. Note.—For other cases, see Factors, Cent. Dig. §§ 60, 63, 64.]

Error from City Court of Reidsville; E. C. Collins, Judge.

Action by the Meinhard-Feirst-Doyle Company against W. F. De Loach. There was a judgment for defendant, and, plaintiff's motion for new trial being denied, it brings error. Reversed.

H. C. Beasley, of Reidsville, for plaintiff in error. Way & Burkhalter, of Reidsville, for defendant in error.

LUKE, J. [1] The amended petition makes substantially the following case: The plaintiff, a corporation, is a "commission merchant or factor." On December 20, 1912, the defendant shipped to the plaintiff five bales of cotton, to be sold by the plaintiff for the account of the defendant, at the same time drawing upon the plaintiff for \$437, which the plaintiff paid. The cotton was sold during the months of August, September, and October, 1913, and the net proceeds were credited to the defendant's account, leaving a balance of \$108.03 due by the defendant to the plaintiff. All the usual and necessary details as to dates, weights, selling prices, etc., appear in the bill of particulars annexed to the petition. The defendant's answer admits that "the said plaintiffs would be entitled to a judgment for the same unless this defendant shows to the court that he had fully paid off and discharged the said indebtedness." The defendant's plea of satisfaction makes substantially the following defense: That at the time the cotton was shipped to the plaintiff it was of a grade "next to fancy," weighed 2,180 pounds, and was then worth on the market 23 cents per pound (a total of \$731.40), "and remained of such value until the said cotton was sold by the plaintiff"; that at first the defendant directed the plaintiff to hold the cotton for 60 days, and "later" directed the plaintiff to "sell to best advantage," and "give him credit for the proceeds of same"; that, instead of selling the cotton as directed, the plaintiff held it "for a long period of time, and finally claimed to have sold it at a price which was far below the market price, * * * to the injury of this defendant, and without his consent"; that but for the plaintiff's said conduct the cotton would have brought \$479.60 net to the defendant, after allowing for all proper expenses, etc., instead of only \$360.52, as was actually realized under the plaintiff's plan; and that, by reason of the plaintiff's said conduct and failure to exercise ordinary care, prudence, and skill in the sale of cotton, the defendant had been damaged in the sum of \$119.08, being the difference between the price the cotton should have brought and the price it did bring. The defendant prayed judgment against the plaintiff "for such an amount as he may be able to show to the court he is entitled to recover in said case." The jury returned a verdict in favor of the defendant for \$6.74. The court overruled the plaintiff's motion for a new trial, and thereupon the plaintiff sued out a writ of error to this court.

In the brief for the plaintiff in error before this court, only one ground of the motion for a new trial is insisted upon, namely, that the verdict is without any evidence to support it. An examination of the brief of evi-

dence shows that this complaint of the plaintiff in error is well founded. The defendant took the stand as a witness in his own behalf for the purpose of establishing his affirmative plea, and the first positive and emphatic testimony given by him appears in the record here in the following language:

"I cannot say that these defendants [plaintiffs] could have sold my cotton any time from the time I shipped it until the time it was sold for more money than it was sold for. I would not swear that they did not act in the utmost good faith. I would not swear that they did not deal with me honestly and fairly. So far as I know, I have been treated exactly right and got the best prices obtainable for my cotton."

The remainder of the defendant's testimony is either vague, indefinite, and conjectural, or self-contradictory. He admits without explanation, the following correspondence between himself and the plaintiff respecting the matter in controversy:

Defendant's letter of December 19, 1912, to plaintiff: "I am shipping you 5 B/c. It is good. Was offered 22 cents per pound for it yesterday, but not ready to sell it yet. I am drawing on you for 20 cents per pound, and ask you to hold about 60 days for me. Kindly honor draft."

Plaintiff's letter of December 20, 1912, to defendant: "We are in receipt of your letter of the 19th instant advising shipment of 5 bales of Sea Island cotton, with draft against same for 20 cents per pound. This draft will be paid on presentation. We note that we are to hold this shipment for 60 days. You, no doubt, realize that the market for Sea Island cotton is at present very easy, but we trust a demand will develop by the time you are ready to make sale."

Plaintiff's letter of January 20, 1913, to defendant: "We have been called on by the banks for more margin against our loans on Sea Island cotton, and we find that it will be necessary to in turn call on the owners of the cotton. Your account shows a debit of \$437, without interest, against 5 bales of Sea Islands. As the banks have reduced loans on Sea Islands to \$70 per bale, we will have to ask that you arrange to furnish margins amounting to \$100. We fear that the above conditions will result in a quantity of distress cotton being forced upon the market. We trust that it will not be necessary for us to resort to these measures with your cotton. Kindly let us hear from you, with check for this amount."

Plaintiff's letter of January 27, 1913, to defendant: "We have no reply to our letter of the 20th inst., asking that you remit us \$100 as margin against your 5 bales of Sea Island cotton. As stated in our previous letter, we do not wish to force the sale of any Sea Island cotton, thereby breaking the market, and we must therefore ask that you comply with our request by return mail."

Plaintiff's letter of April 30, 1913, to defendant: "Referring to our several letters in regard to margining your Sea Island cotton. We consider that we are entitled to the courtesy of a reply to our letters. We advanced more than the cotton will bring, and, as the account will not pay out, you are honestly due us any debit remaining after the cotton is disposed of. If you are not in position to furnish the \$100 asked for, kindly let us hear from you, indicating a willingness to pay the overdraft when the cotton is disposed of and the account adjudged, or let us have a note for the amount. You are, no doubt, aware that the situation has been slightly brighter of late. There has

been a pretty good demand for the lowest grades, and some inquiry for the best grades, but still at what looks like distress prices; so that we have as yet made no sales. Kindly let us hear from you."

Defendant's letter of May 1, 1913, to plaintiff: "In reply to the cotton, will say that I mean to treat you fair. I can't do anything but sell the cotton as soon as you can and let me hear from it. Guess if you treat me right, will ship you more to cover my bills."

Plaintiff's letter of June 16, 1913, to defendant: "We herewith inclose statement of your account to date, showing debit of \$450 against 5 bales of Sea Island cotton. We have been doing everything in our power to avoid making sacrifice of any of our cotton and to uphold the market. The banks, however, are now requiring very full margin in Sea Islands, and we are forced to ask the owners of the cotton to remit cash or give us margin notes to meet these demands, which we can in turn use with the banks. We accordingly herewith inclose a note for \$150 for this purpose. Kindly sign the same and return at once. We will then be in a position to protect your cotton from a sacrifice sale. We are inclined to do everything we can to make the adjustment of this account for you, and we feel sure that you will meet us by showing a disposition to do what you can. We have no intention of forcing the payment of the above note under these conditions."

Plaintiff's letter of September 29, 1913, to defendant: "We herewith inclose account sale, covering the sale of two bales of Sea Island cotton and statement of your account to date. You will note that this statement shows a debit of \$183.88, with one bale of Sea Island still on hand. You must realize that we have done everything in our power to get you out on this cotton, and in fact we made sales on an average of about 2½ cents per pound above what similar cotton was sold at during the 'distress period' in the spring. We therefore consider that we are entitled to an adjustment of this account at once, and we would ask that you forward a check for the above amount, less \$50, against the bale on hand, or a shipment to cover. Kindly let us hear from you."

The defendant shows no communication from himself to the plaintiff, except the two letters, dated December 19, 1912, and May 1, 1913, respectively, which are set out above. He does not claim to have kept up his margins as requested, or to have made any response to the several letters from the plaintiff requesting him to do so. He admits receiving from the plaintiff the letters directed to him, above set out, and then testifies:

"The reason why I did not raise any objection to the price at which the cotton was sold when I received the notices of sale, I just neglected it."

It is needless here to set out the rest of the defendant's testimony. It is needless to set out that of another witness introduced by him. The other testimony can avail the defendant nothing. By his own solemn admissions in *judicio*, which have already been set out and which disprove his plea, he was precluded from establishing the defense which he attempted to set up. Where any party—plaintiff, defendant, claimant, or what not—takes the stand as a witness in his own behalf, and delivers testimony which is self-contradictory on the most material issue in the case, the very heart of it, that version of his testimony must be adopted which is most favorable to his adversary; and such a party will not be permitted to overcome his own adverse testimony merely by offering witnesses who swear differently. *Steele v. Central of Ga.*, 123 Ga. 237, 51 S. E. 438; *Tuten v. A. C. L. R. R. Co.*, 4 Ga. App. 353, 61 S. E. 511; *Johnson v. Southern Ry.*, 9 Ga. App. 661, 72 S. E. 66.

[2] This rule of construction is not, however, the defendant's sole trouble in this case; though, as plainly seen, it is an all-sufficient trouble. But if his damaging admissions were removed from the record, the verdict would still be without sufficient evidence to support it. Taking all the evidence in the record, except that part of the defendant's testimony above dealt with, the case would then be controlled by the decision of this court in *Leffler & Co. v. Pearson & Son*, 17 Ga. App. 57, 86 S. E. 256, and the authorities cited in the first and second divisions of that decision. In the case at bar the defendant not only fails to show any instruction to the factor to hold the cotton, but also fails to show any contract whereby the factor would have been bound by such instructions if given; while the uncontradicted evidence does show that the defendant failed, after due notice given, to deposit the margins necessary to hold it. He was not therefore, under any view of the evidence, entitled to prevail or to have any deduction from the amount of the plaintiff's claim.

The judgment denying the plaintiff's motion for a new trial must therefore be reversed.

WADE, C. J., and GEORGE, J., concur.

(73 W. Va. 279)

WILSON v. BUFFALO COLLIERIES CO.
et al. (No. 3033.)(Supreme Court of Appeals of West Virginia.
Nov. 21, 1916. Rehearing Denied
Feb. 27, 1917.)*(Syllabus by the Court.)***1. LOGS AND LOGGING §3(7)—CONVEYANCE—CONSTRUCTION.**

An instrument under seal, designating itself a conveyance, reciting sale of the timber on a tract of land, to the party of the second part, for an adequate consideration, and conveying the same to him, without words of limitation, together with the privilege of using the land for purposes of severance, manufacture, and removal thereof for and during a period of three years, to which provisions there is added a clause saying the grantee is to have three years in which to remove the timber and longer, on payment of \$50 for each additional year, passes the fee-simple title to the timber; the clauses pertaining to privileges and compensation being construed to be covenants, not conditions subsequent.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 9.]

2. LOGS AND LOGGING §3(7)—CONVEYANCE—CONSTRUCTION—TITLE—"DEED."

A sealed contract reciting a sale and conveyance of timber, for a nominal consideration, but not formally granting or conveying the same, and containing covenants on the part of the party of the second part to sever, manufacture, and remove the timber, and pay for it at certain prices, as they manufacture it into lumber, is not a "deed," and does not pass the legal title to the timber.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 9.]

For other definitions, see *Words and Phrases*, First and Second Series, *Deed*.]

3. TAXATION §848—TIMBER LAND—FORFEITURE.

Forfeiture of the title to the timber on a tract of land for nonentry on the land books for taxation cannot be predicated on mere severance of the title to the timber from the land and lapse of time, without a separate entry of the timber on the land books, since presumptively the land and timber were taxed together as one, when the severance occurred, and have since been so carried on the land books and taxed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1664.]

4. LOGS AND LOGGING §3(7)—TIMBER CONTRACT—COMPENSATION.

Stipulated compensation for the use of land for standing timber and severance and removal thereof belongs to the owner of the surface, in the absence of any other specific disposition thereof.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 9.]

*(Additional Syllabus by Editorial Staff.)***5. WORDS AND PHRASES—"CONVEYS."**

The word "conveys" expresses intention to pass title, and is the equivalent of the word "grant."

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Convey*.]

Error to Circuit Court, Mingo County.

Action of ejectment by J. W. Wilson against the Buffalo Collieries Company and others. Judgment for defendants, and plain-

tiff brings error. Reversed, verdict set aside, and cause remanded for a new trial.

Goodykoontz & Scherr, of Williamson, for plaintiff in error. Wade H. Bronson and S. D. Stokes, both of Williamson, for defendants in error.

POFFENBARGER, J. This writ of error is to a judgment for the defendant in an action of ejectment for the recovery of standing timber on a certain tract of land rendered on a verdict found for the defendant by direction of the court.

Appropriateness of the remedy invoked by the plaintiff is challenged on the ground of lack of title to such an interest in real estate as legally warrants employment thereof. The statute permits the use of the remedy to any person claiming real estate in fee or for life, or for years, either as heir, devisee, or purchaser or otherwise. Code, c. 90, § 2 (sec. 4070). If the contract under which the plaintiff claims creates in his favor only a license or privilege, respecting the land and the timber thereon, and does not vest in him any interest or estate in the land or timber, ejectment does not lie. *Chapman v. Coal & Coke Co.*, 54 W. Va. 193, 46 S. E. 262; *Witten v. St. Clair*, 27 W. Va. 770; *Suttle v. Railroad Co.*, 76 Va. 284.

[1, 2] Though not in form a deed, the contract under which Wilson claims, sells and conveys to him, his heirs and assigns, all the timber 18 inches in diameter and above on a certain tract of land therein described, together with full right and privilege, for and during the period of three years, to enter upon the land and pass and repass over the same at will, on foot, or with conveyances, in the cutting and removal of the timber, and to construct and operate necessary roads and tramways over and upon the same. It contains a clause forfeiting the right granted in case of failure to pay \$1,250 for the timber within sixty days from the date thereof. By another clause it was covenanted that a tenant of the party of the first part should vacate the premises on the payment of the sum of \$1,250 by the plaintiff, and that the plaintiff should have the use of the house so to be vacated, at a rental of \$125 for one year and longer if they should be able to agree on the price. It was further stipulated and agreed that the plaintiff should have three years in which to remove the timber from the land and "longer if the party of the second part will pay to the party of the first part \$50 for each additional year." A further provision was that the party of the second part should be allowed to build houses on the land, for the accommodation of his workmen engaged in the cutting and manufacture of the timber, to set his mill at any place on the premises he might select and to have additional ground

for a lumber yard. This optional contract seems to have been consummated by payment of the \$1,250.

The paper designates itself as a "conveyance," not a deed. It contains neither a habendum nor a warranty clause, but in most other respects it adopts the formality and order of a deed. After the recital of a consideration and reciprocal sale of the timber, it conveys the timber and other rights and privileges above specified, and there is no language in it indicative of purpose to execute any additional papers for consummation of the final and ultimate intention of the parties. In other words nothing on its face imports intention to make an executory contract to be consummated by a deed. In the conditional or forfeiture clause, it calls itself a contract, but a deed is a contract, and a defeasance is not inconsistent with intent to vest title upon a condition subsequent.

[5] The word "conveys" sufficiently expresses intention to pass title. It is now held to be the equivalent of the word "grants." *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 114, 41 S. E. 340; *Chapman v. Charter*, 46 W. Va. 769, 34 S. E. 768. To make an instrument a deed, no particular formality is necessary. The intention expressed controls. If the instrument reveals intention to pass title and is sealed and is executed and delivered by a grantor to a grantee, named or sufficiently indicated, it is a deed. *Parsons v. Baltimore & Ohio R. Co.*, 44 W. Va. 335, 29 S. E. 999, 67 Am. St. Rep. 769; *Devlin, Deeds*, § 174. Hence, if the right conferred by it is an estate or interest in land, such as the statute allows to pass only by deed or will, there is no lack of requisite documentary evidence of title.

The grant made by Wilson cannot be differentiated from the one construed in *Keystone v. Brooks*, 65 W. Va. 512, 64 S. E. 614, upon any substantial ground. There is no time limit in the granting clause. Being absolute and for a consideration paid, it cannot be cut down by mere inference arising from a stipulation as to the time of severance and removal, or an additional grant of rights of way and other privileges on the land, for severance and removal. The granting clause is clear, complete, and unlimited as to the timber. The limitation is upon the removal privileges granted, not on the grant of the timber. A stipulation several paragraphs removed from the granting clause seems clearly to have had for its purpose a guaranty of compensation for use of the land, in the work of severance and removal after three years. It shows the purpose of the limitation on the privileges. Nowhere is there a clause of forfeiture of title for nonpayment of such compensation or delay in severance and removal. Nor is there an express covenant to remove the timber within any stated period of time. The function of the clause relied upon as being a limitation of the grant

is defined by Judge Brannon in the case cited in the following very convincing language:

"In place and in sense it belongs to the clause giving right to occupy the land. It has a function to perform in that clause. It is needed there. It serves only to limit the period during which no charge was to be made for the use of the land. It is no covenant by Barricklow. There is no express covenant by Barricklow to remove the timber at any time. The most we could say as to this is that the deed contemplates a removal, and that thus a covenant to remove is implied. Likely so. But it is only a covenant, not a time limit, not a condition operating as a forfeiture. It would only demand removal in a reasonable time. Delay unreasonable might be the subject of action for breach, or the cause of some legal procedure. We say not as to this; but we do say it does not work a loss of Barricklow's vested title. In *Zimmerman v. Daffin*, 149 Ala. 380 [42 South. 858, 9 L. R. A. (N. S.) 663], 123 Am. St. Rep. 65, where there was a time limit, the court said that, if the intent was that at the close of the limit the failure to remove should work a reverter, it would have been easy to have said so, but that on the face of the instrument it was, at least, a question of doubt whether the limitation was a condition subsequent, or a covenant, not operating as a clause of forfeiture, citing cases so holding. There we see that 'if it be doubtful whether a clause imports a condition or a covenant, the latter construction will be adopted.' If such the case, where there is a time limit, how much more so where there is none, and the only covenant is one to be implied. It is a mere covenant. So the construction of the deed does not give it a time limit for removal of the timber, so as to give the Keystone Company any timber, whether standing, or in felled trees or logs. Without such limit, or some forfeiture clause, the title thereto remains in Brooks. The law does not imply such limit or condition. *Lodwick L. Co. v. Taylor* [100 Tex. 270, 98 S. W. 233], 123 Am. St. Rep. 806."

[3, 4] On the merits of the case it is contended that the plaintiff has lost, by forfeiture, the right vested in him by the contract. More than ten years elapsed between the date of his contract and the institution of this action, and it is claimed he has not paid the \$50 payments required, after expiration of the three-year period. He has made such payments, but the defendant claims they were not made to the party entitled to receive them. Commencing June 2, 1909, he paid to one Vicle Collins from time to time various amounts sufficient to cover the required payments of \$50 up to the date of the institution of this action. The contention of the defendant is that, to avail anything, the payments should have been made either to it or to Elizabeth Deskins. The validity of the respective claims depends upon the following facts pertaining to the title and rights involved. In her own right and as guardian for certain infants Elizabeth Deskins executed the deed under which the plaintiff claims, bearing date February 13, 1905. On May 9th of the same year she executed a lease of the tract of land to the Buffalo Collieries Company, for coal mining purposes, giving it the right to use so much of the surface of the land and of the timber, stone, sand, and water thereon as might be necessary for min-

ing, coking, manufacturing, and building purposes, but reserving all the timber over 18 inches in diameter and such smaller timber as might be needed for repair of buildings, fences, and farming implements. By another contract, dated July 13, 1905, she sold to the Buffalo Collieries Company all of the timber on the tract of land below what was known as the Winifrede seam of coal under 18 inches in diameter 3 feet from the ground. By a deed dated June 17, 1907, she conveyed the tract of land to Vicie Collins, wife of Martin Collins, making the conveyance expressly subject to the rights granted to J. W. Wilson, the plaintiff herein, and to the Buffalo Collieries Company, and inserting this clause in the deed:

"The rights and privileges granted unto the said Buffalo Collieries Company and to the said J. W. Wilson in said lease and contract is expressly reserved from the operation of this deed."

By a deed dated April 4, 1908, and reciting the intention of the parties to the deed of June 17, 1907, to have been a conveyance of only the surface of the tract of land not the mineral rights therein, nor anything more than the surface, Vicie Collins reconveyed to Elizabeth Deskins what had been unintentionally conveyed to her, in the following terms:

"The said Vicie Collins and Martin Collins, her husband, do hereby quitclaim, release, and grant unto the said Elizabeth M. Deskins any and all of their rights in and to the said tract of land in the said deed described in so far as it may have conveyed anything more than the surface of the said land and small timber."

Elizabeth Deskins joined Laura Smith and her husband in a deed dated June 25, 1909, conveying an undivided one-fourth interest in and to the coal in, on and underlying the tract of land, in consideration of the sum of \$10,000 paid and to be paid to the said Laura Smith. That deed recites that Elizabeth Deskins joined in it for the purpose of granting, conveying and releasing, and says she does thereby grant, convey, and release "all right, title, interest, and privileges, whether legal or equitable or otherwise," to which she might be entitled "in and to the property" thereby conveyed. She and others seem to have conveyed the same land to J. M. Smith by a deed dated July 14, 1913, and Smith seems to have conveyed it to T. C. Berger, trustee, by a deed dated September 25, 1913. Berger seems to have conveyed it to the Buffalo Collieries Company by a deed dated, October 15, 1914.

That Mrs. Deskins reserved nothing to herself by the clause in her deed to Vicie Collins above quoted is perfectly obvious. Though she used the word "reserved," the context clearly proves she meant merely to except from the operation of the deed the rights she had granted away. Things she had parted with and could not reserve constituted the subject-matter of her language. It being logically and physically impossible to reserve them, she must have intended by

what she said to except them, and nothing more; for the terms of the clause do not extend beyond them in any sense. But she excepted what she had conveyed to Wilson, the title to the standing timber 18 inches and over in diameter. Vicie Collins' deed of April 4, 1908, did not reconvey that, because she never got it by the deed to her. Neither did subsequent conveyances pass it to the defendant company.

As the owner of the surface, Vicie Collins was entitled to the compensation paid her for the use thereof contemplated by the deed. Such use being in no sense a burden upon the minerals owned by the defendant, nor connected with it, there is no reason why it should accompany the grant thereof, rather than the grant of the surface. None of the conveyances mention it or deal with it in specific terms or by necessary inference. Vicie Collins reconveyed the land. The rental was not land. It was a mere right to money arising out of a burden upon, and use of, the surface conveyed to her and retained by her.

The circuit court seems to have based its direction of a verdict for the defendant upon a supposed forfeiture to the state for nonentry of the timber on the land books for taxation and resultant loss of title by Wilson. Proof that it had not been so entered separately from the land in Wilson's name was admitted. It was not shown, however, that the land had not been taxed, nor that, for the purposes of taxation, the timber had ever been separated from the surface on the land books. If objection to this evidence had been made, it would have been the duty of the court to strike it out, but it proves nothing relevant or material. No forfeiture can be predicated on such evidence. Presumptively the timber was included in the entry of the land. *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S. E. 307; *Wallace v. Elm Grove, etc., Co.*, 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140.

The next contention is that Wilson conveyed his title to H. W. MacConnell and M. L. Swett by a contract dated March 30, 1905. This contract is under seal, and recites a sale and conveyance of the timber in consideration of \$500, but does not in terms convey or grant it. This is followed by numerous stipulations binding MacConnell and Swett to cut the timber and manufacture it into lumber and pay for it at certain prices per 1,000 feet, the minimum monthly payments to be not less than \$100, certain months excepted. All of its provisions considered, this contract is obviously executory, not passing title to the timber, until severed and manufactured. It cannot well be assumed that Wilson intended to part with his title on the mere covenants of the contract. MacConnell and Swett broke up and abandoned it. In real substance and effect, it was clearly executory; wherefore it cannot be regarded as a

deed passing title. *Mineral Co. v. James*, 97 Va. 403, 34 S. E. 37; *Weinrich v. Wolf*, 24 W. Va. 290.

These conclusions make apparent the error in the direction of the verdict. The judgment must be reversed, the verdict set aside, and the cause remanded for a new trial.

(79 W. Va. 602)

ARMENTROUT et al. v. LAMBERT.
(No. 3158.)

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 70(2) — CONSTRUCTION OF JUDGMENT — NIL CAPIAT — NONSUIT.

Where a declaration in assumpsit contains the common counts and also a second or special count, and there is a demurrer thereto and to each count, which is overruled as to the first or common counts and sustained as to the second or special count, and leave is given to plaintiffs to amend, and the declaration is amended by adding a third count more distinctly stating plaintiffs' cause of action, which is also demurred to, and the order thereon is that the demurrer thereto be sustained, and reciting that the plaintiffs not desiring to further amend their declaration, it is further ordered that their declaration be and the same is thereby dismissed, and that defendant recover his costs, the judgment of dismissal properly construed with reference to the previous proceedings is not a final judgment of nil capiat, but amounts simply to a nonsuit, subject to the rule of practice applicable thereto.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 369, 386, 411.]

2. COSTS — 232 — WRIT OF ERROR — DISMISSAL.

If a writ of error be allowed to such judgment of dismissal it should be dismissed as improvidently awarded, without costs to either party.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 877-883.]

Error to Circuit Court, Randolph County.

Action by C. L. Armentrout and another against L. D. Lambert. Judgment for defendant, and plaintiffs bring error. Writ of error and supersedeas dismissed as improvidently awarded.

A. M. Cunningham and Neil Cunningham, both of Elkins, for plaintiffs in error. J. W. Harman, of Parsons, for defendant in error.

MILLER, J. [1] The first point of the syllabus sufficiently states the facts appearing in the record. It is apparent that the court did not intend to finally dismiss plaintiffs' action, and to reverse its previous holding in reference to the first or common counts in assumpsit, which was concededly good on its face.

To be final and subject to review on writ of error in this court the judgment should be that the case be dismissed without day, or that the plaintiff take nothing by his suit, or otherwise refer to the disposition made of the subject matter. *De Armit v. Town of Whitmer*, 63 W. Va. 300, 60 S. E. 136,

and cases cited; *Bower v. Virginian Ry. Co.*, 68 W. Va. 629, 70 S. E. 369; *Myers v. Carnahan*, 69 W. Va. 136, 71 S. E. 15.

A well recognized exception to the general rule is where the judgment abating or dismissing the suit is upon grounds precluding further proceedings, as for want of jurisdiction, etc. In such cases the judgment or order is appealable. *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S. E. 664; *Carson v. Insurance Co.*, 41 W. Va. 136, 23 S. E. 552.

[2] And our decisions say that when a writ of error has been allowed to such an order or judgment wanting in finality it will be dismissed as having been improvidently awarded. *De Armit v. Town of Whitmer*, supra.

The judgment here, therefore, will be that the writ of error be dismissed as having been improvidently awarded, but without costs to either party incurred in this court.

(79 W. Va. 604)

MARTIN v. BEUTER. (No. 3117.)

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. INSANE PERSONS — 53 — INSANE WIFE — LIABILITY FOR MAINTENANCE.

A person taking upon himself, in the manner prescribed by section 10, c. 58, of the Code of 1913 (sec. 3335), the custody and care of a wife adjudged to be insane and committed to a public hospital for the insane, upon the complaint of her husband, under circumstances indicative of motive and purpose on his part, to be relieved of her company and presence, may recover from him the reasonable cost of her board and medicines furnished her and the reasonable value of necessary care, nursing, and attention bestowed upon her.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 84, 85.]

2. INSANE PERSONS — 58 — INSANE WIFE — MAINTENANCE — LIABILITY.

In such case, proof of the husband's unfaithfulness to his wife, devotion to another woman, prosecution of the proceeding for her commitment, lack of effort to take care of her at home, and indifference to her while in private custody, after adjudication of her insanity, justify the court in its direction of a verdict for the plaintiff, in an action to recover from the husband such expenses and the value of such services.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 90.]

Error to Circuit Court, Ohio County.

Action by M. A. Martin against Richard K. Beuter. Judgment for plaintiff, and defendant brings error. Affirmed.

A. L. Sawtell, of Wheeling, for plaintiff in error. W. P. Robinson, of Wheeling, for defendant in error.

POFFENBARGER, J. A judgment rendered by the circuit court of Ohio county, on an appeal from a judgment of a justice, in favor of a father-in-law against his son-in-law, for the support and nursing of the lat-

ter's insane wife, while in the custody and care of the former, under a bond given by him in a proceeding to have her committed to a hospital for the insane, the condition whereof was that he should restrain and take proper care of her until the cause of her confinement should cease, is the subject-matter of this writ of error.

On the complaint of the husband, the wife was apprehended, taken before a justice, and adjudged to be insane, on February 23, 1915. Two days later her father and a sister appeared and took her into their care, on filing with the justice the bond required by the statute. From that date until August 31, 1915, when she was adjudged to have been restored to sanity, she remained at the home of her father and received from him and her mother such care, attention, and nursing as she required, and also her board. Such medicines as she needed were furnished by her father, at an expense of \$14.50. This item and a charge of \$10 a week for board and nursing, amounting to \$263.85, making a total of \$277.35, constituted the claim for which the action was brought. The justice rendered a judgment for the whole amount thereof and, on the trial in the circuit court, there was a verdict by direction of the court, for the like amount, upon which judgment was rendered.

[1] As to the husband's liability for support of his insane wife, the authorities are in considerable conflict. Differences in the circumstances under which claims for such support have been asserted and in the provisions of the statutes pertaining to the subject, may afford ground for reconciliation of most of the decisions and for the view that the contradictions found therein are apparent rather than real. In some instances, actions were brought against husbands by hospitals for the insane, established and maintained by law and at public expense. Under such circumstances, there is no common-law liability or right of recovery, and liability, therefore, depends upon the terms of the statute. *Richardson v. Stuesser*, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, 4 Am. Cas. 784; *Delaware County v. McDonald*, 46 Iowa, 170; *Noble County v. Schmoke*, 51 Ind. 416; *Baldwin v. Douglas County*, 37 Neb. 283, 55 N. W. 875, 20 L. R. A. 850; *Watt v. Smith*, 89 Cal. 602, 26 Pac. 1071; *Bangor v. Inhabitants of Wiscasset*, 71 Me. 535. As no public institution seeks recovery in this case, much of the law referred to and applied in those just cited has no application. In some jurisdictions, it is held that, if the husband abandons his wife and so causes her to become a public charge, county and township authorities may charge him with her maintenance and support, on common-law principles. *Howard v. Whetstone Township*, 10 Ohio, 365; *Springfield Township v. Demott*, 13 Ohio, 105; *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259. An inquiry very sim-

ilar to the one presented here was disposed of in *Senft v. Carpenter*, 18 R. I. 545, 28 Atl. 963.

In that case the husband had placed the wife in a hospital for the insane, from which she escaped. Then he caused her to be apprehended and taken before a court for proceedings under the lunacy statute. The court released her upon a statutory recognizance given by friends and relatives who took upon themselves her care and maintenance. The husband, at the time, objected to her release under the recognizance, and notified the plaintiff that he would not pay for her board at his residence, but would pay for it at the hospital, and afterwards provided a place for her outside of his house and gave notice of the fact. She was an invalid and required much care and attention, and she persistently refused to have any communication with her husband, claiming she was not insane, and that her confinement was wrongful. On the theory of right in the wife to regain her liberty, by means of the recognizance so given, and then pledge the husband's credit for her support and maintenance, in the exercise of her common-law right, in the event of his wrongful abandonment of her, the court permitted the plaintiff to recover.

Our statute providing for release and private custody is like that of Rhode Island, in all substantial particulars; but neither statute expressly gives the custodian right of action against the husband. In neither state does the statute contemplate commitment, if a friend or relative will take the insane person into his care and custody and execute a bond with sufficient security, conditioned for performance of his duty as custodian. Code 1913, c. 58, § 10 (sec. 3335); *Barnes' Code*, c. 58, § 5. No doubt the real purpose of this provision is to enable friends and relatives of persons adjudged to be insane, having the means to provide for their private custody and desiring to take care of them, to prevent them from being committed to public asylums for the insane. Under the law as it was, at the date of the commitment in question, it was the duty of any justice, suspecting any person in his county to be a lunatic, to issue his warrant requiring such person to be brought before him for inquiry and determination as to his sanity. It was interpreted as authorizing any citizen to file a complaint charging lunacy. But for the provision for private custody, it would be within the power of any citizen to cause any insane person to be confined in a public asylum of the state, even though he had ample property and means for private care and maintenance, and beyond the power of a husband to keep his insane wife at home, however great his ability to provide for her and earnest his desire to keep her. This provision may not be a mere means of regaining liberty, afforded an insane person, for such persons have no constitutional or statutory right of liberty in

the ordinary sense of the term. Nor does this provision confer it upon them. It merely gives a right of private custody instead of custody by public officials and institutions.

[2] In this case, however, the filing of the complaint by the husband, the adjudication of insanity, and the commitment are not all of the circumstances to be considered. The husband evidently had an ulterior motive for commitment of his wife to an asylum. He filed the complaint and had her adjudged to be insane, without notice to her parents, and, after they took her into their custody, he contributed absolutely nothing for her support, and gave her no care or attention. Moreover, he had been unfaithful to her. He had given a good deal of his time and attention to another woman, had taken the piano from the house, ostensibly to have it repaired, and had never returned it. These circumstances throw light on his motive for the legal proceedings and his failure to endeavor to make any provision for her private custody and care or to contribute thereto. Taken and considered altogether, the facts and circumstances tend very strongly to prove such neglect and abandonment of the wife as will sustain, under the common law, her pledge of his credit for the necessities of life, support, maintenance, nursing, and medical attention. They are all fully established by evidence none of which is contradicted; the defendant having offered no testimony whatever. In *Richardson v. Stuesser*, 125 Wis. 66, 103 N. W. 261, 69 L. R. A. 829, 4 Ann. Cas. 784, the court interprets the decision in *Senft v. Carpenter*, 18 R. I. 545, 28 Atl. 963, as being based on abandonment, notwithstanding the opinion in that case apparently puts the decision on a different ground. In *Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259, the court said:

"A husband who has voluntarily permitted an insane wife to absent herself from his house and become a public charge, when sued for her support by the poor authorities, is estopped from denying that she is a pauper."

Similarly, it may be said that a husband causing his insane wife to be committed to an asylum, under circumstances indicating desire to get rid of her, may be deemed to have abandoned her, in such sense as legally justifies any person in furnishing her the necessities of life, on his credit. Neglect of duty or misconduct tantamount in law to abandonment or desertion seems to be the ground on which recoveries in cases of this class have been allowed, and in few, if any, instances have they been denied, in the absence of actual substitution of support by the public for that ordinarily imposed upon the husband by law. Such substitution was thwarted by legal intervention of the wife's father, and the facts and circumstances establish conditions under which recovery is generally permitted. The element of legal procedure involved constitutes no insuperable

obstacle. Courts often look beyond that for intent and purpose determinative of questions of right. *State v. Emblem*, 56 W. Va. 678, 49 S. E. 554.

These principles and conclusions sustain the action of the court in directing a verdict for the plaintiff, wherefore the judgment will be affirmed.

(79 W. Va. 587)

KANE & KEYSER HARDWARE CO. v.
COBB et al. (No. 3222.)

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \S 527—CONSTRUCTION—OPINION.

Courts of record speak through the judgments or decrees entered upon their records, and where a judgment or decree is unambiguous, an opinion delivered by the judge rendering it at the time the same is entered will not be looked to to give such judgment or decree an effect different from that which clearly follows from the language used.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. \S 970.]

2. MECHANICS' LIENS \S 84, 161(4)—RIGHTS OF SUBCONTRACTOR—INTEREST.

The effect of our mechanic's lien laws is to give to a party doing work or furnishing material for the construction of a building, when such party is a subcontractor, the same right to subject the building to the satisfaction of his claim as he has against the principal contractor, and in case he resorts to a lien upon said building to satisfy his claim for work done or material furnished thereon, he is entitled to collect interest from the time his debt is due and payable.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. $\S\S$ 128, 283, 606.]

3. APPEAL AND ERROR \S 1022(3)—FINDINGS—CONCLUSIVENESS.

The finding of a commissioner based upon conflicting evidence and confirmed by the circuit court is entitled to great weight on appeal, and will not be reversed unless plainly wrong.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4016.]

Appeal from Circuit Court, Randolph County.

Suit to enforce mechanics' liens by Kane & Keyser Hardware Company against W. H. Cobb and others. Decree for plaintiff, and defendant Cobb appeals. Affirmed.

Arnold & Arnold, of Elkins, for appellant.
Talbot & Hoover, of Elkins, for appellee.

RITZ, J. In the year 1903 the defendant W. H. Cobb, being the owner of a lot in the city of Elkins, entered into a contract with the defendants Hobbs & Co. to erect for him on said lot a three-story building at the contract price of \$35,797. The contractors entered upon the work, but before the completion of the building became embarrassed to such an extent that an involuntary petition in bankruptcy was filed against them in the federal District Court. The plaintiff and the defendants L. C. Wolfe and the Randolph

Company, a corporation, had furnished material to the contractors to be used in the construction of this building, and they gave notice to the owner and filed their mechanics' liens in the office of the clerk of the county court of Randolph county against the building of the defendant Cobb for the amounts remaining unpaid to them by the defendants Hobbs & Co. This suit was then brought to enforce such mechanics' liens. Shortly after the institution thereof such proceedings were had on the involuntary petition in bankruptcy against the contractors that they were adjudged bankrupt, and after a trustee in bankruptcy had been appointed a petition or bill was filed in the federal District Court asking that the plaintiff here and the other defendants holding mechanics' liens be enjoined from prosecuting this suit until the estate of Hobbs & Co. was wound up in the bankruptcy court. This relief was granted. The trustee in bankruptcy under authority from the court of bankruptcy completed the building, as well as some other contracts which Hobbs & Co. had, and upon the completion of it and the payment of the expenses of such completion there remained out of the contract price the sum of \$1,492.29. The bankruptcy court then decreed that the parties holding the mechanics' liens which are in question here were entitled to be preferred to the general creditors in the distribution of this sum of money, and fixed the amount of their debts as follows:

"And the court doth further find, ascertain, and decree that the amount of surplus collected or to be collected by said trustees as assets of Hobbs & Co. on account of the contract for the erection of the W. H. Cobb building is the amount ascertained and reported by said special master in his report, to wit, the sum of \$1,492.29, and that the debts owing by Hobbs & Co. entitled to participate in the distribution of said \$1,492.29 (after paying thereout its proportionate share of the costs and allowances in this proceeding) are the following, that is to say: The Kane & Keyser Hardware Company, \$2,711.11; the Kane & Keyser Hardware Company, \$46.84; the Elkins Planing Mill Company, \$412.98; the Randolph Company, \$299.24; L. Creed Wolfe, \$458.53."

Under this direction the trustee in bankruptcy paid out of the \$1,492.29 the share of the costs and allowances made in said bankruptcy case properly chargeable against this fund, to wit, the sum of \$758.09, and the remainder he disbursed to the holders of the mechanics' liens ratably.

The circuit court in ascertaining the amount of the liens involved in this suit gave credit for the amount actually received by the creditors, but the appellant claims that their liens should have been credited with the total amount of the \$1,492.29. The decree entered by the federal district judge, as appears from the quotation above, provided for the payment of the proportionate part of the costs and allowances out of this fund, and the distribution of the balance of it to these lien creditors. We think this was the decree which was justified by the circum-

stances. There was no reason for these mechanic's lienholders being brought into the bankruptcy proceeding, and their right to enforce their lien suspended, except for the benefit of the appellant, Cobb, in order that it might be determined how much would be paid on these liens out of the estate of the contractors, Hobbs & Co., before appellant was compelled to pay the balance. Whatever expenses or costs were incurred in ascertaining this amount and in having its application made to the debts was for his benefit, and he was properly charged with it.

[1] Even if this were not true, the decree of the bankruptcy court is conclusive upon this question, and it is unambiguous in its direction. It is insisted by the appellant, however, that the opinion of the federal district judge handed down at the time that his decree was entered contains a contrary direction, and provides that the total amount of the \$1,492.29 should be credited upon the debts, notwithstanding that part of it is taken for the payment of costs and expenses. Judgments and decrees entered by courts are the instruments through which they elect to speak, and while we might look to the opinion of the judge delivered at the time the decree was entered to explain the meaning of ambiguous or equivocal terms in the decree if there were such, we cannot look to the opinion in this case, because the decree is unambiguous and clearly expresses upon its face the disposition to be made of this fund. There is no merit in this assignment of error.

[2] In ascertaining the amounts due to the various mechanic's lienholders the circuit court allowed interest upon the debts from the time they were due until the date of the entry of the decree. This is complained of, and it is insisted by the appellant that the holders of these mechanics' liens are not entitled to interest, that he is not withholding any money which he owes to the creditors, but that he is simply made to pay another person's debt, by reason of the mechanic's lien statute, and that, because the mechanic's lien statute does not provide that interest shall be allowed upon said debts, he should not be compelled to pay it. The effect of the mechanic's lien statute is to put the property upon which the work is done, or for the construction of which the material is furnished, in the place of the contractor, and to make such property liable to the same extent and as fully as the contractor himself is liable to the party performing the work or furnishing the materials. This view is fully sustained by all of the authorities. Jones on Liens, § 1609; Philipps on Mechanics' Liens, § 214; Boiset on Mechanics' Liens, § 656; Rockel on Mechanics' Liens, § 126; 20 Am. & Eng. Ency. Law, p. 451; Bailey v. Hull, 11 Wis. 289, 78 Am. Dec. 706; Forbes v. Willamette Falls Electric Co., 19 Or. 61, 23 Pac. 670, 20 Am. St. Rep. 793.

It is contended further that the lien of the Kane & Keyser Hardware Company is invalid, or at least partially so, for the reason that it appears that notice was not given of the intention to file a mechanic's lien within 35 days after the material was furnished. This notice was given within 35 days after the last items of material were furnished, but the greater part of it was furnished more than 35 days prior to the giving of the notice. It sufficiently appears from the evidence that all of the material furnished for this building by the plaintiff was furnished under a contract or arrangement between it and the principal contractor for furnishing all of the hardware to be used in this building so long as it would do so at the market price. Under this agreement it furnished the hardware desired by the principal contractor during the progress of the work at such times as it was needed, and charged therefor the price agreed upon.

"Where it is specially agreed or impliedly understood between the parties that the account is to be kept open and continued as one and the same continuous transaction and course of dealing, the account will be considered as one continuous account and one demand." 15 Am. & Eng. Ency. of Law, 40.

Such was the case here, as found by the circuit court, and this finding appears to be justified from the facts shown.

The validity of the lien in favor of the Randolph Company is also questioned; the ground of complaint being that some of the material at least included in the account was not used in the construction of the building. This was a controverted question of fact. The commissioner found in favor of the validity of the lien; found as a matter of fact that the material was used in the construction of the building. The circuit court confirmed this finding, and, it not appearing to this court that the same was clearly wrong, such finding of fact by the commissioner, confirmed by the circuit court, will not be disturbed here.

The lien claimed by L. C. Wolfe is also attacked, it being contended that notice of his purpose to claim a mechanic's lien was not given within 35 days after he completed his contract for the plastering. It appears that the greater part of his work was done more than 35 days before he gave notice of his intention to file a lien. It appears from his testimony that he could not complete his contract, however, until the finishing was placed in the building; that after this finishing was done he pointed up the plastering around the casings and put the white coat on the top floor; that this he was required to do under his contract, and also was directed to do by a written order from the contractor. The appellant insists that he did this work simply to have an item of work within 35 days of the time he gave the notice.

[3] This was a question of fact to be de-

termined by the commissioner before whom the cause was heard. The commissioner having found in favor of the lienor, and his findings being confirmed by the circuit court, the same will not be disturbed by this court under the circumstances appearing in this case.

Finding no error in the decree complained of, we affirm the same.

(79 W. Va. 596)

COPELAN v. SOHN et al. (No. 3030.)

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. MORTGAGES ⇨372(3)—SUBROGATION ⇨16 — SALE BY TRUSTEE — RIGHTS OF PURCHASER — RENTAL VALUE — REPAIRS — PAYMENT OF TRUST DEBT.

A bona fide purchaser of land from a trustee in a deed of trust given by the owner to secure a creditor who obtains possession, improves the property, pays the taxes thereon and a part of the trust debt, and thereafter loses the land at the suit of the owner is chargeable with the fair rental value of the land during the time of his possession, and is entitled to reimbursement out of the rents for necessary repairs for the preservation of the property and taxes paid, and to be subrogated to the rights of the trust creditor to the extent his purchase money has been applied on the trust debt.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1106-1108; Subrogation, Cent. Dig. §§ 37, 41-43, 79.]

2. MORTGAGES ⇨372(3)—SALE BY TRUSTEE—RIGHTS OF PURCHASER—INSURANCE.

In such case, where the owner has obligated himself to keep the property insured against loss by fire for the creditor's protection, and in his deed to the purchaser the trustee has likewise required the same thing of the purchaser, and the purchaser has complied with such requirement, and the owner has not, the purchaser is entitled to be reimbursed the cost of such amount of insurance as it was the duty of the owner to carry on the property.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1106-1108.]

Appeal from Circuit Court, Mingo County.

Suit by M. Copelan against Eli Sohn and others. Decree for plaintiff, and defendant Eli Sohn appeals. Modified and affirmed.

Goodykoontz & Scherr, S. D. Stokes, and Wade H. Bronson, all of Williamson, for appellant. Wiles & Blas, of Williamson, for appellee.

WILLIAMS, J. M. Copelan executed a deed of trust to J. C. Wysox, trustee, conveying his house and lot in the city of Williamson to secure a debt of \$4,000 which he owed M. Eisenman. By the terms of the deed a sale was not to be made for five years, unless the grantor failed to apply the rents derived from the property after thirty months from the date of the deed as payments on the debt secured, and in the event of his failure to so apply the rent the entire debt was to become due immediately, and the trustee was authorized to sell the property upon the request of

the cestui que trust. Copelan also agreed to keep the property insured against loss by fire for the protection of Eisenman. The property was sold by the trustee and purchased by Eli Sohn at the price of \$4,500, \$1,500 of which he paid in cash, and for the balance executed his two notes for \$1,500 each, payable in one and two years, respectively, from date. The trustee conveyed the property to him on the 21st of November, 1910, and he immediately took possession of it. Copelan then brought this suit, praying to have the sale and conveyance set aside, and obtained the relief sought. Upon appeal to this court by defendant, the decree of the circuit court was affirmed, on the ground that the sale had been made prematurely, and was in violation of the terms of the trust, and the cause was remanded for further proceedings. 75 W. Va. 83, 82 S. E. 1016. The circuit court then referred the cause to a commissioner to state accounts between Copelan and Sohn, charging the latter with the rental value of the property during the time he was in possession, and the former with the amount of purchase money which Sohn had paid on the Eisenman lien, the improvements he had put upon the property, and the taxes he had paid thereon, with interest. The commissioner filed his report April 1, 1915, and numerous exceptions were taken to it by both plaintiff and defendant. The court overruled all of plaintiff's and nearly all of defendant's exceptions, except his sixth, which was sustained. That exception related to the rejection of a claim of \$30 for repairing floors, which the court considered a proper claim and allowed it. From a written opinion prepared by the chancellor it appears that he examined carefully every item of the commissioner's account, corrected some mistakes in his calculations of interest, and gave Sohn credit for some small items which had been rejected by the commissioner, and struck out others with which he had been improperly credited. The chancellor thus ascertained there was due from Copelan to Sohn the sum of \$499.12, as of the 1st of March, 1915, instead of \$459.42, as found by the commissioner, and decreed that Copelan pay said sum of \$499.12 to Sohn, holding it to be a lien upon the property, of equal dignity with the unpaid balance due on the Eisenman lien, which he ascertained to be \$1,820.34, as of March 1, 1915, and decreed to be paid by Copelan to Jeanne Eisenman, executrix of M. Eisenman, deceased, and provided for a sale of the property in the event the liens were not discharged in thirty days from the adjournment of the term. Sohn has appealed, assigning numerous errors. It is unnecessary to discuss them seriatim in this opinion, as all of them are to be determined according to the same general principles of equity. This case is similar to *Liskey v. Snyder*, 66 W. Va. 149, 66 S. E. 702, and the principles there applied are applicable here.

[1] Considering the character of the items

rejected, as not being in the nature of permanent improvements, we fail to see wherein the chancellor has departed from correct principles governing cases of this character. Many of Sohn's charges were properly rejected, because they were in the nature of trade fixtures, such as electric lamps and fans, placed in the building at the instance of his tenant for his own convenience, and which, under the terms of lease, he had a right to remove from the building, and others because they were not essential to the preservation of the building, or added nothing to its value.

Sohn had possession from November 21, 1910, to November 21, 1914. The lower story of the building was used for a retail storeroom, and the upper rooms for a dwelling. When Sohn purchased, November 21, 1910, the storeroom was occupied by one L. S. Spaulding under a lease from Copelan made prior to the trustee sale and extending to May 21, 1911, at a rental of \$40 per month. Sohn immediately raised his rent to \$60 per month, and for the six months the building was occupied by Spaulding the commissioner charged Sohn with \$360 rent, and interest thereon to March 1, 1915, making a total for this period of \$446. Both parties excepted to this item, Copelan because the commissioner did not charge Sohn at the rate of \$100 per month, that being the rental value of the property, and Sohn because he was not given credit for \$80 rent, proven to be due from Spaulding, and not paid. Sohn's liability to Copelan depends, not upon what he actually made or could have made by renting the property, but upon its fair rental value, which is proven to be \$100 per month. Hence this charge was properly allowed. For the remainder of the time, except from May 21 to June 1, 1911, when the house was vacant on account of some repairs being made, Sohn is charged with rent at the rate of \$100 a month. The time being thirty-six months, the amount is \$3,600, to which interest is added. Sohn insists that he collected only \$3,150 rent for that period, and should not be charged with more than he actually received. This contention is not supported by the law. He is chargeable with the fair rental value of the property, whether he actually collects the rent or not. *Liskey v. Snyder*, supra. He leased the property for the three years to one Shein at a stipulated rental of \$100 a month, payable monthly, and it is proven by the uncontradicted testimony to be worth at least that sum. Some witnesses say it is worth more. Sohn's reducing the rent to \$85 a month for part of the time, at the request of his tenant, does not affect his liability to Copelan for the full rental value.

[2] During the time Sohn had possession he paid premiums for fire insurance on the property to the amount of \$333.20. The commissioner rejected all of his claim on that account, except \$107.78, the amount of premiums unearned at the time Copelan regained possession, and for which Copelan received

ed credit on reinsurance. Sohn excepted, and, his exception being overruled, he assigns as error the rejection of this claim. Having purchased in good faith, he was entitled to the same degree of protection, at least, as the law accords to a mortgagee in possession. Copelan had bound himself to keep the property insured for the protection of his creditor, Eisenman. If he had failed to do so, Eisenman or Wysor, the trustee, could have insured it at his expense; and in his deed to Sohn the trustee required him (Sohn) to keep it insured to protect the same debt. Being thus bound to bear the expense of insurance, it is immaterial to Copelan whether it was paid by the trustee or by Sohn, as the one who paid it would be performing his obligation, and would be entitled to be reimbursed by him. However, he is not necessarily bound for the cost of all the insurance carried by Sohn. A part of the time Sohn carried as much as \$7,000 insurance on the building. A portion of this was evidently for his own protection, and not alone in fulfillment of his undertaking with the trustee. Four thousand dollars being the amount of the debt which it was Copelan's duty to protect by insurance, it is only just and equitable that he should reimburse Sohn to the extent of the cost of that amount of insurance for a period of four years, the time Sohn had possession. It appears from the testimony of Allen E. Klingel, an insurance agent, that the premium on \$7,000 fire insurance for a period of six years would be \$333.20. With these figures as a basis, we estimate the premium on \$4,000 insurance for a period of four years to be \$126.92, which, with interest to March 1, 1915, aggregates \$159.92. The amount of money decreed to be paid by Copelan to Sohn will be increased by adding to it the above sum, so as to make the recovery \$659.04, with interest thereon from March 1, 1915, until paid, instead of \$499.12; and, as thus corrected, the decree will be affirmed, with costs of this appeal to appellant.

(79 W. Va. 592)

CORRICK v. WESTERN MARYLAND RY. CO. (No. 3066.)

(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. PARTIES ~~695(5)~~—**PLEADING** ~~248(11)~~—**DECLARATION — DISCRETION OF PARTY — AMENDMENT.**

A declaration and summons describing a defendant corporation by the name of "Western Maryland Railroad Company," whereas its true name is "the Western Maryland Railway Company," may be amended on motion by inserting therein the correct name, and such amendment does not introduce a new defendant or a new cause of action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 164; Pleading, Cent. Dig. §§ 611, 687, 693-695.]

2. NEW TRIAL ~~76(4)~~—**EXCESSIVE DAMAGES — SETTING ASIDE VERDICT.**

To warrant the setting aside of a verdict awarding damages for a personal injury solely on the ground of excessiveness, the amount must be so large as to convince the court that the jury were actuated by improper motives.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 155.]

Error to Circuit Court, Barbour County.

Action by M. D. L. Corrick against the Western Maryland Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Bowers, of Elkins, and Harry H. Byrer, of Philippi, for plaintiff in error. Wm. T. George, H. J. Wilcox, and J. Blackburn Ware, all of Philippi, for defendant in error.

WILLIAMS, J. To a judgment recovered by plaintiff for a personal injury, alleged to have been received while he was a passenger on defendant's railroad train, caused by a collision with a car standing on the switch, defendant obtained this writ of error.

[1] The name by which defendant is designated in the declaration and in the summons is "Western Maryland Railroad Company." Service was made upon H. C. McCoy, defendant's depot agent, at Belington, and the sheriff's return likewise misnames the defendant. It was agreed between counsel at the bar of the court that defendant succeeded to the property rights of the Western Maryland Railroad Company in the year 1909, and owned and operated the railroad and the train on which plaintiff was injured, and that its correct name is "the Western Maryland Railway Company." Plaintiff was thereupon permitted to amend, and did amend his declaration and summons by inserting the word "Railway" in place of the word "Railroad," in defendant's name, and upon his motion the sheriff was permitted to amend his return upon the summons by making a similar correction. The allowance of these corrections is assigned as error, on the ground that the effect was to substitute a new defendant and was equivalent to bringing a new action. Although the name by which defendant was erroneously described was the true name of its predecessor in title, and appears not to have surrendered its franchise, still plaintiff supposed it was the proper name of defendant. He was evidently endeavoring to describe the corporation that owned and operated the train on which he was injured, and no confusion could possibly arise from the fact that there was another railroad company of the exact name by which plaintiff undertook to describe defendant. It owned no tracks and operated no trains, and the employment of its name was simply a mistake in attempting to describe defendant. The law is liberal respecting the right to correct mistakes of this character, including also the right to have

the sheriff correct his return to make it conform to the fact. That officer had served the summons on defendant's depot agent and had simply misdescribed him in his return as the agent of the Western Maryland Railroad Company.

Section 14, c. 125, Code (sec. 4768), provides:

"No pleas in abatement for a misnomer shall be allowed in any action; but in a case wherein, but for this section, a misnomer would have been pleadable in abatement, the declaration and summons may, on the motion of either party, and on the affidavit of the right name, be amended by inserting the same therein."

An affidavit was rendered unnecessary in this case by the agreement of counsel as to the correct name. See, also, *Varney & Evans v. Hutchinson Lumber & Mfg. Co.*, 64 W. Va. 417, 63 S. E. 203, and *Grafton Grocery Co. v. Home Brewing Co.*, 60 W. Va. 281, 54 S. E. 349.

The second assignment is that the court erred in refusing to direct a verdict for defendant on the ground that plaintiff's action was barred; the theory being that the amendment had the effect of bringing a new action, and, more than one year having elapsed between the time of injury and the amendment, the action was barred. This theory is not correct. The amendment had no such effect, and plaintiff's action was brought within a year from the date of his injury. Having the right to amend the declaration and writ in order to correct the misnomer, and having done so, the suit dates from the issuance of the original writ, and not from the amendment.

It is also insisted that the court improperly instructed the jury on behalf of plaintiff. Only one instruction was given at his request. It covers nearly two pages of the printed record, and it is not necessary to incur the reports by copying it into this opinion. It suffices to say that counsel for defendant insist that it assumes the fact that plaintiff was actually injured, whereas it should have been submitted to the jury. But, as we interpret the instruction, the criticism of it is not well founded. Its first four lines, if taken alone, do appear to assume the fact of injury, but, reading further on, we find it does not. Beginning about the twelfth line, it submits the fact to the jury in the following language:

"And that by reason of the negligence of the defendant, its servants and agents or employes in that behalf, the plaintiff was injured and is entitled to recover damages for such injury," etc.

This submits to the jury, not only defendant's negligence, but plaintiff's injury as well, two interdependent facts, both of which had to exist to confer right of action.

Plaintiff took passage on defendant's train at Belington to go to Harding. As the train was pulling out from the station it ran

into an open switch, and the engine collided with a freight car standing thereon. The impact demolished the pilot, jarred the glass out of the windows in the front of the coach near where plaintiff was sitting, and threw him forward across the back of the seat in front of him. He testified that, in trying to catch hold of something to prevent his being thrown down, he sprained his wrist; that immediately after the accident a brakeman passed through the coach and inquired if any one was hurt, and plaintiff told him his wrist was hurt, but that he did not know whether it was broken. Plaintiff is corroborated by Otha Hayes, who was riding in the same seat with him, but the brakeman denies plaintiff told him he was hurt.

[2] It is insisted that the verdict is excessive and should have been set aside. There is no inflexible rule by which damages for personal injuries can be determined with mathematical precision, and the law intrusts the matter to the sound judgment of the jury. They are necessarily given wide, but not unlimited, latitude in arriving at such amount as would be a just compensation for the wrong, and, unless the damages assessed by them are so excessive as to convince the court they were influenced by improper motives, it has no right to set the verdict aside. It will not set aside a verdict simply because it would not have been willing, if sitting as a juror, to assess so large an amount. The court has no right to substitute its judgment in such matters for that of the jury. There is testimony tending to prove that plaintiff's wrist was in a healthy and normal condition before the accident; that it was severely sprained as a result of the railroad accident, and since that time has been swollen, and that plaintiff has been unable to use it without considerable pain, and that, although nearly two years had elapsed before the trial, his wrist was then no better; that he was having it treated by a physician, and, by his direction, he had it in splints a good portion of the time. Plaintiff is a stonemason and also a farmer, able to earn from \$2 to \$4 a day. He testified that since the accident he had not been able to use his wrist or work at his trade, and there is also expert testimony to the effect, not only that the injury was caused by the accident, but that it is permanent in character. Defendant produced a good deal of testimony tending to prove the condition of plaintiff's wrist was the result of rheumatism, and that he had been afflicted with it prior to the accident. But those were questions which had to be determined by the jury from the conflicting testimony, and we cannot say, after carefully considering all the testimony respecting the cause of injury, as well as its nature and extent, that the jury were actuated by improper motives in assessing plaintiff's damages, and the judgment will be affirmed.

(79 W. Va. 608)

LUTZ v. WILLIAMS et al. (No. 3064.)
(Supreme Court of Appeals of West Virginia.
Feb. 13, 1917.)

(Syllabus by the Court.)

1. PRINCIPAL AND AGENT \S 136(3)—**PERSONAL LIABILITY OF AGENT.**

An agent of a disclosed and known principal, conducting a checking account in a bank, in his own name, creating an overdraft therein, and executing his own checks on another bank to make the overdraft good, makes himself individually liable to the bank.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. \S 448-450, 479.]

2. NOVATION \S 5—**PERSONAL LIABILITY OF AGENT—ELECTION TO HOLD PRINCIPAL.**

In such case, the doctrine of discharge of the agent by election to hold the principal for the debt does not apply, and subsequent acceptance by the bank of notes of the principal for the debt and collateral security therefor does not release the agent.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. \S 5.]

3. NOVATION \S 5—**PERSONAL LIABILITY OF AGENT—ELECTION TO HOLD PRINCIPAL.**

A contract between the principal and the bank, to which the agent is not a party, reciting acceptance of the notes and securities, the agency and the indebtedness of the principal, but not releasing the agent nor, in terms or by implication, making the notes payment of the debt, does not effect a novation of the debt.

[Ed. Note.—For other cases, see *Novation*, Cent. Dig. \S 5.]

4. PRINCIPAL AND SURETY \S 5—**RELATION OF PARTIES—INDIVIDUAL LIABILITY.**

The contracts being separate in such case, there is no suretyship relation between the principal and agent, imposing duty upon the bank in its transactions with them.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. \S 5.]

5. BANKS AND BANKING \S 134(1, 4)—**DEPOSITORS—DEBTS OF.**

A bank to which a depositor owes a matured debt may appropriate a general deposit of the debtor to payment of the debt; but it has no right so to appropriate or apply a deposit made by the debtor for a known special purpose, or under a special agreement that it may be checked out or withdrawn for specific purposes.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. \S 353.]

6. GARNISHMENT \S 56—**PROPERTY SUBJECT TO—SPECIAL DEPOSITS.**

A special deposit in a bank is subject to garnishment.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. \S 110, 111.]

7. SET-OFF AND COUNTERCLAIM \S 21—**RIGHT OF SET-OFF—RELINQUISHMENT.**

The statutory right of set-off may be waived or relinquished by an agreement founded upon a valuable consideration, and such an agreement may be implied as well as express.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. \S 25.]

8. BANKS AND BANKING \S 134(4)—**SPECIAL DEPOSITS—AGREEMENT.**

By its acceptance of a special deposit, a bank impliedly binds itself not to set off against it a debt due it from the depositor.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. \S 356.]

9. GARNISHMENT \S 56 — **PROCEEDINGS — PLEADING.**

In a proceeding by suggestion, no formal pleadings are required. The broad issue is whether the garnishee owes the judgment debtor anything or has in his possession any property belonging to him.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. \S 155-166.]

Error to Circuit Court, Randolph County.

Action by D. E. Lutz against J. E. Williams and others. There was judgment for defendants, and plaintiff brings error. Reversed and remanded.

Samuel T. Spears, of Elkins, A. M. Cunningham, of Parsons, and Neil Cunningham, of Elkins, for plaintiff in error. Arnold & Arnold and W. B. Maxwell, all of Elkins, for defendants in error.

POFFENBARGER, J. The substantial parties to this action are the plaintiff, Lutz, and the People's National Bank of Elkins, a garnishee, claiming the fund in controversy. On the issue duly made between them, there was a verdict in favor of the garnishee, rendered under an instruction from the court, and judgment was entered accordingly. Having a judgment against J. E. Williams for the sum of \$591.66 and believing the bank to be indebted to him in the sum of about \$1,500 for money deposited with it, the plaintiff proceeded against the bank by a suggestion based upon his execution. The bank founded its defense upon a claim of right to apply the deposit upon an alleged indebtedness from Williams to it, and this defense was resisted upon the ground that the indebtedness due the bank was not that of Williams, the depositor, but of one Edwin Kelton for whom Williams acted as agent at the time of the making of that indebtedness, and, as he claimed, in the making thereof, and also upon the ground of estoppel. At the conclusion of the evidence, the court refused several instructions requested by the plaintiff and gave one peremptorily requiring the jury to find for the bank.

The indebtedness for which the bank claims the deposit was incurred in November, 1909, and the deposit itself, the fund in controversy, was made in August, 1912. The latter sum represents the purchase money of certain timber severally sold by the plaintiff and six other persons to Williams and resold by him to the Virginia Timber Company. He bought without money, in his own right or as agent for the Virginia Timber Company, expecting to pay the purchase money out of the funds to be paid to him by the timber company, when the timber should be inspected and taken up. Early in August, 1912, Williams received a draft from the timber company on some bank in Boston, for the sum of \$1,247.06, which he deposited with the People's National Bank, taking a deposit slip therefor, in the form of a receipt, with the

verbal understanding, however, he claims, that he should not check out the money it represented until after payment of the draft. From August 5, to August 12, 1912, he drew ten checks against this deposit and a small amount of other money he had in the bank, only two of which, amounting to about \$175, were paid. The draft seems to have been paid August 9th, and on August 12th Williams was notified by a letter from the bank that the deposit had been credited upon his alleged indebtedness to the bank, created in 1909. Claiming to have acted, in the receipt of this money and the deposit of the draft, as the agent of the Virginia Timber Company, Williams, together with the payees of the checks, or some of them, brought a chancery suit against the bank to compel payment out of the fund. Finding the timber company unwilling to acquiesce in this theory of the case, the chancery suit was dismissed. Then Williams confessed judgment in favor of the payees. This proceeding on Lutz's judgment is conducted under an agreement that the result thereof shall be binding upon the other six claimants of interests in the fund.

In the making of the debt of 1909, amounting to \$5,562.12, three parties besides the bank were concerned: Edwin Kelton, located at Columbus, Ohio, and professing to do a timber business for himself and for his wife, as her agent; J. E. Williams, located at Elkins, W. Va., and claiming to be a purchasing agent for Kelton; and one S. S. Leak, whose location, business, and place of residence are not disclosed by the record. Kelton seems to have done business in his own name, in a Columbus bank and in a bank at Roanoke, Va. Another account was carried in the name of Williams, in the People's National Bank of Elkins. The account in the last-named bank seems to have commenced in 1909 and to have run until November, 1909, when a large overdraft occurred. From October 28, 1909, until November 9, 1909, Williams drew seven checks against his account in favor of Kelton, ranging from \$486.32 to \$615.32, in amount, and aggregating \$3,694.61, and three in favor of S. S. Leak, aggregating about \$2,200, all of which were paid by the bank. From November 5, 1909, until November 10, 1909, Williams deposited checks amounting to \$7,335.42, all of which except three, amounting to about \$1,750, were drawn by Kelton, and those so drawn were protested and never paid. On November 8th, Williams drew his own check on the First National Bank of Roanoke, for the sum of \$2,700, payable to J. T. Lingamfelter, cashier of the People's National Bank of Elkins, and on November 9, 1909, one of like character for \$1,485, both of which were also protested and never paid. These operations resulted in an indebtedness of \$5,562.12 to the People's National Bank of Elkins, in the name of Williams.

Williams denies any fraud or bad faith in these transactions, insisting that Kelton was

doing a timber merchandising business in good faith and that he represented him as agent therein, with the knowledge of the officers of the bank. They, the cashier and assistant cashier, do not deny that he represented himself to them as being such an agent, but the former strenuously denies that the bank dealt with him in his alleged representative capacity. Williams insists that the checks out of which the overdraft arose were drawn in the regular and usual course of the business, as conducted through the banks, and that the nonpayment of Kelton's checks deposited by him, to cover his own, was due to Kelton's failure in business, and that the two large checks drawn by him failed of payment for the like reason; the Roanoke bank refusing to furnish money on Kelton's notes to provide for them agreeably to its former practice.

On December 3, 1909, a contract was entered into between Edwin Kelton and Laura B. Kelton, his wife, and Edwin Kelton, agent, parties of the first part, and the People's National Bank of Elkins, party of the second part, rectifying indebtedness of Kelton to the bank, in his own right and as agent, in the sum of \$5,562.12; the desire of the parties of the first part to secure the payment thereof, and of the parties of the second part, upon being made secure in the payment thereof, to grant the first parties reasonable indulgence; the delivery to the bank of certificates of stock in a mining corporation for stock of the par value of \$6,000, by Laura B. Kelton, in consideration of the premises, and delivery of stock of the same company of the par value of \$4,000 and stock in the Great American Life Insurance Company of the par value of \$500, by J. E. Williams, described as agent of said Edwin Kelton, "for the purpose of assisting" him, all of which stock was to be held as collateral security; the conveyance of a tract of land to Richard Chaffey, the president of the bank and trustee, by the Keltons, as further security; and the execution of their six joint and several promissory notes to the bank, four of which were for \$695.26 each, and the other two for \$1,309.52 each, by Edwin Kelton and Edwin Kelton, agent. Williams is not described in the contract as a party to it and did not sign it. Though an officer of the bank says his signature thereto was requested, he denies the assertion and also all knowledge of the contract until long after it was made.

The facts and circumstances disclosed by the record do not bring the case within the doctrine of discharge of the agent by election to hold the principal. Williams testifies positively that the officers of the bank knew he was agent and Kelton principal. This they do not deny. Hence Williams' transactions with the bank were not those of an agent for an undisclosed principal. Though the cashier of the bank says that institution had nothing to do with Kelton, until it made

the contract of December 3, 1909, to which reference has been made, he did not mean to say, and did not say, he had no knowledge of the relation of principal and agent between Kelton and Williams. In the same connection, he said he knew Williams was employed by Kelton. Fairly analyzed, his testimony merely insists that credit was given to Williams, without denial of knowledge of the relation.

[1-6] It is uniformly held that an agent of a disclosed principal may bind both himself and the principal, and that he does so when he enters into a contractual relation. *Sayre v. Edwards*, 19 W. Va. 352; *Church v. Manson*, 4 Rand. 197; *Strider v. Winch. & Pot. Railroad Co.*, 21 Grat. 440; 31 Cyc. 1422; 1554; *Clark & Skyles, Agency*, § 566.

Williams not only conducted the account with the bank in his individual name, but also drew and signed checks, which, being paid by the bank, created the overdraft. Though these checks no doubt lost the quality of negotiability, by reason of their having been paid by the bank, they are evidence of indebtedness on the part of Williams and prove a contract in his own name. Besides, he executed two large checks to the bank, in his own name, that have never been paid.

Nor did the contract of December 3, 1909, relieve Williams from the obligation so imposed. As he was not a party to it, and it did not deal with the question of his liability, it cannot be regarded as having effected a novation. His checks were not surrendered. The contract does not in terms release him, and there is no evidence in its terms, or elsewhere, tending to prove it was taken in satisfaction or payment of the debt. The taking of collateral security from the debtor or a stranger does not effect a novation. *Yerby v. Lynch*, 3 Grat. 460. Novation involves extinguishment of the old debt. *Chenoweth v. National Bldg. Ass'n.*, 59 W. Va. 653, 53 S. E. 559.

Although Kelton and Williams are held for the same debt, their obligations rest on separate contracts, wherefore there is no suretyship relation between them. Satisfaction by one would relieve the other, and equities may arise between them; but these results are obviously not dependent upon that relation.

Williams' indebtedness to the bank, however, is not conclusive of the case, as the court seems erroneously to have assumed. A bank has not the right, under all circumstances, to apply its patron's deposit to the payment of his debt. It may, at any time, so apply a general deposit, but not a special one. In other words, if a bank holding a debt against a person agrees to accept money on deposit and allow him to check it out for special purposes, notwithstanding the indebtedness, it is bound by such an agreement. The deposit in such a case is a special one, although the books of the bank do not in terms show it to be such. *Lynam Trustee v.*

Belfast National Bank, 98 Me. 448, 57 Atl. 799; *Smith v. Bank*, 147 Iowa, 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517, 140 Am. St. Rep. 336; *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066.

The evidence tends to prove that, for several months after the creation of the large overdraft constituting indebtedness of Williams to the bank, he was permitted to carry a checking account through and out of which he paid for the timber purchased by him and resold. In all such instances, he was unable to pay for the timber, until after the receipt and deposit of the money for which the timber was resold. There were several transactions similar to the one involved here. In this instance, there is testimony tending strongly to prove that the timber company draft was taken for collection and deposit, with the understanding that the depositor might check upon it, for the purpose of paying for the timber the money practically represented. If the bank, through its assistant cashier, made such an agreement, or if it can be inferred from the established course of business between the bank and Williams, the deposit was a special one precluding right in the bank to appropriate it to payment of the old debt, except as to such portion thereof as may remain after the discharge of the timber obligations of the depositor. By its peremptory instruction to find for the bank, the court denied the right of the plaintiff to have the jury determine the character of the deposit, as a question of fact arising out of the evidence.

The conclusion thus indicated is resisted on three grounds, namely, inappropriateness of the remedy, failure to plead the agreement, and conclusiveness of the right of set-off. The objection to the remedy stands upon the theory of a trust relation between Williams and the bank, cognizable in a court of equity. If it is a subject of equity jurisdiction at all, such jurisdiction is obviously not exclusive. Treated as the mere agent of Williams and not as his debtor, the bank would be liable to him in an action at law. Its failure to pay on demand would give such a right of action. *Wait v. Bdg. Assn.*, 76 W. Va. 431, 450, 85 S. E. 637; 16 Ency. Pl. & Pr. 911, 914; *Clark & Skyles, Agency*, § 423. If a trust is involved at all, it is a mere dry trust imposing no active duty upon the trustee and vesting no title in it, other than a mere right of possession until demand for payment. Of course, an agent may be sued in equity for an accounting, but he may be sued at law also, and the principal has a right of election as to the forum. A liability is beyond the reach of a judgment or order on a suggestion, when it can be enforced only in a court of equity, not when it can be enforced either in a court of law or a court of equity, at the election of the party in whose favor it is. *Swann Adm'r v. Summers*, 19 W. Va. 115, 125.

[7-9] Nor would the bank have a right of set-off, against its special contract waiving the benefit of the set-off statute. On this question, there is conflict in the authorities; but the weight of modern authority upholds contracts of waiver or relinquishment of the statutory right, founded upon valuable considerations. Early English decisions recognized no such right and applied the statute, even though there was an agreement not to invoke it. *Lechmere v. Hawkins*, Esp. Nl. Pri. R. 626; *Cornforth v. Rivett*, 2 Maul. & Sel. 510; *Eland v. Kerr*, 1 East. 375. To some extent these decisions have been followed in America. *Downer v. Eggleston*, 15 Wend. (N. Y.) 51; *Gutchess v. Daniels*, 58 Barb. (N. Y.) 401; *Waterman, Set-off*, p. 680, 681; *Lovett v. King*, 16 Ind. 464. That such an agreement is valid and binding is now generally accepted in this country. *Gutchess v. Daniels*, 49 N. Y. 605; *Oil Co. v. Oil & Mining Co.*, 68 Pa. 375; *Hill v. Parsons*, 110 Ill. 107; *Nottebohm v. Maas*, 3 Rob. (N. Y.) 249; *Bank v. Railway Co.*, 123 Wis. 389, 101 N. W. 687; *Blood v. Crew Levick Co.*, 177 Pa. 606, 35 Atl. 871, 55 Am. St. Rep. 742; *Stacy v. Cook*, 62 Kan. 50, 61 Pac. 399; *Fitzgerald v. Bank*, 64 Minn. 469, 67 N. W. 361. The agreement may be implied as well as express. 25 Am. & Eng. Ency. L. 497. A special deposit in a bank is deemed and held to be an agreement on the part of the bank to waive or relinquish its right of set-off, and to be founded upon a sufficient consideration. *Fitzgerald v. Bank*, 64 Minn. 469, 67 N. W. 361; *Lynam v. Bank*, 98 Me. 448, 57 Atl. 799; *Smith v. Bank*, 147 Iowa, 640, 126 N. W. 779, 30 L. R. A. (N. S.) 517, 140 Am. St. Rep. 336; *Carter v. Martin*, 22 Ind. App. 445, 53 N. E. 1066.

Another suggestion is that the agreement cannot be invoked, in the absence of a plea setting it up as a defense. The statute expressly dispenses with formal pleadings in a proceeding by suggestion or garnishment founded upon an execution. It says:

"The court shall cause a jury to be impaneled without any formal pleadings, to inquire as to such debts or effects." Code, c. 141, § 12 (sec. 5134).

The broad issue is whether the garnishee owes the judgment debtor anything or has property belonging to him.

These principles and conclusions make the action of the court, in directing a verdict for the bank, manifestly erroneous.

As six of the seven instructions requested by the plaintiff and refused by the court were based upon the untenable theories of lack of contractual relation between the bank and Williams in his individual capacity, discharge by novation and by extension of time to the alleged principal debtor and by election to hold the principal, the court properly refused them. The other one, No. 7, which would have advised the jury that Williams was not

bound by the contract of December 3, 1909, should have been given.

For the errors noted, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

(146 Ga. 383)

JEFFERSON BANKING CO. et al. v. TRUSTEES OF MARTIN INSTITUTE et al. TRUSTEES OF MARTIN INSTITUTE et al. v. JEFFERSON BANKING CO. et al. HOLDER et al. v. JEFFERSON BANKING CO. et al. (No. 226.)

(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. EXCEPTIONS, BILL OF €25 — JOINDER OF PARTIES.

Where a common right can be established by or against several in one suit, equity will determine the whole matter in one action. And where in such a case the rights of all the parties were tried in one suit and resulted in one verdict and one decree, this court will not dismiss the bill of exceptions to the overruling of a motion for new trial; the motion to dismiss being on the ground that there should have been two motions for new trial and two bills of exceptions instead of one.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 32.]

2. REFORMATION OF INSTRUMENTS €14 — "PREFERRED STOCK"—"CERTIFICATE OF INDEBTEDNESS."

The instrument sought to be reformed in this case is a certificate of "preferred stock," and not a "certificate of indebtedness" which creates a lien on all the property of the corporation issuing it, superior to the rights of general creditors. Nor can it, under the allegations of the petition, be reformed into a certificate of indebtedness creating a mortgage in favor of the interveners, superior to general creditors of the corporation.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 61-67.

For other definitions, see Words and Phrases, First Series, Certificate of Indebtedness; First and Second Series, Preferred Stock.]

3. CORPORATIONS €156—PREFERRED STOCK—RIGHT OF HOLDERS.

As a general rule, preferred stock in a corporation entitles the owner to dividends only from the income or earnings of the corporation issuing it, in preference to the owners of common stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 581-583, 598-603.]

4. CORPORATIONS €545(2) — PREFERRED STOCKHOLDER'S LIEN.

An agreement of a corporation to create a lien in favor of preferred stockholders and to thus give them a preference over general creditors of the corporation, in the absence of statutory authority, is illegal. No such authority is alleged in the present case.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2170.]

5. CORPORATIONS €545(2) — PREFERRED STOCKHOLDERS—INTERVENTION.

The court erred in overruling the demurrer to the intervention in so far as it sought to have a lien created in favor of the holders of the certificates of preferred stock superior to the general creditors of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2170.]

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Suit by the Jefferson Banking Company and others against the Jefferson Cotton Mills, in which the trustees of the Martin Institute and others filed interventions. From a judgment for interveners, plaintiffs appeal, and interveners allege cross-errors. Reversed on main bill of exceptions, and affirmed on cross-bill.

The Jefferson Banking Company brought an equitable petition against the Jefferson Cotton Mills to recover the amount of an unsecured promissory note amounting to \$7,000, and alleged that the defendant was insolvent. There was a prayer for a receiver to take charge of its assets, and a receiver was appointed. The trustees of Martin Institute and the trustees of the Methodist Episcopal Church South of Jefferson filed their interventions, claiming that they had a first lien on all of the property of the Jefferson Cotton Mills, as well as on the income from it, superior to all other liens and debts, and should be first paid by reason of instruments executed and delivered to them (in form identical in each case, except as to name of holder and amount), a copy of one of which is as follows:

"Certificate of Preferred Stock in the Jefferson Cotton Mills, Jefferson, Jackson County, Georgia, Chartered A. D. 1899.

"This is to certify that the trustees of the Martin Institute are the owners of the two hundred and sixty shares of fully paid up preferred stock in the Jefferson Cotton Mills. This certificate is issued by the Jefferson Cotton Mills, and paid for and accepted by the trustees of the Martin Institute, upon the following expressed terms and conditions:

"(1) The cotton mills to pay all taxes that may be collectible on this certificate.

"(2) This stock is sold at one hundred dollars per share, and is preferred, and no other preferred stock is to be issued by the cotton mills except eighty-two shares to the trustees of the funds bequeathed by the will of William D. Martin to the Society of Jefferson, Jackson County, Ga., of the Methodist Episcopal Church South: Provided, however, that nothing contained herein shall (nor shall any action hereafter be taken to) prevent the issuing of common stock until the whole number of shares shall reach one hundred thousand dollars, as provided in the charter.

"(3) The Jefferson Cotton Mills will pay to the holder or holders, out of the income or earnings, a cash dividend of 6 per cent. per annum, the same to be paid semiannually, on the 1st day of June and the 1st day of December in each year at the office of the Jefferson Banking Company, at Jefferson, Ga.

"(4) And to secure the prompt payment of said dividend semiannually, as well as the principal, the Jefferson Cotton Mills hereby binds and pledges to the holders of this certificate (and gives to them a first lien on) all its property, be real, personal, or mixed, that it now has or at any time hereafter may own, including its income, its assets, and its franchises, and all policies of insurance taken at any time on said property (and the Cotton Mills hereby contracts to keep it all at all times fully insured for the benefit of the holders of this preferred stock).

"(5) No other or further profits or dividends will be paid on this preferred stock, the holders of same waiving all rights to participate in

profits, further than this 6 per cent. (which they are entitled to in any event).

"(6) The holders of this certificate or preferred stock waive all authority or right to vote or participate in the management of the affairs of said cotton mills, except a right to vote on a question of amendment of the charter of the same.

"(7) Upon failure of the said cotton mills to promptly pay the semiannual installment of the dividend when due or within sixty days thereafter, then the whole sum, principal and interest, shall become due and collectible at the option of the holders of this certificate, who are hereby authorized, without resort to any court, to take possession of said mills, all its property, assets, etc., either in person or by its agents appointed for that purpose, and operate the same if they so desire, until it can be sold by them, which sale may be had within ninety days after they take possession, but not until thirty days notice in the newspaper that publishes the sheriff's sales in said county, and to be at public outcry before the courthouse door, unless otherwise agreed.

"(8) The proceeds of such sale to be applied: First, to the payment of expenses and costs of proceedings; second, the principal and interest due on the preferred stock; third, the balance to be turned over to the cotton mills.

"This stock is transferable on the books of the company by the holder only or his authorized attorney.

"In witness whereof the president and secretary have hereunto affixed their hands and the seal of the company this January 10, 1905.

"H. W. Bell, President.

"F. Roberts, Secretary.

"Homer Hancock, N. P. J. C.

"I hereby acknowledge the execution of the above certificate, my signature thereto attached, in the presence of Homer Hancock. This June 11, 1914. H. W. Bell.

"Witness: Homer Hancock, N. P. J. C.

"Jefferson, Ga., June 11, 1914. I, Homer Hancock, hereby certify that H. W. Bell acknowledged in my presence that he signed the above certificate of preferred stock on the date therein mentioned, and the same is his signature. Homer Hancock, N. P. J. C.

"State of Georgia—Jackson Superior Court.

"Filed June 12, 1914, 11 a. m. Recorded June 12, 1914, Book QQ, page 50.

"N. B. Lord, Clerk."

The original intervention of the interveners alleges, in substance, that they were the legally qualified trustees of Martin Institute of Jefferson and of the Methodist Episcopal Church South of Jefferson; that on January 10, 1905, the Jefferson Cotton Mills issued certificates to the two institutions named above for 260 and 82 shares, respectively, "of fully paid up preferred stock in the Jefferson Cotton Mills," the certificates having been paid for and accepted by the trustees of the institutions named, upon the expressed terms and conditions therein set out; that under the certificates they have a first mortgage lien upon all the property of the Jefferson Cotton Mills, including its assets, its franchise, and all policies of insurance; that this lien was executed upon all of the property of the mills, in order to better secure the payment of the money invested in the mills and 6 per cent. interest on the same, the same being a trust fund, and the officers and agents for the Jefferson Cotton Mills having due notice of this fact at the time of investment; that since the mills were placed in the hands of

receivers and operated for the past three or four months a profit over and above operating expenses has been accumulated, which, as interveners understand, is shown by the report of the receivers now in the custody of the court; that, taking as true this report and the information they have, they are now entitled to receive from the receivers of the Jefferson Cotton Mills the 6 per cent. interest upon the moneys invested in the mills; and that the same is due and is a superior lien upon all the property as well as the income of the mills, except state and county and municipal taxes. The prayers are that their lien be declared superior to all other liens, except taxes, upon all the property of the mills, and that their right to the 6 per cent. interest upon the moneys invested in the mills be fixed and permanently established.

The interventions were amended as follows:

"By striking all of paragraph 2 of the intervention filed by said interveners on the 15th day of January, 1915, except the following words appearing at the end of said paragraph, to wit: 'and made a part of this intervention and marked Exhibit A,' and by substituting in the place of the language stricken from said paragraph 2 the following language and allegations, to wit: 'On the 10th day of January, 1905, the said Jefferson Cotton Mills issued to the said Martin Institute and to said trustees of said Martin Institute an instrument of writing in consideration of said trustees delivering and advancing to said mills in cash the sum of \$26,000. Said money belonged to said Martin Institute and said trustees above named, as trustees of said Martin Institute, and was delivered and advanced by said Martin Institute and said trustees to said mills in consideration of said instrument of writing being issued and delivered to said Martin Institute and said trustees, a copy of which instrument of writing is hereto attached.'

"By striking the word 'certificate,' appearing in paragraph 3 of said intervention, and substituting in lieu thereof the following words, to wit: 'instrument of writing,' and by striking from said paragraph 3 the following words, to wit: 'invested and 6 per cent. interest on the same in the Jefferson Cotton Mills,' and substituting in lieu thereof the following words, to wit: 'delivered and advanced as aforesaid, and 6 per cent. interest on said money as provided for and contracted to be paid in said instrument of writing,' and by striking from said paragraph 3 of said intervention the following words appearing at the end of said paragraph, to wit: 'of investment,' and by substituting in lieu thereof the following words, to wit: 'said money was delivered and advanced as aforesaid, and said instrument of writing was executed as aforesaid.'

"By striking from paragraph 5 of said intervention the following words, to wit: 'invested in,' and substituting in lieu thereof the following words, to wit: 'delivered and advanced as aforesaid to.'

"By striking from the second prayer in said intervention the words 'invested in,' and inserting in lieu of said words the following words, to wit: 'delivered and advanced as aforesaid to,' and by striking from the third prayer in said intervention the word 'certificate' wherever the same appears, and inserting in lieu of said word 'certificate' the following words, to wit: 'said instrument of writing.'

"By adding to said intervention and pleadings the allegations and prayers hereinafter set forth. Said sum of \$26,000, belonging to said interveners and delivered and advanced by them

to said mills, was used by said mills for the benefit of said mills. The interest on said sum of \$26,000 at the rate of 6 per cent. per annum, contracted in said instrument of writing to be paid by said Mills semiannually on the 1st day of June and the 1st day of December in each year and every year after said instrument of writing was issued, has not been paid since the 1st day of —, 1913. Said mills agreed to pay said interest in the third paragraph of said instrument of writing. Interveners, who are now and who have been since said instrument of writing was first issued the holders of said instrument of writing, in the exercise of the right and option given them in the seventh paragraph of said instrument of writing, have heretofore declared and do now declare said sum of \$26,000 and any and all interest which has accrued thereon under the terms of said instrument of writing due, payable, and collectable; and interveners desire that, as provided in the seventh paragraph, 'the whole sum, principal and interest, shall become due and collectable' at once."

The prayers of the amendment were:

"That it be adjudged and decreed by this court that under and by virtue of said instrument of writing and the facts hereinbefore set forth that said Jefferson Cotton Mills are indebted to interveners in the sum of \$26,000, besides interest on said sum at the rate of 6 per cent. per annum from — day of —, 1913, and that to secure the payment of said \$26,000 and all interest thereon said instrument of writing is a lien or mortgage, and interveners have by virtue of said instrument of writing a lien or mortgage on said income or profits in the hands of said receivers and on said real estate and all improvements thereon and on any and all other property of said Jefferson Cotton Mills, and that said lien or mortgage on said income, real estate, and all other property of said mills in the hands of said receivers or elsewhere is superior to any and all other claims or liens or rights of any and all other person or persons on said income or real estate or other property; that it be adjudged and decreed by this court that any and all cash now in the hands of said receivers arising from income or profits made in operating said mills or from any other source (except such amount as may be necessary to be retained by said receivers to pay court costs and expenses of said receivership) be paid to interveners, to be applied to the payment of said interest and said principal sum of \$26,000 and reasonable attorney's fees incurred by said interveners in this proceeding; that it be decreed and adjudged by this court that any and all property of said mills in the hands of said receivers or elsewhere be sold, and that interveners under and by virtue of said instrument of writing have a lien on the proceeds of said sale superior to any and all other claims or liens of any nature whatever, and that the proceeds of said sale be applied to the payment of said interest and said principal sum of \$26,000 delivered and advanced by interveners to said mills as aforesaid, and reasonable attorney's fees incurred by interveners by reason of having employed attorneys in this case; that it be decreed and adjudged by this court that interveners, under and by virtue of the power given them in said instrument of writing, have the right to take possession of any and all of said property of said mills in the hands of said receivers or elsewhere, and that said receivers be required to deliver to said interveners any and all of said property, and that said interveners be allowed and be given the right, under and by virtue of the power given them in said instrument of writing, to operate the property of said mills until said property belonging to said mills is sold, and that interveners have the right and power to sell any and all of said property under and by virtue of the power given them in the said instrument of writing."

A demurrer to the interventions was overruled. To this ruling, and to the refusal of a new trial after verdict, exceptions were taken.

J. A. B. Mahaffey, of Jefferson, and Jno. J. & R. M. Strickland, of Athens, for plaintiffs in error. P. Cooley and S. J. Nix, both of Jefferson, and Shackelford & Meadow, and Horace M. Holden, all of Athens, for defendants in error.

HILL, J. (after stating the facts as above). [1] 1. On the call of the case in this court the defendants in error made a motion to dismiss the bill of exceptions, upon a number of grounds. They insist that the plaintiffs in error, claiming to be creditors of the Jefferson Cotton Mills, filed an answer to the interventions of the Martin Institute and the Methodist Church, and that the interventions and answers thereto made two separate and distinct cases before the court. Only one verdict was rendered and one decree taken in the case. One motion for new trial was made, and one brief of evidence was filed and approved. One bill of exceptions to the order of the court overruling the motion for new trial was made. One bill of exceptions pendente lite to the order overruling the demurrer to each intervention was taken. It is insisted that there were two cases being tried, and that there should have been two motions for new trial, two briefs of the evidence, two bills of exceptions, and two bills of exceptions pendente lite, and that there are not sufficient parties defendant, etc. There is no merit in the motion to dismiss. It is true that generally all parties interested in the litigation should be made parties to proceedings for equitable relief. Civil Code 1910, § 5417. But, "where there is one common right to be established by or against several, and one is asserting the right against many or many against one, equity will determine the whole matter in one action." Civil Code, § 5419. And see *Benson v. Shines*, 107 Ga. 406, 33 S. E. 439; Civil Code, § 4600. There was but one main issue in the case, namely, whether the certificates of stock were "preferred stock," or were "certificates of indebtedness" creating a lien on all the defendant's property as against creditors who were parties. The agreement of the parties on the trial was in part as follows:

"That the judge direct a verdict as he may determine the verdict should be under the law and evidence."

One verdict was rendered and one decree taken, and we think it was sufficient that one motion for new trial, one brief of evidence, and one bill of exceptions should have been filed. Two motions would have been permissible, but were not necessary. The court below did right in refusing to dismiss the motion for new trial, and we likewise refuse to dismiss the bill of exceptions.

[2-4] 2-4. The Jefferson Banking Company brought an equitable petition against the

Jefferson Cotton Mills to recover the amount due on an unsecured promissory note, and alleged that the defendant was insolvent. A receiver to take charge of the assets of the defendant was prayed for, and one was appointed. The trustees of the Martin Institute and the trustees of the Methodist Episcopal Church South of Jefferson both filed interventions, alleging that they had a first lien on all of the property of the Jefferson Cotton Mills, as well as on its income, superior to all other liens and debts of creditors of the corporation, and prayed that they be first paid by reason of the lien created by the alleged "certificate of indebtedness," as they denominate the instrument, a copy of which is set out in the statement of facts. These interventions were allowed by the court. And all other creditors of the corporation, so far as known, were made parties to the suit. All the creditors who were parties demurred to the interventions on various grounds. The demurrer was overruled by the court, and the creditors excepted pendente lite. The case went to trial; but in our view we need proceed no further than to a consideration of the exceptions to the overruling of the demurrer, one ground of which is that the interventions as amended show on their face that the respective intervenors were only "preferred stockholders," and not creditors of the cotton mills. Another ground is that the proceeding on the part of the intervenors is an effort to change all the terms of the written contract by parol evidence, without alleging that there was any fraud, accident, or mistake in the execution of the contract, etc., and that where they undertake to allege mistake they do not allege how it occurred or in what way the mistake was made. The certificates issued to the intervenors are both alike, except as to names and amounts, and both will be treated as one. The main question in the case is whether the instrument of writing which is the basis of the interventions is "preferred stock," as it purports to be by its terms, or whether it is a "certificate of indebtedness," creating a lien on all the property of the cotton mills superior to all other liens and the claims of all general creditors of the corporation. The certificate by its terms recites that the school trustees "are the owners of 260 shares of fully paid up preferred stock in the Jefferson Cotton Mills." It further recites that "this stock is sold at one hundred dollars per share, and is preferred," etc. It provides for the payment to the holder out of the income or earnings of a cash dividend of 6 per cent. per annum, and "to secure the payment of said dividend semiannually, as well as the principal," the Jefferson Cotton Mills binds and pledges to the holders of the certificates" and gives to them a first lien on all its property, be [it] real, personal, or mixed, that it now has or may at any time hereafter own," etc. It also provides that no preferred stock shall be issued except that issued to the in-

terveners. The right to vote or to participate in the management of the cotton mills is waived, "except a right to vote on a question of amendment of the charter of the same." "The stock is transferable on the books of the company by the holder only, or his authorized attorney." Throughout the certificate it is denominated as "preferred stock," and it is significant that when the interventions were first filed the interveners evidently thought they owned preferred stock; for the petition alleged that they owned "fully paid up preferred stock" in the mills, and that under the certificates they had a first mortgage lien upon "all the property of the Jefferson Cotton Mills," etc. It was only when the interventions were amended that the word "stock" wherever it occurred in the petition was stricken, and the words "instrument of writing" were substituted therefor, in an effort to reform the contract from a certificate of preferred stock into a mortgage indebtedness. But we do not think the instrument, which is clearly on its face a certificate of stock, can, under the allegations of the petition, be so reformed as to make it a mortgage. Indeed to do so would be, not to reform it as a mortgage, but to create a mortgage debt for the parties, which this court cannot do. It may be that the trustees of the church and school thought, at the time of the execution of the contract and subsequently, that the certificate of preferred stock created in their favor a lien upon the property and assets of the corporation superior to the claims of the corporation's creditors; but, if they were misled into so thinking, it is their misfortune. They chose their present position by their own voluntary contract which they entered into a number of years before this suit was brought, and presumably they have accepted the dividends on the stock from the corporation each year since and until its failure to meet its obligations. The powers of a corporation are fixed by law. It may, under proper legal authority and in the proper form, create an indebtedness. It may, under authorized powers and limitations, issue bonds and secure their payment by liens created on its property; such liens being properly executed and recorded. It may issue common and preferred stock to its stockholders and issue certificates therefor; and when such certificates are properly issued, the owner and holder becomes a shareholder of the capital stock of the corporation, subject to the laws operating on such corporation and stock. But the issuance of such certificates does not of itself create an indebtedness against the corporation, nor make the stockholder a creditor. He is instead a joint owner of the corporation, and as such, in some jurisdictions, is liable to creditors of the corporation for the amount of his stock and for additional amounts which may be fixed by statute. But, in the absence of statutory authority, such certificates of stock cannot become a lien upon

the assets of the corporation, in preference to creditors of the corporation, as will be seen later in this opinion. We know of no such authority conferred by law on the corporation in the instant case. In the absence of statutory authority to make this preferred stock a lien on the assets of the corporation, we do not see how the equitable lien sought to be worked out by the interveners can be made to operate against bona fide creditors of the corporation.

It follows from what has been said that the interveners are not lien creditors in preferment to creditors of the corporation, as claimed by them, but they are merely preferred stockholders. The case of *Savannah Real Estate, etc., Co. v. Silverberg*, 108 Ga. 281, 287, 33 S. E. 908, 910, is relied on by the defendants in error; but the facts on which that decision rests are different from those in the present case. In the *Silverberg Case*, it was held that the instrument sued on was an evidence of indebtedness, and not a certificate of preferred stock. That case was decided upon its own peculiar facts. It was a suit by the holder of the certificate against the maker, and did not involve the question whether the corporation could create a lien in favor of other stockholders as against creditors. Mr. Justice Cobb, in delivering the opinion of the court, said:

"The stipulation that the entire issue shall be 'retired' on January 1, 1897, and that the company may 'retire the same or any part thereof at any time after two years from date,' upon giving notice of the character therein provided for, are stipulations indicating an intention to make a contract under which one party was to receive the money for use in its business and return the same in any event at a designated time and earlier if desired, paying to the person whose money was thus used as interest thereon a certain proportion of the earnings made by the borrower in a given enterprise; the amount of interest thus to be paid for the loan of the money depending upon the success of the enterprise in which the borrower was to use the money."

It was also said in that case that:

"The question as to whether the holder of a certificate issued by a corporation, * * * or whether the certificate is simply evidence of a debt due by the corporation to the holder, is one that depends upon the peculiar facts of each case," etc.

See, in this connection, *Coggeshall v. Georgia Land, etc., Co.*, 14 Ga. App. 637, 82 S. E. 156. The case of *Totten v. Tison*, 54 Ga. 139, was also decided upon its own peculiar facts, which were different from those of the present case. It is true, as said by Mr. Justice Lewis in *Cook v. B. & L. Ass'n*, 104 Ga. 814, 829, 30 S. E. 911, 917:

"It matters not what name is given to its obligation, whether stock, note, or bond; the nature of the transaction, whether it be a pure borrowing of money or not, is determined by the real substance and effect of the contract between the parties."

But, as pointed out above, the nature of the transaction in the instant case, as shown by the petition including the certificate itself, shows the instrument declared upon to

be preferred stock, and not an evidence of indebtedness. Under the terms of the instrument, which is in the form of a certificate of stock, no time is fixed when the principal debt shall become due and payable; and, unless this be done, it cannot even create a debt. 13 Cyc. 393; 27 L. R. A. 769-772. The contract as written could go on indefinitely or until default in the payment of dividends. The holders of the certificates could not demand payment until default in the payment of dividends. There is no provision in the contract for paying off the interveners and for the cancellation of the debt, if it was one, at any time. It does provide for the dividend to be paid semiannually out of the "Income or earnings" of the corporation. These facts and others patent upon the face of the instrument itself differentiate it from those cases where the instruments of writing were held to create debts.

As we construe the instrument to be preferred stock, and not a mortgage indebtedness, it is unnecessary to decide whether the description of the property alleged to be mortgaged is void for uncertainty. Nor is it necessary to enter into a discussion of the question raised as to whether the certificates were voidable at the time of issuance, but were ratified by the subsequent acts of the corporation. We are treating the certificates on demurrer as valid and binding. Construing, therefore, the certificates to be "preferred stock," let us inquire whether they create a debt against the corporation and a lien on all its property superior to the claims of creditors of the corporation. In *Cook on Corporations* (7th Ed.) § 267, it is said:

"By preferred stock is to be understood stock which entitles the holder to receive dividends from the earnings of the company before the common stock is paid a dividend from such earnings. In other words, it is stock entitled to dividends from the income or earnings of the corporation, before any other dividend is paid. The relation of debtor and creditor does not exist between the preferred stockholders and the corporation, and the right to a preferred or guaranteed dividend is not a debt until the dividend is declared. A dividend is money paid out of profits by a corporation to its stockholders. A preferred dividend is nothing more than that which is paid to one class of stockholders in priority to that to be paid to another class."

The same author says, in section 271 of the same volume:

"Formerly it was a matter of doubt and discussion whether or not a preferred stockholder had any rights as a creditor of the company, or was confined to his rights as a stockholder. The law is now clearly settled that a preferred stockholder is not a corporate creditor. * * * A contract that dividends shall be paid on the preferred stock whether any profits are made or not would be contrary to public policy and void. An agreement to pay dividends absolutely and at all events from the profits when there are any, and from the capital when there are not, is an undertaking which is contrary to law, and is void. Public policy condemns with emphasis any such undertaking on the part of a corporation as to its preferred or guaranteed stock. * * * An agreement of a corporation to pay

the preferred stockholders before corporate creditors are paid is void. * * * Occasionally a mortgage is given by the corporation to secure the payment of dividends on preferred stock, and to give it a preference in payment over subsequent debts of the corporation upon insolvency or dissolution. It is difficult to see how such a mortgage would be legal, unless it has been issued under express statutory authority. The courts have no power to give stockholders a preference over creditors, even though the preferred stock by its terms be a lien on the property."

In 10 Cyc. 370(b), it is said:

"The power to issue preferred shares does not include the power to make such shares a lien upon its property; the true conception of preferred shares being that they merely create a preference in the declaration and payment of dividends out of the income. For the creation of a lien upon the property of the corporation in favor of any one class of its shares there must be a direct statutory authorization," etc.

And to the same effect, see 3 *Thomp. Corp.* (2d Ed.) § 2262; 3 *Words and Phrases* (2d Ser.) 1136; *Continental Trust Co. v. Toledo, St. L. & K. C. Ry. Co.* (C. C.) 72 Fed. 92; *Warren v. King*, 108 U. S. 389, 2 Sup. Ct. 789, 27 L. Ed. 769.

[§] 5. Having construed the instrument sued on in this case to be a certificate of preferred stock, and holding that it cannot by being reformed, or of itself, make the owner and holder of the certificate a corporate creditor with a lien on all the property of the corporation, superior to general corporate creditors, even if the stockholders intended to do so, in the absence of statutory authority, the trial judge erred in not sustaining the demurrer and dismissing the interventions in so far as they sought to have a lien created in favor of the holders of preferred stock superior to general creditors of the corporation. See *Warren v. King*, supra.

Judgment reversed on the main bill of exceptions, and affirmed on the cross-bill. All the Justices concur.

(148 Ga. 440)

GILLESPIE v. HUNT. (No. 239.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

MORTGAGES \Leftrightarrow 246, 411—PROPERTY CONVEYED AS SECURITY—PERSONAL JUDGMENT—INDORSEMENT WITHOUT RECOURSE.

Hunt brought his equitable petition against Norman Pool, Mrs. Leila Menkee, and Mrs. James Gillespie, alleging as follows: On December 10, 1909, Pool, who was the owner of a lot of land in Atlanta, Ga., procured from an insurance company a loan of \$2,500 for a term of five years, and to secure its payment executed a deed to the land, which deed was duly recorded. On June 16, 1911, Pool sold the property to Mrs. Menkee for \$5,000, and executed to her his bond for title, she assuming the obligation to pay the loan of \$2,500 and interest, and in addition executing and delivering to Pool her 66 promissory notes for \$30 each and one for \$20. Afterwards Pool sold and assigned for value, before their maturity, these said notes to one Reynolds. On August 29, 1913, Mrs. Menkee sold her interest in the land to Mrs. Gillespie, transferring to her the bond for title. Mrs. Gillespie assumed the payment of the \$2,-

500 debt to the insurance company, as well as the payment of 41 of the purchase-money notes payable to Pool and by him indorsed and transferred to Reynolds. Mrs. Gillespie in addition gave her 34 promissory notes for \$30 each, and one for \$10, payable to Mrs. Menkee, which notes are not yet due, together with other valuable consideration. Mrs. Gillespie failed to pay 33 of the 41 notes transferred to Reynolds, and failed to pay the interest upon the \$2,500 loan due the insurance company, and failed to pay the principal of this loan on December 10, 1914, when it became due. Thereafter Reynolds purchased and had assigned to himself the notes and interest coupons held by the insurance company, and received from that company a quitclaim deed to the lot of land. On December 22, 1914, Reynolds sold and transferred for value to Hunt, the plaintiff, the \$2,500 note assigned to him by the insurance company, together with the interest coupons, and the 34 purchase-money notes signed by Mrs. Menkee and indorsed by Pool, and at the same time executed his quitclaim deed to Hunt to the lot of land. Thereafter Hunt sued on to judgment the note of \$2,500, with the three interest coupons. He sued on to judgment also the 34 notes signed by Mrs. Menkee and indorsed by Pool. By oversight these judgments were not made a special lien upon the lot of land. Executions were issued upon these judgments; and, after Hunt had executed and filed a deed of reconveyance for the purpose of levy and sale, he had the sheriff to levy the *fi. fa.* based upon the judgment for \$2,500 and interest upon the lot of land in question, and placed in the hands of the sheriff the *fi. fa.* against Mrs. Menkee as principal and Pool as indorser, to claim enough of the surplus to make the amount of the *fi. fas.* and costs. Mrs. Gillespie, who was in possession under the bond for title before referred to, filed her claim to the property in forma pauperis. The claim was filed for delay only, and to enable the claimant to fraudulently remain in possession of the property. She is insolvent and unable to respond in damages. The property, if sold at public outcry, would not bring a sufficient sum to pay the charges against it. The plaintiff prayed that Mrs. Gillespie be enjoined and restrained from prosecuting her claim; that she be required to come into court and set up her rights and contentions, if she has any; that a receiver be appointed to take charge of the property in the meantime, with authority to manage, preserve, and rent it; and that the *fi. fas.* against Mrs. Menkee and Pool be decreed to be a superior lien on the land, except as to the \$2,500 *fi. fa.*

Mrs. Gillespie demurred to the petition; and the demurrer was overruled, and she excepted. *Held*, that the court did not err in overruling the demurrer. The fact that Hunt had a common-law judgment against Pool did not prevent his making the levy referred to upon the land after having duly filed his deed for that purpose. The fact that the notes were transferred by the insurance company to Reynolds, and by Reynolds to Hunt, without recourse, made no difference, inasmuch as quitclaim deeds were executed, transferring the title to the property to secure the payment of the notes. *Hunt v. New England Mortgage Security Co.*, 92 Ga. 720, 19 S. E. 27; *Tripod Paint Co. v. Hamilton*, 111 Ga. 823, 35 S. E. 696; *Gillespie v. Hunt*, 145 Ga. 490, 89 S. E. 519.

[*Ed. Note.*—For other cases, see *Mortgages*, Cent. Dig. §§ 656, 1181-1184.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action for injunction by J. M. Hunt against Mrs. J. E. Gillespie and others. De-

murrer to petition overruled, and defendant brings error. Affirmed.

See, also, 145 Ga. 490, 89 S. E. 519.

Frank L. Neufville and Edward L. Neufville, both of Atlanta, for plaintiff in error. J. Mallory Hunt, of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 421)

LAWSON v. PROSSER. (No. 233.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. TRUSTS *§* 43(3)—WITNESSES *§* 149(1)—COMPETENCY OF WITNESSES—TRANSACTIONS WITH PERSONS SINCE DECEASED—EVIDENCE.

This suit, not being one instituted or defended by the personal representative of a deceased person, the provisions of section 5858 of the Civil Code do not apply to any of the evidence offered and objected to as offending said section. The evidence was admissible to show a state of facts from which the law implies a trust.

[*Ed. Note.*—For other cases, see *Trusts*, Cent. Dig. § 65; *Witnesses*, Cent. Dig. § 556.]

2. VENDOR AND PURCHASER *§* 235—BONA FIDE PURCHASER—CONSIDERATION.

"A voluntary deed, though duly recorded, and taken without notice of a prior voluntary deed executed by the same grantor and not recorded, does not give to the second grantee a priority over the first." The doctrine of constructive notice applies only to deeds made for a valuable consideration.

[*Ed. Note.*—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 567-569, 571-576.]

3. VENDOR AND PURCHASER *§* 233 — BONA FIDE PURCHASER—NOTICE.

It was not error in this case to instruct the jury as follows: "I charge you that, although you might reach the conclusion that Mrs. F. E. Prosser made to Mattie Leone Prosser the deed in 1902, if the defendant, in 1907, purchased the land from his mother, for a valuable consideration (this is that he paid money for it, although it might not have been the full value of the land), and if he had no actual notice of the previous deed claimed by the plaintiff to have been made by Mrs. F. E. Prosser in the year 1902, if he had no actual notice of that deed, and was what the law calls an innocent purchaser, he should get a good title to the land."

[*Ed. Note.*—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 563-566.]

4. JUDGMENT *§* 252(1) — RECOVERY — CONFORMITY TO PETITION.

The court did not err in charging the jury as follows: "If the plaintiff is entitled to recover anything at all, she is entitled to recover the 49 acres sued for in this action."

[*Ed. Note.*—For other cases, see *Judgment*, Cent. Dig. §§ 441, 442.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Suit by Mrs. Mattie Prosser, as next friend of her daughter, Leone Prosser, against Emmett L. Lawson. Verdict for plaintiff, motion for new trial refused, and defendant excepts and brings error. Affirmed.

Mrs. Mattie Prosser, as next friend of her daughter Leone, filed her petition against Emmett L. Lawson, for the recovery of 49 acres of land, together with mesne profits. A verdict was rendered in favor of the plaintiff for the land in question, and for mesne profits. The defendant moved for a new trial, which was refused, and he accepted.

The petition, as amended, alleged, in substance, as follows: J. M. Prosser died intestate, leaving the plaintiff and his widow, and their infant child Leone. The grandparents of Leone were A. H. Prosser and his wife, Mrs. F. E. Prosser. The only children of the grandparents were J. M. Prosser and his sister, Mrs. Posey. On August 6, 1895, the grandfather made to his wife a deed, conveying a tract of land containing 100 acres, including the 49 acres for which this suit was brought. This deed gave a life estate to the grandmother, with remainder over to J. M. Prosser and Mrs. Posey. After the grandfather's death, his son, J. M. Prosser, made a deed dated November 22, 1902, to his mother, Mrs. F. E. Prosser, to his one-half undivided interest in the land referred to. While this deed was absolute on its face, it was not the intention of J. M. Prosser to convey the title to his mother, and therefore his mother, immediately upon delivery of the deed to her, executed a deed to the one-half undivided interest to her granddaughter, Leone Prosser. This deed was delivered to the plaintiff for her daughter, Leone, and she at once brought it to the clerk's office to be recorded. Finding no official in the clerk's office to attend to the recording, the plaintiff returned the deed to the grandmother, together with money to pay the recording fee, with the request that the grandmother have the deed recorded at the earliest convenience and return it to the plaintiff. The grandmother accepted the deed and promised to do as requested. The plaintiff relied on the promise and had no reason to believe that the deed had not been recorded until after the death of the grandmother in February, 1912. Upon inquiry the plaintiff ascertained that the grandmother, after executing the deed to her granddaughter, Leone, destroyed it without authority, and without having had it recorded, as she agreed to do. In December, 1912, the defendant, Lawson, and Mrs. Posey divided the 100 acres of land referred to, the defendant receiving and taking possession of the 49 acres for which this suit is instituted. The plaintiff is willing to acquiesce in the division of the land as made by Mrs. Posey and the defendant, and prays judgment for the 49 acres received by the defendant under the terms of the division.

The defendant contends that:

"The deed from J. M. Prosser to Mrs. F. E. Prosser, made November 22, 1902, was a warranty fee-simple deed, and passed a title absolute to Mrs. F. E. Prosser, and said deed was duly recorded, and she lived upon and claims said tract of land, and was in peaceful, adverse

possession of same until she sold said one-half undivided interest in said land to this defendant on July 29, 1907, and that the titles to said one-half undivided interest in said tract of land from that date was in this defendant, and that this defendant claimed title to said tract of land, and that his mother, Mrs. F. E. Prosser, continued in peaceful, adverse possession of said tract of land until her death in 1912.

"This defendant further alleges that he bought this land in absolute good faith from Mrs. F. E. Prosser, without any knowledge or notice, and without the slightest hint or intimation from any one that there was ever a shadow or the slightest taint against the title to this land, and this defendant bought this land and paid for same, and the deed was delivered and accepted by this defendant, and said deed was recorded without any knowledge or notice of any irregularity or any claim or interest the plaintiff or her child might have in same."

D. S. Sanford, Livingston Kenan, and Hines & Vinson, all of Milledgeville, for plaintiff in error. Allen & Pottle, of Milledgeville, for defendant in error.

GILBERT, J. (after stating the facts as above). [1] 1. Mrs. Mattie Prosser, the nominal plaintiff, suing in behalf of her minor daughter, was offered as a witness by the plaintiff to prove certain facts in regard to the making of a deed to the land in question by Mrs. F. E. Prosser. The defendant objected to her testimony, on the ground that she was the plaintiff in the case, and because she was interested in the result of the suit, Mrs. F. E. Prosser, the grantor from whom both the plaintiff and the defendant claimed, being dead; and upon the further ground that the offer of this testimony was an attempt to ingraft upon an unconditional deed a trust in favor of a third party. The testimony was not inadmissible for any of the reasons assigned. The suit was neither instituted nor defended by the personal representative of a deceased person; nor was the evidence rendered inadmissible by any other provision of Civil Code 1910, § 5858. *Blanchard v. Johnson*, 142 Ga. 447, 83 S. E. 104 (2). By express terms section 5858 of the Civil Code is to be strictly construed, and other than therein provided there are no exceptions. Civil Code 1910, § 5859. See, in this connection, *Blount v. Beall*, 95 Ga. 182, 22 S. E. 52 (2); *Jackson v. Gallagher*, 128 Ga. 321, 57 S. E. 750; *Hall v. Hilley*, 139 Ga. 13, 76 S. E. 566; *Kitchens v. Pool*, 146 Ga. —, 91 S. E. 81.

For the same reason the court did not err in admitting similar testimony of Mrs. Estelle Posey, a witness for the plaintiff. The testimony of this witness was also objected to by the defendant, on the ground that it was an attempt to ingraft a parol trust upon an unconditional deed. The testimony of neither of these witnesses was inadmissible for the last-stated reason. The witnesses were offered for the purpose of proving that J. M. Prosser executed a deed to his interest in the land to his mother for a particular purpose, namely, that the mother should ex-

ecute thereafter a deed to the same property to his daughter, Leone Prosser, and that this deed was actually executed and delivered, but not recorded. If this was the truth of the case, when J. M. Prosser conveyed title to his mother merely to enable her to convey it to Leone Prosser, the property immediately became impressed with an implied trust in favor of Leone Prosser. *McKinney v. Burns*, 31 Ga. 295; *Williams v. Smith*, 128 Ga. 306, 310, 57 S. E. 801; Civil Code 1910, § 3741.

[2] 2. "A voluntary deed, though duly recorded, and taken without notice of a prior voluntary deed executed by the same grantor and not recorded, does not give to the second grantee a priority over the first." The preference given by statute is confined to deeds made upon a valuable consideration. *Toole v. Toole*, 107 Ga. 472, 33 S. E. 686; *Byrd v. Aspinwall*, 108 Ga. 1, 33 S. E. 688. The court fairly submitted to the jury the disputed issue of fact as to whether the deed to Lawson was voluntary or for a valuable consideration. The jury found it to be voluntary. This finding cannot be said to be unsupported, since the defendant himself swore, speaking of the grantor:

"She told me she wanted to give me the property. In a way she gave it to me. There was a money consideration. I couldn't say how much; but it was her purpose and intention to reimburse me with this land. I paid her what the deed says at the time of her making it. I paid her \$10 at that time."

[3] 3. It was not error in this case to instruct the jury as follows:

"I charge you that, although you might reach the conclusion that Mrs. F. E. Prosser made to Mattie Leone Prosser the deed in 1902, if the defendant, in 1907, purchased the land from his mother, for a valuable consideration (this is that he paid money for it, although it might not have been the full value of the land), and if he had no actual notice of the previous deed claimed by the plaintiff to have been made by Mrs. F. E. Prosser in the year 1902, if he had no actual notice of that deed, and was what the law calls an innocent purchaser, he should get a good title to the land."

There is no merit in the criticism of this charge that the court instructed the jury that "the valuable consideration must be paid in money," movant contending that the consideration "may be anything of value, and other things than money." The only reference to consideration in the defendant's allegations was to "a valuable consideration in cash."

[4] 4. The court did not err in charging the jury as follows:

"If the plaintiff is entitled to recover anything at all, she is entitled to recover the 49 acres sued for in this action."

The plaintiff in error contends that this charge was error, because if the plaintiff was entitled to anything under her petition, "she was entitled to a one-half undivided interest in the whole tract of land," or "a one-half undivided interest in that portion

of the land held by the defendant." The reply to this is that the petition of the plaintiff ratified the division of the land already made between the defendant and Mrs. Posey, and sued for that portion awarded to the defendant. This she had a right to do.

Judgment affirmed. All the Justices concur.

(146 Ga. 406)

WRIGHT, Comptroller General, v. CENTRAL OF GEORGIA RY. CO. (No. 230.)

(Supreme Court of Georgia. Feb. 13, 1917.)

(Syllabus by the Court.)

1. TAXATION \S 145—RAILROAD LEASE—INTEREST OF LESSEE.

A leasehold in a railroad for the full term of 101 years, renewable in like periods forever, at the option of the lessee, creates an interest in the property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 252, 253.]

2. TAXATION \S 145 — PROPERTY SUBJECT—RAILROAD LEASE.

Such an interest is assessable for taxation against the owner thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 252, 253.]

3. TAXATION \S 247—CHARTER EXEMPTIONS—CONSTRUCTION—LEASE.

A charter exemption from taxation, or a charter limitation as to the extent of the tax to be demanded of a railroad company on its property and appurtenances, will not be so extended as to exempt also the leasehold interest of parties to whom the company leases its property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 326-330.]

4. CONSTITUTIONAL LAW \S 229(3), 284(1)—TAXATION \S 40(1), 231—EXEMPTIONS—UNIFORMITY OF TAXATION — DUE PROCESS OF LAW—EQUAL PROTECTION OF THE LAWS.

A railroad company embraces in its system several railroads. Some portion of the railroad is protected by a charter limitation as to the extent of the tax to be demanded of the company on that property. Other portions of the railroad were acquired by the company, and as to such portion the charter limitation does not apply. When the railroad company leases its entire system to a lessee, and the lessee makes a return for ad valorem taxation on the whole fee of so much of the railroad as has no charter exemption, and omits from its return for taxation the leasehold interest of so much of the railroad as comes within the charter exemption, and where the proper taxing officer demands a return of the omitted leasehold interest, which is made under protest, the collection of the tax on such omitted leasehold interest will not be enjoined on the ground of lack of due process of law, or because the action of the taxing officer denies to the lessee the equal protection of the laws, or because the taxation of the leasehold interest under these circumstances violates the clause of the state Constitution as to uniformity of taxation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 685, 896; Taxation, Cent. Dig. §§ 68, 71, 371-378.]

5. CONSTITUTIONAL LAW \S 138—OBLIGATION OF CONTRACT—TAXATION.

Inasmuch as the leases from the Augusta & Savannah and the Southwestern Railroad Companies to the Central of Georgia Railway Company create a claim or interest in the property separate and distinct from the fee, the taxation

of the leasehold interest does not infringe any constitutional inhibition, state or federal, against the impairment of contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 303, 408.]

6. TAXATION — 391 — RAILROADS — LEASEHOLD INTEREST.

The comptroller general's assessment of the leasehold interest of the Central of Georgia Railway Company in the railroads leased by it from the Augusta & Savannah Railroad Company and the Southwestern Railroad Company is in substantial compliance with the law providing for the assessment and collection of taxes due by railroad companies.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 660-663.]

(Additional Syllabus by Editorial Staff.)

7. WORDS AND PHRASES — "REAL ESTATE."

At common law the term "real estate" does not include anything short of a freehold.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Suit for injunction by the Central of Georgia Railway Company against William A. Wright, Comptroller General of the state of Georgia. Decree for complainant, and the Comptroller General sues out a writ of error. Reversed.

William A. Wright, comptroller general of the state of Georgia, assessed against the Central of Georgia Railway Company taxes for the years 1908 to 1914, inclusive, on its leasehold interest in the Augusta & Savannah Railroad and its leasehold interest in certain portions of the Southwestern Railroad. The comptroller general issued executions against the railway company on these assessments for state taxes and certain county, municipal, and school district taxes for the year 1914, and was about to issue similar executions for the prior years, when the railway company filed its petition to restrain the comptroller general from levying and collecting these executions. The case was heard by the judge without a jury upon the pleadings and stipulations filed in the cause, and a final decree was rendered, perpetually enjoining the defendant from levying and enforcing the tax executions. From this decree the comptroller general sued out a writ of error.

The Augusta & Waynesboro Railroad Company was incorporated in 1838, and its name was subsequently changed to Augusta & Savannah Railroad by the act of 1856. The thirteenth section of its charter (Acts 1838, p. 178) provides:

"That the said railroad, and the property of said company, shall not be subject to be taxed higher than one-half of one per centum, on its annual income; and no city or town corporation shall have power to tax the stock of said company, but may tax any property, real or personal, of said company, within the jurisdiction of said city or town, in the same ratio of taxation of like property."

The Southwestern Railroad Company was incorporated in 1845. The fourteenth section of its charter (Acts 1845, p. 136) provides:

"That the said railway and its appurtenances, and all property therewith connected, shall not be subject to be taxed higher than one-half of one per cent. upon its annual net income."

In the same year the Muscogee Railroad Company was incorporated, with a provision in its charter (Acts 1845, p. 116):

"That the capital stock of the railroad company shall not be taxed by the state higher than one-half of one per cent. upon its net income, nor shall any other tax be levied or collected on the stock of said company."

By the act of 1856 (Acts 1856, p. 187) the Muscogee Railroad Company was united and merged into the Southwestern Railroad Company under the charter of the Southwestern Railroad Company, and all its rights, privileges, and property became a part of the Southwestern Railroad Company. The total mileage of the lines of the Southwestern Railroad Company in Georgia is 329.59 miles. Of this mileage 198.72 miles are covered by the charter provisions as to taxation set forth above. The remaining lines of the Southwestern Railroad Company in Georgia, having a mileage of 130.87 miles, are not covered by the foregoing tax provisions of the charter, but are taxable on ad valorem basis as all property in Georgia is taxable. By act of 1852 (Acts 1852, p. 119), these two companies were authorized to make leases of their railroads to the Central Railroad & Banking Company of Georgia. The charter of the Augusta & Savannah Railroad expressly authorized that corporation to rent or farm out its property. On May 1, 1862, the Augusta & Savannah Railroad leased its railroad and franchises to the Central Railroad & Banking Company of Georgia, and on June 24, 1869, the Southwestern Railroad Company leased its railroad and franchises to the same lessee railway company. On March 4, 1892, all the properties and assets of the Central Railroad & Banking Company of Georgia, including its leasehold interests in the Augusta & Savannah Railroad and in the Southwestern Railroad, passed into the hands of the receivers of the Circuit Court of the United States for the Southern District of Georgia. The greater part of the properties of the Central Railroad & Banking Company of Georgia, including these leasehold interests, were purchased by Thomas and Ryan at judicial sale. On October 17, 1895, these purchasers and their associates were incorporated under the name of the Central of Georgia Railway Company. The Southwestern Railroad Company, on October 17, 1895, entered into a contract with the Central of Georgia Railway Company, whereby the lease of its railroad to the Central Railroad & Banking Company was modified and renewed, and the

modified lease was to run for the full term of 101 years, renewable in like periods, upon the same terms, forever, the right of renewal to be in conformity to the laws authorizing it; and on October 24, 1895, the Augusta & Savannah Railroad also leased its railroad to the Central of Georgia Railway Company, the lease being substantially similar to the lease of the Southwestern Railroad Company. The consideration of each lease was the payment of an annual rental to the leasing companies of 5 per cent. upon their respective capital stocks. On these two leasehold interests the comptroller general is seeking to collect the tax from the Central of Georgia Railway Company.

The comptroller general demanded of the Central of Georgia Railway Company that it make a return of the value of its lease and lease privileges and other interests less than the fee, owned by the Central of Georgia Railway Company in and concerning the railroads in its system of railways respectively known as the Augusta & Savannah Railroad and the Southwestern Railroad. The railway company made a return, under protest, denying the taxability of these leasehold interests. In addition to assessing the leasehold interest for state taxation, the comptroller general assessed taxes with respect to these leasehold interests in favor of the various counties, municipalities, and school districts through which the leased railroad runs in the case of the Augusta & Savannah, and through which the charter tax lines run in the case of the Southwestern Railroad. The tax to be assessed in favor of counties, municipalities, and school districts was arrived at by first assigning to each of the political subdivisions such proportion of the total assessed valuation of the leasehold interest as the mileage in such political subdivision bore to the total mileage of the leased line in the case of the Augusta & Savannah and of the charter tax lines in the case of the Southwestern Railroad, and then multiplying that result by the tax rate of each of these respective political subdivisions. The grounds of attack upon the right of the state and its political subdivisions to tax these leasehold interests will more fully appear in the opinion.

John C. Hart, of Atlanta, and Samuel H. Sibley, of Union Point, for plaintiff in error. Lawton & Cunningham, of Savannah, and Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

EVANS, P. J. (after stating the facts as above). [1, 7] 1. The leases are for the full term of 101 years, renewable in like periods upon the same terms forever, at the option of the lessee. A lease for a term of years is a chattel real; it is personal estate, and not real. At common law the term "real estate" does not include anything short of a freehold.

2 Kent, Com. *342, *401. An estate for years in this state passes as realty. Civil Code 1910, § 3685. It is not necessary to go into an analysis of the leasehold interest created by this lease to determine whether the leasehold interest is to be regarded as personality or as realty; if it be either, it is property. The Constitution requires that taxation shall be ad valorem on all property not expressly exempted, and relatively to the question of taxation it makes no substantial difference whether the property of the beneficial owner be classed as realty or personality. Wells v. Savannah, 87 Ga. 397, 13 S. E. 442; Atlanta National Building & Loan Association v. Stewart, 109 Ga. 80 (8), 81, 35 S. E. 73. A lease of the character of those under consideration is the practical equivalent of a sale of the property for a series of terms without end, and the lessee certainly acquires an interest in the property. The creditors of the predecessor of the present lessee esteemed the leases of such value as to have them administered as assets in a receivership proceeding. The present lessee is paying a substantial rent charge for the control and possession of the property for an indefinite time. A lessee under a lease for 101 years, renewable forever at his option, has a right both to possession and profits, which may be projected indefinitely into the future. Surely such a right creates an interest in the property.

[2] 2. Is a leasehold interest taxable in Georgia? The Constitution (article 7, § 2, par. 1 [Civil Code, § 6553]) declares that:

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The article of the Civil Code on persons and property subject to taxation embraces section 1008, which reads as follows:

"All persons owning any mineral or timber interests, or any other interest or claim in or to land less than the fee, shall return the same for taxation and pay taxes on the same as on other property."

It is argued that this section only applies to cases where the interest attaches to something tangible, which may be carved out of the property, as in the case of timber, turpentine, minerals, and the like, and has no application to leases of the kind we have under consideration. The language of the section is too comprehensive to admit of such a restriction, unless it be conceded that a lease of land for a long period of time, renewable in perpetuity at the option of the lessee, is neither an interest nor claim in and to the land. Such a concession can hardly be made when we come to consider what a valuable property right such a lease would be. Under these leases the lessee took the entire property, to hold, if it pleased, in perpetuity, subject to an annual charge of 5 per cent. on the capital stock. Certainly this val-

uable right creates some interest or claim in the property. See *P. W. & B. R. Co. v. Appeal Tax Court of Baltimore City*, 50 Md. 397.

It is contended, in support of the proposition that a leasehold interest is not taxable, that the rule at common law was that the landlord was bound to pay all state and municipal taxes upon the property, and that the common-law rule is in force in Georgia. But we apprehend that this rule has never been applied to leases of the character of these, which extend into perpetuity at the election of the lessee. The scheme of taxation in this state is that taxes are chargeable against the owner of property, if known. Life tenants and those who own and enjoy the property are chargeable with the tax thereon. Civil Code 1910, § 1018. The Legislature had in mind that the owner of property might create in another an interest in his property, which interest was subject to taxation separately from the fee in the property, and accordingly in the formulation of a tax return required an answer to the question: "What is the value of your losses, or leased privileges, or other assets of like character?" Civil Code, § 1087. It may be that sections 1008 and 1087 of the Civil Code were only intended to cover leases which create an interest in the property, and were not intended to apply to the ordinary case of landlord and tenant, where the tenant has only a usufructuary right in the property. Be that as it may, these sections are applicable to leases of the kind we have under consideration.

[3] 3. Will the charter limitations upon the extent of the tax to be demanded of the Southwestern Railroad and the Augusta & Savannah Railroad be extended to the lessee, so as to exempt from taxation the leasehold interest which it owns in these properties? Our first inquiry will be to determine whether this question has been foreclosed by the recent decision of *Wright v. Central of Georgia Railway Company*, 236 U. S. 674, 35 Sup. Ct. 471, 59 L. Ed. 781. That case involved the state's right to collect from the Central of Georgia Railway Company an ad valorem tax on the real estate, roadbed, and franchise value, after crediting one-half of 1 per cent. of the net income, on that portion of its property known in its system, respectively, as the Augusta & Savannah Railroad and the Southwestern Railroad. The court in the majority opinion did not base its decision on the leases as technically effective to pass by assignment the contract in the charters from the lessors to the lessee, but reached its conclusion from a consideration of the specific transaction as permitted and encouraged by the charter act of 1838 and leasing act of 1852. These statutes were construed as making the fee exempt from other taxation than that provided for in favor of the lessee as well as the lessor. As we understand this

decision, the state is prohibited by its charter contracts with the Southwestern Railroad Company and the Augusta & Savannah Railroad Company from collecting from the lessee, the Central of Georgia Railway Company, any tax assessed against the fee of the property and appurtenances of the leasing companies in the possession and control of the lessee, beyond one-half of 1 per cent. upon their respective annual incomes. The comptroller general is not now seeking to assess and collect a tax on the fee in the property of the leasing companies, but a tax from the "Central of Georgia Railway Company, as lessee, on its lease and leased privileges and other interests less than the fee" of the Augusta & Savannah and the Southwestern Railroads, operated by the lessee as a part of its system. The subject-matter of the first effort to collect a tax was on the fee of the leasing companies; the present tax *fi. fas.* run against the lessee for the tax on its lease, leasehold privileges, and other interests less than the fee. The present question was not involved in the case before the United States Supreme Court.

Again, it is insisted that under former adjudications of this court, respecting a construction of these identical tax limitations, a settled and definite interpretation has been given to these charter provisions as excluding the state from taxing the leasehold interest of the lessee on the basis of ad valorem taxation. Perhaps the most pertinent observation on this subject may be found in the case of *Goldsmith v. Augusta & Savannah Railroad Co.*, 62 Ga. 468, in the following language:

"The lease of the road [A. & S. R. Co.] to another company by authority of the Legislature does [not] affect the basis of taxation. The income contemplated by the charter is not the annual rental, but the earnings of the road. The act authorizing the lease not having any provision in regard to taxation, the limit in the charter was not lost or changed by the lease."

This is not an authoritative ruling, for the reason that it is confessedly an obiter dictum, the only question before the court being one of jurisdiction; and the learned justice delivering the opinion said that he made the ruling "to indicate the opinion of this court on questions necessary to a settlement of the case should the parties desire a settlement." Moreover, the lessee was not a party, and the statement bore only on the lessor's liability for the tax. So far as concerns the question of the taxability of the lessee's interest arising out of the lease on an ad valorem basis, it is *res integra* in this state.

A charter exemption from taxation, or a charter limitation as to the extent of the tax to be demanded of a railroad company on its property and appurtenances, will not be so extended as to exempt also the leasehold interest of parties to whom the company leases its property. *Jetton v. University of*

the South, 208 U. S. 489, 28 Sup. Ct. 375, 52 L. Ed. 584. In that case the state of Tennessee granted an exemption to the University of 1,000 acres of land. The University gave leases of lots within this tract. The state authorized the taxing of the leasehold interests. The University, and certain individuals claiming to be lessees of certain land from the University, brought a bill in equity to restrain the state's taxing officers from taking any proceedings to collect taxes from the lessees of the University within the limits of the 1,000 acres exempted in the University charter. The state of Tennessee, subsequently to the grant of the charter and the making of the leases (which were nonassignable except by the consent of the University), enacted legislation authorizing the taxing of a leasehold interest. The Supreme Court of the United States held that the tax assessment against the lessees on their leasehold interest was not a tax against the University as owner of the fee, nor was it a tax on the University's income from the leases; that the tax, in form and substance, was upon a separate interest in real estate granted by the lessor, and was assessed against the owner of such separate interest, and was not in violation of the charter exemption. In discussing the nature of the interest, Mr. Justice Peckham, speaking in behalf of a unanimous court, said:

"What is the exact interest of the lessee in the land * * * it is not necessary here to determine. It is plain that he has some interest in it, and that interest is distinct from the fee, and may be taxed when the fee is exempt from taxation."

[4] 4. Up to this point we have endeavored to establish these propositions: That a lease of a railroad for 101 years for a stated annual rental, renewable in like periods upon the same terms, creates an interest or claim in the property; that the owner of any interest or claim in property less than the fee shall return the same for taxation; and that the charter limitation upon the extent of the tax to be demanded of the Southwestern and the Augusta & Savannah Railroad Companies will not be so extended as to exempt from taxation the leasehold interest of the Central of Georgia Railway Company in these properties. We will now proceed to examine whether these propositions can be sustained as against constitutional and other objections urged by the lessee. The lease of the Southwestern Railroad Company embraces a system of roads, some portions of which have no charter exemption from ad valorem taxation. It is urged that the taxation of the leasehold interests of these portions of the system which have a charter limitation as to the extent of the tax which may be demanded, and the omission to tax other leasehold interests in the system, is a denial of due process of law and an unjust and unequal classification of property. The record discloses that, prior to any call for a return of any leasehold interest, the lessee had re-

turned for ad valorem taxation the entire fee in all portions of its system, save such as had a charter exemption. In the case of these portions of the railroad which had a charter exemption from ad valorem taxation no return was made by the lessee of its interest in the property, and it is a tax on this interest of the lessee that is now sought to be collected. The comptroller general assessed to the lessee the tax on that portion of its lines which has no charter exemption on the fee and the lessee had returned the fee in that portion for taxation. The leasehold interests in the railroads so returned were taxed in taxing the entire fee. The comptroller general recognized as fair the rule that, if the whole fee was returned, the assessment on the whole fee, whether returned by lessor or lessee, necessarily embraced the leasehold interest on the noncharter lines. In the matter of the leasehold interest of the lessee in the property leased from the Augusta & Savannah and the Southwestern railroad companies, a peculiar situation existed. This anomalous condition resulted from a tax limitation in the charters of these companies, limiting a tax on the fee assessable against them, which tax limitation was not repealed by the Constitution of 1877, which demanded uniform ad valorem tax upon the same class of subjects. These railroad companies, by their own act, created an interest in the property in the lessee. This interest being a separate and distinct subject class for taxation, either the constitutional mandate must be ignored or the leasehold interest of the lessee must be assessed, as was done by the comptroller general. This action of the comptroller general neither violated the due process clause of the Constitution, state and federal, nor denied the lessee the equal protection of the laws, nor violated the tax uniformity clause of the state Constitution.

[5] 5. It is only necessary to observe that, inasmuch as the leases from the Augusta & Savannah and the Southwestern Railroad Companies to the Central of Georgia Railway Company create a claim or interest in the property separate and distinct from the fee, the taxation of the leasehold interest does not infringe any constitutional inhibition, state or federal, against the violation or impairment of contracts.

[6] 6. And, lastly, the point is made that there is no machinery provided by law for the distribution of a tax on a leasehold interest among the counties, municipalities, and school districts located on the leased lines, and in the absence of such machinery the leasehold interest cannot be taxed by such counties, municipalities, and school districts. This question is fraught with difficulty, and especially with reference to the lease of the Southwestern Railroad Company. The latter company owns a continuous line, made up of railroads whose charters have tax limitations and of railroads whose charters contain no exemptions. The

charter exemption lines in the system are not continuous, having gaps between them supplied by railroads which have no tax exemptions. If there were as many lessees as there are different railroads in the Southwestern system, the assessment of the taxes of each road would be relieved of any serious complexity. It is the union of these different roads into one system, owned by one company, and a lease by that company of all of them to a single lessee, which cause the complications. The comptroller general solved the problem in this manner: He called upon the lessee to return the value of its leases and lease privileges and other interests less than the fee, owned by it in and concerning the railroads in its system of railways respectively known as the Augusta & Savannah Railroad, extending from Augusta, Ga., to Millen, Ga., and those portions of the Southwestern Railroad extending from Macon to Americus, Cuthbert to Ft. Gaines, Ft. Valley to Columbus, and Smithville to Cuthbert. The lessee made a return under protest, fixing the values in aggregate sums for their interest in the property of lessor, and denied the taxability of their lease interest in these properties. A mileage basis was furnished, but no separate mileage valuation was placed in the return. The valuation of the aggregate mileage was placed in one sum. The comptroller general acted on the implication that the mileage was of equal value, and applied the general law in making the assessments on that basis. We think the assessments were made in substantial accord with the general law for the assessment of railroads. This law and the comptroller's application of it may be more or less imperfect, but all modes of taxation are subject to this criticism. See *Taylor v. Secor*, 92 U. S. 575, 23 L. Ed. 663; *Atlanta Ass'n v. Stewart*, supra.

Judgment reversed. All the Justices concur.

(146 Ga. 466)

TALLEY et al. v. BROWN et al. (No. 248.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

PERMANENT INJUNCTION — LAW AND EVIDENCE.

This case by consent was tried by the presiding judge without the intervention of a jury. The judgment rendered, permanently enjoining the defendants, was authorized by the law and the evidence.

Error from Superior Court, Walker County; Moses Wright, Judge.

Suit for injunction by L. A. Brown and others, trustees, against Jim Talley and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

W. P. McClatchey, of Chattanooga, Tenn., and W. M. Henry, of Rome, for plaintiffs in

error. O. N. Chambers, of Rossville, for defendants, in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 464)

BANK OF ETON v. OWENS et al.
OWENS et al. v. BANK OF ETON.

(No. 247.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. REMAINDERS ¶12 — WILLS ¶70 — FOREIGN WILL—BEQUEST OF PERSONALTY—VALIDITY.

Where property is bequeathed by will to one in another state, and the will according to the laws of that state was sufficient to make a valid devise of personalty (having only two witnesses), the title of the devisee thus obtained will be recognized in this state after the personalty has been brought into this state. *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134, 119 Am. St. Rep. 320.

(a) But where the devise was to A. for life, with remainder to the children of A., and the executor in the other state sold the personalty in the other state, and from the proceeds of the sale advanced money to A. and her husband, taking from them a mortgage on other separate property of A. in the estate, conditioned upon the repayment to the executor of the amount so advanced to A. and her husband when A. should die, and after having thus procured money from the executor A. invested it in lands in this state, to which she took an absolute fee-simple deed, the title thus acquired by A. to the lands in this state was hers absolutely, unaffected by any right of the remaindermen mentioned in the will.

[Ed. Note.—For other cases, see *Remainders*, Cent. Dig. § 3; *Wills*, Cent. Dig. §§ 184–186.]

2. DESCENT AND DISTRIBUTION ¶24—HEIRS.

Under the evidence in this case all the property in controversy descended to C. T. Owens, the defendant in *fi. fa.*, and Osmo Owens, his son, the claimant, as heirs at law of Cohutta L. Owens at her death.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 63–68, 70, 81.]

3. TENANCY IN COMMON ¶46—LIEN OF CO-TENANT—PRIORITY.

Where a father and his son inherit property as tenants in common from a deceased wife and mother, and the father takes possession of all the property owned by himself and son and uses it for his own benefit, the son in an equitable accounting has a lien on such property for his claim thereon, superior to liens placed on his interest by the tenant in possession receiving the property. Civ. Code 1910, §§ 3724–3727.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. § 138.]

4. SET-OFF AND COUNTERCLAIM ¶8(1)—ACCOUNTING—SET-OFF—MAINTENANCE OF MINOR SON.

Where in such case the father has property in his hands belonging to the son, although he is not his guardian, yet in an equitable accounting between the father and the son, on the trial of a claim case in which an ancillary equitable petition is filed setting up the rights of the father and son, the father has the right to a set-off against the son for money expended for the latter while a minor, where it is made to appear that the father was insolvent and unable to maintain and educate his son, and that such ex-

penditure was necessary for his maintenance and education. *Maddox v. Oxford*, 70 Ga. 179.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 9, 10.]

5. MOTION FOR NEW TRIAL—SUFFICIENCY.

Applying the foregoing legal principles to the facts of this case, no ground of the motion for a new trial in either bill of exceptions requires a reversal.

6. VERDICT—EVIDENCE.

The verdict was supported by the evidence.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Proceeding in execution by the Bank of Eton against C. T. Owens, in which Osmo Owens filed a claim joining O. W. Muller as executor of estate of Arabella C. Summerour. Verdict finding a lien in favor of claimant, and after the overruling of their motions for new trial, the bank and the claimant each except and bring error. Affirmed on both bills of exception.

The Bank of Eton obtained a mortgage *fi. fa.* against C. T. Owens, and had it levied upon certain real estate described as being a one-half undivided interest in lots of land 268 and 269 in the tenth district and third section of Murray county, as the property of the defendant in *fi. fa.* Osmo Owens, the son of C. T. Owens, filed a claim to the property, and an ancillary petition in aid of his claim, and joined O. W. Muller, as executor of the last will and testament of Arabella C. Summerour, with him; the executor being a formal party with no interest in the result of the suit. It was alleged in the ancillary petition that Arabella C. Summerour died testate, in 1890, in Polk county, Tenn.; that by her will Cohutta L. Summerour (who afterwards married C. T. Owens) received 75 acres of the land levied on, and after her marriage to C. T. Owens she received certain moneys from the estate of Arabella C. Summerour, with which she purchased in 1893 the 100-acre tract of land levied on; that when she received the money from O. W. Muller as executor, C. T. Owens, the husband of Cohutta L. Owens, the devisee, executed with his wife a mortgage deed or bond to the executor to the remaining portions of the two lots, the 148-acre tract, which was the property of Cohutta L. Summerour Owens by inheritance from her father, the condition of the bond or deed being in substance to secure the repayment of \$1,000 of money paid her by the executor in the event she died without issue, in which event, under the will of Arabella C. Summerour, other legatees took the estate. The will bequeathed all the property of Arabella C. Summerour, the testatrix, to Cohutta L. Summerour (afterwards Owens) "or her children," she having no children at the time. "Should she die without children,"

then the property was to go to other named legatees. The claimant alleged, in substance, that the will above mentioned created a life estate in his mother, Cohutta L. Summerour Owens, to the 75-acre tract and the money purchasing the 100-acre tract of land, with remainder to him as her only child; that the mother died in 1896, while the claimant Osmo Owens was three years old, and his father, C. T. Owens, the defendant in *fi. fa.*, took possession of all the land and received the profits of it until about the time of the levy, of about the value of \$500 per annum, amounting in all to \$9,000, besides interest; that claimant was the owner in fee simple of the 75-acre tract, and also of the 100-acre tract if purchased with money bequeathed to his mother by his grandmother; and that he had an equitable lien amounting to title to the remainder of the 100-acre tract, for the reason that his father had appropriated to his own use for 18 years the proceeds of the land, of the value of \$200 yearly. He also claimed that the legal title to the 148-acre tract owned by his mother, Cohutta L. Summerour Owens, and transferred by her and her husband to O. W. Muller, executor, was in the executor for the benefit of the claimant, as it was transferred to him to protect the trust fund which had been misappropriated. It was also claimed that if the will of Arabella C. Summerour was not subject to the construction given it, but vested the title in his mother, subject to be divested, and if she died as owner of the entire fee, with his father and himself as her sole heirs, he would be entitled to \$250 as rent per annum as half owner, with a lien therefor on his father's half, which, in equity, was prior to the lien of the mortgage *fi. fa.* of the Bank of Eton, etc.

On the trial the court directed a verdict finding the property subject, and submitted to the jury the question of the right of the claimant to have his lien set up for rents, as tenant in common, as against the lien of the mortgage *fi. fa.*, as well as the amounts for land sold by C. T. Owens. The jury returned a verdict finding the property subject according to the direction of the court, and finding a lien in favor of the claimant for \$3,000 against the interest of C. T. Owens levied upon. Both the Bank of Eton and Osmo Owens filed motions for a new trial, which were overruled, and each excepted.

C. N. King, of Chatsworth, and W. E. Mann, of Dalton, for plaintiffs in error. W. W. Sampler, of Spring Place, and M. C. Tarver, W. C. Martin, and Geo. G. Glenn, all of Dalton, for defendant in error.

HILL, J. Judgment affirmed on both bills of exceptions. All the Justices concur.

(146 Ga. 456)

CITY OF ATLANTA v. AUSTELL
(No. 243.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. EMINENT DOMAIN §170—PROCEEDINGS—
CONDITION PRECEDENT—AGREEMENT WITH
OWNER.

In order to condemn property for public purposes, it is necessary, preliminary to the commencement of the proceedings, for the condemnor to make an effort to agree with the owner of the property upon a price to be paid for the land. *Bridwell v. Gate City Terminal Co.*, 127 Ga. 535, 56 S. E. 624 (8), 10 L. R. A. (N. S.) 909; Civ. Code 1910, § 5207.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 462-467.]

2. EMINENT DOMAIN §170—PROCEEDINGS—
CONDITIONS PRECEDENT—AGREEMENT AS TO
PRICE.

An effort was made by a city to condemn certain real estate for the purpose of widening a street. The property had been devised by the terms of a will. The condemnation proceedings were upon the basis that the property had been bequeathed to a person who was nominated executor and to others. The person appointed by the city to agree with the owners upon the value of the property addressed a letter to the person who was executor of the will, and who was also a legatee, as follows: "It is the intention of the city to agree with you, if possible, as to the price to be paid, before instituting condemnation proceedings in court. I understand that you own a one twenty-seventh interest in this property, subject to an estate for the life of your mother, and that you are one of the executors of the estate of Alfred Austell, deceased. The city asks that you make an offer as to what you will take for your interest. Kindly write me what price you would be willing to accept for the interest you hold." *Held*, that this letter is to be construed as a proposition to the addressee personally, and not to him as executor in his representative capacity, and that it did not require the judge, on an interlocutory hearing for injunction, to hold that the condemnor had made an effort to purchase the easement before institution of the condemnation proceedings.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 462-467.]

3. EMINENT DOMAIN §284—ASSETS—LAND—
INJUNCTION—INTEREST OF EXECUTOR.

Under a proper construction of the will, the executor had sufficient interest in his representative capacity under the will to maintain an action against the city to enjoin an illegal proceeding instituted by the city, seeking to condemn for public use the land bequeathed by the will.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 789, 790.]

4. CONDEMNATION PROCEEDINGS—EVIDENCE.
Certain evidence offered by the defendant was properly excluded on objection that it was irrelevant.5. EMINENT DOMAIN §274(1)—INJUNCTION
BY EXECUTOR—RELIEF.

Under the pleadings and the evidence, this was an effort by the city to condemn certain lands for the purpose of widening one of the streets. The land had been bequeathed by a testator, and the city was seeking to condemn the interest therein of the widow, who had renounced a devise in her favor and to whom dower had been set apart in the property, and also the interests of others to whom the property should go under the terms of the will.

After the condemnation proceedings had been commenced, the sole surviving executor filed an equitable petition to enjoin the city from proceeding with the condemnation, on the ground that the proceedings were not against him in his representative capacity, and that no attempt had been made by the city, preliminary to the condemnation proceedings, to agree with him in his representative capacity upon a price to be paid for the property sought to be taken. *Held*, that under the pleadings and the evidence there was no error in granting the injunction.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 765-767.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Condemnation proceeding by the City of Atlanta against W. W. Austell, Executor. Judgment for the executor, and the city brings error. Affirmed.

Jas. L. Mayson, Sam'l D. Hewlett, Anderson & Rountree, and Moore & Pomeroy, all of Atlanta, for plaintiff in error. Chas. T. & L. C. Hopkins, of Atlanta, for defendant in error.

ATKINSON, J. [1-5] In 1881 Alfred Austell died, leaving a will which contained, among others, the following items:

"Item 2. It is my will and desire, and I hereby devise and direct, that my executors herein after named shall not sell, during the life of my said wife, any of 'Trout House' lot, on the corner of Decatur and Pryor streets in said city of Atlanta, fronting on Decatur street one hundred feet, more or less, and extending back at right angles with Decatur street, and on Pryor street, to Line street; but they may build, out of any funds that may come into their hands, if they deem it best, other storehouses on the part of said lot adjoining the building known as the Austell Corner. I direct my said executors to collect the rents of the storehouses, or other houses, as may be on said 'Trout House' lot, and, out of the rent so collected, that they pay my said wife the sum of two thousand dollars, payable in equal quarterly payments, for each and every year of her natural life, whether she marries again or not. And my executors are directed to take the receipt for the same from herself alone, and to pay it to no other person. My executors are further directed, after paying my said wife the sum of money aforesaid, to divide the balance equally between my said children, and after the death of my said wife to sell the said storehouses and lot and divide the proceeds of such sale among my children, share and share alike, the child or children of any child of mine to take the share of their deceased parent."

"Item 4. The provisions hereinbefore made for my beloved wife being ample for her support, I hereby declare that the bequests hereinbefore made to her are in lieu of dower, or right of dower, of, in, or to any real estate of which I may die seised, and that it is my will that she inherit or get no part of my estate except what is specifically given to her by this will."

"Item 10. In any item of my will, where a division of property is directed to be made between my children, I hereby declare it to be my will and desire that if any of my children should be dead at the time such division is to be made, leaving any child or children surviving them, that such surviving child or children shall take the portion of their deceased parent. And in the event any of my children shall die before the division of any part or the whole of my estate, as provided for in this my will, leav-

ing no issue or surviving children, then it is my will and desire that the portion of my estate that would have otherwise gone to such deceased child or children shall be divided between my other surviving child or children, share and share alike."

The will was duly probated, and the three executors therein named qualified. Thereafter two of the executors died, leaving the remaining one as sole surviving executor. The widow elected to take dower in lieu of the bequest left her under the will, and dower was duly set apart to her, which included, among others, the whole of the property described in item 2 of the will. On December 7, 1915, the widow was still living, as were also two sons and one daughter. One of the daughters died after the testator's death, leaving no children. One of the sons had children in esse, and the other son was unmarried and without children. On the date last mentioned the city of Atlanta served a notice upon the widow and each of the sons and the daughter of the testator, and certain children of the son having children, and certain tenants occupying the property, of its intention to condemn a portion of the property referred to in the second item of the will, for the purpose of widening a street of the city in such manner as to appropriate a part of the property.

The only evidence as to an effort on the part of the city to agree with the owners of the property upon the price to be paid therefor was the testimony of W. W. Austell, who was the sole surviving executor, to the effect that there had been an offer made to him personally, but no offer made to him in his representative capacity to agree upon a price. And a certain letter written by W. S. Dillon, addressed, "Mr. W. W. Austell, 108 Juniper St., Atlanta, Ga.," which contained the following:

"It is the intention of the city to agree with you, if possible, as to the price to be paid, before instituting condemnation proceedings in court. I understand that you own a one twenty-seventh interest in this property, subject to an estate for the life of your mother, and that you are one of the executors of the estate of Alfred Austell, deceased. The city asks that you make an offer as to what you will take for your interest. Kindly write me what price you would be willing to accept for the interest you hold."

After the service of the notice of intention to condemn the property, W. W. Austell, as executor, instituted an action against the city to enjoin the condemnation proceedings, which contained allegations substantially as above set forth, and others to the following effect: (a) Upon the death of the daughter of the testator above mentioned, her interest, under the will, in the property in question reverted to the estate, by reason of her having died childless. (b) None of the children or grandchildren of the testator has any vested legal right in the property, and under the terms of the will, the property is to be sold by the executor after the death of

the widow, and the proceeds realized from the sale to be distributed in the way provided for by the will, and the shares of those who may die childless revert to the survivors or their children; and consequently such interests are contingent and relate to the estate itself and to the proceeds of the sale of the property which was required to be made by the executor at the death of the widow. (c) In his representative capacity the executor is vested with the power and duty to sell all of the property and convey title thereto and distribute the proceeds thereto when thus authorized. (d) In not giving petitioner notice in his representative capacity, and in not attempting to agree with him in a representative capacity as to the price to be paid for the land, the city had failed to comply with the provision of the statute requisite to the condemnation of property for public uses.

Judgment affirmed. All the Justices concur.

(146 Ga. 420)

SPURLIN v. TOWNS et al. (No. 232.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. EJECTMENT \S 12—TITLE OF GRANTEE—RECOVERY.

If A., having no title, executes a deed purporting to convey land to B. for life, with vested remainder to children of B., the children will not by virtue of the deed acquire such title as will support an action for recovery of the land after the death of B.

(a) The case differs in its facts from *McLendon v. Horton*, 95 Ga. 54, 22 S. E. 45, where the defendant, while attempting to prescribe under a void tax deed, set up and claimed, both by "his pleadings and evidence," title from the same source from which the plaintiff claimed to have derived title; and it was held that such pleadings and evidence dispensed with the necessity of the plaintiff's making further proof of title in order to recover.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 47-55.]

2. ADVERSE POSSESSION \S 71(3) — PRESCRIPTION—SHERIFF'S DEED.

If B. enters possession under such a deed and thereafter executes a deed purporting to convey the land in fee to C. as security for a debt, and the debt is reduced to judgment, and the land is sold as the property of B. under an execution based on such judgment, and a deed is executed by the sheriff to the purchaser, purporting to convey the land in fee, and the latter enters into adverse possession of the land under the sheriff's deed in good faith and remains in possession for seven years, he will acquire a prescriptive title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. \S 422, 423.]

3. LIFE ESTATES \S 8 — PRESCRIPTION — SUSPENSION.

Relatively to the children of B., the prescriptive period would not be tolled by the time B. may have lived subsequently to the date of the entry of the prescriber.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. \S 24-28.]

4. DIRECTED VERDICT—ERROR.

Applying the rulings announced in the preceding notes, the verdict for the plaintiffs was unauthorized, and the court erred in directing it in their favor.

5. NEW TRIAL §18—GROUNDS—SUFFICIENCY OF PLEADINGS.

Rulings of the court on the sufficiency of the pleadings are not proper subject-matter for grounds of a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24–29.]

6. ADMISSIBILITY OF EVIDENCE—RULINGS.

The rulings on the admission of evidence were not erroneous for any reason assigned.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action by W. B. Towns and others against J. A. Spurlin. Judgment for plaintiffs, and defendant brings error. Reversed.

T. B. Felder and J. Mallory Hunt, both of Atlanta, for plaintiff in error. J. W. Culpepper, of Fayetteville, and Daley, Chambers & Daley, of Atlanta, for defendants in error.

HILL, J. Judgment reversed. All the Justices concur.

(146 Ga. 461)

WEBB v. THOMPSON. (No. 245.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

BILLS AND NOTES §537(1)—ACTION—QUESTION FOR JURY.

The pleading and the evidence raised issues which should have been submitted to the jury for determination, and the court erred in directing a verdict.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862, 1871–1875.]

Error from Superior Court, Milton County; H. L. Patterson, Judge.

Suit by V. F. Thompson against J. J. Webb. Judgment for plaintiff, and defendant brings error. Reversed.

In 1910 Webb borrowed money of Thompson, gave his note therefor, and executed a deed to land to secure its payment, taking a bond for title for reconveyance upon payment of the debt. The debt was due four years after the date of the note. At maturity Webb had paid neither principal nor interest. In the meantime he had been declared a bankrupt, and the trustee in bankruptcy on August 13, 1913, sold the equity of redemption which Webb had in the land conveyed to secure Thompson. In the suit brought to recover the amount of principal and interest, Thompson charged the insolvency of Webb and waste on his part, and prayed for injunction and a receiver, which extraordinary relief was granted. To the suit the defendant filed a plea and answer, in which he admitted that he had been adjudicated a bankrupt, and that his equity of redemption in the land referred to had been sold as alleged; but he alleged that at

the sale of his equity of redemption he purchased it and had paid a part of the purchase money. The purchase price was about \$1,260. He averred that the plaintiff agreed to furnish him with money with which to make the purchase, but he had not done so; that he purchased it upon an agreement with the plaintiff that, if he would so purchase and make certain valuable improvements upon the land, he could continue to occupy it and the plaintiff would allow him to make two crops upon the land for the years 1914 and 1915, and would allow him those two years to make the improvements, and that if the defendant should make them within the two years the plaintiff would then allow the defendant five years after December 15, 1915, in which to pay off the debt; that he made and completed the valuable improvements as stipulated in the agreement with the plaintiff, at a cost of \$800, and says that now in equity and good conscience the plaintiff should stand to and abide his contract, and not be allowed to take judgment at this time. Upon the trial the court directed a verdict for the plaintiff for principal and interest.

E. H. Clay and J. Z. Foster, both of Marietta, and J. P. Brooke, of Alpharetta, for plaintiff in error. Geo. F. Gober and W. I. Heyward, both of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). We are of the opinion that, instead of directing a verdict for the plaintiff, the court should have submitted the issues made by the pleadings and evidence to the jury for their decision. If the allegations of the defendant's answer as to the contract made between him and the plaintiff on the day upon which the defendant's equity of redemption in the land was sold by the trustee in bankruptcy be true (and there is some evidence to support them), the plaintiff should be forced to stand to and abide by his part of the contract. Taking the defendant's testimony offered in support of the allegations in his answer to be true, the plaintiff agreed that, if the defendant would make and complete certain valuable improvements and would buy the equity of redemption at the sale by the trustees in bankruptcy, he should be allowed to cultivate the lands during the years 1914 and 1915, and have five years after December 15, 1915, within which to pay the principal and interest of his debt; and, moreover the plaintiff agreed that he would furnish the money with which to pay for the equity of redemption. This, in substance, amounted to an agreement on the part of the plaintiff to extend, for a valuable consideration, the time of payment of the defendant's debt. If the allegations of the defendant's answer in regard to the contract made between him and the plaintiff on the

day of the sale of the equity of redemption be true, then his defense is meritorious. Of the truth of that defense the jury are the sole judges. To hold that the defense is without merit would be holding, in effect, that when a proposal on the part of the plaintiff to the defendant has been accepted in good faith by the latter, had been acted upon by him at a cost of over \$800—an expenditure made on the faith of the promise and agreement of the plaintiff—the plaintiff was not bound by his agreement and promise merely because the new contract was not reduced to writing. We cannot take this view of the defense pleaded. The case must be returned for another trial, and the issues made must be submitted to the jury under proper instructions from the court.

Judgment reversed. All the Justices concur.

(146 Ga. 453)

JACKSON et al. v. SOUTHERN FLOUR & GRAIN CO. (No. 242.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. DOMICILE §4(1), 5—MINOR—CHANGE OF DOMICILE.

The domicile of a minor is that of his father, if his father is living and has not voluntarily relinquished parental authority to some other person. A change of domicile does not result from the minor's leaving the parental abode by consent of his father, and going into another county to live in order to be convenient to a partnership business which the minor conducts in his own name for himself and his father.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-8, 10-35.]

2. PARTNERSHIP §195—ACTION—VENUE.

The venue of an equitable suit against the father and son, based on a transaction with them in such business, is the county of the residence of the defendants, and not the county where the business was conducted.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 358.]

3. OTHER QUESTIONS.

It is unnecessary to deal with other questions in the case.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Equitable action by the Southern Flour & Grain Company against L. H. Jackson and Sims Jackson, alleged partners under name of L. H. Jackson, and others. Interlocutory injunction granted and receiver appointed, and defendants bring error. Reversed.

The Southern Flour & Grain Company instituted an equitable action in Fulton county against L. H. Jackson and Sims Jackson, alleged to be partners conducting a business in Fulton county under the name of L. H. Jackson, and against T. J. Jackson and J. E. Mozley. It was alleged that L. H. Jackson was a resident of Fulton county and all the other defendants were alleged to be residents of Cobb county. The suit was to recover a general judgment against the two de-

fendants first named, for the amount of certain promissory notes payable to the plaintiff, executed by the alleged firm; to enjoin all the defendants from disposing of a certain draft or the proceeds thereof collected from an insurance company for a loss under an insurance policy on alleged partnership property which was held by T. J. Jackson and J. E. Mozley under an alleged collusive agreement with the firm; and to have a receiver appointed to take charge of the draft and its proceeds. The defendants pleaded to the jurisdiction of the court, and to the merits of the case. In the pleas it was denied that L. H. Jackson and Sims Jackson were partners, or that L. H. Jackson had any interest in the business. It was further alleged that L. H. Jackson was a minor and unable to contract, and resided with his father, Sims Jackson, in Cobb county, where he was born and reared. At the hearing there was uncontradicted evidence that L. H. Jackson lived in Fulton county, and conducted the business, and that he attained his majority one week after the action was commenced. Other evidence, though contradicted, tended to show insolvency by L. H. and Sims Jackson and their joint liability to the plaintiff, and a collusive arrangement as alleged in the petition between them and the other defendants, whereby the latter should control the draft and its proceeds in such manner as to place it beyond the reach of the plaintiff. The judge granted an interlocutory injunction and appointed a receiver. The defendants excepted.

Jno. E. Mozley and D. W. Blair, both of Marietta, for plaintiffs in error. Walter McElreath, of Atlanta, for defendant in error.

ATKINSON, J. [1] 1. Had L. H. Jackson been of full age and without any wife or family, no doubt his manner of living, as set forth in the statement of facts, would have been sufficient basis for a legal residence in Fulton county. *Hinton v. Lindsay*, 20 Ga. 746; Civ. Code 1910, § 2181. But he being a minor, it is different. In the Civil Code, § 2184, it is declared, in part:

"The domicile of every minor shall be that of his father, if alive, unless such father has voluntarily relinquished his parental authority to some other person. In such event the domicile of the minor shall be that of his master, if an apprentice, or his employer; if neither master nor employer, then the place of his * * * choice."

Other portions of this section apply only when the father of the minor is dead, and they need not be stated. Taking the language of the statute, the domicile of every minor having a father alive is that of his father, unless such father has voluntarily relinquished his parental authority to some "other person." This authorizes a change of domicile of the minor from that of his father, in cases where there is relinquishment of

parental authority to some "other person," but the domicile of the minor is made to follow the "parental authority," and can only be the place of "his own selection" in instances where the relinquishment might be to "some other person" who is not the master or the employer of the minor. The statute does not authorize a change of domicile of the minor by the mere consent of the father that he live elsewhere and conduct business for himself. Nor has the minor any power to bring about a change of his domicile under such circumstances, for it is declared in the Civil Code, § 2187:

"A person whose domicile for any reason is dependent upon that of another can, by no act of volition of his, effect a change of his own domicile."

Civil Code, §§ 2181, 2182, and 2186, relating to the domicile of persons having no permanent place of abode, or to election as to domicile where the person resides indifferently at two or more places, or to change of residence by persons sui juris, have no application to a case of this kind, where the person is a minor whose father is alive and has a fixed domicile and has not relinquished his parental authority to some other person. See *Taylor v. Jeter*, 33 Ga. 195, 81 Am. Dec. 202; *Knight v. Bond*, 112 Ga. 828, 38 S. E. 206 (2).

[2] 2. A suit for equitable relief must be brought in a county of the residence of a defendant against whom substantial relief is prayed. Civil Code, § 5527; *White v. North Georgia Electric Co.*, 139 Ga. 587, 77 S. E. 789. The plaintiff relied on residence of L. H. Jackson in Fulton county as a basis for jurisdiction of the court of equity in Fulton county. Applying the ruling made in the preceding division to the uncontradicted evidence, L. H. Jackson was not a resident of Fulton county, but his legal residence was the domicile of his father in Cobb county, and the court was without jurisdiction of the case.

[3] 3. As the ruling made in the preceding divisions disposes of the case, it is unnecessary to deal with other questions presented in the record.

Judgment reversed. All the Justices concur.

(146 Ga. 463)

TUCKER v. TUCKER et al. (No. 246.)
(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. ADMINISTRATOR'S ACTION—EVIDENCE.

This is an action by an administrator seeking to have canceled a deed executed by his intestate to the defendant, on the ground of fraud and undue influence exercised by the grantee and inducing the execution of the instrument. The petition sought to recover also the value of corn produced on the land during the year and shortly before the conveyance was made, as well as the proceeds of the sale of a certain sawmill located on the land, and the value of timber taken from the land by a third person under a written contract executed by the defendant and

the intestate jointly, a few days before the execution of the deed. *Held:*

Under the admission in the answer and the evidence introduced on the trial, the plaintiff made a prima facie case for recovery of the value of the corn.

2. ADMINISTRATOR'S ACTION — PRIMA FACIE CASE.

There was no evidence, except hearsay (which was of no probative value, as it did not fall within any of the exceptions providing for the admission of such evidence), to authorize a verdict finding fraud and undue influence by the defendants as alleged, upon which to support a decree for cancellation; nor was there evidence to make out a prima facie case for the plaintiff as to the value of the sawmill, nor for the timber taken from the land.

3. NONSUIT—REVERSAL.

The judgment granting a nonsuit is reversed on the ground of the error in not submitting to the jury that branch of the case involving the corn.

Error from Superior Court, Whitfield County; A. W. Flite, Judge.

Action by W. A. Tucker, administrator, against G. F. Tucker and others. Judgment for defendants on granting a nonsuit, and plaintiff brings error. Reversed.

W. C. Martin and M. C. Tarver, both of Dalton, for plaintiff in error. S. P. Maddox, Wm. E. Mann, and Geo. G. Glenn, all of Dalton, for defendants in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(146 Ga. 467)

GIBBONS et al. v. INTERNATIONAL HARVESTER CO. OF AMERICA et al.
(No. 249.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. WILLS — 634(3), 635 — CONSTRUCTION — CONTINGENT REMAINDER — VESTED REMAINDER.

In a devise to one for life, with remainder to his children as a class, there being no child of the life tenant in esse at the death of the testator, the remainder is construed to be contingent until the birth of a child, when the title to the remainder immediately vests, subject to open and take in all children born before the termination of the life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1490, 1491, 1511-1513.]

2. EXECUTION — 33—INTEREST—VESTED REMAINDER.

A child belonging to the class referred to in the foregoing headnote has a leviable interest in the property devised.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 76-82, 86, 87.]

3. ENFORCEMENT OF FI. FA.—INJUNCTION.

The court did not err in refusing an injunction restraining the enforcement of a fi. fa. against such interest.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Suit by W. S. Gibbons and others against the International Harvester Company of America, and Barron, Sheriff, to restrain

enforcement of a *fi. fa.* Injunction refused, and petitioners bring error. Affirmed.

W. S. Gibbons, W. S. Gibbons, Jr., Robert, Charles, and Fannie Lou Gibbons filed their petition against the International Harvester Company of America and Barron, sheriff, to restrain them from enforcing a *fi. fa.* which had been levied upon an undivided one-fourth interest in remainder, after the life estate of W. S. Gibbons, in certain described land, as the property of W. S. Gibbons, Jr., the defendant in *fi. fa.* The first named is the father of the other four plaintiffs. The land so described was conveyed by deed of Archer Griffith to W. S. Gibbons. Petitioners alleged that the defendant in *fi. fa.* had no leviable interest in the property, but that his interest was in contingent remainder. The judge refused the injunction, and the petitioners excepted. For the other facts see the opinion.

M. B. Eubanks, of Rome, for plaintiffs in error. Lipscomb & Willingham, of Rome, for defendants in error.

BECK, J. (after stating the facts as above). [1] The court properly refused the injunctive relief prayed. Injunction is sought upon the sole ground that W. S. Gibbons, Jr., had no leviable interest in the property. His interest in the property levied upon is derived from the following item in the will of Samuel Gibbons, who died in 1870:

"It is my will and my desire that my executors hereinafter named, as soon as the same can be done without sacrificing the same, sell all other lands owned by me, wherever situated, and of the proceeds therefrom vest the sum of ten thousand dollars in a valuable tract of land for the use and benefit of my son, W. S. Gibbons, for and during the term of his natural life, remainder to his children, or, if the same can not be profitably invested in lands, then to be vested [invested?] in the discretion of my executors in solvent stock, the dividend or interest arising therefrom to be used by the said W. S. Gibbons during his natural life and at his death the principal to go to and be enjoyed by the children of his body."

The sum of money bequeathed was invested in a tract of land, and a deed in accordance with this item of the will was taken from the vendor, conveying the land to W. S. Gibbons (Sr.) for life, and to his children in remainder. At the time of the execution of the deed he had no children and was not married. He subsequently married, and the four children heretofore named were born to him.

The devise was to W. S. Gibbons for life, and to his children as a class in remainder. No child of the life tenant was in esse at the death of the testator, and the remainder was therefore contingent until the birth of a child; but upon the birth of a child the title to the remainder immediately vested, subject to open and take in all other children

born before the termination of the life estate. *Crawley v. Kendrick*, 122 Ga. 183, 50 S. E. 41, 2 Ann. Cas. 643; *Milner v. Gay*, 145 Ga. 858, 90 S. E. 65.

[2, 3] Having held that W. S. Gibbons, Jr., had a vested remainder interest in the property, it follows that his interest was leviable. *Wilkinson v. Chew*, 54 Ga. 602. The levy would more properly have been made upon the undivided remainder interest of W. S. Gibbons, Jr., instead of upon a one-fourth interest, inasmuch as the life estate is not yet terminated, and in case the life tenant should have other children the remainder interest would open again to let in such child or children, and the interest leviable upon by this *fi. fa.* against W. S. Gibbons, Jr., would be, not one-fourth, but an interest in remainder equal to that of each of the other remaindermen. However, this question is not raised by the petition, but the enforcement of the *fi. fa.* is combated upon the sole ground that the defendant in *fi. fa.* has no leviable interest in the property.

Judgment affirmed. All the Justices concur.

(146 Ga. 497)

WRIGHT, Ins. Com'r, v. HAMILTON.
(No. 263.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

REFUSAL OF INJUNCTION.

The court did not err in refusing an injunction in this case. *Bank v. Robinson*, 141 Ga. 78, 80 S. E. 555; *Wright v. State Mutual Life Insurance Co.*, 142 Ga. 764, 83 S. E. 666.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action for injunction by W. A. Wright, Insurance Commissioner, against L. B. Hamilton. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. C. & Philip H. Alston and H. E. Riddell, all of Atlanta, for plaintiff in error. Burton Smith and Hines & Jordan, all of Atlanta, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur.

ATKINSON, J. I adhere to the views expressed in *Wright v. State Mutual Life Insurance Co.*, supra, and, being bound by the ruling of the majority, specially concur in the judgment in this case.

(146 Ga. 442)

HAM v. A. M. ROBINSON CO. et al.
(No. 240.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. ABATEMENT AND REVIVAL ~~67~~75(1) — NEW PARTIES—RULE—EXECUTRIX.

The personal representative of a deceased defendant may be made a party by rule, as pro-

vided in the Civ. Code 1910, § 5601. Where a rule is issued against the executrix of a deceased defendant, and she objects to being made a party on the ground that the rule should not have issued until after the elapse of 12 months from the probate of her testator's will, and, though admitting that she received a copy of the rule by mail, she protests that she was not properly served, and where the hearing occurs more than 12 months after the probate of the will, a judgment, making her a party, will not be vacated on these grounds under the circumstances of the case.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 441, 445-465, 467-473.]

2. ABATEMENT AND REVIVAL §57 — DEATH OF PARTY—ACTION AGAINST CORPORATORS—"PENAL STATUTE"—"REMEDIAL STATUTE."

A statute, giving a right of action to creditors against persons who organize a corporation and transact business before the minimum capital stock has been subscribed for, is "remedial," and not "penal"; and a cause of action thereunder does not abate with the death of one liable by virtue of the statute.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 286-293.]

For other definitions, see Words and Phrases, First and Second Series, Penal Laws; Remedial Statutes.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by A. M. Robinson Company and others against M. M. Ham, and others. From the granting of a motion making Fannie B. Ham, executrix of M. M. Ham, deceased, a party defendant, she excepts and brings error. Affirmed.

J. G. Collins, of Gainesville, and Moore & Pomeroy, of Atlanta, for plaintiff in error. Hewlett, Dennis & Whitman, Smith, Hammond & Smith, A. E. Wilson and Jerome Simmons, all of Atlanta, and C. L. Collins, for defendants in error.

EVANS, P. J. A. M. Robinson and others instituted an action against M. M. Ham and others, to recover on debts incurred by the Howard Lumber Company, on the ground that the defendants had organized the company and had transacted business in its name before the minimum capital stock had been subscribed for. At the appearance term the defendants filed pleas to the jurisdiction and to the merits. Before the trial of the case M. M. Ham died testate. Fannie B. Ham probated his will, and, on May 4, 1914, qualified as his executrix. On August 5th following, on motion of the plaintiffs, the court passed an order, requiring Mrs. Fannie B. Ham, as executrix of the estate of M. M. Ham, to show cause, on September 7, 1914, why she as such executrix should not be made a party defendant in the case. A copy of this order was mailed to attorney of record for the defendant. In response to the rule to show cause why she should not be made a party defendant, Mrs. Fannie B. Ham, as executrix of M. M. Ham, filed her response, setting up that the court was without jurisdiction to make

her a party, no legal process having been served upon her; that the motion and order to make her a party was received by her through the mail; that she was exempt from suit, and not subject to be made a party defendant until after the expiration of 12 months from the probate of the will of her testator, and then only by scire facias. She further objected to being made a party on the ground that the action against her testator abated with his death. The motion to make her a party was granted on December 20, 1915. Exception is taken to this judgment.

[1] 1. The statute provides that in case a defendant shall die pending a suit, the plaintiff may sue out a scire facias immediately after the expiration of 12 months from the probate of the will or granting of letters of administration, requiring such executor or administrator to appear and answer to the cause. Civil Code 1910, § 5599. An additional method is authorized by the act of 1895, which is incorporated in Civil Code 1910, §§ 5601, 5602. There it is provided that when it is necessary or proper to make parties, the judge shall cause a rule to be prepared and signed by him, either in term time or vacation, calling upon the person to show cause why he should not be made a party, the answer to which rule may be heard in term or vacation. This latter procedure is cumulative to the former, and is that followed in the present instance. Inasmuch as the statute (Civil Code, § 4015) exempts an administrator or executor (Civil Code, § 3892) from suit for 12 months after his qualification, and the procedure to make parties by scire facias permits the plaintiff to proceed after the expiration of 12 months from the probate of the will or the granting of letters of administration, it would seem that, if the course authorized by sections 5601 and 5602 be pursued, the motion should be made after the 12 months has expired. This was not done in this case. Nor was a copy of the rule served by an officer or by some other person. Service by mail is not a recognized manner of serving papers of this kind. Nevertheless, as the plaintiff's testator was a party to the original suit, and she admits having received a copy of the rule to show cause, and as the order making her a party was entered after the lapse of 12 months from her qualification as executrix, the court will treat the matter of service, under the circumstances, as more a matter of irregularity in form than a defect in substance, and will proceed to consider the other ground of objection.

[2] 2. The executrix of the deceased defendant makes the point that the action against her testator abated with his death. It becomes necessary to inquire into the nature of the liability alleged against her testator, to determine the merits of this contention. Independently of statute, many courts

of high repute have adjudged that where persons undertake to organize a corporation and transact business before the corporation comes into legal existence as a de jure corporation by compliance with certain prerequisites, the organizers become personally liable for the debts contracted by the defectively organized corporation. Some place the liability on the suggestion of the court in *Lewis v. Nicholson*, 18 Q. B. 503, that a person contracting without authority as agent of a named principal warrants his authority as such, and is liable on such warranty. This doctrine was applied in *Farmers' Co-operative Trust Co. v. Floyd*, 47 Ohio St. 525, 26 N. E. 110, 12 L. R. A. 346, 21 Am. St. Rep. 846, under these circumstances: Certain persons undertook to organize a corporation under the laws of Ohio, and did obtain a certificate of incorporation from the secretary of state. In the certificate the capital stock of the corporation was stated to be \$50,000, and yet the organizers chose directors when less than \$3,000 had been subscribed and less than \$2,000 had been paid in, and began to transact business, incurring a large indebtedness in the name of the so-called corporation. Under the law of Ohio the corporate powers, business, and property of corporations formed for profit must be exercised, conducted, and controlled by a board of directors, who cannot be chosen until 10 per cent. of the capital stock specified in the articles of incorporation has been subscribed. It was held that persons contracting as directors when less than the required amount of stock had been subscribed, being without authority to create a corporate obligation, were personally liable. See, also, *White v. Madison*, 26 N. Y. 117. In *Burns v. Beck*, 83 Ga. 471, 10 S. E. 121, it was held that when the stock of a corporation is not subscribed for up to the minimum amount of capital fixed by the charter and none of it is paid in, if the corporators organize, elect themselves officers, proceed to business, contract debts up to and beyond its nominal capital, having paid in nothing whatever, they commit a legal fraud by so doing, and are liable to creditors to make good the minimum capital, should it be necessary to discharge the corporate debts. The liability under the facts of that case was predicated on fraud. *Howard v. Long*, 142 Ga. 789, 83 S. E. 852. The legal proposition announced in *Burns v. Beck* was subsequently introduced into the Code and adopted as statute law, and may be found as section 2220 of the Code of 1910, in the following words:

"Persons who organize a company and transact business in its name, before the minimum capital stock has been subscribed for, are liable to creditors to make good the minimum capital stock with interest."

The executrix of the deceased organizer insists that the liability sought to be charged her testator is statutory, since the ruling made in *Burns v. Beck* has been enacted into law by the General Assembly, and that, the stat-

ute being penal in character, her testator's liability thereunder abated with his death. Is the statute penal? In *Neal v. Moultrie*, 12 Ga. 104, it was held that in all cases where a statute creates a right of action and recovery in individuals, or a particular class of individuals, such statute is not penal, but remedial. The action in that case was by a creditor against the directors of a bank, and was founded on a clause of the bank's charter prohibiting the incurring of debts by the bank in excess of a certain amount, and making the directors individually liable in case of excess. In discussing this provision of the bank's charter, Nisbet, J., said:

"This is something more than a measure of prevention, founded on a policy which looks to the public at large; it is also a measure of individual security, which creates rights in individual citizens; and this is the distinction upon which this case, in our judgment, rests; a distinction founded in good sense, and, as I hope to show, upon authority."

The National Bank Act of June 3, 1864 (13 Stat. 99, c. 106), imposing a legal liability on the directors of a national bank for certain things which they may do, which result in an injury to the bank, its stockholders or creditors, and making the directors liable for the amount of the damage, has been held to be a remedial and not a penal statute. *Stephens v. Overstolz* (C. C.) 43 Fed. 465; *Boyd v. Schneider*, 131 Fed. 223, 65 C. C. A. 209. We are aware that some courts hold to be penal a statute of the character under discussion. These cases in the main overlook the differentiating feature pointed out by Nisbet, J., *supra*, viz. that the statute does something more than afford a measure of prevention, which looks to the public; it creates rights in individuals. An illustrative case is that of *Huntington v. Attrill*, 148 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. In that case the director of a corporation chartered in New York made a false oath, stating that the whole capital stock of the corporation had been paid in. By the law of New York he became liable for all the debts of the corporation contracted while he was a director. A creditor of the corporation recovered a judgment in New York by force of the statute, and afterwards filed a bill in equity in the circuit court of Baltimore city, Md., to enforce the judgment. The Court of Appeals of Maryland held that the New York judgment, being founded on a penal statute, was not enforceable in Maryland; that such a judgment did not come within the clause of the Constitution of the United States by which the judgments of the courts of any state are to have such faith and credit given to them in every court of the United States as they have by law and usage in the state in which they were rendered, because "the courts of no country execute the penal laws of another." On writ of error the Supreme Court of the United States held that:

"The question whether a statute of one state, which in some aspects may be called penal, is a

penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act. A statute making the officers of a corporation, who sign and record a false certificate of the amount of its capital stock, liable for all its debts, is not a penal law in the international sense."

A most prominent feature of Civil Code, § 2220, is the creation of a right of action in creditors against the organizers of a corporation who foist it upon the public as having been properly and legally organized, and contract debts in its behalf. Clearly the statute is remedial as to giving creditors an additional source from which to collect their debts. So distinctive is this object and purpose that it stamps the statute as one creating rights in others; as remedial and not penal. When the statute was under consideration by this court in another case, it was said:

"The liability imposed by the statute above cited is so far penal in its nature as to require a strict construction." *Farwell Co. v. Jackson Stores*, 137 Ga. 174, 176, 73 S. E. 13, 14.

But this observation was not intended to be a ruling that the statute was penal, but rather that, being in derogation of the common law, it must be strictly construed. This is apparent for the reason that the above quotation purports to be based on the authority of *Banks v. Darden*, 18 Ga. 318 (3), which rules that a similar statute was remedial and not penal, but that the remedy, being in derogation of common law, should be strictly pursued. Being convinced that the statute is remedial and not penal, the action falls within the principle that statutory actions against organizers of corporations for debts incurred by the corporation survive against the personal representatives of a deceased organizer, where the statute creating such liability is remedial. See 1 C. J. 212.

Judgment affirmed. All the Justices concur.

(146 Ga. 459)

CITY COUNCIL OF AUGUSTA et al. v. BREDENBERG. (No. 244.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. CEMETERIES — 15 — BURIAL LOTS — EASEMENT — REGULATION.

The city of Augusta owned and maintained a cemetery. An ordinance was duly passed declaring: "The City Cemetery shall be under the special charge of a committee to be styled, 'The Committee of City Cemetery.' It shall be the duty of said committee, whenever it becomes necessary, to lay out or alter such avenues or walks and to make such rules and regulations as they may deem requisite and proper for the management of said cemetery and those employed therein." Thereafter another ordinance was adopted, which provided that the city council shall elect, "an officer who shall be known as 'cemetery brick mason and gravedigger.'" The

ordinance also specified that the officer should maintain an office in the cemetery, and provided that his term should be for three years, and that he should receive specified fees for digging graves and constructing vaults; and provided, further, "that any brick mason shall have the privilege of doing this work when called on." This ordinance was amended by another ordinance by striking out the words last quoted, and inserting in lieu thereof the words: "That any brick mason resident and doing business in the city of Augusta shall have the privilege of doing any work in the cemetery, except such work as specifically provided for in section 2 of this ordinance" (digging of graves and constructing vaults). Prior to the amendment last mentioned a person had paid to the city treasurer the customary price for certain lots, and received certificates signed by the city sexton and countersigned by the city treasurer, which, omitting dates, names, description of land, and consideration, were as follows: "This is to certify that — has bought of the city council of Augusta — section in the City Cemetery, known on plan of same as — section and numbered — for the sum of \$ —, the receipt whereof is hereby acknowledged; and this certificate and receipt when countersigned by the collector and treasurer will give the purchaser a fee-simple title." After the passage of the ordinance last mentioned the person holding the certificates to the lots employed a person who for a number of years had been city sexton, to remove the body of the deceased wife of the holder of the certificates from one lot to another lot in the cemetery, which involved the digging of graves. When the person so employed requested permission from those in charge of the cemetery to dig the graves, he was denied the privilege of doing so, for no other reason than that, under the ordinance last mentioned, no person was authorized to dig graves or construct vaults other than the city brick mason and gravedigger. *Held:*

The holder of the certificates for the burial lots did not by virtue of such certificates become the owner of the fee in the lots, but merely of an easement therein for the purpose of burying the dead and maintaining the grounds as a burial place, subject to reasonable control and regulations by the city. *Nicolson v. Daffin*, 142 Ga. 729, 83 S. E. 658, L. R. A. 1915E, 168; *Stewart v. Garrett*, 119 Ga. 386, 46 S. E. 427, 64 L. R. A. 99, 100 Am. St. Rep. 179.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 16-18.]

2. CEMETERIES — 3 — EASEMENT — REGULATIONS.

The right of the holder of the easement was subject to the subsequent regulation imposed by an ordinance providing that no person other than the city brick mason and gravedigger should dig graves or construct vaults in the city cemetery.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 3.]

3. CEMETERIES — 3 — CONSTITUTIONAL LAW — 212, 278(1) — CEMETERY ORDINANCE — REASONABLENESS—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS.

The provision of the ordinance mentioned in the preceding note was not unreasonable solely because of its exclusiveness, and was not in violation of the due process clause, or the equal protection clause, of the Constitution of the United States (Fourteenth Amendment), or of the Constitution of the state of Georgia (article 1, § 1, par. 3).

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 3; *Constitutional Law*, Cent. Dig. §§ 684, 705, 818.]

4. ENFORCEMENT OF ORDINANCE—INJUNCTION.

It was erroneous to enjoin the city and its officers from enforcing the ordinances mentioned above, in so far as they prevented the plaintiff from digging graves and constructing vaults in the city cemetery.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit for injunction by J. H. Bredenberg against the City Council of Augusta and others. Judgment for plaintiff, and defendants bring error. Reversed.

Isaac S. Peebles, Jr., of Augusta, for plaintiff in error. C. Henry & R. S. Cohen, of Augusta, for defendant in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 447)

FULTON COUNTY et al. v. WRIGHT, Comptroller General, et al. (No. 241.)

(Supreme Court of Georgia. Feb. 14, 1917.)

(Syllabus by the Court.)

1. TAXATION — 282 — RAILROADS — GENERAL DEPOSITS — "CHOSE IN ACTION" — "LOCATED PROPERTY."

Money placed on general deposit in a bank by a railroad corporation, subject to check, creates a chose in action, and is taxable for county and municipal purposes in the county and municipality wherein the principal office of such corporation is located by its charter or by law. "Such property is 'located' property in the meaning of the law of this state providing the machinery for distributing the property of railroad companies for county and municipal taxation."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 460.]

For other definitions, see Words and Phrases, First and Second Series, Chose in Action; Second Series, Located Property.]

2. REFUSAL OF MANDAMUS.

The court did not err in refusing the mandamus.

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Petition for mandamus by Fulton County and other counties and by the City of Atlanta and other cities, against W. A. Wright, Comptroller General. Judgment for defendant, and petitioners bring error. Affirmed.

This was a petition for mandamus brought by the counties of Fulton, De Kalb, Rockdale, Newton, Walton, Morgan, Greene, Taliaferro, Warren, McDuffie, Columbia, Oglethorpe, and Clarke, and the cities of Atlanta, Covington, Madison, Greensboro, Union Point, Crawfordville, and Thomson, against William A. Wright, comptroller general of Georgia, to compel the distribution of certain taxes of the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company. Richmond county, the board of education of Richmond county, and the city council of Augusta were permitted to intervene. By agreement of all parties the case was submitted to the trial judge, without a jury, up-

on an agreed statement of the facts, with right of exception to the Supreme Court, the facts appearing in the admissions of the pleadings, the return for taxes, the testimony of W. H. Vincent, auditor of the Georgia Railroad, and a letter from counsel for the taxpayers to the comptroller general. The letter and agreed statement of facts were as follows:

"Hon. Wm. A. Wright, Comptroller General, Atlanta, Ga., Aug. 4, 1915—Dear Sir: Judge Sibley advises me that he is thinking of applying for a mandamus requiring you to assess the item of taxable property of the lessees of the Georgia Railroad & Banking Company, to wit, 'cash on hand and due from other railroads' to the counties and municipalities through which the road of the lessor runs. At Judge Sibley's request I write to say that the return will be made in such manner as you may direct or as the courts should decide. There seems no reason why the taxpayer in this instance should be made a party to the mandamus proceedings, which, as I understand, will apply only to the taxes for the year 1915 and future years. Very truly yours, Jos. B. Cumming.

"Copy to Hon. Samuel H. Sibley, as answer to his of August 2d.

"The tax return of Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, as lessees of the Georgia Railroad, of all property of said company subject to taxation on January 1, 1915, was read, same dated July 12, 1915, and sworn to by Chas. A. Wickersham as general manager of said lessees, containing among others an item: 'Cash on hand, and amounts due from other roads, \$92,728.' Under the portion of the return making distribution of the property returned occurs the following: 'Value of rolling stock and all other personal property in this state, \$92,728; pro rata value of personal property located in county Richmond, \$92,728; pro rata value of personal property in city Augusta, \$92,728.' The return was blank as to the value of track and real estate in each county and city. It showed, however, the following items: 'Value of real estate not used for railroad purposes: Greene county, \$1,333; Clarke county, \$26,400; Richmond county, \$11,550—and similar amounts in the cities of Greensboro, Athens, and Augusta, respectively, no other property being returned.

"The depositions of W. H. Vincent, taken by consent, were in substance as follows: I am the auditor of the Georgia Railroad. The figures for the tax returns of the Georgia Railroad are made up in my office, and sent to the general manager to be sworn to. That is true of the return for 1915, in which \$92,728.20 is returned as cash on hand and amounts due from other railroads. This money so returned comes from earnings from freight and passengers, mail pay, and miscellaneous earnings; it represents, of course, the funds on hand at certain dates after expenditures have been made. These expenditures are incurred in the operation of the Georgia Railroad. The Georgia railroad is operated by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company as lessees. The money taken in by the agents is deposited in the following depositories: Georgia Railroad Bank, Augusta, Ga.; Fourth National Bank, Atlanta, Ga.; American National Bank, Macon, Ga.; Farmers' Bank, Monroe, Ga.; Bank of Monroe, Monroe, Ga.; treasurer Georgia Railroad, Augusta, Ga.; Georgia National Bank, Athens, Ga. These depositories are named by the treasurer for certain agents to deposit in, the agencies to deposit in each being as follows. * * * The deposits are made in

the name of the Georgia Railroad, and W. S. Morris, treasurer, takes charge of them after they are made. The disbursements as a general proposition are made through the Georgia Railroad Bank, Augusta, Ga.; in some cases through the Fourth National Bank, Atlanta, Ga. These two are considered the main depositories of the Georgia Railroad. Transfers of funds are made as the case may be from the various banks to the Georgia Railroad Bank at Augusta, as I said all disbursements are made through it, and to do that, of course, transfers have to be made. In some special cases disbursements are made through the Fourth National Bank, Atlanta. When this return was made the percentages in each depository was:

	Per cent.
Georgia Railroad Bank, Augusta, Ga.	14.02
Fourth National Bank, Atlanta....	27.00
American National Bank, Macon...	38.00
Farmers' Bank, Monroe	4.06
Bank of Monroe, Monroe	3.54
Treasurer Ga. R. R., Augusta.....	7.92
Georgia National Bank, Athens,....	4.86
	100.00

"That percentage fluctuates. The percentage stated is rather an abnormal one. The bulk of the money is kept in the Georgia Railroad Bank at August, Ga. It and the Fourth National Bank are considered the main depositories. As to whether it is a matter of uncertainty where the largest portion is on any particular day, it is left entirely with the treasurer of the Georgia Railroad, who adjusts the situation every morning, and as the balance shrinks in the Georgia Railroad Bank at Augusta he replenishes the fund by transferring from the other depositories. The partnership, as you might call it, of the Louisville & Nashville Railroad Company and Atlantic Coast Line Railroad Company have their headquarters in Augusta, Ga. The headquarters of the lessees of the Georgia Railroad & Banking Company is located at Augusta, Ga. These depositions are taken at my office there, the treasurer of the organization is there, and the head offices are at Augusta. W. S. Morris, the treasurer, has his office at Augusta. He has in charge the disbursement of the funds of the lessee company, upon regularly approved vouchers. Those vouchers are sight drafts on the treasurer, who gives checks to cover these drafts, which checks are countersigned by the auditor. He signs these checks at Augusta, drawing through the Georgia Railroad Bank at Augusta. All the money of the Georgia Railroad is under his supervision. As a general proposition, the money in these depositories is put there temporarily, and for convenience, but there are other reasons entering into the situation. As a rule the disbursements are made through the Georgia Railroad Bank, except on special occasions, and then through the Fourth National Bank. The Georgia Railroad does not send out a pay train with cash. Payments are made with checks. Vouchers are sent out to parties in settlement of invoices and other accounts, which when properly dated and receipted become a sight draft on the treasurer at Augusta, and those drafts are paid the banks by the treasurer by checks drawn by him on the Georgia Railroad Bank. This cash has been returned for the city of Augusta and county of Richmond since 1903, the first return being in 1910. The agents of the Georgia Railroad are permitted to cash these vouchers, but as they are sight drafts on the treasurer, they may be returned if not properly dated and receipted. We have several means of paying claims for overcharges and damage to goods in transit. On overcharges the agent pays direct from his station funds, taking proper receipt therefor, remitting to the freight claim agent for his relief. On loss and damage claims they are also settled in this manner up to a certain stated amount. Sight drafts are also

used as a medium of paying claims, sent by the freight claim agent direct to the payee. The headquarters of the Louisville & Nashville Railroad company are at Louisville, Ky.; of the Atlantic Coast Line Railroad Company at Wilmington, N. C. They are both foreign corporations. The residence of the general manager of the Georgia Railroad, Mr. Wickersham, is College Park, Fulton county, Ga. The residence of the general passenger agent of the Georgia Railroad is Atlanta, Ga. He has a general passenger office there, too. He has also an office in Augusta. The general manager, Mr. Wickersham, has an office in Atlanta. Of the other general officers having their offices in Atlanta are the superintendent of maintenance of way and superintendent of car service. The general manager has his office in Augusta. The general passenger agent in Atlanta, the superintendent of maintenance of way, and superintendent of car service have their offices in Atlanta. The others, including the treasurer, general freight, general freight claim agent, superintendent, chief law agent, auditor, general counsel, and superintendent motive power and equipment have their official offices in Augusta. The general machine shops are in Augusta, and the general manager's official office. We have no meetings of stockholders and directors. Conferences with the other officers of the Georgia Railroad are held by the general manager in Augusta. He does confer also with other officials in his Atlanta office. It is true that he spends most of his time in Atlanta."

After argument the court held that the property in dispute was taxable in Augusta and Richmond county, and refused a mandamus. To this judgment the petitioners excepted and assign error on the ground, among others, because the money was property, the tax on which is distributable under the statutes of Georgia, and that the comptroller general should have been required to distribute the same, and to require such returns for taxation as would distribute the same.

Saml. H. Sibley, of Union Point, for plaintiffs in error. Pierce Bros., C. Henry Cohen, and Isaac S. Peebles, Jr., all of Augusta, and Clifford Walker, Atty. Gen., for defendant in error.

HILL, J. (after stating the facts as above). This case is controlled by the principle decided in the case of *Greene County v. Wright*, 126 Ga. 504, 54 S. E. 951. That case is so thoroughly reasoned out that we will not undertake to cover the same territory again. In the view we take of the case, it is only necessary to point out wherein that decision is controlling in the instant case. In that case the Georgia Railroad & Banking Company, a domestic corporation whose railroad is wholly within this state, and which was shown to run through the territorial limits of each of the counties and municipalities which were the petitioners (the same counties being petitioners in that case as in this), owned in the state of Georgia 15,000 shares of the capital stock of the Western Railway of Alabama, a corporation of the state of Alabama. In that case it was held that:

"Stock in a nonresident railroad corporation owned by a domestic railroad company is taxable for county and municipal purposes in that county and city wherein the principal office of

such corporation is fixed by its charter or by-law. Such property is 'located' property in the meaning of the law of this state providing the machinery for distributing the property of railroad companies for county and municipal taxation."

[1] In the instant case the Georgia Railroad returned for taxation, among other things \$92,728.20 as "cash on hand and amounts due from other railroads." This money so returned, according to the agreed statement of facts, came from freight and passenger earnings, mail pay, and miscellaneous earnings on hand at certain dates after expenditures were made in the operation of the railroad. The Georgia Railroad is operated by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company as lessees. The money collected by the agents of the railroads is deposited in certain "depositories," being the following banks: Georgia Railroad Bank, Augusta, Ga.; Fourth National Bank, Atlanta, Ga.; American National Bank, Macon, Ga.; Farmers' Bank, Monroe, Ga.; treasurer Georgia Railroad, Augusta, Ga.; Georgia National Bank, Athens, Ga.

At the date of the tax return each of the above banks had money on deposit in the name of the Georgia Railroad ranging in percentage from 4.88 per cent. to 38.60 per cent. of the amount returned for taxation. The percentage in each bank fluctuated according to the statement of facts. As to whether it is a matter of uncertainty where the largest portion is on any particular day, it is left entirely with the treasurer of the Georgia Railroad, who adjusts the situation every morning, and as the balance shrinks in the Georgia Railroad Bank at Augusta he replenishes the fund by transferring money from other depositories. It will thus be seen that the sum returned for taxation was in the various banks and with the treasurer at Augusta, where the principal office of the railroad is. When the money was placed on general deposit in the banks, the title to the money passed to the banks, and it ceased to be the money of the railroad, and the right of the railroad to the amount deposited became a chose in action. *McGregor v. Battle*, 128 Ga. 577, 58 S. E. 28, 13 L. R. A. (N. S.) 185. And a chose in action is taxable at the domicile of the owner. *Greene County v. Wright*, 126 Ga. 504, 54 S. E. 951. See *City Council v. Dunbar*, 50 Ga. 387, 393; *Richmond County v. Augusta*, 90 Ga. 634, 648, 17 S. E. 61, 20 L. R. A. 151. But it cannot be said that the money placed on general deposit in these depositories is the money of the railroad, and is taxable as such in each county where deposited. Really what the railroad had to give in for taxation was not money at all, but the chose in action against the banks, or the right to the amount of money so deposited when called for, or checked out, unless, of course, which does not appear, the money itself, by agreement, was to remain

in the banks as the money of the railroad depositing it. It appears from the agreed statement of facts that disbursements of the money deposited, as a rule, were made by checks through the Georgia Railroad Bank, at Augusta, Ga., one of the depositories. This being so, the chose in action—the right of the railroad to the amount of money deposited with the banks—would be taxable under the decision in the *Greene County Case*, 126 Ga. 504, 54 S. E. 951, at the main office of the railroad which is in Augusta, Richmond county, Ga.

[2] It follows from what has been said that the court did not err in refusing the mandamus.

Judgment affirmed. All the Justices concur.

(19 Ga. App. 285)

SELLERS et al. v. WOLVERINE SOAP CO.
(No. 7329.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. TRIAL ~~6~~168 — DIRECTED VERDICT—EVIDENCE.

It does not appear in this case that the evidence introduced, with all reasonable deductions or inferences therefrom, demanded a particular verdict. The court therefore erred in directing the verdict returned. See *Wolverine Soap Co. v. Sellers et al.*, 13 Ga. App. 880, 79 S. E. 246.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 341, 376-380.]

2. EVIDENCE ~~6~~370(4) — GUARANTY ~~6~~4 — SERVICES OF SALESMAN—RECORD—EVIDENCE.

There is no provision of law requiring the record of a written instrument guaranteeing the performance of a contract for the services of a salesman. Such a paper is not a mortgage, or a conditional bill of sale, or an instrument of like character; nor does it describe any property with sufficient certainty to constitute constructive notice, if recorded, as to the articles or goods sold or to be sold to the salesman. The execution of the instrument being admitted, the court did not err in receiving it in evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1538, 1564, 1567, 1569, 1573; *Guaranty*, Cent. Dig. §§ 3-6.]

3. REVERSAL—QUESTION FOR JURY.

The issues involved should have been submitted to a jury, and for that reason alone the judgment of the lower court is reversed.

Error from City Court of Cairo; W. J. Willie, Judge.

Action by Wolverine Soap Company against R. L. Sellers and others. Judgment for plaintiff on directed verdict, and defendants bring error. Reversed.

Jesse M. Sellers, of Chatsworth, S. P. Cain, of Whigham, W. V. Custer, of Bainbridge, and D. W. Blair, of Marietta, for plaintiffs in error. R. C. Bell and J. S. Weathers, both of Cairo, for defendant in error.

WADE, C. J. Reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 351)

MURPH MACHINERY CO. v. BURKE.

(No. 8153.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)*(Syllabus by the Court.)***1. COMPROMISE AND SETTLEMENT — 24 —
TERMS OF COMPROMISE — QUESTION FOR
JURY.**

There was evidence from which the jury could properly infer that the attorney at law for the plaintiff had special authority from his client to discharge the claim against the defendant and settle a suit pending thereon for less than the full amount in cash apparently due on the claim; and the conflict as to the exact terms of the compromise agreement finally arrived at between that attorney and the defendant's attorney was for determination by the jury.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. § 95.]

2. OVERRULING MOTION FOR NEW TRIAL.

There is no substantial merit in any of the special assignments of error; and since there was evidence to support the verdict, the court did not err in overruling the motion for a new trial.

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Action between the Murph Machinery Company and J. F. Burke. Judgment for the latter, and the former brings error. Affirmed.

Feagin & Hancock, of Macon, for plaintiff in error. Chambers & Deaver, of Macon, for defendant in error.

WADE, O. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 331)

BUXTON v. STATE. (No. 7914.)(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)*(Syllabus by the Court.)***1. HOMICIDE — 300(14)—INSTRUCTIONS—VOL-
UNTARY MANSLAUGHTER.**

"On the trial of one for murder, where the evidence or the defendant's statement at the trial would authorize the jury to find that the person killing acted in self-defense on account of a reasonable fear aroused in his mind by words, threats, or menaces, in connection with the other facts in the case, it is not erroneous for the court, in instructing the jury on the law of voluntary manslaughter, as contained in Pen. Code 1910, § 65, to fail or refuse to charge in immediate connection therewith the right of the jury to consider words, threats, or menaces in determining whether the circumstances attending the homicide were such as to justify the fears of a reasonable man that his life was in imminent danger or that a felony was about to be committed upon his person." *Deal v. State*, 145 Ga. 33, 88 S. E. 573.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 629.]

2. MOTION FOR NEW TRIAL—RULING.

The evidence authorized the verdict, and the errors assigned in the motion for new trial are almost identical with the errors alleged in the case of *Deal v. State*, supra. Accordingly the court did not err in overruling the motion for a new trial.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Will Buxton was convicted of murder, and he brings error. Affirmed.

C. W. Turner, of Metter, for plaintiff in error. R. L. Moore, Sol. Gen., of Statesboro, and Walter F. Grey, Sol. Gen., of Swainsboro, for the State.

LUKE, J. Judgment affirmed.

WADE, O. J., and GEORGE, J., concur.

(19 Ga. App. 394)

**LOGANVILLE BANKING CO. v. FOR-
RESTER et al.****FORRESTER et al. v. LOGANVILLE
BANKING CO.**

(Nos. 7505, 7561.)

(Court of Appeals of Georgia. Feb. 16, 1917.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR — 1098(4)—LAW OF
CASE—SUBSEQUENT APPEAL—JURISDICTION.**

This suit as originally filed was an ordinary action on notes, brought against R. A. Forrester & Co. and S. N. Forrester. Subsequently the plaintiff amended its petition by striking out all prayers asking for a general judgment against the defendants, and praying for a special judgment against the land of S. N. Forrester only. The case was referred to an auditor, and his findings in favor of the defendant were excepted to. The exceptions of law were overruled by the trial judge; the exceptions of fact were submitted to a jury, and a verdict was rendered finding against them, and a judgment was entered for the defendant. A motion for a new trial was overruled, and the case was brought to this court, where the judgment was reversed, and the case sent back for a new trial. 17 Ga. App. 246, 87 S. E. 694. Upon the new trial the defendant made a motion to dismiss the entire case, on the ground that the city court of Monroe was deprived of jurisdiction by the plaintiff when it amended its original petition as aforesaid, the contention being that the amendment left the cause a purely equitable one, of which the city court of Monroe had no jurisdiction. This motion was overruled, and the defendant filed exceptions pendente lite, upon which he assigns error in his cross-bill of exceptions. The question involved in this assignment of error is whether the trial court had jurisdiction to render the special judgment against the land, as prayed for in the amendment to the petition. When this court rendered its decision reversing the judgment of the lower court, the defendant in error, within the time allowed by law, made a motion for a rehearing of the case, and in that motion specifically called the attention of this court to this amendment to the petition, and pointed out the alleged lack of jurisdiction of the city court of Monroe to render the judgment therein prayed for. The rehearing was denied, and, although in the decision of this court on the motion for a rehearing, written by Judge Wade, this point is not discussed, nevertheless it must be held that when the court declined to grant the motion for a rehearing and adhered to its former ruling, it passed upon all the questions made in that motion, including this one of alleged lack of jurisdiction of the trial court. Consequently the judgment of this court, which became the law of the case, is that the lower court had jurisdiction to render the special judgment against the land as prayed for in the amendment to the

plaintiff's petition. It follows that the court did not err in overruling the motion of the defendant to dismiss the cause for the alleged lack of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4356.]

2. ASSIGNMENTS OF ERROR—MERITS.

The other assignments of error in the cross-bill of exceptions are without merit.

3. APPEAL AND ERROR §1099(1)—REFERENCE §105—LAW OF CASE—SUBMISSIONS OF EXCEPTIONS.

When this case was formerly before us (17 Ga. App. 246, 87 S. E. 694), the matter of res judicata was (as it is now) the controlling point, and it was then held by this court that the defendant was estopped by the judgment of the United States District Court for the Northern District of Georgia holding that the deed in question was valid, from thereafter asserting in the state courts its invalidity on the ground that it was infected with usury. When the judgment of this court was made the judgment of the lower court, counsel for both sides agreed in writing to try the case solely on the question of res judicata, and to confine the issues to exceptions of law to the auditor's report, numbered 1, 2, 3, and 10, and exceptions of fact numbered 15 and 21; these exceptions being the ones pertaining to the question of res judicata. Under the former decision of this court in this case the question of res judicata was finally settled. The issue as to whether the deed in question was a valid conveyance, although infected with usury, was concluded in favor of the validity of the deed, and it was distinctly held that the bankrupt (who is the defendant in this case) was estopped by the judgment in the United States District Court from asserting in this case the invalidity of the deed upon the ground of usury, although the question of usury was not passed upon by the federal court: Judge Wade, who wrote the opinion for this court, saying: "No claim of usury was in fact presented by the trustee in bankruptcy in the proceedings brought by him in the federal court to set aside and cancel the security deed therein attacked, and which it is now sought to avoid in the state courts on that ground. This fact is, however, immaterial, in view of the ruling made by this court that the claim of usury was one which the trustee in bankruptcy could have advanced in the proceeding brought by him in the bankruptcy court to set aside the deed given to secure the debt * * * due to the Loganville Banking Company by Forrester et al., since it is well settled that in this state judgments conclude the parties, not only upon the matters expressly involved in the litigation, but also upon all that might properly have been called in question under the pleadings in the case. * * * As the trustee stood in the place of the bankrupt and could have availed himself, as fully as the bankrupt himself could have done, of the defense of usury, in attacking the security deed made by the bankrupt to the Loganville Banking Company, the fact that he failed to urge this legal objection to the deed under attack cannot inure to the benefit of the bankrupt he represented, since in the suit brought by him to set aside this deed there was an adjudication of every issue that was raised or could properly have been raised in that proceeding. The defense of usury, though not presented by the trustee in that proceeding, would be res judicata as to him in a subsequent proceeding brought under the laws of Georgia, and therefore the plea of res judicata would be good as against the bankrupt, now seeking to set up this defense in the state courts." It is clear from what has been said that the controlling question in this case is one of law, and that it was definitely settled by this court in the decision just referred to, and has

become the law of the case. The verdict and judgment for the defendant were contrary to the law and the evidence, and the court erred in overruling the motion for a new trial. In view of this ruling it is unnecessary to consider the other assignments of error in the main bill of exceptions or in the motion for a new trial.

It is clear from a consideration of the case that the material parts of the exceptions of fact, Nos. 15 and 21, to the auditor's report, are really exceptions of law. It was therefore error for the court to submit these exceptions to the jury.

Under all the facts and the history of this case, and for the purpose of ending this long and expensive litigation, the controlling point in the case having been clearly and unequivocally passed upon by this court in its former decision, and no other legal result except a finding for the plaintiff being possible, and there being no issues of fact to be passed upon by a jury, the judgment of the lower court is reversed, with direction that the aforesaid exceptions of law to the auditor's report, and the so-called exceptions of fact thereto, be sustained, and that a special judgment against the land in question be entered up in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370, 4374; Reference, Cent. Dig. § 205.]

Error from City Court of Monroe; A. C. Stone, Judge.

Suit by the Loganville Banking Company against S. N. Forrester and others. From the judgment, the Loganville Banking Company excepts and brings error, and defendants bring a cross-bill of exceptions. Reversed on main bill of exceptions, with directions, and affirmed on cross-bill of exceptions.

See, also, 17 Ga. App. 246, 87 S. E. 694.

J. H. Felker, of Monroe, for plaintiff in error. R. L. Cox and O. Roberts, both of Monroe, and A. J. Cobb, of Athens, for defendants in error.

BROYLES, P. J. Judgment on the main bill of exceptions reversed, with direction; affirmed on the cross-bill of exceptions.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 328)

BENSON et al. v. HARRIS, Governor.
(No. 7673.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §588—EXCEPTIONS, BILL OF—DISMISSAL.

The motion to dismiss the bill of exceptions, upon the ground that it does not appear from the record specified and sent up, or from the bill of exceptions, that any brief of evidence was filed in the court below must be denied; it affirmatively appearing from the record that the case was heard and determined by the court upon the admission of the adverse party that the statement of facts contained in the answer to the scire facias was true, and the answer being specified in the bill of exceptions as a part of the record and duly transmitted to this court; especially since it further appears that the "statement of facts" was in truth only an agree-

ment that the facts recited in the response were true. *Lindsey v. Hardeman*, 60 Ga. 61.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610.]

2. BAIL ~~6~~74(1) — BAIL BONDS—DISCHARGE.

Where a person was arrested on a charge of stabbing, gave bond to appear at the city court of Carrollton, to be held in and for the county of Carroll on the first Monday in December, 1915, to answer for such offense, and thereafter, at the October term, 1915, of Carroll superior court, a true bill of indictment was returned against him, charging him with the offense of assault with intent to murder, but in fact involving the same transaction, and upon the finding of the true bill the judge issued a bench warrant, under which he was arrested and taken into the custody of the sheriff of the county, from whose custody he subsequently escaped, *held*, applying the "same-transaction test," the indictment charged the same offense, or a higher grade of the same offense, as that for which bail was given by the defendant, and his rearrest on the bench warrant discharged the sureties. The only consideration on the undertaking of the sureties, accruing to them, was the custody of the principal, and, this consideration having failed, their liability ceased, and the subsequent escape of the defendant, through no fault of the sureties, does not alter the rule. *Smith, Gov., v. Kitchens*, 51 Ga. 159, 21 Am. Rep. 232; 6 C. J. p. 1027, § 282; 3 R. C. L. p. 52, § 62. The subsequent indictment and arrest of the defendant were both legal and proper, but the state—the obligee in the bond—having elected to charge the defendant with a more serious offense, growing out of and involving the same transaction in which the bond for his appearance before the city court was given, released the sureties from further liability when it took the defendant into custody. The subsequent arrest or custody of one on another charge, while he is out on bail, does not operate, *ipso facto*, as a discharge of his bail, but its effect depends upon its continuance. The decision in *Cooper v. Brown*, Governor, 10 Ga. App. 730, 73 S. E. 1101, while authority upon the general proposition announced in this case, is unsound on the peculiar facts in that case.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 289-308.]

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceedings by N. E. Harris, Governor, against Walter Benson and others, on a bail bond. There was a judgment for plaintiff, and defendants bring error. Reversed.

Leon Hood, of Carrollton, for plaintiffs in error. C. E. Roop and Willis Smith, Sols., both of Carrollton, for defendant in error.

GEORGE, J. Walter Benson, as principal, and Willis Latimore, Will Allen, R. P. Crockett, and R. H. Fletcher, as sureties, entered into a bond to the sheriff of Carroll county, by which they acknowledged themselves to be indebted to the Governor of this state and his successors in office, in the sum of \$300, this obligation to be void on condition that the principal make his personal appearance before the city court of Carrollton to answer to the offense of stabbing. At the March term, 1916, of that court the bond was forfeited and a rule issued, calling upon the sureties to show cause at the next term of the court why the order forfeiting the bond should not

be made absolute. At the next term the sureties filed an answer to the *scire facias*, in which they admitted the making of the bond in the sum and on the condition stated above. They further alleged that Benson, the principal, was accused of an assault on the 8th day of August, 1915, upon one Les Horton, and that upon the affidavit charging him with this offense an accusation was filed in the city court of Carrollton, charging him with the offense of stabbing; that at the October term, 1915, of the superior court of Carroll county the grand jury of the county returned a true bill of indictment against him, charging him with the offense of assault with intent to murder alleged to have been committed upon the said Les Horton; that the accusation in the city court of Carrollton and the bill of indictment returned by the grand jury "involved and covered the identical and same transaction"; that after the return of the indictment the judge of the superior court of Carroll county issued a bench warrant and caused it to be placed in the hands of the sheriff of the county, and that their principal, Benson, was arrested under it and taken into the custody, power, and control of the state of Georgia through the said sheriff, but subsequently escaped from the sheriff. Counsel for the state agreed in writing that all the facts stated in the response were true. On the pleadings and on the admission of counsel for the state referred to, the judge of the city court of Carrollton, at the June term, 1916, rendered a judgment making the rule absolute. In the judgment it is recited that the securities "filed their answer, and, the issue raised thereby coming on to be heard before the court this day without the intervention of a jury, by agreement of counsel, and it being admitted that the allegations of facts made in said answer to the *scire facias* are true, but not the conclusions drawn therefrom," etc., the answer was in fact filed in the office of the clerk of the city court of Carrollton, also the "agreed statement of facts," and both this agreement and the answer of the sureties were referred to in the bill of exceptions and duly specified as parts of the record. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 370)

MACON, D. & S. R. CO. v. ROBINSON.
(No. 8218.)

(Court of Appeals of Georgia, Division No. 1,
Feb. 16, 1917.)

(Syllabus by the Court.)

TRIAL ~~6~~423—INSTRUCTIONS — CORRECTION OF ERROR.

The charge of the court as to the methods of using the mortality and annuity tables was incorrect and misleading, and the error thus com-

mitted was not cured by the plaintiff writing off a part of the recovery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 984, 986.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by Lucius Robinson against the Macon, Dublin & Savannah Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Minter Wimberly and Chas. Akerman, both of Macon, and J. S. Adams, of Dublin, for plaintiff in error. Robt. L. Berner, of Macon, Earl Camp, of Dublin, and Little, Powell, Smith & Goldstein, of Atlanta, for defendant in error.

LUKE, J. Lucius Robinson, an employé of the Macon, Dublin & Savannah Railroad Company, brought suit under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), alleging that while engaged as a switchman he received an injury resulting in the loss of both legs, and that the injury was occasioned by the negligence of the company. The acts of negligence were fully pleaded. The defendant agreed in open court that:

"The Macon, Dublin & Savannah Railroad Company at the time that Lucius Robinson was injured was engaged in interstate commerce. That does not mean that this particular engine upon which it is alleged he was injured was at that time engaged in interstate commerce, but that shipments were made to and received from points out of the state of Georgia prior to the accident, at the time of the accident, and since the accident."

The trial resulted in a verdict for the plaintiff in the sum of \$7,500. The defendant's motion for a new trial was overruled, and to this judgment it excepted.

1. In the motion for a new trial it is alleged that the verdict is contrary to law and without evidence to support it, "because plaintiff pleaded that he and defendant were engaged in interstate commerce at the time he was hurt, and the evidence shows that plaintiff was hurt on a switch engine moving in the yards of the defendant and not engaged in interstate commerce." In another ground of the motion the defendant assigns error because the court charged the jury that "the plaintiff can recover in this case even if you find from the evidence that he was guilty of contributory negligence and was more at fault than the defendant company, provided you find from the evidence that the defendant company was also negligent in one or more ways defined in the plaintiff's petition," the movant alleging that this charge was not applicable to the evidence, and that it assumed that the defendant was engaged in interstate commerce, whereas the evidence shows that plaintiff was hurt while on an engine between two points in the same city and carrying no interstate traffic. The defendant admitted that it was a carrier en-

gaged in interstate commerce at the time of the plaintiff's injury, and the defendant's engineer in charge of the engine testified that the switch engine on which the plaintiff was working and by which he was injured had been engaged in switching cars and making up trains that were composed of foreign cars and interstate shipments just before the injury; that at the moment of the injury the engine and crew were on the way to the water tank to get water; that this water was necessary to create steam and power to run the engine with, and that it was necessary to have this water so as to be able to return to the work of switching both intrastate and interstate shipments, etc.

Ordinarily, in a suit by an injured employé against a railroad company, where he contends that his employer and himself were engaged in interstate commerce at the time of his injury, and the employer denies that they were engaged in interstate commerce, there being an issue of fact upon the question, upon which the jury would be authorized to find either way, according as they might credit the witness testifying, the court should leave that question to the jury; but where the facts are such that they of themselves, under the rulings of the courts in the construction and application of the federal Employers' Liability Act, remove the issue, the simple denial by the employer will not require the court to submit this issue to the jury. In the case of *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 151, 33 Sup. Ct. 648, 649, 57 L. Ed. 1127, Ann. Cas. 1914C, 153, Mr. Justice Van Devanter, delivering the opinion for the court, said:

"That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency' * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But, independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the busi-

ness as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? [Citing many cases.] Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such. True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

See, also, *L. & N. R. Co. v. Parker*, 242 U. S. 13, 37 Sup. Ct. 4, 61 L. Ed. —, decided by the Supreme Court of the United States November 13, 1916, and cases cited.

The getting of water by the engine was necessary to the use of the engine for the purpose of handling the interstate traffic of this defendant. The court did not err in holding that the cause proceeded under the federal Employers' Liability Act; and consequently there is no merit in the above-quoted grounds of the motion for a new trial.

2. The exception to the ruling of the court in admitting in evidence certain rulings of the Interstate Commerce Commission is without merit.

3. In ground 30 of the motion a new trial is sought upon the averment that:

"Since the rendition of said verdict certain material evidence, not merely cumulative in its character, but relating to new material facts, has been discovered by this applicant, said evidence being in substance as follows: An order of the Interstate Commerce Commission, dated at Washington, D. C., March 31, 1911, extending the time within which carriers might comply with the standards prescribed in the order of the said commission introduced by the plaintiff."

The plaintiff was injured on October 23, 1911. The case was tried and judgment was rendered on July 31, 1915. This court cannot say that the defendant has shown ordinary diligence in discovering the order which it says is new to it. The rulings of the Interstate Commerce Commission are binding on the defendant, and a failure to know of a ruling which the defendant in its motion for a new trial says had been of force for nearly four years at the time of the trial cannot become a meritorious ground for new trial upon the averment that the evidence is new.

4. The court having given in charge an incorrect measure of damages, as is complained of in grounds 16, 17, and 18 of the motion for a new trial, a new trial should have been granted. The evidence in this case entitled the plaintiff to recover only, if at all, for the injury, pain, suffering, and decrease of earning capacity. Under the charge given, the jury would have been authorized to find an amount in favor of the plaintiff as if the evidence had shown a total loss of earning capacity. The court did not properly instruct

as to the use of the mortality and annuity tables where there is proof of only decreased earning capacity.

5. On the day of hearing the motion for a new trial the plaintiff filed in open court the following motion:

"Now comes the plaintiff in the above-stated case, and in view of the contention of the movant that the charge of the court on the tables adduced by the plaintiff (the mortality and annuity tables) was calculated to impress the jury with the idea that the plaintiff was entitled to recover for the total loss of earning capacity instead of for the loss of his diminished earnings, offers to and does write off of the verdict and judgment in said case the sum of \$1,210.14, the same being the amount of the value of his earning capacity which survived his injury, under the evidence of the plaintiff, who testified alone on that subject, and who testified on that point that he averaged only two days' work in a week and made, he supposed, 75 cents a day, and not over \$1 a day. The above amount is reached on the basis of \$1 per day."

The court, upon that motion, entered the following order:

"This action allowed, and the verdict and judgment reduced in the above-stated amount. September 11, 1915."

The court, after hearing the motion for a new trial, entered the following order:

"The plaintiff, through his counsel, having in open court written off from the verdict the sum of \$1,210.14, the new trial is refused."

The error in the charge of the court cannot be cured by the plaintiff writing off a part of the verdict in this case. There is no way to compute accurately in money the harmful error of the charge. The jury were instructed that they may or may not use the tables referred to in the charge. The jury may or may not have used the tables. Neither the trial court nor this court can accurately compute separately the damages that the jury allowed for the injury, pain, suffering, and total loss of earning capacity.

The other assignments of error in the motion for a new trial are without merit. For the reasons given, the court erred in overruling the motion for new trial.

Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 352)

HOME SAV. BANK OF COLUMBUS v.
MASSACHUSETTS BONDING
& INS. CO.

MASSACHUSETTS BONDING & INS. CO.
v. HOME SAV. BANK OF
COLUMBUS.

(Nos. 8161, 8162.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. INSURANCE — §665(1) — FIDELITY BOND — ACTION—EVIDENCE.

The evidence warranted the verdict, and, no harmful error of law appearing, the judge did not err in overruling the motion for a new trial.

*(Additional Syllabus by Editorial Staff.)***2. INSURANCE** **⚡168**—FIDELITY BOND—CONSTRUCTION.

A bond whereby bonding and insurance company insures to a savings bank the fidelity of its treasurer, though resembling a contract of suretyship, is in effect a contract of insurance to which rules governing ordinary contracts of insurance are applicable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 325.]

3. INSURANCE **⚡285**—FIDELITY BOND—RENEWAL—CONSTRUCTION.

A bond insuring the fidelity of the treasurer of a savings bank and each renewal certificate constituted the entire contract between the insurer and the bank, and contained the warranties and covenants required of the bank in connection with the original bond, so that, where the original bond warranted the truth of bank's statements so far as it had knowledge, the statements in the renewals would be given that construction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657.]

4. INSURANCE **⚡640(2)** — FIDELITY INSURANCE—ACTION ON BOND—PLEAS—DEMURRER.

In an action by a bank on its treasurer's fidelity bonds, a demurrer to pleas alleging that no audit or examination of treasurer's accounts were made, as stated in declaration furnished to it by bank, and that, if such examination was made, bank knew of treasurer's dishonesty, was properly overruled.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1617, 1618.]

5. INSURANCE **⚡669(4)**—ACTION ON FIDELITY BOND—INSTRUCTIONS.

Where the application had included statement by bank, and where the insurer claimed that the bank's statements as to the treasurer's books and accounts and as to the performance of his services were false and fraudulent, an instruction that Civ. Code 1910, §§ 2479, 2480, relating to applications for fire insurance policies, applied only to the part of the application signed by bank, in view of another instruction that, if bank acted in good faith and disclosed all material facts within its knowledge, any false statements would not void the bond, was not erroneous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1774-1776.]

6. INSURANCE **⚡285**—FIDELITY BOND—MISREPRESENTATION—AUDIT OF BOOKS.

If statement that the bank's books were audited on certain day and were correct was a material representation and was in fact false, and if the variation changed the character of the risk, the policy would be void.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657.]

7. INSURANCE **⚡668(6)** — FIDELITY INSURANCE—QUESTION FOR JURY.

In a savings bank's action on its treasurer's fidelity bond, it was for jury to say whether any representations inducing the execution of the bond were true or untrue, and whether such statements were so material as to vary the nature and character of the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737-1740, 1758-1760.]

8. INSURANCE **⚡285**—FIDELITY INSURANCE—STATEMENTS BY INSURED.

Statements of a savings bank that the books of its treasurer were examined on a certain day was a statement within the bank's knowledge, but a statement as to the information derived from such examination was not necessarily within its knowledge, and if made in good faith

would not defeat an action on the treasurer's fidelity bond.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657.]

9. INSURANCE **⚡646(1)** — FIDELITY INSURANCE—DEFENSES—BURDEN OF PROOF.

In an action on the fidelity bond of a savings bank's treasurer, the burden was on the insurer to establish its affirmative pleas.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1645-1649.]

10. TRIAL **⚡296(7)** — INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTION.

In a savings bank's action on its treasurer's fidelity bond, error in a charge confusing preponderance of evidence with proof to a reasonable certainty, where the court charged that the preponderance of evidence should control, was harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 710.]

11. INSURANCE **⚡285**—FIDELITY INSURANCE—STATEMENTS OF INSURED.

Where the fidelity bond of the treasurer of a savings bank made the bank's statements to the insurer as to the treasurer's indebtedness warranties so far as it had knowledge, a later statement furnished the insurer to obtain an increase in the amount of bond must be considered as modified by the provisions of the existing bond, and cannot be considered as positive affirmations of the truth of the matter therein contained, but is limited to the knowledge of the bank.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 657.]

12. APPEAL AND ERROR **⚡1064(1)** — HARMLESS ERROR—INSTRUCTION.

While it cannot be said generally that an erroneous instruction resulted in no harm to the losing party, yet, where it clearly appeared from the jury's understanding of the charge that it could not have harmed the plaintiff, it was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Trial, Cent. Dig. §§ 475, 525.]

Error from Superior Court, Muscogee County; R. W. Freeman, Judge.

Action by the Home Savings Bank of Columbus, Ga., against the Massachusetts Bonding & Insurance Company. Judgment for plaintiff, and it excepts, and defendant takes a cross-bill of exceptions. Judgment affirmed on main bill of exceptions, and cross-bill of exceptions dismissed.

In the years 1911, 1912, 1913, and for a number of years prior thereto, George H. Waddell was the treasurer of the Home Savings Bank of Columbus, Ga. The Massachusetts Bonding & Insurance Company insured, for the Home Savings Bank of Columbus, Ga., the fidelity of Waddell as such treasurer, and issued therefor its schedule bond No. S21499 in the amount of \$5,000, to take effect on April 10, 1911. The material parts of this bond were as follows:

"Now, therefore, for and in consideration of a stipulated premium, paid or agreed to be paid by the employer, the Massachusetts Bonding & Insurance Company, a corporation existing under and by virtue of the laws of the commonwealth of Massachusetts (herein designated the 'Company') hereby covenants and agrees to and with the employer that it will, at the expiration of three months after proofs of loss shall have been furnished to the Company, pay to the em-

ployer the amount of any loss or damage that shall happen to the employer, in respect of any funds, property, or estate belonging to or in the custody of the employer, through the dishonesty of any of the employes, or through any act of omission or commission of any of the employes done or omitted in bad faith, and not through mere negligence, incompetency, or any error of judgment and whether such dishonesty or such act of omission or commission occurs in the performance of any duty or trust specially assigned to such employe or occurs otherwise, subject, however, to the following provisions and agreements:

"(1) There shall be no liability on the part of the Company unless the act or default through which such loss may happen shall, in respect of the employes originally named in the schedule, occur on or after the 10th day of April, A. D. 1911, and shall in respect of any employe hereafter added to the schedule by notice and acceptance as hereinafter provided, occur on or after the date upon which his or her name shall have been added to the schedule, and shall, in respect of all employes, occur prior to or on the 9th day of April, A. D. 1912, or prior to or on any other date to which this bond may be continued.

"(2) There shall be no liability hereunder on the part of the Company, unless such loss or damage shall be discovered during such designated term, or within one year after the final expiry (as determined by the term herein specified and any and all continuances) of this bond, and within one year after the cancellation or termination of this bond or of any engagement hereunder in respect of the employe causing a loss.

"(3) The Company's liability on account of any employe shall in no case exceed the amount set opposite his or her name in the schedule hereto attached, as such name and amount now appear or as they may be hereafter added to or changed upon the schedule in accordance with the provisions thereof hereinafter set forth.

"(4) If the employer requires indemnity in respect of any employe in the schedule named in an amount larger or smaller than therein specified, the employer shall give to the Company written notice specifying in respect of a change in the amount of indemnity, the new amount and the date from which it shall be effective, it being agreed and understood that thereby such name or names and specifications shall be deemed to be added to the schedule hereto attached, and the obligations of the employer and the Company in respect thereof shall be subject to all the provisions herein contained and in every way as though such name and specifications had formed part of the original schedule.

"(5) Whatever number of engagements may be made by the Company with the employer in respect of any employe, either by way of separate bonds, or by acceptances as herein provided, or by continuances as herein provided, the aggregate liability of the Company for all losses under all its engagements shall not exceed a sum equal to the amount of the largest of the engagements under which such losses occurred, nor shall the Company be liable under any specific engagement for any loss occurring under any other engagement.

"(6) The Company shall in no event be liable for any act or default of an employe occurring after a loss in respect of such employe shall have come to the knowledge of the employer.

"(7) The Company shall be primarily responsible to the limit of its bond in respect of any employe, for any loss sustained by the employer through the act or default of such employe without regard to any other security or indemnity held by the employer. * * *

"(11) The employer warrants that the following statements are true:

"(a) Each employe named in the schedule has, while in the service of the employer, discharged his or her respective duties in good faith (mere

negligence or error of judgment not being considered) and with honesty, so far as the employer has knowledge.

"(b) There is at present, so far as the employer has knowledge, no shortage in the accounts of any employe bonded hereunder, and no misappropriation by any such employe of any funds or other property belonging to, or in the custody of, the employer.

"(c) In so far as the employer has knowledge, no one of said employes habitually gambles, uses intoxicating liquors to excess, frequents houses of ill fame, or is a spendthrift living beyond his or her means.

"(d) That the written statements made to the Company by the employer regarding the indebtedness to the employer of the several employes named in the schedule truthfully and correctly show the amounts of indebtedness of each employe to the employer at the time of making such statements, *so far as the employer has knowledge*. A copy of said statements, certified by the Company, is delivered to the employer with this bond, and receipt of same is hereby acknowledged by the employer.

"In case of the breach of any of the foregoing warranties in respect of any employe, then this bond shall be void in respect of such employe only, and the Company shall be relieved from all liability in respect of such employe.

"(12) The employer further covenants and agrees that the employer will not at any time give the Company notice of the appointment of, or request the Company to become bound hereunder, in respect of, or to renew or continue this bond or any engagement hereunder in respect of any employe who has to the *knowledge of the employer*, ever been guilty of dishonesty, or who, to the knowledge of the employer habitually gambles, uses intoxicating liquors to excess, frequents houses of ill fame, or is a spendthrift living beyond his or her means, and that on the notice given by the employer to the Company of the appointment of any such new employe, and upon the request for any renewal or continuance of this bond or any engagement hereunder, the employer will, upon request of the Company, state truthfully in writing the amount, if any, which such employe or employes may to the *knowledge of the employer* then owe the latter by overdraft, promissory note, as indorser, or otherwise; and any breach of this covenant and agreement on the part of the employer shall render any such acceptance, renewal, or continuance executed by the Company in behalf of any and every such employe void, and relieve the Company from all liability on account of every such employe. A copy of every statement so made by the employer to the Company regarding the indebtedness of any employe shall be certified by the Company and delivered to the employer with the Company's acceptance of the risk or renewal of this bond.

"(13) The employer further covenants and agrees that, if at any time during the term for which this bond is written, or during any continuance hereof, there shall come to the knowledge of the employer the fact that any employe for whom the Company may be bound under this bond is dishonest, or has in bad faith, and not through mere negligence or error of judgment, done or neglected to do any matter or thing, or that any such employe habitually gambles, uses intoxicating liquors to excess, frequents houses of ill fame, or is a spendthrift living beyond his or her means, the employer shall promptly notify the Company of such fact, and the failure so to do shall relieve the Company from all liability on account of such employe, in respect of loss or damage thereafter arising. * * *

"(17) The employer shall, whenever required by the Company, give all information *within the employer's knowledge* or which can be obtained from the employer's books or records, and shall render all assistance (not pecuniary) which will in any way aid in the apprehension, arrest, or prosecution of any employe for any

criminal offense committed by such employé involving the liability of the Company, and in like manner shall aid and assist the Company in suing for or obtaining reimbursement from such employé or from the employé's estate or from other sources any moneys which the Company may have paid or become liable to pay under this bond on account of such employé.

"(18) The employer shall give notice in writing to the Company promptly after knowledge thereof by the employer of any loss in respect of which liability of the Company is claimed, and shall within six months thereafter furnish the company proof of such loss, and in default thereof the liability of the Company therefor shall terminate.

"(19) All notices to be given by the employer to the Company shall be by registered mail addressed to the Company at its principal office in the city of Boston, and all notices to be given by the Company to the employer shall be by registered mail addressed to the principal office of the employer.

"(20) In case the employer be a corporation, the knowledge of its board of directors or trustees or of any executive officer, such as the president, vice president, cashier or assistant cashier of a bank and corresponding officers of a savings bank or trust company, who shall receive a salary from the corporation and shall be active in its affairs, shall be deemed to be the knowledge of the employer, excepting that the knowledge of any such directors, trustees, or officers in collusion with the employé through whose act the loss may arise shall not charge the corporation.

"(21) So long as the Company and the employer agree so to do, this bond may be continued in force from year to year, and in case of such continuance, the Company's liability in respect of the employés then in the employer's service and for whom the Company may then be bound hereunder shall be the same as if this instrument had been originally written for a term including the period of such continuance."

(All italics are ours.)

Accompanying the application of Waddell for this bond was a statement made by the plaintiff bank as follows:

"The foregoing applicant has been in the service of the undersigned employer 14 years and — months, and the duties required have always been performed in a faithful and satisfactory manner. The accounts were last audited on the 18th day of December, 1910, and were correct in every particular. There has never come to the notice or knowledge of the employer any act, fact, or information tending to indicate that the applicant is negligent, unreliable, deceitful, dishonest, or unworthy of confidence. As far as the employer knows, applicant's habits are good, and the employer knows no reason why you cannot safely assume the suretyship applied for.

"The above and foregoing statements and representations are made for the purpose of inducing the Massachusetts Bonding & Insurance Company to execute said bond.

"Dated at Columbus, Ga., the 18th day of March, 1911.

"Home Savings Bank (Employer),

"By [Signed] Rhodes Browne, Pres't."

On April 10, 1912, the foregoing bond was renewed for one year, and in the renewal Waddell was bonded for \$10,000. The material parts of the renewal certificate are as follows:

"In consideration of the sum of twenty-five and no/100 dollars, Massachusetts Bonding & Insurance Company, a corporation duly incorporated under the laws of the commonwealth of Massachusetts, hereby continues in force schedule bond No. S21499 in favor of Home Savings

Bank, Columbus, Ga., on behalf of persons named in annexed schedule in the positions and for the sums therein specified for the period beginning the 9th day of April, 1912, and ending the 9th day of April, 1913, subject to all the covenants and conditions set forth and expressed in said schedule bond heretofore issued on the 10th day of April, 1911.

"Provided the aggregate liability of Massachusetts Bonding & Insurance Company from the date of the issuance of said schedule bond to the date of the expiration of this certificate for or on account of any act or acts of any one of said persons shall not exceed the sum written opposite that person's name upon the attached schedule."

Before the foregoing renewal Waddell made an application for such renewal on April 5, 1912. Accompanying this application was a statement of the plaintiff bank, dated April 5, 1912, identical in form with the statement dated March 18, 1911.

On March 10, 1913, the Massachusetts Bonding & Insurance Company renewed said bond in favor of the plaintiff bank for the year commencing April 9, 1913, issuing a renewal certificate therefor. This renewal certificate was identical in form with the first renewal certificate, except that the bond was renewed for \$15,000 instead of \$10,000. Prior to the time of this last renewal the plaintiff bank made the following statement to the defendant:

"To Massachusetts Bonding and Insurance Company:

"This is to certify that the books and accounts of our officers and employés as per attached schedule were examined by us from time to time in the regular course of business, and we found them correct in every respect, all moneys or property in their control or custody being accounted for, with proper securities and funds on hand to balance their accounts, and they are not now in default. They have performed their duties in an acceptable and satisfactory manner, and we know of no reason why the guaranty bond should not be continued.

"Dated at Columbus, Ga., this — day of —, 19—.

"Home Savings Bank of Columbus, Ga.,

"By [Signed] Rhodes Browne, President."

The plaintiff made one other statement to the defendant, to wit, on October 10, 1912, at which time the liability of the defendant company on its bond insuring the fidelity of Waddell was increased from \$10,000 to \$15,000, to wit:

"Oct. 10th, 1912.

"The Massachusetts Bonding & Insurance Company, of Boston, Mass., is hereby notified that on the respective dates shown below we made the following changes in list of officers or employés covered under its schedule bond No. S21499—R17577: All appointments to any position and any increase in amount of security required of officers or employés appear as 'additions'; all removals, retirements, or transfers of officers or employés, and any decrease in amount of security required of an officer or employé appear as 'deductions.' The employer (assured) knows no reason why the Company cannot safely become surety for the officers or employés added, and warranty is hereby made that the books and accounts of such officers or employés are now correct in every respect, all moneys handled by them being accounted for, and that all books and accounts will be examined from time to time in the regular course of business, but

at least annually. * * * [Then follows a tabulation and schedule showing that the bond of Waddell was requested to be increased from \$10,000 to \$15,000.]

"Dated at Columbus, Ga., the 19th day of October, 1912.

"Home Savings Bank of Columbus,
"By Rhodes Browne, Prest."

During the period of the said fidelity bond the plaintiff suffered a loss on account of acts of commission and omission of George H. Waddell, for which it brought suit for \$15,000 against the defendant, based upon the said bond and the renewals thereof. On February 15, 1915, the plaintiff filed an amendment to its original petition in order to meet certain special demurrers of the defendant, and in the amendment set forth in detail the manner, kind, and amount of the losses sustained by the plaintiff through acts of commission and omission of George H. Waddell, and alleged that the statements which it made to defendant in connection with the applications of George H. Waddell at the time the original bond was written and at the times when the original bond was renewed, and whatever statements were made by plaintiff to defendant, were true so far as plaintiff had knowledge, and were made honestly and in good faith, and that at the time they were made the plaintiff had no knowledge of loss or damage caused it by the said Waddell, and no knowledge that he had not been faithfully and honestly performing his duties with the plaintiff as treasurer.

The plaintiff further alleged in the amendment that about August 9, 1913, the Audit Company of the South commenced an examination of the books and accounts of the plaintiff, and that on August 12, 1913, Rhodes Browne, president of the plaintiff, first had knowledge that Waddell, as treasurer, was short in his accounts with the plaintiff, but that on August 12, 1913, neither the said Browne nor the plaintiff was aware of the amounts and special conditions of the shortage, or whether it occurred during the original period of the bond and the renewals thereof or prior thereto, or whether it was a loss in respect of which the plaintiff could claim liability from the defendant, and that prior to August 12, 1913, the plaintiff had no knowledge whatever of any dishonest acts of Waddell. The plaintiff further alleged that at said time, to wit, August 12, 1913, the Audit Company of the South was unwilling and unable to report definitely to the plaintiff that said Waddell was short in his accounts, and that the Audit Company on the night of September 20, 1913, made its first report of a definite character to the plaintiff that Waddell was short in any particular amount in his accounts with the plaintiff; and the plaintiff promptly thereafter (September 23, 1913) gave notice in writing to the defendant of the approximate amount of the loss caused the plaintiff by Waddell and discovered up to September 20, 1913. In the petition as amended it is alleged in detail

how the losses caused through the dishonesty of Waddell occurred.

The defendant filed general and special demurrers to the plaintiff's original petition, the demurrers were overruled, and exceptions pendente lite were taken, upon which the defendant's cross-bill of exceptions assigned error. The defendant filed an answer denying all the material averments in the original petition, and on the date of the trial amended its answer by adding six pleas. The plaintiff demurred to these pleas, and the court sustained the demurrer to the plea numbered 6, and overruled the demurrer as to the others. The plaintiff excepted pendente lite to the latter ruling, and assigns error thereon; and the defendant excepted pendente lite to the ruling sustaining the demurrer to the plea numbered 6, and in its cross-bill of exceptions assigns error thereon. The defendant on June 15, 1915, amended its amended answer by filing four additional pleas. Pleas Nos. 1 and 2 of this amendment were stricken by the court, and to this ruling of the court defendant excepted pendente lite, and in its cross-bill of exceptions assigns error thereon. The first amendment to the original answer alleges in substance that at the time of the execution of the original bond and at the time of each renewal and increase in amount thereof the plaintiff made and delivered to the defendant a declaration relating to George H. Waddell, the employé whose fidelity was to be insured—the statement hereinbefore quoted; that such statements were material to the risk, induced the defendant to accept the risk, and were made for the purpose of inducing the defendant to execute the bond and the several renewals and increases thereof; that said statements were untrue, and that, if the defendant had known they were untrue, it would not have accepted the risk and issued the bond and executed the several renewals and increases thereof; that the accounts of the plaintiff had not been audited on the respective dates named in the declaration and statements made by it, and were not correct in every particular, but, on the contrary, the employé Waddell was then in default in said bank in a large sum, which fact appeared from the books of account of the bank, and that the books on their face showed that they were not correct and that the accounts kept by said Waddell were not correctly kept; that the bond and each renewal and increase thereof was therefore void. And the defendant tendered to the plaintiff the full premiums on said bond and on the renewals thereof, paid to it by the plaintiff.

So much of the second amendment to the defendant's pleas as was allowed by the court averred that, if any investigations were made of the accounts of the plaintiff's bank or of the books or accounts of the employé Waddell, they were not made with ordinary care and diligence, and did not in-

clude an examination of the accounts of Waddell with said bank, and that on certain dates stated the plaintiff, through its examining committee, did examine the books kept by Waddell, and did investigate far enough to discover that on each of the dates his accounts were not correctly kept, and his books were not in balance, and that the plaintiff, at the time of making the warranties and representations hereinbefore quoted, had knowledge and notice that said warranties and representations were false.

On these pleadings the case went to trial, and a verdict for the plaintiff for \$87.50 on the plea of tender was returned.

The evidence is voluminous. On the question as to the bank's knowledge of Waddell's defalcations it is conflicting. While there is no direct evidence to the effect that Waddell's dishonesty was known to the bank before or at the time of the execution of the bond or any renewal or increase in amount thereof, yet the books of the bank were offered in evidence and were inspected by the jury. It is fairly deducible from the evidence that the bank, if it made examination of the books and accounts as claimed by it, knew their condition, and had knowledge of facts sufficient to charge it with notice of Waddell's dishonesty. His dishonesty is established beyond question, and the evidence, summed up, shows that through his dishonesty the bank lost, between April 10, 1911, and April 9, 1912, the period of the original bond, \$3,057.39; during the second period, \$5,998.20; and during the third period, \$4,102.72. It is also clear that for several years before the date of the original bond Waddell had systematically extracted and stolen the funds of the bank, and that the total amount of the shortage occurring by reason of his dishonesty greatly exceeded the amount of the loss shown to have occurred during the period covered by the bond.

Slade & Swift and A. W. Cozart, all of Columbus, for plaintiff in error. Dodd & Dodd and Little, Powell, Smith & Goldstein, all of Atlanta, for defendant in error.

GEORGE, J. (after stating the facts as above). 1. The foregoing statement is by no means exhaustive of the facts in this case, as they appear from the record of more than 400 pages, but they are sufficient to indicate that the court rightly overruled the demurrers to the defendant's pleas; and no reversible error appears in the court's charge.

[2] It is undoubtedly true that, while the bond in this case may resemble a contract of suretyship, it is in effect a contract of insurance, to which the rules of construction peculiar to contracts of suretyship proper would not apply, but to which the rules governing ordinary contracts of insurance are applicable. *Hormel v. American Bonding Co.*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. 513. In *John Church Co. v. Aetna Indemnity*

Co., 13 Ga. App. 826, 80 S. E. 1093, this court said:

"Viewed as insurance contracts, the contracts of an organization writing fidelity insurance are to be governed by the rules applicable to insurance companies, and when the contract is fairly susceptible of two constructions, one favorable and the other unfavorable to the indemnity company, the latter is to be adopted. It is but the familiar rule that ambiguities are to be construed most strongly against the insurer."

To the same general effect is the almost unbroken current of authority, and citation of the many cases supporting this view would be entirely useless.

[3] In our opinion, the bond in this case and each renewal certificate constituted the entire contract between the plaintiff and the defendant, and contained the warranties and covenants required of the plaintiff, in connection with the writing of the original bond; and the terms of the bond and the renewal certificates specifically modified, qualified, and controlled the statements made by the plaintiff in connection with the original bond and the renewals, so that the said statements, by the intention of the contract, were made only so far as the plaintiff had knowledge, and were not absolute, unconditional affirmations of the representations which they contained, but only representations of the knowledge of the plaintiff. Each statement furnished the defendant by the plaintiff after the first must be given the construction clearly indicated in the original bond; and, as there indicated, such statements were only as to the knowledge of the plaintiff, and were not absolute and unconditional affirmations of the matters referred to therein. This construction is consistent with the intention of the parties, and is in harmony with the great weight of decided cases dealing with the question.

[4] However, the demurrers to the pleas were properly overruled, because it is distinctly alleged in these pleas that no audit or examination of the books and accounts of the employé Waddell were made at the times and as stated in the declaration furnished the defendant by the plaintiff. It is also distinctly alleged in these several pleas that, if such examinations were in fact made, the plaintiff knew of the dishonesty of Waddell, because his books on their face showed such dishonesty. It was certainly proper for the defendant to show, if it could, that no examinations were made by the bank, as stated by it to the defendant, but, if made, the bank had knowledge of Waddell's dishonesty. We therefore conclude that there was no error in overruling the demurrer to the pleas set out in the amendment to its original answer.

[1] 2. The plaintiff insists that a new trial should have been granted it upon the general statutory grounds, and upon 19 additional grounds, complaining of certain charges given by the judge to the jury. As already indicated, we think the verdict is supported by the evidence. The evidence was in conflict

upon the material issues in the case, and, while it would have sustained a finding for the plaintiff in a substantial sum, it cannot be said that the verdict is without evidence to support it. The case was well prepared, and was submitted to the jury with great skill and ability. Doubtless every material fact and circumstance was before the jury. Not only was the evidence developed in minute detail by the witnesses, both expert and nonexpert in such matters, but the books of the bank were admitted in evidence, and the jury was authorized to find that the plaintiff either did not make examinations of Waddell's accounts as claimed by it, or, if such examinations were in fact made, that knowledge was thereby obtained on the part of the bank of the actual condition of the books. There is no reason to suppose that the jury were friendly to the defendant and unfriendly to the plaintiff. The contrary presumption, if there be ground for speculation, might be indulged.

3. Certain charges of the court are excepted to in grounds 4, 5, 6, and 7 of the motion for a new trial, as intimating and expressing an opinion upon the facts of the case. On careful examination of the record it appears that the trial judge read to the jury, in detail, the pleadings of the parties, and also read to the jury certain stipulations between counsel. Further in the charge he undertook to apply the law of the case to the contentions of the defendant, and in making this application the charges attacked as intimating an opinion were given. We do not think that these charges are subject to the criticism made. The jury undoubtedly understood the purpose of these charges.

[5] 4. The court gave in charge to the jury sections 2479 and 2480 of the Civil Code of 1910. It is contended, in the eighth and ninth grounds of the motion for a new trial, that in so doing the court committed harmful error against the plaintiff. Whether these sections were applicable to the facts of this case need not be considered. The court instructed the jury that these sections of the Code should be applied only to that part of the application which was signed by the bank itself. The application undoubtedly included the statement made by the bank, the obligee named in the bond. No release of liability on account of anything stated in Waddell's application, or any such part of the application as was made by Waddell, was pleaded, but the defendant insisted that the statements made by the bank concerning the condition of Waddell's books and accounts, and relating to the manner in which he performed his services as treasurer of the bank, were false and fraudulent. In addition the court instructed the jury that, if the bank acted in good faith in making the statements to the bonding company, and disclosed to the company all the material facts within its knowledge, then such statements, with one excep-

tion, hereinafter noted, if false, would not void the bond.

5. The instructions complained of in the tenth, twelfth, thirteenth, sixteenth, and seventeenth grounds were not, for any of the reasons assigned, erroneous.

[6] In the eleventh ground exception is taken to an instruction to the effect that, if the jury should find that the statement that the books of the bank were audited on the 18th day of December, and were correct in every particular, was a material representation, and that this statement was not in fact true, either because the books were not audited or because, being audited, they did not show that the accounts of Waddell were true in every particular, and if they should further find that the variation was a variation by which the nature or extent or character of the risk was changed, then the policy would be void. One ground of exception to this charge is that the court confined the plaintiff to the exact date, December 18, 1910. This exception is not well taken, because the court expressly stated to the jury that the variation from this statement, in order to affect this bond, would have to be material, and of such character as would change the nature, extent, and character of the risk. This charge was correct. It would not have been proper for the judge to state to the jury that it was immaterial, under the facts of the case, whether the audit was made on the 18th or 14th of December. He properly left it to the jury to say whether or not an examination of the accounts of Waddell was made on December 18, 1910, as represented in the statement made by the bank to the defendant, and, if not, whether by the variation the nature or extent or character of the risk assumed by the defendant would be changed.

[7] It was for the jury, and not for the court, to say whether any representations inducing the defendant to execute its bond insuring the fidelity of Waddell were true or untrue, or whether the statements were material or immaterial, or whether such statements were so material as to vary the nature, extent, or character of the risk assumed by the defendant company.

[8] It is to be noted that a statement made to the defendant that the books of Waddell were on a certain date examined is a statement within the knowledge of the bank. That portion of the statement which relates to the information derived from such examination is not necessarily within the knowledge of the bank, and, if made in good faith by the bank, would not defeat the plaintiff's action.

6. The charges referred to in the fourteenth, fifteenth, and eighteenth grounds of the motion for a new trial do not require discussion. These charges are not subject to the exceptions taken. The charges may contain certain inaccuracies of expression, but

they do not contain an incorrect statement of any controlling principle of law applicable to the facts of the case.

[9,10] In the twenty-second ground it is complained that the judge confused preponderance of evidence with proof to a reasonable and moral certainty. This criticism seems to be well founded. However, this charge did not immediately follow the contentions of the plaintiff; and since the burden in this case was upon the defendant to establish its affirmative pleas, the charge was more harmful to the defendant than to the plaintiff. In addition, the charge of the court fully explained to the jury that in the instant case the preponderance of the evidence should control.

[11] 7. The assignments of error in the nineteenth, twentieth, and twenty-first grounds of the motion remain for consideration. The judge here read to the jury a portion of the statement furnished by the plaintiff to the defendant under date of October 19, 1912, asking for an increase in the amount of the bond of Waddell from \$10,000 to \$15,000. The court thus charged in effect that, if this statement was material to the risk, and the bonding company believed it was true, and acted upon it and granted an increase in the amount of the bond from \$10,000 to \$15,000, but if in point of fact the books and accounts of Waddell were not at that time correct in every respect, and there was a variation by which the nature or extent or character of the risk was changed, the bond would be void "in so far as the increase of the bond was concerned," and that this would be true although the president of the bank, in making this statement, may have acted in good faith and may have believed that the statement was true; that, where the insurer is induced to enter into the contract by a representation as to a material fact, the policy will be void where the representation was made willfully, with intent to deceive, or through an innocent mistake. Further, and in the same connection, the court charged the jury that the same rule that he had given in connection with the application to increase the liability under the bond from \$10,000 to \$15,000 would apply "as to these other matters to which I have directed your attention." He then proceeded to remind the jury:

That it was alleged by the defendant that at the time of the execution of the bond, and on the several occasions when it was renewed, the plaintiff bank stated that examinations of the books of Waddell were made at certain times, and that these audits showed the books to be correct, and that the same rule applied to those "instances of defense to which I have already directed your attention, in so far as the examinations were concerned; but in those cases, as already charged you, if the examinations were in point of fact made, and the result of the audit or examination showed that the books and ac-

counts of Waddell as treasurer were correct, then the representations would not void the policy, if the Home Savings Bank in good faith believed that they were correct and made the representations believing that they were correct."

The court did, however, in the same connection, leave it to the jury to say whether in point of fact the bank had examined or audited the books of Waddell. He concludes the instruction on the effect of the statement dated October 19, 1912, and made by the plaintiff with the positive statement that:

"The matter I referred to is the increase of the policy from \$10,000 to \$15,000."

The concluding statement of the charge is this:

"If that increase is void, if you find that to be void from \$10,000 to \$15,000, why, then the plaintiff in no event could recover over \$10,000, because that would leave the bond only \$10,000."

In our view, these charges incorrectly stated the law of this case. The statement of October, 1912, was made for the purpose of increasing the liability fixed by the terms, provisions, and conditions of the original bond, and this statement must be considered as modified by the provisions of that bond. The original bond in this case did not contemplate that statements made by the employer were to be considered as positive and unconditional affirmations of the truth of the matter therein contained, but meant that such statements were true only to the knowledge of the employer.

[12] As a general rule, it cannot be said that an erroneous instruction as this was, resulted in no harm to the losing party. In this case, however, it is clear to the point of demonstration that the charge did not harm the plaintiff. The jury could only have understood from this charge that it related to the increase in the liability of the bond from \$10,000 to \$15,000. Indeed, the judge clearly and repeatedly stated to the jury that this rule which he was then giving them applied only to the increase in liability of the bond, and did not affect the original bond or any renewal thereof.

The jury found for the defendant upon its affirmative pleas, and returned to the plaintiff the amount of premiums paid by it for the bond and its renewals. This was a clear finding that the bond was void; and, inasmuch as the jury found, under substantially correct instructions by the court, that the plaintiff was not entitled to recover any amount, and that the bond was void by reason of the things affirmatively pleaded by the defendant, a reversal is not required on account of this error in the charge of the court. The court therefore did not err in overruling the motion for a new trial.

Judgment affirmed on main bill of exceptions; cross-bill dismissed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 307)

TEMPLES v. CENTRAL OF GEORGIA RY. CO. (No. 7507.)(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)*(Syllabus by the Court.)*

1. MASTER AND SERVANT \S 235(2) — TRIAL \S 256(4) — PERSONAL INJURIES — PRESUMPTION — BURDEN OF PROOF — INSTRUCTION—NECESSITY OF REQUEST.

The action being for the recovery of damages on account of personal injuries received by the plaintiff while engaged in interstate commerce, there was no presumption of negligence against the defendant; and, in the absence of any timely request in writing, the court did not err in charging the jury generally that the burden of proof rested upon the plaintiff throughout the case, and in failing to instruct the jury as to when and under what circumstances this burden might be shifted.

[For other cases, see Master and Servant, Cent. Dig. \S 873, 895, 896; Trial, Cent. Dig. \S 631.]

2. CHARGE—CORRECTNESS.

The charge complained of in the ninth ground of the motion for a new trial is in exact accord with the ruling in *Worlds v. Georgia Railroad Co.*, 99 Ga. 283, 25 S. E. 646(2), which was approved in *Freeman v. Savannah Electric Co.*, 130 Ga. 449, 454, 60 S. E. 1042, and this ground of the motion is therefore without merit. The decision in the case of *Southern Railway Co. v. Rutledge*, 4 Ga. App. 80, 60 S. E. 1011, is not at variance with those rulings or with the ruling now made.

3. TRIAL \S 256(10)—FAILURE TO CHARGE—NECESSITY OF REQUEST.

There is no merit in the objection made in the tenth ground of the motion for a new trial to an excerpt from the charge of the court relating to the doctrine of assumed risks. *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235, 241; *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. 1070, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Middle Ga. & Atl. Ry. Co. v. Barnett*, 104 Ga. 582, 584, 585, 30 S. E. 771; *Charleston & Western Carolina Railway Co. v. Sylvester*, 17 Ga. App. 85, 86 S. E. 276. In the absence of any request for a fuller charge where a correct charge as to the assumption of risk is given, the failure to instruct precisely as to what would not constitute an assumption of risk by the plaintiff is not reversible error. See, in this connection, *Charleston & W. C. Ry. Co. v. Brown*, 13 Ga. App. 744, 751, 79 S. E. 982. The charge did not tend to confuse the jury, nor was it subject to the exception that it was calculated to prejudice the plaintiff's case because argumentative.

[For other cases, see Trial, Cent. Dig. \S 637.]

4. MOTION FOR NEW TRIAL—GROUNDS.

There is no merit in the eleventh ground of the motion for a new trial; as the charge complained of did not tend to eliminate or disparage any evidence offered in behalf of the plaintiff.

5. APPEAL AND ERROR \S 961—DISCRETION OF TRIAL COURT—COMMISSION—PHYSICAL EXAMINATION.

There is no merit in the twelfth and thirteenth grounds of the motion for a new trial assigning error because the court appointed a commission of physicians to make a physical examination of the plaintiff. No abuse of discretion by the trial court appears, and no objection was raised to the personnel of the commission appointed.

[For other cases, see Appeal and Error, Cent. Dig. \S 3839, 3840.]

6. JURY \S 92 — DISQUALIFICATION — INTEREST.

The court did not err in holding that the juror objected to by the plaintiff was not disqualified, and in declining to require him to stand aside.

[For other cases, see Jury, Cent. Dig. \S 420-422.]

7. APPEAL AND ERROR \S 302(1) — MOTION FOR NEW TRIAL—CONSIDERATION.

The ground of the motion for a new trial insisting that "a new trial is demanded by the general countenance of the case," etc., need not be considered.

[For other cases, see Appeal and Error, Cent. Dig. \S 1744-1746.]

Error from City Court of Albany; Clayton Jones, Judge.

Action by W. H. Temples against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 15 Ga. App. 115, 82 S. E. 777.

John Henry Pool, of Albany, for plaintiff in error. Pottle & Hofmayer, of Albany, for defendant in error.

WADE, C. J. [2-4, 7] The fourth, fifth, sixth, and eighth grounds of the motion for a new trial are expressly abandoned in the brief of counsel for the plaintiff in error. No review of the evidence developed at the trial of this case is necessary, nor is it necessary to amplify any of the rulings in the headnotes, except those in the first, fifth, and sixth headnotes, referring to the seventh, twelfth, thirteenth, and fourteenth grounds of the motion for a new trial.

[1] The seventh ground of the motion for a new trial assigns error on the following excerpt from the charge of the court:

"The burden of proof in this case rests upon the plaintiff. There is no presumption of negligence against the defendant. The fact that the plaintiff may have been injured raises no presumption of negligence against the defendant, but the burden rests upon the plaintiff throughout the case to prove that any injury he may have received was caused by the defendant's negligence."

It is clear that there is no substantial merit in this exception. Under the allegations of the amended petition of the plaintiff and the admissions made in the plea of the defendant, the plaintiff was employed by the defendant in interstate commerce at the time he suffered the alleged injury, and the federal Employers' Liability Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, \S 8657-8665]) therefore governs, to the exclusion of the state statute. *Landrum v. Western & A. R. Co.*, 90 S. E. 710 (1).

"As the action is under the federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law as interpreted and applied in federal courts. *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. Rep. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475, 8 N. C. C. A. 834; *Central Vermont R. Co. v. White*, 238 U. S. 507, 35 Sup. Ct. Rep. 865, 59 L. Ed.

1433 [Ann. Cas. 1916B, 252] 9 N. C. C. A. 265; Great Northern R. Co. v. Wiles, 240 U. S. 444, 36 Sup. Ct. Rep. 406 (60 L. Ed. 732). Southern Ry. Co. v. Gray, 241 U. S. 334, 36 Sup. Ct. 558, 60 L. Ed. 1030.

This being true, no presumption of negligence on the part of the defendant was created by proof of the injury resulting to the plaintiff while so engaged in interstate commerce. *Ivey v. Louisville & Nashville R. Co.*, 18 Ga. App. 434, 89 S. E. 629. It was held by the United States Supreme Court in *Southern Ry. Co. v. Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 473 (60 L. Ed. 836), in passing upon the liability of a carrier under a bill of lading for an interstate shipment, that the question as to responsibility under the bill of lading was a federal question, and that:

"The railway company was therefore liable only in case of negligence. The plaintiff, asserting neglect, had the burden of establishing it. This burden did not shift."

This is equally true in a personal injury suit brought under the federal Employers' Liability Act. The charge of the court complained of amounted to no more than a mere statement of the law that the burden of proof rested upon the plaintiff, or that he must prove his case by a preponderance of evidence, and was equivalent to the final instruction, "If you believe by a preponderance of the evidence that the plaintiff should prevail," etc., given by request of counsel for the plaintiff. As was said by Justice Lumpkin in *Hawkins v. Davie*, 136 Ga. 550, 552, 71 S. E. 873:

"Where the presiding judge, in an ordinary action at law, correctly charges the jury in regard to the general burden of proof, he is not required, as an essential part of his charge, to discuss the shifting of the burden of introducing evidence on special points which may arise during the progress of the case; and it will not be held error that he omits to do so."

See, also, *Martin v. Nichols*, 127 Ga. 705, 709, 56 S. E. 995; *Brandon v. Pritchett*, 133 Ga. 480, 66 S. E. 247 (2); *Central of Georgia Ry. Co. v. Manchester Mfg. Co.*, 6 Ga. App. 254, 64 S. E. 1128.

There was no request for a charge upon any rule of evidence or upon the shifting of the burden of proof.

[5] The twelfth ground of the motion for a new trial is as follows:

"Because the court erred in appointing Dr. J. C. Keaton [and] Dr. J. M. Barnett to examine the person of plaintiff, to which plaintiff objected at the time of the appointment, upon the ground that said examination caused plaintiff nervous derangement and physical pain and exhaustion; that plaintiff was willing to be examined in the presence of the jury, and expected to be examined that way; that defendant's doctors had already made ample examination of plaintiff—which objections were then and there overruled, and the appointment made, and an examination made, in pursuance thereof."

The thirteenth ground of the motion for a new trial is as follows:

"Because the court erred in admitting the following material evidence [set out in an exhibit attached] of Dr. J. M. Barnett: Of the exam-

ination made by him of the person of plaintiff, W. H. Temples, under the order of the court. Movant objected to the evidence at the time it was offered, and did then and there urge the following grounds of objection: Because said Dr. J. M. Barnett had twice previously testified upon behalf of the defendant."

To these two grounds of the motion the trial judge attaches the following note:

"In reference to grounds 12 and 13 defendant made due application for a commission of doctors to examine the plaintiff, which was duly assigned for hearing and heard on the 13th day of October, 1915. After hearing same on the pleadings and evidence submitted, including the briefs of evidence of the two previous trials, I announced that under all of the circumstances I thought the appointment of a commission was proper and would grant an order accordingly. Suggestions were made as to whether or not the doctors should be appointed from other cities, or whether or not they should be residents of Albany, and both sides seemed to prefer the appointment of resident doctors, and I invited suggestions from both sides informally, in an effort to get doctors who would be agreeable to both sides. When the name of Dr. Keaton was suggested, I mentioned the fact that he was my brother-in-law, and both sides stated that would not affect the matter, and made no objection personally to his appointment. It was further stated that he was the only doctor in the city who had an X-ray machine. Dr. Barnett's name was suggested by me, as I recall it, because he was generally recognized as one of the most competent physicians and surgeons in South Georgia, and the court knew also that he was a man of high honor and integrity. Plaintiff's counsel said that he previously testified in the case, but the record showed also that he had never examined the plaintiff, had previously testified on hypothetical questions, and that there was practically no dispute between the doctors who testified on both sides in the former trials in regard to the answers on these hypothetical questions. When this appeared, counsel for the plaintiff stated that, while he objected to the appointment of a commission, he had no objections to offer to Dr. Barnett or Dr. Keaton, his objections going to the appointment of any commission of doctors. From all that occurred and was said at the hearing, I understood that the appointment of the two physicians named was satisfactory to both sides, as they were to the court, in so far as their professional and personal standing, ability, integrity, and impartiality were concerned, and I never heard any suggestion to the contrary from plaintiff or his counsel until after the physicians named had examined the plaintiff. The court ordered the examination of the plaintiff to take place at Columbia, Ala., where plaintiff was, and refused to order it done at Albany; but it was agreed by counsel that plaintiff's counsel was to try to get his client to come to Albany at defendant's expense, in which event it was agreed that the examination might be held at Albany. At a hearing before me about two or three weeks before the case was assigned for trial I was informed that the plaintiff refused to come to Albany and would not let the doctors examine him if they came to Columbia, Ala., unless his doctor was present. Defendant then insisted on the right to have its doctor also present, and I was asked by both sides to construe the order previously granted, which I did by inserting in the order, by consent of both sides, that no one should be present except the doctors heretofore appointed. It was brought to the attention of the court later, some time having been consumed in the effort to have the examination made at Albany, that the doctors had not been able to go to Columbia, for various reasons, one of them when a date had been set, on account of the continued critical illness of one of the mem-

bers of the family where one of the doctors appointed lived. The case had been assigned for trial for the 16th day of November, 1915, on Tuesday, and, for the reasons above stated, it was brought to the attention of the court that defendant's counsel had requested plaintiff's counsel to have his client come to Albany on the day before the case was set so that the doctors could examine him, then otherwise, they stated, they would be compelled to ask the court to postpone the case sufficiently long to have the examination made on the day the case was assigned for trial. About two days before the case was set plaintiff's counsel came up to the bench while another case was on trial and stated to the court the contentions of defendant's counsel, as above set forth, and asked if I would postpone the case if the examination was not had previous to the trial. I stated to counsel that I hoped he would have his client submit to the examination before trial, because neither the doctors nor defendant's counsel had been at fault, and if defendant made a motion on the date the case was assigned for trial, for the reasons above stated, to postpone the case sufficiently long for such examination to be had, I would be compelled as a matter of justice to do so, although I did not want to do it, as that was the last case left on the calendar for trial, and there was no other business before the court to occupy the attention of the jury."

The objection raised in the twelfth ground is to the appointment of any commission to examine the plaintiff, unless such examination was conducted in the presence of the jury; whereas the plaintiff insisted in the thirteenth ground that the court erred in admitting the evidence of one of the physicians who conducted the examination by an order of the court, for the reason that this physician had previously testified twice as a witness called by the defendant. It will be observed from the note of the trial judge, which is quoted above in full, that the witness Dr. Barnett had previously testified in reply to hypothetical questions propounded to him, but had never personally examined the plaintiff, and that there was no actual dispute between the various physicians who testified for the plaintiff and the defendant at the former trials of the case as to the correctness of his answers to these hypothetical questions. It furthermore appears from the note of the presiding judge that when the commission was named counsel for the plaintiff in the lower court stated that:

"While he objected to the appointment of a commission, he had no objections to offer to Dr. Barnett or Dr. Keaton, his objections going to the appointment of any commission of doctors."

The defendant, in applying for the appointment of the medical commission, appears to have acted in accordance with the practice approved in such cases. It was held in *Richmond & Danville R. Co. v. Childress*, 82 Ga. 719, 9 S. E. 602, 3 L. R. A. 808, 14 Am. St. Rep. 189, that:

"It is within the discretion of the trial court to require the plaintiff suing for a physical injury alleged to be permanent to submit to an examination by competent physicians, at the instance and at the expense of the defendant in the action, to ascertain the nature, extent, and probable duration of the injury, so as to afford means of proving the same at the trial."

See, also, *City of Cedartown v. Brooks*, 2 Ga. App. 583, 59 S. E. 836 (2).

This power "is one to be exercised or not according to the sound discretion of the presiding judge." *Macon & Birmingham Ry. Co. v. Ross*, 133 Ga. 83, 65 S. E. 146 (1).

There is nothing in the record in this case to suggest that the trial judge abused his discretion in appointing a commission, or that the appointment of Dr. Barnett on the commission was improper, or that the testimony thereafter delivered by him was legally inadmissible for any reason.

[8] The fourteenth ground of the motion for a new trial is as follows:

"Because the court erred in refusing to remove Juror W. A. Sumter from the panel of 24 jurors put upon plaintiff, and thereby refusing to put another qualified juror upon the panel of 24 jurors; said juror being, plaintiff contended, disqualified for the reason he could obtain a pass over the defendant, the Central of Georgia Railway Company, by reason of his employment by the Georgia Southwestern & Gulf Railway Company, he not being able to obtain a pass automatically by his request, but his request, as movant contends, would have to go through the proper officials of the Central of Georgia Railway Company, the defendant, from the officials of the Georgia, Southwestern & Gulf Railroad. When the above facts were elicited at the trial the plaintiff urged the objection that said juror was disqualified, and moved the court to put said juror off the panel of 24, and to put on said panel of 24 jurors another qualified juror. The objections to said Juror Sumter were overruled, and the motion to remove him from the panel of 24 jurors and to put in his place another juror upon the list of 24 jurors was overruled."

It further appears in the record, from an exhibit attached to the motion, that at the trial of the case the plaintiff exhausted his entire six strikes and struck the juror W. A. Sumter. To this ground of the motion for a new trial the trial judge attaches the following note:

"When objections were made to Juror W. A. Sumter, as above stated, he was put on the court as prior, and upon the evidence submitted, including satisfactory answers by the juror to the questions on his voir dire, the usual questions being propounded to the juror under oath, I held that he was not disqualified as a matter of law, and that under the evidence he was a competent, impartial, and qualified juror."

When the panel of 24 jurors, including the juror W. A. Sumter, was put upon the plaintiff, the juror, upon examination, testified that he worked for the Georgia, Southwestern & Gulf Railway Company, and as an employe of that railway company could obtain a pass over the Central of Georgia Railway Company, not on his own request, but by making proper application through the officials of the company employing him; that he was not employed by the Central of Georgia Railway Company, and had no connection with the Central in any way, and could only obtain trip passes for transportation; that he did not believe he had received such a pass "for a long time," and had no pass over the Central Railway Company at the time of the trial; that he had no annual pass over the Central, and had never applied for one. In response to notice, the

Central of Georgia Railway Company, the defendant in this case, produced several requests made during the years 1914 and 1915, and one on January 18, 1916, by the president and general manager of the Georgia, Southwestern & Gulf Railway Company, for trip passes to be issued to Miss Rosalie Sumter, a dependent daughter of "W. A. Sumter, agent G. S. W. & G. R. R." Several stubs showing the issuance of passes to Miss Sumter, referred to in the requests therefor as a person "not prohibited by law from receiving free transportation," were likewise produced. So far as can be determined from the requests therefor and from the stubs from which they were apparently detached, all of the passes shown by the evidence to have been issued to the dependent daughter of the juror Sumter were limited by their express terms to periods of 30 and 60 days, and all had therefore expired by limitation except one issued on October 20, 1915, good until December 22, 1915, and one issued January 20, 1916, which was, according to the request therefor, to cover a period of 60 days from its date. There is nothing in the record to show whether the pass issued on November 22, 1915, to Miss Rosalie Sumter as the daughter of the agent of the "G. S. W. & G. R. R." from Cuthbert to Atlanta and return, which expired by its terms on December 22, 1915, had or had not been used by Miss Sumter before the date when the jury was selected on November 18, 1915, for the trial of this case. To the contrary, the juror Sumter testified in his examination that he had no pass over the "Central Railway now," and a fair interpretation of this testimony, in the absence of anything whatever to indicate the contrary, would be that neither the witness himself nor any dependent member of his family then had such an unused pass. The pass applied for on January 18, 1916, and issued January 20, 1916, was issued two months after the trial of the case, and therefore cannot affect the consideration of the question as to this juror's disqualification to try the case. It will be observed that the juror Sumter did not in fact sit on the jury that returned a verdict in favor of the defendant, the Central of Georgia Railway Company; but, of course, both parties to the case were entitled to have 24 qualified and unbiased jurors put upon them, from which to select the actual 12 who should hear the evidence and return a verdict. It appears that the plaintiff exhausted all six of the strikes to which he was entitled under the law, one of the jurors stricken by him being the juror W. A. Sumter, and therefore, if Sumter was in fact disqualified to serve as a juror, the plaintiff presumably suffered a substantial injury, as the number of his arbitrary strikes was thereby reduced to five only. When this case was here before (Temple v. Central of Georgia Railway Co., 15 Ga. App. 115, 82 S. E. 777), a new trial was granted because one of the jurors trying the

case was an employé of the Atlantic Compress Company, a corporation in which the defendant, the Central of Georgia Railway Company, owned at the time of the trial 610 shares of stock of the par value of \$100, and it was agreed when the motion was heard that, though the juror Whitehead owned no stock in either the Atlantic Compress Company or the Central of Georgia Railway Company, his position as an employé of the Atlantic Compress Company was his sole occupation, and, under his contract of employment, the duration thereof was fixed by the pleasure of his employer, and that the juror was under the impression and in a general way believed that the Central of Georgia Railway Company owned stock in the compress company, though he had no actual knowledge of the fact or of the amount so owned, and that he would testify that these facts did not in any way influence him as a juror in the trial of the case.

The disqualification held to be material existed at the time when the juror Whitehead actually served, for the Central of Georgia Railway Company then owned the stock in the Atlantic Compress Company, and Whitehead was then an employé of the latter company, and subject at that time to a discharge, which might be brought about or induced by the Central of Georgia Railway Company, as one of the large stockholders of the compress company. In the trial now under consideration there was no evidence showing that either the juror Sumter or any member of his family then was in possession of any unused pass or other evidence of favor from the Central of Georgia Railway Company. Sumter neither owned stock in the Central of Georgia Railway Company nor had any apparent interest in the result of the litigation between the plaintiff and that company. The court saw no reason to impute to him bias or prejudice, either from his demeanor when examined on the voir dire or on account of any circumstances in proof; and nothing appears to indicate that this witness was in fact consciously biased or prejudiced in the case, or that any existing facts might subconsciously warp or affect his judgment. As there is nothing to show that at the time of the trial the witness Sumter was in possession of any pass or other evidence of favor or consideration from the Central of Georgia Railway Company, it would be stretching the rule beyond reasonable or practical limits to hold that the grant of a trip pass to an employé of one railroad company by the officers of another road, not upon his request, but by the request of the officials of the company for which he worked, amounted to such a personal favor to the employé as would disqualify him as a juror in a case where the railroad issuing the pass was a party. Such passes are issued by permission of the law, and are received by an employé, whether over his own road or obtained for him from

another road upon the request of his superior officers, generally as a matter of course as well as of right, and actually place the recipient under no obligation to the road granting the pass. Where the pass is granted by another road, the applicant is not personally known in the matter, but the pass is issued upon the request of his superiors, who reciprocate in like cases when called upon by the other road in behalf of their employes. To say that an employé of one road, who had several times ridden upon another road on passes obtained from that road by his own employer, would feel any appreciable degree of interest or bias towards the railroad from which his own company had obtained for him a trip pass, would be exaggerating beyond all bounds the capacity of the human heart to respond to the sentiment of gratitude. In fact, to arrive at such a conclusion, it would appear that gratitude was not the rarest, but the commonest, of human virtues.

From the former opinion in this case (*Temples v. Central of Georgia Railway Company*, 15 Ga. App. 115, 82 S. E. 777) it appears that Whitehead, on account of whose disqualification as a juror a new trial was granted, actually served on the jury that returned the verdict complained of, while in the present case the juror Sumter did not aid in fashioning the verdict arrived at by the jury. Regardless of what may be the rule in other jurisdictions, the question as to the disqualification of a juror in this state must be determined by the law of this state, as declared by the Supreme Court and this court. Without intending to recede from the doctrine asserted by this court when this case was formerly here for review, no reason for extending the rule there laid down is now presented, nor do we think that any extension is authorized by law. In this view we are confirmed by the ruling of the Supreme Court in *Campbell v. State*, 144 Ga. 224, 87 S. E. 277, and, under the facts in this record, we hold that the trial judge did not err in finding the juror Sumter qualified to serve.

It may not be inappropos to say generally that there was a sharp conflict in the evidence as to whether or not the plaintiff in this case had in fact suffered injury as alleged by him, and some testimony from which the jury were authorized to infer that, if the plaintiff had in fact suffered such injury, the injury resulted from accident purely, and not from negligence on the part of the defendant. Likewise at the trial now under review a sharp attack was made upon the credibility of the plaintiff, and admissions were drawn from him that on previous trials he had made various statements which he knew to be untrue, for the purpose of misleading, or, as he expressed it, "bluffing," counsel for the defendant. It is

not for us to say what degree of credibility a jury should attach to the testimony of any witness or witnesses in a trial, or to question their acceptance of the testimony of the medical commission appointed by the court, to the general effect that the plaintiff was a malingerer, who was not in fact suffering from any physical injury, but that his state of health resulted from his unfortunate and long-continued use of drugs. The conclusion reached by the jury is apparently supported by a preponderance of the testimony, but whether this be true is not within the purview of this court to determine. The fact that after two previous verdicts in his favor the jury, hearing the explanations offered by the plaintiff as to his previous contradictory evidence, and hearing the testimony of the physicians who examined him under the order of the court, to the effect that he was not injured at all, and also hearing his own statements in regard to this physical examination, and observing his manner while on the stand, nevertheless found a verdict against him and in favor of a railroad corporation, in whose behalf but little partiality is generally shown by the mass of citizens from whom juries are drawn, indicates clearly that, in the opinion of the jury, the burden resting upon the plaintiff, to establish all the essential allegations showing injury to him and negligence on the part of the defendant was not successfully carried, and there was no presumption against the defendant to aid the plaintiff in this case.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 238)

SAVANNAH & N. W. RY. v. ROACH.
(No. 7248.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §291(1)—INJURIES TO SERVANT — ACTIONS — SUBMISSION OF GROUNDS OF RECOVERY.

Every question of negligence in this case was clearly and correctly submitted by the court to the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1133.]

2. APPEAL AND ERROR §1004(3)—REVIEW—DAMAGES.

The amount of damages found by the jury was authorized by the evidence and approved by the judge, and this court will not interfere.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3945, 3947.]

3. PLEADING §403(2)—ACTIONS—VARIANCE.

Where an employé of a common carrier was killed while both he and the carrier were engaged in interstate commerce, and an action against the carrier for damages on account of his death was brought under the state law by his administratrix, and at the term of court at which the

case was tried the defendant amended its plea and alleged that at the time the decedent received the injuries that resulted in his death both he and the defendant were engaged in interstate commerce, and that the "case comes within the terms of, and is to be determined by, the provisions of the federal statute" (the Employers' Liability Act [Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, §§ 8657-8665)]), and the case was tried under the provisions of that act, and the entire charge of the court was based thereon, the defendant was not deprived of any right under the federal law, and the court did not err in giving him that for which he asked by his plea.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1344-1347.]

4. INSTRUCTIONS—SUFFICIENCY.

The excerpts from the charge of the court embraced in the motion for a new trial are not erroneous when read in connection with the entire charge.

5. SUFFICIENCY OF EVIDENCE.

There was evidence to support the verdict.

Error from City Court of Springfield; Paul D. Shearouse, Judge.

Action by Mrs. Maggie Roach, as administratrix, against the Savannah & Northwestern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Hitch & Denmark, of Savannah, and Y. E. Barger, of Springfield, for plaintiff in error. Oliver & Oliver, of Savannah, for defendant in error.

BLOODWORTH, J. Mrs. Maggie Roach, as administratrix, brought suit for the benefit of herself and her child against the Savannah & Northwestern Railway for the death of her husband, who was an engineer. At the time of the accident the engineer was in charge of an engine and tender, and was on the way to where there had been a wreck. One of the wrecked cars was loaded with coal and was en route from Danville, Va., to Waynesboro, Ga. The suit as originally brought consisted of two counts, the first being brought under the federal Employers' Liability Act, and the second under the state law. Before proceeding to the second trial, at which the verdict now complained of was rendered, the plaintiff struck from her petition the first count and all the amendments thereto, and the case proceeded on the second count. At the second trial the defendant amended its plea and alleged that at the time of the injuries complained of the engineer and the defendant were engaged in interstate commerce.

[1] 1. The charge in this case was comprehensive and correct, completely covering every issue of negligence, and questions of negligence are peculiarly for the jury. The plaintiff in error insists that a new trial should be granted "because the injuries to and death of plaintiff's husband were attributable, not to the causes alleged in the petition, but to his voluntary use of liquors and to his intoxicated or semi-intoxicated condi-

tion at the time of the accident." Whether or not the deceased was intoxicated was a question for the jury, to be considered along with all the evidence, to determine whether or not he exercised ordinary care, and his intoxication alone would not relieve the defendant of any negligence shown. In the case of *Robinson v. Ploche*, 5 Cal. 460, upon an exception to the charge in the court below to the effect that, if the intoxication of the plaintiff was the cause of the injury, he could not recover, *Heydenfeldt, J.*, in delivering the opinion of the court for reversal, said:

"If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such * * * negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it."

[2] 2. Under the facts in this case we are not authorized to set aside the verdict as excessive. The evidence shows that at the time of the death of the engineer he was 47 years old, that his physical and mental condition were good, and that "he gave the greater part of his earnings to his family." If he earned \$150 a month the wife got \$125 of it. If he earned \$200 she got \$175 of it, and sometimes over that. When viewed in the light of this and other evidence, we do not see our way clear to set aside the verdict as excessive, as there is nothing in the record to show prejudice or bias on the part of the jury, and it has the approval of the trial judge. In this connection attention is called to the case of *the Realty Bond & Mortgage Co. v. Harley*, 91 S. E. 254, decided by this court at the present term, in which this question is discussed at some length.

[3] 3. Plaintiff in error insists that the plaintiff in the court below did not prove her case as laid; the contention being that "the case, if any, that was proven was under the federal statute," and "the federal count of the petition had been stricken on plaintiff's motion," and "the plaintiff had elected to proceed on the second count alone." To support the contention stated above plaintiff in error cites the case of *St. L., S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, and that of *Moliter v. Wabash R. Co.*, 180 Mo. App. 84, 168 S. W. 250. The two cases above referred to are entirely different from the one under consideration. In the *Moliter* Case the plaintiff, who was a brakeman engaged in interstate commerce, sued for damage caused by one of the defendant's cars passing over his foot. The petition stated a common-law action, and the case was presented to the jury as such character of action, and the judgment was rendered as in such character of action. The court said:

"Plaintiff's insistence is that, if the evidence showed his right of action was under the federal statute, he could recover although no facts constituting such action were pleaded, and although he did not submit the case to the jury under

that statute. * * * Here, as has been stated, the plaintiff himself affirmatively proved that he was engaged in interstate commerce, and defendant, seeing that a case was proven which was exclusively cognizable under the federal Employers' Liability Act, asked the peremptory instruction referred to. The court refused it and submitted the case under another law, and thus deprived defendant of a trial under the federal statute."

It will be noted from the above that in the *Molter Case* the case was submitted under the petition as originally drawn, and this "deprived the defendant of a trial under the federal statute." In the *Seale Case* the suit was brought by the widow and parent of the deceased employé and was tried under the Texas statute, when it should have been "brought by deceased's personal representatives under the federal statute." "When the evidence was adduced it developed that the real case was not controlled by the state statute but by the federal statute. In short, the case pleaded was not proved and the case proved was not pleaded." It will be seen that there was nothing in the pleadings to show that the federal statute was involved, that the case was not tried under the federal statute, but under the state statute, and it was remanded "for further proceedings not inconsistent with this opinion, but without prejudice to such rights as a personal representative of the deceased may have." In the case under consideration the petition was under the state statute, but there was a plea that the deceased and the defendant were engaged in interstate commerce at the time the deceased received the injuries complained of, the plea concluding with the statement that "the above-stated case comes within the terms of and is to be determined by the provisions of the federal statute." In addition to this, the brief of plaintiff in error states that "the case was tried under the federal law on the state count." In the brief of defendant in error it is stated:

"It was conceded by both parties that the federal Employers' Liability Act of 1908 applied, and the case was tried under that law."

In charging the jury the judge stated:

"It is admitted by the attorneys for both parties that the deceased and the railroad company for which he was working at the time he met his death were engaged in interstate commerce, that is, both the deceased and the company were engaged in work connected with the carrying of freight and passengers into another state or in furtherance thereof, and the laws of the Congress of the United States known as the federal 'Employers' Liability Act' would be controlling."

And the judge based his charge on the federal statute.

Before a reversal of the judgment of the court below can be obtained on the ground that there has been a denial of right under the federal statute, the plaintiff in error must demonstrate that this right was denied. As illustrating the principle involved, attention is called to the following cases: The case of *N. C. & St. L. R. Co. v.*

Anderson, 134 Tenn. 666, 185 S. W. 677, was a suit brought in the circuit court of Davidson county, Tenn., by a switchman. The declaration as originally filed was founded on the Georgia statute regulating the right of recovery for wrongful death, and contained no reference to interstate commerce. Among the pleas filed by the defendant was one setting out that it was a common carrier, and that the deceased was a servant employed in operating a car engaged in interstate commerce when he met his death. In the decision it was said:

"That deceased was not engaged in intrastate commerce, but interstate commerce, was fully made to appear by the aforesaid plea interposed to the declaration by the defendant below, and we agree with counsel for the administrator that this plea of the railway company supplied the omission in the declaration and made the interstate character of deceased's service obvious in the pleadings. No issue was ever made on the facts alleged in said plea. * * * Matters of substance omitted from a declaration may be cured by a plea."

In the case of *United States v. Morris*, 10 Wheat. 246, 6 L. Ed. 314, the Supreme Court of the United States held that a defective plea might be aided by a replication, just as a defective declaration might be aided by a plea. If a necessary allegation is omitted from a pleading and the missing allegation is either alleged or admitted by the pleadings of the other party, the defect is cured. Thus the defective statement or entire admission of a material fact by the plaintiff in setting up his cause of action is cured by an allegation or admission of the fact in the plea or answer. 31 Cyc. 714, 715. The case of *White's Adm'r v. C. V. R. Co.*, 87 Vt. 330, 89 Atl. 618, is one where suit was brought against the railroad company for damages on account of the death of a brakeman, in which none of the counts contained an averment showing that the train on which the intestate was injured was being operated as an interstate train, nor was it shown that he was employed by the defendant in such commerce, without which character of employment there could be no right of action under the federal Employers' Liability Act. The defendant pleaded in bar, expressly alleging that at the time of the accident it was, and ever since has been, a common carrier engaged in interstate commerce. The plaintiff filed a replication, and averred that by the laws and statutes of the United States and the state of Vermont the court has full and complete jurisdiction of the matters and things set forth in the plaintiff's declaration, to determine according to law. To this replication defendant demurred, alleging, among other things:

"The declaration purports to cover damages under the laws of the state of Vermont, while the replication contends that the action should be under the federal Employers' Liability Act."

The court held that by this plea the defendant expressly supplied the omission in

the declaration, essential to a good cause of action under the federal statute, saying:

"A declaration that is bad for lack of essential averments is made good by a plea that supplies these averments."

In the case of Southern Ry. Co. v. Ansley, 8 Ga. App. 326, 68 S. E. 1086, the petition was based upon the Alabama law and the case tried under the Alabama law, and the jury was instructed solely with reference to the Alabama law, and yet the verdict was allowed to stand because of the fact that defendant was not injured, Judge Russell saying:

"Mere error does not require the grant of a new trial. To set aside a verdict sustained by evidence, the error of which complaint is made must be shown to have been injurious to the complaining party, or at least appear to have affected some of his rights."

In the case at bar the court had jurisdiction, it was tried under the federal statute, and no injury resulted to the plaintiff in error therefrom.

"Paramount to every other consideration is the rule which requires that injury shall concur with error, before the finding of a jury should be set aside."

It will thus be seen that there is no merit in the contention of plaintiff in error that:

"The case that was pleaded was not proven, and the case, if any, that was proven, was not pleaded."

[4, 5] 4. The charge complained of in reference to the amount which plaintiff could recover is but a part of the instructions given on this point. When all of the charge relating to this subject is considered, there is no error. The charge measures up to the requirements of the federal law, and there are no objectionable additions thereto.

Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 434)

MORRISON v. CITIZENS' & SOUTHERN BANK. (No. 8303.)

(Court of Appeals of Georgia, Division No. 2. Feb. 16, 1917.)

(Syllabus by the Court.)

1. BILLS AND NOTES §489(3)—SURETYSHIP—PROOF—NOTICE AND PLEA.

Before one who is sued as the maker of a promissory note and who appears as such on the face of the note can avail himself of the provisions of section 3556 of the Civil Code of 1910, which allow a defendant, under such circumstances, either before or after the judgment, to prove by parol the fact that he was in reality a surety only, he must give the notice required by the statute, and his plea must contain an appropriate prayer for independent affirmative relief. *Carlton v. White*, 99 Ga. 384, 27 S. E. 704 (3). In the instant case, even if the prayer in the defendant's plea was sufficient to allow him to prove his suretyship by parol, it does not appear that he had notified the alleged principal of his intention to make such proof. In the absence of such notice, parol evidence as to the suretyship was inadmissible, and the court did

not err in refusing to allow the defendant to establish this fact before the jury.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1590-1595.]

2. BILLS AND NOTES §394, 396—NOTICE OF PROTEST AND NONPAYMENT—NECESSITY.

There is no merit in that ground of the motion for a new trial which alleges that the court erred in not submitting to the jury the question whether the Irish-American Bank had waived protest on the note sued upon, it appearing that no notice of nonpayment or protest for nonpayment had been given that bank. Notice of protest and nonpayment is not necessary to bind a principal on a note. It is given only for the purpose of fixing liability upon an indorser or surety. *Pritchard v. Smith*, 77 Ga. 463, 466. In the instant case the defendant's contention is that the Irish-American Bank was not an indorser of the note, but was the real maker and principal of the same. If this be true, the Irish-American Bank was ultimately liable on the note as the maker, and no protest for nonpayment was necessary to bind it. Under such circumstances the defendant will not be heard to complain that no notice of nonpayment or protest for nonpayment had been given the Irish-American Bank, or that it did not waive such notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 996-1050.]

3. BANKS AND BANKING §74—"PREFERENCE"—CONSTRUCTION OF STATUTE—RIGHT TO RELIEF—TRANSFEROR.

The facts of this case, as disclosed by the record, show that the provisions of section 2360 of the Civil Code of 1910 are not applicable thereto. That section provides that "all conveyances, assignments, transfers of stocks, or other contracts made by a bank in contemplation of insolvency, or after insolvency, except for the benefit of all creditors and stockholders, shall be fraudulent and void, unless made to an innocent purchaser for value without notice or knowledge of the condition of the bank." Under this statute an unlawful preference arises only when the transfer is made by a bank insolvent at the time or in contemplation of insolvency for an antecedent debt. *Booth v. Atlanta Clearing House Association*, 132 Ga. 100, 63 S. E. 907; 10 Cyc. 295. In the instant case the transfer of the collateral notes, of which the note sued upon was a part, from the Irish-American Bank to the plaintiff bank, was to secure a present, and not an antecedent, debt. See *Toomey Bros. v. Citizens' & Southern Bank*, 91 S. E. 339, decided by this court February 1, 1917.

(a) Even if the transfer of the collateral security from the Irish-American Bank to the plaintiff bank could be held illegal, the former bank, or its receiver, could not demand the return of its collateral from the plaintiff bank without restoring the latter to its original condition, which would mean the repayment of the debt for the security of which the collaterals were transferred. *Booth v. Atlanta Clearing House Association*, supra.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 156.

For other definitions, see Words and Phrases, First and Second Series, Preference.]

4. APPEAL AND ERROR §1078(6)—PLEDGES §58(1)—COLLATERAL—COLLECTION—ABANDONMENT OF ERROR.

There is no merit in the complaint that the court did not require the plaintiff bank to account for the other collateral security pledged to it by the Irish-American Bank. There was no evidence which showed that the debt of the latter bank to the plaintiff had been paid. As was held by the Supreme Court in *Bank of the University*

v. Tuck, 96 Ga. 456, 23 S. E. 467 (6): "If a promissory note, before its maturity, is pledged as collateral security for a particular debt, and such debt is afterwards paid, the holder of the collateral note has then no right to collect it, if the person liable for its payment has already paid it to the pledgor who was the original payee; *but so long as any portion of the debt secured by the collateral remains unpaid, the holder of the latter may collect the same, or at least enough thereof to satisfy whatever may remain due on the claim thereby secured.*" (Italics ours.) And in *Hancock v. Empire Cotton Oil Co.*, 17 Ga. App. 170, 86 S. E. 434 (4), this court held that: "Where the holder of a bill or note has acquired it as collateral security for a debt and is entitled to recover thereon, the extent of his recovery is limited to the amount of that debt, if there be a valid defense against the party transferring it to him, * * * but, in the absence of proof to the contrary, the holder of an accommodation paper, transferred to him as collateral for the debt of the person who transferred it, will be deemed to have advanced the full amount of the paper, or to hold against his debtor a claim equal to or in excess of the paper." See, also, to the same effect, *Linderman v. Atkins*, 143 Ga. 366, 85 S. E. 101 (3).

The remaining grounds of the motion for a new trial are not argued in the brief of counsel for the plaintiff in error, and are therefore treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261; Pledges, Cent. Dig. §§ 186-189.]

5. REFUSAL OF NEW TRIAL.

The court did not err in directing a verdict for the plaintiff, or in thereafter refusing to grant a new trial.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by the Citizens' & Southern Bank against H. C. Morrison. Judgment for plaintiff, and defendant brings error. Affirmed.

W. K. Miller, of Augusta, for plaintiff in error. Boykin Wright, Boykin Wright, Jr., and Alexander & Lee, all of Augusta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 436)

CORNELISEN v. CITY OF ATLANTA. (No. 6388.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 27, 1917.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS §733(1), 747(2) —
PUBLIC PARK — NEGLIGENCE OF OFFICERS —
LIABILITY.

"Where a city maintains a park primarily for the use of the public, intended as a place of resort for pleasure and promotion of health of the public at large, its operation is in virtue of the governmental powers of the municipality, and no municipal liability would attach to the nonperformance or improper performance of the duties of the officers, agents, or servants of the city in respect to keeping the park safe for use by members of the general public. It would not affect the public character of the duties of the officers, agents, or servants of the city that a purely incidental profit might result

to the city from its operation or management of the park. But if the city, having charter authority, maintain the park primarily as a source of revenue, the duty of maintaining it in a safe condition for the use for which it is intended would be ministerial and municipal liability would attach for breach of such duty." *Cornelisen v. Atlanta*, 91 S. E. 415, decided by the Supreme Court, February 13, 1917.

(a) It being apparent from the allegations in the plaintiff's petition that the "public recreation park," therein asserted to be "owned and controlled" by the city of Atlanta: at the time of the injury complained of, was maintained "primarily for the use of the public, intended as a place of resort for pleasure and promotion of health of the public at large," no municipal liability attached on account of the nonperformance or improper performance of the duties of the officers, agents, or servants of the city in respect to keeping the park safe for use by members of the general public. Considering the allegations in the petition as made, it is plain that any profit resulting to the city from the operation or management of the park was purely incidental.

(b) The trial court therefore did not err in sustaining the demurrer and dismissing the case as to the city of Atlanta.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1547, 1572.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by Martin Cornelisen against the City of Atlanta. Judgment for defendant sustaining demurrer to bill and dismissing the case, and plaintiff brings error. Affirmed.

See, also, 91 S. E. 415.

Geo. H. Gillon and Dean E. Ryman, both of Atlanta, for plaintiff in error. Jas. L. Mayson and W. D. Ellis, Jr., both of Atlanta, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 425)

WILLIAMSON v. MARTIN-OZBURN REALTY CO. (No. 8249.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. PLEADING §192(6)—DEMURRER—SUBJECT-MATTER.

A defendant cannot, by demurrer to a petition, avail himself of the defense of dual agency on the part of the plaintiff, where it does not appear from the petition that the inconsistent relationship was unknown to him.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 426.]

2. BROKERS §86(1)—ACTION FOR COMMISSION—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict, and no error of law was committed.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 117, 118.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by Martin-Ozburn Realty Company against R. H. Williamson. Judgment for plaintiff on second count of petition, motion

for new trial denied, and defendant brings error. Affirmed.

Westmoreland & Westmoreland, of Atlanta, for plaintiff in error. Dorsey, Shelton & Dorsey, of Atlanta, for defendant in error.

JENKINS, J. On March 22, 1913, Martin-Ozburn Realty Company filed suit in the superior court of Fulton county against R. H. Williamson in two counts. In the first count the plaintiff alleged that the defendant owed it \$690, with interest at 7 per cent. per annum from November 8, 1912, for commissions due the plaintiff as real estate agent and broker; that prior to May, 1912, Mrs. Harrett F. Brandon and Mr. James R. Wylie, through their agent, Bun Wyley, had listed a certain piece of real estate with the plaintiff for sale, agreeing to pay the plaintiff \$690, if it sold the property for \$21,690, and that it showed the property to various prospective purchasers, and in the month of May, 1912, through its agent and salesman, A. M. Reid, showed it to the defendant, stating to him the price and the names of the owners; and that on November 8, 1912, the defendant, by fraudulent representations to the owners, purchased the property directly from the owners, without disclosing to them that the plaintiff had shown the property to the defendant and thereby defrauded the plaintiff out of its commission. The second count set up an indebtedness to the plaintiff in quantum meruit for labor performed and services rendered, in the sum of \$575, this count alleging that the defendant came to the plaintiff some time prior to May, 1912, and requested it to assist him in finding and purchasing some vacant property in the city of Atlanta, suitable for subdivision and improvement; that the plaintiff informed him that there was listed with it for sale the property already indicated; and that thereafter the plaintiff, through its agent, made frequent trips from its office, in company with the defendant and showed him this property, explaining fully the terms of the sale, and informing him who the owners were, and stating the price, at which it was listed; that at his instance and request the plaintiff had divers interviews and consultations with him, relating to said property, running through the month of October, 1912, and that, at his request the plaintiff assisted him also in disposing of certain promissory notes held by him against other property, which he represented was a necessary prerequisite to his purchase of the property involved; that on or about November 8, 1912, he purchased the property directly from the owners thereof, for the consideration of \$21,000, and that by reason of the plaintiff's services, rendered at his request in connection with the purchase of said property, he became indebted to the plaintiff in the sum of \$575, this being the usual and customary real estate agent's commission on said sale.

The defendant interposed a demurrer to

each of the counts of the petition, on the ground that neither of them stated facts sufficient to constitute a cause of action. The demurrer was sustained as to the first count and overruled as to the second count; and, the defendant filed exceptions pendente lite. Upon the issue raised upon the second count there were two trials. The first verdict was set aside by the trial judge, and on the second trial the jury returned a verdict against the defendant for \$500. He made a motion for a new trial, which was denied, and he excepted, assigning error upon the refusal to sustain the demurrer to the second count of the petition, and upon the overruling of the motion for new trial.

The record discloses that A. M. Reid, the plaintiff's agent in this transaction, testified that he and Williamson made several trips to various parts of the city and looked at various tracts of land, among which was the vacant block belonging to Wylie and Brandon, involved in this litigation. According to Reid's testimony, Williamson was then informed that this property was listed with the plaintiff for sale, and he was given the names of the owners and information as to the price and terms. Reid further testified that he assisted Williamson in figuring out how this property could be advantageously subdivided, and that the matter of its purchase was thoroughly discussed with Williamson on frequent occasions thereafter at the office of the plaintiff. Reid further testified that at the request of Williamson he made a trip to West End, and remained there for an hour or more, for the purpose of aiding in the disposition of certain purchase-money notes held by Williamson, which he represented to be a necessary prerequisite to the purchase of the property involved. According to Reid's testimony, Williamson requested him to stay away from the owners, as he preferred to purchase the property himself directly, but that he "would take care of" the plaintiff's compensation.

According to the evidence for the plaintiff, after being requested by Williamson to let him make the trade direct, and after being promised by him that its compensation would be taken care of, it did not have any interview with the owners or do anything to induce them to sell the property. The evidence of both the owners showed that the plaintiff had done nothing to induce them to make the sale. According to the evidence of Brandon, who was sworn as a witness for the defendant, something was said by Williamson, at the time the trade for the property was closed, about his being entitled to a reduction on the price, equivalent to the agent's commission. Wylie, the other of the owners, also stated in his testimony for the defendant, at the trial, that when Williamson and he were looking over the property, the statement was made by Williamson that as he was dealing with the owners direct, a sum equal to the commission should be deducted from the

price. The owners of the property further testified in behalf of the defendant that the property had not in fact been listed for sale by them with the plaintiff.

[1] 1. Considering first the exception made to the overruling of the general demurrer, we are of the opinion that the second count of the petition sets out a valid cause in quantum meruit. Certainly, in the absence of a special demurrer, the statement of the services rendered by the plaintiff in assisting the defendant, at his request, in finding and purchasing the property referred to, are adequately set forth; and, while it is true it is not alleged that there was specific agreement on the part of the defendant whereby he obligated himself to pay for such services, yet the rule of law which ordinarily implies such a promise when one accepts the benefit of valuable service rendered by another is sufficient to supply this omission. Civil Code 1910, § 5513. In such a case it is not necessary to allege or prove an express promise. *Jackson v. Bulce*, 132 Ga. 51, 63 S. E. 823; *Keener on Quasi Contracts*, 19-318; *Citizens' Bank v. Rudisill*, 4 Ga. App. 37, 41, 60 S. E. 818; 40 Cyc. 2808; *Moses v. MacFarlan*, 2 Burrows, 1008. The petition having alleged the service by the plaintiff in behalf of the defendant at the request of the latter, we cannot hold as a matter of law that any compensation therefor was due by the owners and not by the defendant. But it is insisted by counsel for plaintiff in error that the general demurrer to the second count of the petition should have been sustained for the reason that the allegations therein contained set out the existence of such dual agency on the part of the plaintiff as would forfeit its right to compensation from the defendant principal, in that the petition shows on its face that the property involved had been listed for sale with the plaintiff by the owners thereof. In support of this contention counsel cites *Gann v. Zettler*, 3 Ga. App. 589, 60 S. E. 283, and *Williams v. Moore*, 3 Ga. App. 756, 60 S. E. 372. We are not prepared to hold, however, that because an owner may have listed property with a broker for sale, the broker is thereby necessarily precluded from entering into an agreement with the purchaser, whereby he would be entitled to render and charge for services in connection with a sale of such property, although in such a transaction the utmost loyalty and good faith on his part is required. In the present case the terms on which the owners had listed this property with the broker are not disclosed, and there is no special demurrer to the petition. We can therefore assume, for the purposes of the demurrer, that the property had been listed with the plaintiff by the owners at a stated

price and on the express condition that the broker's compensation should be paid by the purchaser. It can also be said that contracts of dual agency are not void per se, but are void only when the fact that the agent represented both parties was unknown. The burden of making out a defense to a prima facie liability rests upon the defendant; and, where dual agency is relied on, it is necessary for the defendant to allege and prove not only the incompatible relationship, but also that it was unknown. It follows that unless both of these facts appear upon the face of the petition, a demurrer could not raise such a defense. See *Red Cypress Lumber Co. v. Perry*, 118 Ga. 876, 45 S. E. 674. We think the court properly overruled the demurrer.

[2] 2. There was abundant testimony, which the jury was authorized to accept, sustaining each of the material allegations made in the petition. There was no plea setting up the defense of dual agency, and, from the evidence at the trial, the jury were authorized to believe that the plaintiff had exercised good faith towards all parties concerned, and that he violated no duty which he might have owed to either the owner or the purchaser. Furthermore, in this connection, the owners of the property, in testifying for the defendant, denied that the property had been listed for sale with the plaintiff, and the jury, being the exclusive judges of the weight of the evidence, were authorized, even on that theory, to find that the plaintiff violated no duty of loyalty and good faith. *Christian v. Macon Ry. & Lt. Co.*, 120 Ga. 317, 47 S. E. 923. See, also, *Dacy v. Gay*, 16 Ga. 203; *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 395 (8); *Bussey v. Moses*, 48 Ga. 120; *Slaton v. Fowler*, 124 Ga. 255, 53 S. E. 567 (1). While we are inclined to think that the verdict was liberal in amount, we do not feel authorized, in view of all the evidence, to disturb the finding of the jury on that ground.

3. The exceptions taken to the charge of the court and to the failure to charge are not borne out by the certified record in the case, although counsel for the defendant in error admits the correctness of the excerpts complained of and the omission to charge, as excepted to. This case having been twice tried in the court below, we surmise that counsel on both sides base their contentions upon the charge of the court given in the first trial, and not upon the charge given in the trial of the case now before us for review.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 412)

CHRISTOFIELD v. E. S. STREET & CO.
(No. 7698.)(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)*(Syllabus by the Court.)***APPEAL AND ERROR §371—WRIT OF ERROR—DISMISSAL.**

The clerk having informed the court, upon the call of this case, that the costs had not been paid, and the case having been submitted upon briefs, subject to the condition that the costs be paid within ten days, and it appearing that they have not been paid, the writ of error is, in accordance with rule 17 (57 S. E. xii) of this court, dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2000.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action between Peter Christofield against E. S. Street & Co. Judgment for the latter, and the former brings error. Writ of error dismissed.

Camp & Twitty, of Dublin, for plaintiff in error. M. H. Blackshear, of Dublin, for defendant in error.

JENKINS, J. Writ of error dismissed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 341)

J. W. STAFFORD & SON v. MEANS.
(No. 8140.)(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)*(Syllabus by the Court.)***CONTRACTS §242—EXTENSION—FORFEITURE—SUBSEQUENT CONTRACT.**

The original deed of conveyance executed by the defendant in 1910 to secure a debt required her to turn over 10 bales of rent cotton each year, and to pay at least one of the notes secured thereby; and provided that, in default of a compliance with these stipulations, an agreed extension of five years within which to pay the indebtedness should be forfeited. A later deed of conveyance, covering the same property and intended to secure, not only the original indebtedness, but a large increase thereof, while adopting all the terms and conditions of the contract of 1910, expressly provided that the debtor should "pay first" out of her rent notes and all her income and crops whatever sum, not secured by either deed, she might become indebted to the plaintiff on account of supplies furnished for the year 1912; and this stipulation was in direct conflict with the above-mentioned agreement in the contract of 1910, requiring a different disposition of rent notes, income, etc., and it nowhere appeared that the indebtedness of 1912 had ever been discharged, or that the debtor did not apply her entire income and all the profits, rent notes, etc., derived from the "old Means place," or from her entire property, in settlement thereof. The conditions upon which a forfeiture of the time extension allowed by the contract of 1910 could be avoided were made impossible of performance by the express provisions of the contract of 1912, and therefore the debtor could not be held to have forfeited such extension. The tri-

al judge correctly sustained the demurrer on the ground that the action was prematurely brought.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1127.]

Error from Superior Court, Monroe County; W. E. H. Searcy, Jr., Judge.

Action by J. W. Stafford & Son against Mrs. A. A. Means. Judgment for defendant on demurrer, and plaintiff brings error, and cause was transferred by the Supreme Court to the Court of Appeals. Affirmed.

O. J. Lester, of Barnesville, for plaintiff in error. R. L. Berner, of Macon, and J. B. McDonald, of Yatesville, for defendant in error.

WADE, C. J. Stafford & Son brought suit to the August term, 1915, of the superior court of Monroe county, against Mrs. Means, to recover \$3,677.30 principal besides interest and attorney's fees, on eight promissory notes of the defendant to the plaintiffs, four of which were dated June 13, 1910, and due on October 15, November 1, November 15, and December 1, 1910, respectively, the three first for \$500 and the last for \$507.30 principal, besides interest, etc., and four others dated March 18, 1912, and due October 1, October 15, November 1, and November 15, 1912, respectively, for \$417.50 principal each, besides interest, etc. The indebtedness represented by the four notes first mentioned above was secured by a deed of the same date to 303¼ acres of land therein described intended to operate under the provisions of sections 3306, 3310, and 6037 of the Civil Code of 1910. This deed provided by its terms that the indebtedness represented by the notes should become due and payable as stated therein, "but in the event it is so desired on the part of the said Mrs. Means [the maker of the deed], she is to have five years in which to pay same in full, provided she shall make annual payments on the same of at least the amount of one of the said notes, thereby reducing said indebtedness each year." The contract further stipulated that Mrs. Means should "turn over and transfer to said Stafford & Son rent notes for 10 bales of lint cotton each year as a part of the security for the indebtedness" secured by the deed, and that:

"A failure to turn over and transfer the rent notes as herein above stipulated shall be a forfeiture of the right to have any of said notes or indebtedness extended over and beyond the due date named therein. February 15th of each year shall be the date or last day on which to turn over and transfer said rent notes."

On March 18, 1912, Mrs. Means executed and delivered to Stafford & Son another deed, covering the lands described in the deed of June 13, 1910, for the purpose of securing the four notes last mentioned above. This deed referred to the deed of June 13, 1910, and made the following recital:

"And whereas I, the said Mrs. A. A. Means, desire to further secure the payment of the

four promissory notes herein above mentioned, which is an additional indebtedness contracted and made with said Stafford & Son since the execution of the security deed above referred: Now, therefore, for and in consideration of said indebtedness, the extension of the payment thereof to the several dates named in said notes, and as well as for and in consideration of the sum of one dollar in hand paid, the receipt whereof is hereby acknowledged, I, the said Mrs. A. A. Means, do hereby grant, bargain, sell, alien, convey, and confirm unto the said Stafford & Son, their heirs, executors, and assigns, the said farm containing 303 $\frac{3}{4}$ acres, which is described above and is fully described in said deed dated June 13, 1910, and recorded June 16, 1910, in deed record 34, at pages 663, 664, in the office of the clerk of the superior court of Monroe county, Georgia, which deed and conveyance is hereby referred to and made a part of this contract and subject to and including all the terms, stipulations, and conditions named in said former deed of conveyance; and all the rights, options, powers, and privileges therein contained and provided are hereby referred to and adopted and made a part of this contract and conveyance. And it is fully understood and agreed that the said four notes which represent an existing indebtedness due by said Mrs. Means to said Stafford & Son shall be secured by and fall under the terms and stipulations of said conveyance as fully and completely and amply as if embodied in said deed, and said deed shall be of full force and virtue until the said indebtedness therein named, and that named herein as well, shall be fully paid off and discharged."

The deed contained also the following further recitals and agreement:

"It is further understood and hereby agreed, that, whereas I, the said Mrs. A. A. Means, am so indebted to said Stafford & Son in the way and manner herein above stated, aggregating approximately \$4,000, which is very likely more than I can pay during the year 1912; I therefore hereby agree and bind myself, my heirs, representatives, and assigns, to pay first, out of all my crops, all my income, including ten bales of rent cotton from my old Means place, or from any other resources, or income that I may have, all my indebtedness to said Stafford & Son which shall be created or made the present year (and which is not secured by and under the terms of this contract and conveyance and the conveyance of June 13, 1910, which is a part of this contract), before requiring or asking that any payment made shall be credited upon the notes secured hereby. It is also further understood and agreed hereby that in view of the increased amount of my indebtedness to said Stafford & Son subsequent to the execution and delivery of the deed of 1910, and the necessity for a longer period of time in which to pay off all of said indebtedness, the said Stafford & Son agree to give said Mrs. Means two years, and if absolutely necessary three years, in addition to the five years stipulated in the said conveyance of 1910, in which to pay off and discharge all the indebtedness secured by this and the said 1910 conveyance."

The defendant interposed a demurrer, in which it was insisted: (1) That the petition did not state a case authorizing a recovery against the defendant; (2) that the petition showed on its face that the plaintiff was not entitled to institute a suit upon the alleged indebtedness; and (3) that the petition showed upon its face that the indebtedness sued upon was not due, "for the reason that the contract of March 18, 1912, was a new and distinct contract, in itself extending the time of payment two years in addition to the five

years stipulated in the conveyance of 1910, 'in which to pay off and discharge all indebtedness secured by this and the said 1910 conveyance,' and it appears from the face of the pleadings that the said two years have not elapsed." The court sustained this demurrer, whereupon the plaintiff excepted and brought the case to the Supreme Court for review, and from that court the case was transferred to the Court of Appeals under the recent amendment to the Constitution.

The original contract allowed the maker of the security deed the full term of five years in which to pay the indebtedness thereby secured, but also required the debtor to turn over and transfer to the Stafford & Son rent notes for 10 bales of rent cotton each year, as a part of the security, and stipulated that upon a failure so to turn over and transfer these rent notes "the right to have any of said notes or indebtedness extended over and beyond the due date named therein" should be forfeited. Under the contract of 1912 the original contract of June 13, 1910, was referred to and made a part thereof, and the second contract was made "subject to and including all the terms, stipulations and conditions named in said former deed of conveyance," and "the rights, options, powers, and privileges therein contained and provided" were adopted and made a part of the second contract, but there is an apparent conflict between the terms of that contract and the original contract. The original contract provided that a failure to turn over and transfer rent notes for 10 bales of rent cotton each year on the indebtedness thereby secured would work a forfeiture of the right to have the notes secured by that deed extended beyond the maturity of each in 1910, and also made the grant of the five-year extension for the payment of the indebtedness thereby secured conditional upon the payment by the mortgagor of "at least the amount of one of the said notes." The agreement made in 1912 recognized by its recitals that the debtor would not, during that year, be able to pay the aggregate amount of \$4,000 then due, and expressly bound the debtor as follows:

"To pay first, out of all my crops, all my income, including ten bales of rent cotton from my old Means place, or from any other resource or income that I may have, all my indebtedness to said Stafford & Son which shall be created or made the present year (and which is not secured by and under the terms of this contract and conveyance and the conveyance of June 13, 1910, which is a part of this contract), before requiring or asking that any payment made shall be credited upon the notes secured hereby."

It further provided that:

"In view of the increased amount of my indebtedness to said Stafford & Son subsequent to the execution and delivery of the deed of 1910, and the necessity for a longer period of time in which to pay off all of said indebtedness, the said Stafford & Son agree to give said Mrs. Means two years, and if absolutely necessary three years, in addition to the five years stipulated in the said conveyance of 1910, in which

to pay off and discharge all the indebtedness secured by this and the said 1910 conveyance."

This last provision of the contract is not necessarily in conflict with any provision in the contract of 1910, but the agreement binding the debtor to "pay first" out of all her crops and income, "including ten bales of rent cotton from [her] old Means place, or from any other resource or income that [she] may have" all her indebtedness to Stafford & Son which shall be created or made during the year 1912, "before requiring or asking that any payment made shall be credited upon the notes secured" by the contract of 1912, is plainly in conflict with the agreement of 1910, which required the debtor to turn over rent notes for ten bales of cotton each year, and also to reduce the indebtedness secured by the contract of 1910 by the payment of at least one of the notes therein described each year, since it required her to pay this identical cotton first upon her indebtedness for the year 1912, not secured by the deed of 1910 or of 1912, and made it impossible to pay off one of the notes annually until after payment of the indebtedness created in 1912 and not covered by the deeds. The plaintiff, therefore, could not declare a forfeiture because of the failure of the defendant to comply with requirements in the contract of 1910, which the contract of 1912 took it out of her power to perform, and therefore the default under the provisions of the contract of 1910 could not work a forfeiture of the right to extension therein provided for. Also, notwithstanding the recital in the contract of 1912 that all the provisions of the contract of 1910 are embraced and embodied therein, the latter contract contains an express agreement (based upon the fact therein stated, that the indebtedness of the defendant was largely increased after the execution of the deed of 1910, and the necessity for a longer period of time in which to pay off the indebtedness had therefore been created) that Stafford & Son would give Mrs. Means two years, "and if absolutely necessary three years, in addition to the five years stipulated in the conveyance of 1910, in which to pay off and discharge all the indebtedness secured by this and the said 1910 conveyance." If the condition in the contract of 1910, which required the debtor to turn over and transfer rent notes for ten bales of cotton, and to pay off in full one of the notes thereby secured each year, was ingrafted upon and made a part of the contract of 1912, in order to prevent the forfeiture of the privilege of an extension of five years therein granted, it must be considered in connection with all the terms of the latter contract; and the provision in the contract of 1912, requiring the debtor first to pay another debt out of all her crops and income, including 10 bales of rent cotton from the old Means place (described in both

security deeds), might absolutely preclude the possibility of complying with the above-mentioned terms of the contract of 1912.

It is not alleged by the plaintiff that the indebtedness of 1912 had been in fact paid by Mrs. Means, the debtor, and that there remained in her hands thereafter any rent notes from the old Means place, which she declined to turn over in compliance with the contract of 1910; or, in other words, it does not appear that the entire income and all the rent notes of the debtor were not consumed in discharging the indebtedness which was incurred in 1912. So far as appears from the pleadings in the case, the contract of 1912 took it absolutely out of the power of the debtor either to deliver over the rent notes for 10 bales of cotton as additional security each year, or to make annual payments on her indebtedness of at least the amount of one of the notes described in the security deed. The contract of 1912 amounted, therefore, to a novation of the contract of 1910, in so far as the two were in conflict, and since the forfeiture provided for could not operate, and the right of action had not otherwise accrued at the time the suit was brought (the original five years and the additional three years not having then expired, and no sufficient facts are pleaded to show any forfeiture of the right to extension provided for by both contracts), the action was prematurely brought.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 338)

BEVERLY v. WILSON. (No. 7470.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917. Rehearing Denied
Feb. 28, 1917.)

(Syllabus by the Court.)

1. TROVER AND CONVERSION \S 23—RIGHT OF ACTION—POSSESSION.

While the mere right of possession of personal property, even if the holder has no valid title to it, gives him a right to maintain a suit in trover against a wrongdoer who has deprived him of that possession, yet where the plaintiff relies on his title to recover possession of the property, and his evidence shows that a paramount outstanding title to the property is in a third person, he cannot recover. *Mitchell v. Georgia & Alabama Ry.*, 111 Ga. 760, 771, 36 S. E. 971, 51 L. R. A. 622; *Central Bank v. Georgia Grocery Co.*, 120 Ga. 883, 885, 48 S. E. 325.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. \S 163-166.]

2. APPEAL AND ERROR \S 832(21)—BRIEF OF EVIDENCE—STRIKING OUT.

The "pony" homestead having been excluded from the evidence, on motion of the plaintiff, he will not be heard to complain that the trial judge declined to approve the following reference to it in the brief of the evidence: "The defendant tendered in evidence a pony homestead, taken out by Mary Gaskins on August 15, 1915, in which said cow and calf were scheduled as

her own property." The judge struck the last four words, to wit, "as her own property," ruling that they were not material in the case or in the brief of evidence for any purpose. Under the facts it would not have been error for the judge to strike from the brief of evidence the entire reference to the homestead.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3610.]

3. APPEAL AND ERROR ⇨1008(2)—VERDICT—CONCLUSIVENESS.

In this case the trial judge was by consent exercising the functions of both judge and jury, and the evidence not demanding a finding for the plaintiff, his judgment in favor of the defendant will not be controlled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3957, 3964.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Action by T. C. Beverly against J. I. Wilson. Judgment for defendant, and plaintiff brings error. Affirmed.

C. E. Hay, of Thomasville, for plaintiff in error. Jas. B. Burch and W. I. MacIntyre, both of Thomasville, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 397)

SEABOARD AIR LINE RY. v. VAUGHN.
(No. 7536.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇨1078(3) — ASSIGNMENTS OF ERROR—BRIEFS—WAIVER.

In the brief of counsel for the plaintiff in error no reference is made to the assignment of error based upon the ruling on the demurrer; and therefore this will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4258.]

2. APPEAL AND ERROR ⇨302(5), 303—TRIAL ⇨46(1)—MOTION FOR NEW TRIAL—SETTING OUT EXCLUDED EVIDENCE—QUALIFICATION.

(a) In several of the grounds of the motion for a new trial error is alleged on the refusal of the court to allow a witness to be asked certain questions. Before such refusal will be held to be error, it must appear what answers were expected, and that the trial judge was informed thereof at the time the questions were propounded. (b) Others of the grounds were rendered "spineless" by the qualifications and explanations of the judge in his approval thereof. (c) Still other grounds alleged that the verdict was against certain portions of the charge. This is equivalent to a complaint that the verdict was contrary to law, and "such an exception does not present for decision any legal question." (d) There is no merit in any of the grounds of the amendment to the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744, 1756; Trial, Cent. Dig. § 115.]

3. APPEAL AND ERROR ⇨1004(3) — MASTER AND SERVANT ⇨276(1)—ACTION FOR INJURY—SUFFICIENCY OF EVIDENCE—EXCESSIVE DAMAGES.

The evidence abundantly authorized a finding for the plaintiff; and, though the verdict

may be "large and generous," this court does not feel authorized, under the law, to set aside the verdict on the sole ground that it is excessive, there being nothing in the record to indicate prejudice or bias on the part of the jury, and the verdict having been approved by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3945, 3947; Master and Servant, Cent. Dig. §§ 950, 954.]

4. COSTS ⇨261 — APPEAL — LOSING PARTY — DISCRETION OF COURT.

Although there is no reason for the grant of a new trial in this case, this court, exercising the discretion vested in it, declines to award 10 per cent. damages against the plaintiff in error, as requested by defendant in error.

[Ed. Note.—For other cases, see Costa, Cent. Dig. § 997.]

Error from City Court of Americus; W. M. Harper, Judge.

Action by S. E. Vaughn against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

E. A. Hawkins, of Americus, for plaintiff in error. Shipp & Sheppard, of Americus, for defendant in error.

BLOODWORTH, J. Defendant in error, S. E. Vaughn, showed by his petition that he was employed by the Seaboard Air Line Railway, in the capacity of engine and tender carpenter at the roundhouse in Americus; that while in the discharge of his duty as such carpenter he went under the tender of an engine to do some repair work on the safety chain attached to the brake beam near the rear trucks of the tender, and while engaged in this work the engine was moved by the hostler and his left hand was caught under one of the rear wheels, and his thumb and first finger were mashed off; that the flesh on the palm was mashed open and all the left hand and wrist mashed, and that one of the bones in his right arm was fractured; that he suffered excruciating pain and would continue to suffer; and that his injuries were permanent and his earning capacity was totally destroyed. Defendant denied all liability. The trial resulted in a verdict for the plaintiff for \$15,000. The evidence of the plaintiff shows that at the time of the accident he was 51 years old and was in perfect health; that he earned by his work for the road \$100, and by outside work \$50, monthly; that in addition to his pain and suffering, which still continued, he lost the thumb and index finger of his left hand, which was "crushed all to pieces"; that his right arm also was injured; that he was not able to use his left hand for any purpose, "not a thing in the world"; that his hand remained tender, and he could not bear to touch anything, and that he could not sleep without keeping the hand saturated with alcohol so as to relieve the pain; that he could not use his right arm any more, "not to amount to anything." Dr. J. W. Chambliss testified that some two or

three months after the injury the plaintiff came to him complaining that he was not able to use his arm at all. He further testified that the fingers which remained on the hand of plaintiff were in a stiffened condition; that, "when the thumb and finger were gone the remaining fingers cannot hold anything at all, it makes his hand useless;" that the injury was of such character, so far as carpenter or mechanical work was concerned, as to make the hand remain hopeless, and that the future condition of his hand would probably remain the same. A. C. Guy testified that plaintiff had not been able to do any work since the injury, and that after he came from the hospital he said his right arm was hurt; that something was the matter with the elbow and he could not use a hoe or saw. Dr. R. E. Cato, who was sworn for the defendant, testified that he was surgeon for the Seaboard Air Line Railway, and took off the finger and thumb of the plaintiff, and that he examined him at the time to see if there were other injuries, but found none; that he examined the plaintiff's right arm and found no injury to it at all. Dr. F. L. Cato testified that he was a brother to Dr. R. E. Cato, was a practicing physician, and assisted in taking off the thumb and finger of the plaintiff; that some time later the plaintiff, in company with an insurance agent, came to him to examine the plaintiff's right arm; and that he found no injury to that arm and there was not anything the matter with the condyle.

[3] 1. From the above it will be seen that the evidence is somewhat conflicting as to the injury to the right arm, but it was within the province of the jury to believe the evidence for the plaintiff, and, if this evidence is true, then both arms of the plaintiff are practically useless and his earning capacity, according to his testimony, almost entirely gone. While the verdict may seem large, yet under the law—

"the question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Civil Code, § 4399.

In the case of *Murphy v. Meacham*, 1 Ga. App. 155, 57 S. E. 1046, the second headnote is as follows:

"The court has no power to review the finding of the jury because their verdict is claimed to be excessive, unless it appear that their finding was due to prejudice or bias, or was influenced by corrupt means."

Section 6087 of the Civil Code is as follows:

"The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding."

"Thus the judge of the superior court has by law conferred upon him the discretionary power to grant a new trial where the verdict is

contrary to evidence and the principles of justice and equity, or is decidedly and strongly against the weight of the evidence; and it is his duty to exercise a sound discretion, and to grant new trials where it should be done. A court of errors has not the same discretionary power conferred upon it in this regard. When a case comes before the Supreme Court, after the refusal of a new trial by the judge of the superior court, it comes not only with the presumption in favor of the verdict of the jury, but also stamped with the approval of the presiding judge, after a consideration of the evidence and the verdict and the use of the discretionary power of review which the law confides to him as a right, and imposes upon him as a duty. Thus we are confronted with the question, not as one of primary discretion, but as to whether the trial judge has abused his discretion in approving the verdict, and whether there is any evidence sufficient to support it, or whether this court can say that the damages are so excessive as to authorize an inference of gross mistake and undue bias, in spite of the verdict and in spite of its approval." *Southern Ry. Co. v. Brock*, 132 Ga. 862, 64 S. E. 1085.

There is nothing in the record to authorize us to say that the verdict in this case is the result of prejudice or bias, unless it be the size of the verdict itself; and as this is not necessarily so large as to "shock the moral sense," or to authorize us to say that the jury was not impartial or that the verdict was the result of "gross mistake and undue bias," we must let it stand. See *Realty Bond & Mortgage Co. v. Harley*, 91 S. E. 254, decided at the present term.

[1, 2, 4] 2. The headnotes as to the other assignments of error "speak for themselves." Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 413)

CENTRAL OF GEORGIA RY. CO. v. LARSEN. (No. 8222.)

(Court of Appeals of Georgia. Division No. 2. Feb. 16, 1917.)

(Syllabus by the Court.)

1. RAILROADS \Leftrightarrow 348(1)—ACCIDENT AT CROSSING—SUFFICIENCY OF EVIDENCE.

The verdict approved by the trial judge was not without evidence to support it, there was no error in overruling the general demurrer, and the charge of the court correctly stated the rules of law applicable to the issues involved.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1138, 1140, 1141.]

(Additional Syllabus by Editorial Staff.)

2. RAILROADS \Leftrightarrow 335(1)—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—EFFECT.

The common-law rule that, where the plaintiff's negligence contributed to the injury, he cannot recover, is not the law of the state in respect to homicide by railroad.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1084.]

3. NEGLIGENCE \Leftrightarrow 101—INJURY AT RAILROAD CROSSING—"COMPARATIVE NEGLIGENCE"—STATUTE.

Under Civ. Code 1910, § 2781, providing that no person shall recover damages from a railroad for an injury to himself or property, where the same is done by his consent or is caused by his

own negligence, the plaintiff, though at fault himself, may recover, unless his negligence was equal to or greater than the negligence of the railroad, though damages are diminished by the jury in proportion to the fault contributable to him; the doctrine being that of "comparative negligence."

[For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167.]

For other definitions, see Words and Phrases, First and Second Series, Comparative Negligence.]

4. NEGLIGENCE ⇨101—INJURY AT CROSSING—COMPARATIVE NEGLIGENCE—STATUTE.

The rule of comparative negligence in respect to damages to person or property by railroad, prescribed by Civ. Code 1910, § 2781, is qualified by section 4426, providing that, if plaintiff by ordinary care could have avoided the consequences to himself, he cannot recover; the qualification applying only where the railroad's negligence becomes apparent to the person injured, or where by the exercise of ordinary care he could have become aware of it, and he thereafter failed to exercise ordinary care to avoid the consequences.

[For other cases, see Negligence, Cent. Dig. §§ 85, 163, 164, 167.]

5. PLEADING ⇨193(5)—DEMURRER—NEGLIGENCE.

Ordinarily the question of negligence, both on the part of a railroad and one injured thereby, is an issue for the jury; but where petition shows on its face that plaintiff cannot recover, and the question is raised by general demurrer, it is the court's duty to sustain the demurrer and dismiss the petition.

[For other cases, see Pleading, Cent. Dig. §§ 433, 441, 442.]

6. RAILROADS ⇨324(2)—INJURY AT CROSSING—AUTOMOBILE LAW—EFFECT.

Acts 1910, p. 90, regulating the driving of automobiles on public highways, does not supersede the law governing the liability of a railroad for injuries to persons driving automobiles, other than to render nonobservance of certain duties therein imposed negligence per se.

[For other cases, see Railroads, Cent. Dig. § 102L.]

7. RAILROADS ⇨350(13)—CONTRIBUTORY NEGLIGENCE—USE OF AUTOMOBILES—STATUTORY REGULATIONS—QUESTION FOR JURY.

Under Acts 1910, p. 90, § 5, providing that no one shall operate a machine on any highway at a speed greater than is reasonable and proper, having regard to the traffic and use of the highway, or operate a machine thereon so as to endanger life or limb, or safety of property, whether one so operates a machine is a question for the jury.

[For other cases, see Railroads, Cent. Dig. § 1166.]

8. RAILROADS ⇨324(3)—CONTRIBUTORY NEGLIGENCE—USE OF AUTOMOBILES—RATE OF SPEED.

Acts 1910, p. 90, § 5, requiring drivers of automobile approaching a descent, or a railroad crossing, to have it under control and not to operate it at a speed of more than 6 miles per hour, does not require that that speed be maintained while making the descent, as the object is to require him to slow his car to ascertain whether any one not before discerned is using the highway on its descent, so that a descent at more than 6 miles per hour is not negligence per se.

[For other cases, see Railroads, Cent. Dig. § 1024.]

9. STATUTES ⇨241(1)—CONSTRUCTION OF PENAL STATUTE.

A penal statute requires a strict construction.

[For other cases, see Statutes, Cent. Dig. § 322.]

10. NEGLIGENCE ⇨136(31)—RAILROADS ⇨350(13), 350(32)—INJURY AT CROSSING—OPERATION OF AUTOMOBILE—QUESTION FOR JURY—VIOLATION OF STATUTE.

In an action under Code 1910, §§ 4424, 4425, for the homicide of plaintiff's husband in a collision at a public crossing, where it is shown by the petition that the decedent drove his automobile down a descent and to within 89 feet of the track at 12 miles per hour, and where it is contended that deceased was thereby shown to be negligent in violating the automobile law (Acts 1910, p. 90, § 5), the negligence of defendant, or at least the degree of his comparative negligence, as prescribed by section 2781 of the Code, together with the question as to what constituted the proximate cause of the injury, and also the question as to whether deceased exercised proper prudence after the danger had been or should have been discovered, were all questions which together should have been properly submitted for the consideration of the jury.

[For other cases, see Railroads, Cent. Dig. § 1166.]

11. APPEAL AND ERROR ⇨1078(3)—ASSIGNMENTS OF ERROR—ABANDONMENT.

Errors complained of in the matter of overruling special demurrers, not urged by counsel in their briefs, must be treated as abandoned.

[For other cases, see Appeal and Error, Cent. Dig. § 4253.]

12. NEGLIGENCE ⇨141(12)—INJURY AT CROSSING—INSTRUCTIONS—COMPARATIVE NEGLIGENCE.

In an action, under Civ. Code 1910, §§ 4424, 4425, for the homicide of plaintiff's husband, killed by a collision between his automobile and defendant's train, it was not error to charge conjunctively sections 2781 and 4426, the former prescribing a rule of comparative negligence, and the other stating a particular instance in which recovery could not be had.

[For other cases, see Negligence, Cent. Dig. §§ 397-399.]

13. DEATH ⇨99(4)—EXCESSIVE DAMAGES—VERDICT.

Verdict of \$15,000 in action under Civ. Code 1910, §§ 4424, 4425, for homicide of plaintiff's husband, 27 years of age, in good health, and earning \$2,500 per year, was not excessive.

[For other cases, see Death, Cent. Dig. §§ 125, 126, 128.]

Error from Superior Court, Johnson County; E. D. Graham, Judge.

Action by Mrs. Reble Parker Larsen against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Hines & Jordan, of Atlanta, L. H. Moye, of Wrightsville, and W. W. Larsen, of Dublin, for defendant in error.

JENKINS, J. Mrs. Reble Parker Larsen brought suit against the Central of Georgia Railway Company, under sections 4424 and 4425 of the Civil Code of 1910, for the homicide of her husband, W. T. Larsen, who was killed by a collision with a passenger train of the defendant at a public crossing while driving an automobile. The plaintiff alleged, in her petition, that the defendant failed to observe any of the requirements of section 2675 of the Civil Code, known as the "blow post law," but that the engineer in charge of the train at the time of the collision ran it over the said crossing at a high and reck-

less rate of speed, to wit, at the rate of 40 miles per hour; that the servants in charge of the train did not blow the whistle or give any other signal of its approach to the crossing, from the time the blow post was reached until the crossing was passed; and that the engineer in charge of the train did not, on arriving at the blow post, check and continue to check its speed, as required by law, so as to be able to prevent such a collision. The petition alleged that the plaintiff's deceased husband was 27 years of age at the time of his death, and was at that time earning \$300 per month in the practice of law, and alleged the full value of his life to be \$39,725. The petition further alleged as follows: At the time of his death said W. T. Larsen was traveling in an automobile, going from Dublin, via Scott, Ga., to Swainsboro, Ga., and had to cross the railway of said company at the point where said public road, known as the National Highway, crosses the railway of said company after leaving Scott, Ga. Where said railway crosses said public road is near the foot of a hill. To the right of said public highway, as a traveler approaches said crossing from the west, the hill is of such elevation as to prevent him from seeing a train approaching from the point east of said crossing. Said public road whereon said Larsen was traveling and approaching said crossing from the west is in a cut 3 or 4 feet deep. The embankment of said cut and the elevation of said hill preclude travelers from seeing a train approaching said crossing from the east. Said railway to the east of said crossing is likewise in a cut for some distance; and this fact keeps a traveler, approaching said crossing from the west, from seeing and hearing an approaching train. There is likewise an embankment to the right of said public road as it approaches said crossing, which prevents a traveler approaching the same from seeing and hearing the approach of a train from the east. Said W. T. Larsen was not acquainted with the public road, and with the location of said public road and said railway to each other, not having traveled the same before said date. On approaching said crossing he was prevented from seeing and hearing the approach of said passenger train of said company by reason of the facts hereinbefore stated. Said public road approaches said crossing in a cut with an embankment to its right, as already stated, and on the left there is a ditch, leading from said public road to the said ditch of the roadbed of said railway. This ditch at the point of intersection with the railway is about 90 feet from the crossing. Between said ditch and said crossing there are a stump, a branch, and other obstructions, on the left of said public highway. On the right of said public road and near to said public crossing are a telephone pole and said embankment. These obstructions on both sides of said public road, on the right of way

of said railway and within 50 feet of said crossing, prevent a traveler in an automobile, or other vehicle, from turning to the left or the right to prevent a collision with any train of said company, passing over said crossing; and these obstructions prevented the said W. T. Larsen from cutting to one side in order to escape a collision with said west-bound passenger train. Said W. T. Larsen was traveling at a rate of speed not exceeding 12 miles per hour until he got within 80 feet of said crossing, when he discovered said west-bound passenger train rapidly approaching. He immediately applied his brakes to his automobile, and brought it almost to a stop as the train reached said crossing. He furthermore turned his automobile to the right, down the side of the track of said railway, and almost escaped entirely a collision with said passenger train. The engine and tender of said passenger train struck and collided with the left front wheel of said automobile and threw and hurled him from said automobile onto the ground and under said train, whereby he was killed. His left arm and right foot were cut off by the wheels of said train, his body was torn and lacerated, and his skull crushed, from which wounds he shortly died.

The defendant filed a general demurrer, alleging that the petition set forth no cause of action, and that it showed on its face that the plaintiff was not entitled to recover. There was also a special demurrer on various grounds. The court overruled the general demurrer, and sustained some of the grounds of the special demurrer and overruled others.

[1] The evidence for the plaintiff appears to have fully substantiated all the material allegations of negligence herein mentioned. C. W. Turner, who was an occupant of the automobile, testified substantially to all the facts as set forth in the petition. According to his evidence, the train, on passing the crossing where the collision occurred, maintained a speed of 30 or 40 miles per hour, and, despite the fact that the tender of the locomotive was derailed on account of the collision, the train continued to run for a distance of 800 feet from the crossing before it could be brought to a stop. He further testified that no signal of any sort was given by the locomotive before reaching the crossing. This witness testified that in his opinion the automobile, had it not collided with the tender of the locomotive, would have been brought to a stop within 5 or 6 feet beyond the crossing. On cross-examination, he stated, as his opinion, that the cross sign post or danger signal at the crossing could have been seen at a distance of 150 yards up the road from the direction in which the crossing was approached, and that the automobile, running at the speed testified to, prior to the accident, could have been brought to a standstill within a distance of 100 feet.

The only other evidence offered, relating to the accident, was the testimony of Mrs. Anna Horton, who stated that she lived about 300 yards from the crossing where the collision occurred, and that she saw the train right after it had passed the signal post on its approach to the crossing; that the whistle of the locomotive was not blown as it reached the blow post, but was blown one time only, about half way between the blow post and the crossing; that the train was going unusually fast, at a probable rate of 35 or 40 miles per hour; and that she was attracted by its making a most unusual noise. Whether the signal referred to by her was given after the danger to the decedent had been discovered, and the unusual noise referred to was occasioned by an attempt to stop the train after that time, is a matter of conjecture only. There was evidence showing that the earnings of decedent at the time of his death amounted to \$2,500 per year, with the reasonable prospect of increased earning capacity, and that his health at that time was good.

No evidence was introduced on behalf of the defendant, and a motion for nonsuit having been made and refused, at the conclusion of the plaintiff's testimony, the case was submitted to a jury, who found for the plaintiff in the sum of \$15,000. Counsel for the defendant made a motion for a new trial upon the usual grounds, and upon the further ground that the court erred in charging conjunctively sections 4426 and 2781 of the Civil Code of 1910, the charge of the court being as follows:

"No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agent of the company are both at fault, the former may recover, but the damage shall be diminished by the jury in proportion to the amount of default attributable to him. If the plaintiff's husband by ordinary care could have avoided the consequences to himself caused by the defendant's alleged negligence, plaintiff is not entitled to recover, but in other cases the defendant would not be relieved, although the plaintiff's husband may in some way have contributed to the alleged injury sustained."

Error is assigned on the ground that, in charging these two sections together, the court confused and misled the jury, and caused them to believe that the negligence or want of ordinary care on the part of deceased was to be considered only in the reduction of damages; that the jury, being misled by said charge, did not consider that if it appeared that the deceased, by the exercise of ordinary care, could have prevented the injury although the railroad was negligent, the plaintiff could not recover; and that the stating of these two sections of the Code in immediate connection and without explanation, confused two separate and distinct defenses, and was calculated to mislead the jury.

[2, 3] 1. While at common law, if the neg-

ligence of the plaintiff contributed to the injury, he could not recover, in this state the liability of railroad companies for injury done by them to persons or property has been modified, so that the law governing such liability is as follows: Under the provisions of section 2781 of the Civil Code, no person shall recover damages from a railroad company for injury done to himself or his property, where the same is done by his consent or is caused by his own negligence. If the complainant and the agent of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him. The doctrine usually referred to as that of contributory negligence is not the law of this state, inasmuch as that term, properly used, expresses, not such negligence as would diminish, but only such negligence as would preclude, a recovery. The doctrine which here obtains can be and is more accurately and properly designated as that of comparative negligence. *Western & A. R. Co. v. Ferguson*, 113 Ga. 712, 39 S. E. 306, 54 L. R. A. 802; *Christian v. Macon Ry. & Lt. Co.*, 120 Ga. 314, 47 S. E. 923; *Ga. & Fla. Ry. v. Newton*, 140 Ga. 463, 79 S. E. 142; *Louisville & N. R. Co. v. Stafford* (Sup.) 91 S. E. 29.

[4] Thus, if the plaintiff and the defendant were both negligent, the former can recover, unless his negligence was equal to or greater than the negligence of the defendant, except that this rule is further qualified by the provisions of section 4426 of the Civil Code, which provides that if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not, in such event, entitled to recover. *Western & A. R. Co. v. Ferguson*, 113 Ga. 712, 39 S. E. 306, 54 L. R. A. 802; *Ga. R. Co. v. Neely*, 56 Ga. 544; *Central Ry. Co. v. Harris*, 76 Ga. 508; *Americus Ry. Co. v. Luckie*, 87 Ga. 6, 13 S. E. 105; *Briscoe v. Railway Co.*, 103 Ga. 224, 227, 28 S. E. 638; *Central R. Co. v. Dorsey*, 106 Ga. 826, 828, 32 S. E. 873; *Hopkins v. Railway Co.*, 110 Ga. 85, 88, 35 S. E. 307; *Atlanta R. Co. v. Loftin*, 86 Ga. 43, 45, 12 S. E. 186; *Brunswick R. Co. v. Gibson*, 97 Ga. 489, 497, 25 S. E. 484; *Cain v. R. Co.*, 97 Ga. 298, 22 S. E. 918; *W. & A. R. Co. v. Bradford*, 113 Ga. 276, 38 S. E. 823. The rule stated in section 4426, however, applies only where the defendant's negligence became apparent to the person injured, or where, by the exercise of ordinary care, he could have become aware of it, and he thereafter failed to exercise ordinary and reasonable diligence to avoid the consequences of the defendant's negligence. *Brunswick R. Co. v. Gibson*, 97 Ga. 497, 25 S. E. 484; *Cen. R. Co. v. Attaway*, 90 Ga. 661, 16 S. E. 956; *Comer v. Barfield*, 102 Ga. 489, 31 S. E. 89; *Macon & I. S. S. R. Co. v. Holmes*, 103 Ga. 658, 30 S. E. 563; *W. & A. R. Co. v. Ferguson*, 113 Ga. 708, 39 S. E. 306.

54 L. R. A. 802; A. & W. P. R. Co. v. Love-lace, 121 Ga. 487, 49 S. E. 607; Atlanta R. Co. v. Gardner, 122 Ga. 98, 49 S. E. 818 (4); Central R. Co. v. Pelfry, 11 Ga. App. 122, 74 S. E. 854; Collins v. A. A. R. Corp., 13 Ga. App. 128, 78 S. E. 944; Williams v. Southern R. Co., 126 Ga. 711, 55 S. E. 948.

[5] Thus it will be seen that a plaintiff can recover partial damages for injuries caused by the negligence of a railway company, notwithstanding his own fault, which might, in some less degree, have contributed thereto, provided that ordinary and reasonable caution was exercised by plaintiff to avoid the consequences of the defendant's negligence, after it had or should have become apparent. Ordinarily the question of negligence, both on the part of the plaintiff and the defendant, is an issue to be determined by the jury; but where the plaintiff's petition shows on its face that he has no right to recover, and this question is raised by general demurrer, it is the duty of the court to sustain the demurrer and dismiss the petition. Ga. Pacific R. Co. v. Richardson, 80 Ga. 727, 7 S. E. 119; 2 Hopkins on Personal Injuries (2d Ed.) p. 1074, § 521, citing Hill v. L. & N. R. Co., 124 Ga. 243, 52 S. E. 651, 3 L. R. A. (N. S.) 432; Freeman v. Savannah Electric Co., 130 Ga. 451, 60 S. E. 1042. If, therefore, the allegations of the plaintiff's petition should themselves disclose the fact that the collision was brought about by the violation, on the part of the decedent, of the statute of this state governing the operation of automobiles, such fault on his part would constitute negligence per se, and, if such negligence was the proximate cause of the injury, would bar a recovery in a suit by his widow.

[6, 7] The act of 1910 governing the operation of automobiles in this state (Acts 1910, p. 90, § 5), provides:

"No person shall operate a machine on any of the highways of this state as described in this act at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of such highway, or so as to endanger the life or limb of any person or the safety of any property, and upon approaching a bridge, [curve,] dam, high embankment, sharp curve, descent or crossing of intersecting highways and railroad crossings, the person operating the machine shall have it under control and operate it at a speed not greater than six miles per hour."

It is insisted by counsel for the plaintiff in error that the petition of the plaintiff shows on its face that the injury was occasioned by the violation on the part of the decedent of these provisions of the act, in that he was guilty of negligence per se, in driving the automobile down the descent referred to without having it under control, and at a rate of speed greater than 6 miles per hour, and further that he was guilty of negligence per se under the statute in that he in like manner approached the railroad crossing where the accident occurred. The act of 1910 regulating the driving of automobiles on the public highways in no wise supersedes the

law governing the liability of a railway company for injuries to persons driving such machines, other than to render the nonobservance of certain duties therein imposed negligence per se. The act recognizes that the drivers of automobiles have equal right to the use of public highways with other persons, but it provides that this right shall be exercised in the manner by it prescribed, and the failure to comply with the requirements prescribed by the act constitutes negligence as a matter of law. Sheppard v. Johnson, 11 Ga. App. 280, 75 S. E. 348. But we know of no distinction recognized by law whereby the right of plaintiff to recover on account of his negligence is affected to a greater or less degree, according as such negligence may be adjudged as such, or whether, when the fact is proved, negligence follows as a matter of law; the sole distinction between ordinary negligence and negligence per se being that in cases of ordinary negligence there must be an adjudication as to whether or not a proved fact constitutes negligence, whereas, when an act is shown to have been committed or omitted in violation of law, it necessarily follows that the act constitutes negligence, and this has been designated as negligence per se.

Analyzing the provisions of section 5 of this law regulating the driving of automobiles, we find the requirements of that section to be as follows: (1) No person shall operate a machine on any of the highways of this state at a rate of speed greater than is reasonable and proper, having regard to the traffic and use of the highway. (2) No person shall operate a machine on any highway of this state so as to endanger the life or limb of any person or the safety of any property. (3) On approaching a bridge, dam, high embankment, sharp curve, descent, or crossing of intersecting highways and railroad crossings, the person operating a machine shall have it under control and operate it at a speed not greater than six miles per hour. It is manifest that in the first two provisions of this section, as we have divided it for the purpose of discussion, it is a question of fact for the jury, and not one of law for the court, whether a person is operating such a machine at a rate of speed greater than is reasonable and proper, or so as to endanger life, limb, or property. In the case of Empire Life v. Allen, 141 Ga. 414, 81 S. E. 120, and in the case of Hayes v. State, 11 Ga. App. 371, 75 S. E. 523, these provisions are declared to be too uncertain and indefinite in their terms to be capable of penal enforcement, although the measure of care prescribed in the act is sufficient to furnish a rule of civil conduct. Strickland v. Whatley, 142 Ga. 802, 83 S. E. 856.

[8, 9] Coming now to the third division of section 5, we find it provided, among other requirements, that the driver of an automobile, in approaching a descent or railroad

crossing, shall have his machine under control, and operate it at a rate of speed not greater than 6 miles per hour. The statute being penal, a strict construction is required. See *Renfro v. Colquitt*, 74 Ga. 618; *Atlanta v. White & Kreis*, 33 Ga. 229. It will be observed that the statute provides that on *approaching* a descent in the road, or a railway crossing, the rules provided must be observed. The statute does not in fact require that a speed of 6 miles per hour shall be maintained while the machine is making the descent of a hill or incline; and we think this construction is based upon good reason, the object of the statute, in this respect, being to require the traveler, on approaching the crest of a hill, and before commencing the descent, to slow down his car in order to ascertain whether some other person, whom he could not theretofore discern, might be using the highway on its incline. If, however, this requirement of the law be complied with, there is nothing therein contained necessitating the traveler to maintain such a reduced speed down the incline, in the absence of some special cause therefor. We therefore do not think that as a matter of law the fact that the decedent might have descended the incline just prior to the accident at a greater speed than 6 miles per hour could be adjudged negligence per se. The statute, however, further requires that, in approaching a railway crossing, such reduced speed shall be maintained, and that the driver of the machine must in such case have his car under control.

Counsel for the plaintiff in error analogizes these requirements of the automobile statute to those governing railroads under the blow post law (Civil Code, § 2675). That section provides as follows:

"There must be fixed on the line of said roads, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road."

It is argued by counsel that the clear intent of the automobile statute necessarily requires the driver of such a machine, in approaching a railroad crossing, to be able to stop his car before reaching the crossing, should it at any time be necessary to do so to prevent a collision, just as it is specifically provided in the case of trains. It will be observed that the statute applying to railway companies prescribes the exact distance at which the engineer shall commence to check his train, and specifically requires him to be able to stop it before reaching the crossing, should circumstances require, whereas the statute for the regulation of the approach of automobiles to such crossings is indefinite as to the point at which the speed shall be

reduced and does not by its terms require that the driver must be able to stop the automobile before reaching the crossing. It is strongly insisted, however, that the only reasonable purpose of the statute in regulating the speed of the car and requiring it to be under control on approaching a crossing must be to require the driver to be able to stop it before reaching the crossing, should emergency require.

[10] Under the petition in the instant case the car was driven at a rate of speed of about 12 miles per hour until it approached within 89 feet of the railroad track, after which, it appears the driver of the car used every possible endeavor to avoid a collision with the train, and so reduced the speed of the automobile as to almost prevent the collision. The contention of the plaintiff in error is that the speed should have been reduced in approaching the crossing at a distance greater than 89 feet, for the reason that the facts set forth show that 89 feet was not a sufficient distance in which the car could be brought to a stop, and therefore, as a matter of law, the court should have held that the car approached the crossing at an excessive speed, and was not at that time under the control of the driver. This contention is earnestly and ably presented by counsel, and the conclusion we have reached has not been arrived at without difficulty. If, however, we should accept the reasoning of counsel in this contention, and decide that the petition should have been dismissed, because, as a matter of law, the conduct of the plaintiff constituted such negligence per se as would bar his recovery, then it would indeed be difficult to conceive where, under this principle, the driver of an automobile would be entitled to recover by virtue of any degree of negligence on the part of the railroad in violating its duties pertaining to the approach of trains to public crossings. The logic of such a ruling would be to require such a driver in all cases and at all times to be in a position to bring his car to a stop before arriving at a crossing, and in fact actually so to do whenever necessary to avoid the consequences of the company's negligence. Such a construction takes into account nothing of the doctrine of comparative negligence, takes from the jury all right to determine whether the negligence of the decedent constituted the proximate cause of the injury, and leaves entirely out of account all question as to the exercise of proper prudence on the part of decedent after the negligence of the defendant had been, or should have been, discovered.

We are therefore brought to the conclusion that the opinion rendered on November 18, 1916, by our Supreme Court in the case of *L. & N. R. Co. v. Stafford*, 91 S. E. 29, must control our decision in the present case. In the case just referred to the facts as outlined are in many respects identical with those of the instant case. In that case error

was assigned on a refusal of the court to charge as follows:

"If you find from the evidence in this case that the plaintiff did not have his automobile under control, or was operating it at a rate of speed greater than 6 miles per hour, at the time he approached the railroad crossing, then I charge you that in either event he would not be in the exercise of ordinary care for his safety, and would not be entitled to recover in this case, and your verdict would be for the defendant."

Mr. Justice Atkinson in the opinion speaks as follows:

"The request to charge does not properly apply these principles to the facts of the case. The railroad company might be negligent per se in violating the city ordinance and the statute in regard to running trains over public crossings, and the plaintiff might be negligent per se in violating the statute in regard to running automobiles while approaching and crossing railroad tracks; but it would not necessarily follow that the negligence of the plaintiff would be the proximate cause of the injury, or that it would be as great as that of the defendant, or that the plaintiff by the exercise of ordinary care could have avoided the consequence of the defendant's negligence after it commenced or became apparent, or the circumstances would have afforded reason to apprehend its existence. The question of negligence and the degree of negligence of the respective parties would be for the jury under the particular facts. The railroad company could be guilty of negligence per se, under the city ordinance, in failing to toll the bell and in running its train over the crossing at a speed slightly over 5 miles per hour; but the jury could say that it would be guilty of a greater degree of negligence by failing to toll the bell, and in running the train over the crossing at a speed of '25 or 30 miles per hour. And the plaintiff would be guilty of negligence per se in approaching the crossing at a greater rate of speed than the statute prescribed, but the degree of his negligence would in all cases depend on the circumstances. If there was no train in the vicinity, no danger from disobeying the statute would exist. If not otherwise negligent, his negligence would consist in disobeying the statute. As the circumstances might enhance the danger, his negligence would increase; but whether it should bar a recovery under the circumstances must be left to the jury. So, also, the time when the negligence of the defendant came into existence and was apparent, or should have been apprehended, and whether after it became so the plaintiff by the exercise of ordinary care could have avoided the consequences thereof to himself, were questions for the jury. The evidence reported in the statement of facts, concerning the circumstances in which the injury was committed, was not sufficient, under the application of the foregoing principles, to take the case from the jury. As the requested charge, if given, would have invaded the province of the jury, it was properly refused."

For the reasons which we have stated and in the light of the decision of our Supreme Court just quoted from, we think the trial judge did not err in overruling the general demurrer. The request of counsel, under the provisions of section 6355 of the Civil Code, that the Supreme Court be asked to overrule or modify its ruling in the case of *L. & N. R. R. v. Stafford*, supra, is denied.

[11] 2. The error complained of in the matter of overruling the special demurrers not having been in any wise argued by counsel

in their briefs, under the rulings of this court these contentions must be treated as abandoned.

[12] 3. There was no error committed by the trial judge in the charge complained of in the fourth ground of the amended motion for new trial. Mr. Justice Hill, in the case of *Cent. of Ga. R. Co. v. Brown*, 138 Ga. 107, 74 S. E. 839 (3), has thoroughly discussed the question there raised, and, after distinguishing certain earlier decisions of the Supreme Court, has shown such a charge as that here complained of to be without error.

[13] 4. The testimony amply supported the verdict, and there was no error in refusing to set same aside for lack of evidence, or on the ground that the amount of the recovery was excessive.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(173 N. C. 700)

BROWN v. TAYLOR. (No. 111.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

APPEAL AND ERROR ~~624~~—CASE ON APPEAL—STIPULATIONS.

Where on plaintiff's motion to strike from the record the case on appeal on the ground that it had not been served in time defendant moved for certiorari that the case might be settled and filed, affidavits alleging an agreement of plaintiff's counsel extending the time for service, such affidavits not having been denied, will be considered, and certiorari is allowable, though the court will not pass on affidavits and determine whether an oral agreement which is denied has been made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2737-2742.]

Action between H. Q. Brown and S. C. Taylor. On motion by plaintiff to strike out from the record the case on appeal on the ground that it was not served in time, and to affirm the judgment. Defendant's motion for certiorari allowed.

W. S. O'B. Robinson & Son, of Goldsboro, for plaintiff. Langston, Allen & Taylor, of Goldsboro, and Stevens & Beasley, of Kenansville, for defendant.

PER CURIAM. The plaintiff moves in this court to strike out from the record the case on appeal on the ground that it was not served in time, and to affirm the judgment. The defendant moves for a certiorari in order that the case on appeal may be settled, and filed affidavits showing an agreement of one of the counsel of the plaintiff extending the time for service of case on appeal. No affidavit of counsel with whom the agreement is alleged to have been made has been filed.

The motion of the plaintiff is denied, and the motion for a certiorari is allowed, because, while we will not pass on affidavits and determine whether an oral agreement

which is denied has been made, we do consider affidavits showing an agreement, which are uncontradicted. *Sondley v. Asheville*, 112 N. C. 694, 17 S. E. 534.

The plaintiff is allowed 20 days after this opinion is certified to the superior court to serve his case on appeal, or exceptions to the defendant's case.

(173 N. C. 698)

**LEGGETT v. ATLANTIC COAST
LINE R. R. (No. 58.)**

(Supreme Court of North Carolina. Feb. 28, 1917.)

TRIAL ¶295(7)—INSTRUCTIONS—CONSIDERATION AS A WHOLE.

The charge to the jury must be considered as a whole, and, when so construed, if it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous; hence, in an action against a railroad company for the death of a passenger intending to take its next scheduled train, the reference to facts tending to establish contributory negligence upon the part of deceased in an instruction submitting the question of defendant's negligence was harmless, where the jury were correctly charged that if defendant was negligent in the particulars stated, and such negligence was the proximate cause of the death, verdict should be for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

Appeal from Superior Court, Martin County; Daniels, Judge.

Action by Martha H. Leggett, executrix of James D. Leggett, against the Atlantic Coast Line Railroad. From a judgment for defendant, plaintiff appeals. Affirmed.

The cause was before this court on a former appeal by plaintiff from a judgment of nonsuit in the superior court, the judgment being set aside here, and the general facts tending to fix responsibility on defendant will be found stated in the opinion on that appeal, reported in 168 N. C. 366, 84 S. E. 357. The opinion having been certified down, the cause was tried, as stated, before Judge Daniels and a jury on the three ordinary issues in suits of this character:

"(1) Was the death of plaintiff's testator caused by the negligence of defendant company?"

"(2) If so, did deceased, by his own negligence, contribute to the injury?"

"(3) What damage is plaintiff entitled to recover, etc.?"

Both sides offering testimony, the court charged the jury, who rendered their verdict on the first issue, "No." Judgment for defendant, and plaintiff excepted and appealed.

Critcher & Critcher, of Williamston, Winston & Biggs, of Raleigh, Wheeler & Martin, of Williamston, and Winston & Matthews, of Windsor, for appellant. F. S. Spruill, of Rocky Mount, and H. W. Stubbs, of Williamston, for appellee.

PER CURIAM. We have carefully considered the record, and the exceptions noted,

and are of opinion that the cause has been tried in substantial accord with the principles laid down in the former appeal, and that no reversible error has been shown. The reference of the court, in the charge, on the first issues, to certain facts in evidence tending to establish contributory negligence, should not be allowed to affect the result. The principal negligence alleged against the defendant was a failure of the defendant to provide adequate lights at the station, where the testator was present as a passenger intending to take its next scheduled train, and the court, in such clear and explicit terms, instructed the jury, and more than once, that, if there was negligent breach of duty in this respect and such negligence was the proximate cause of testator's death, to answer the issue "Yes," that the jury could not possibly have been misled, and the reference suggested, if mistaken, should not be held for reversible error. It has often been held with us:

"The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous." *Kornegay v. Railroad*, 154 N. C. 389, 70 S. E. 731; *State v. Exum*, 138 N. C. 600, 50 S. E. 283.

And, considering the record and charge in the light of this recognized and wholesome principle, we are of opinion, as stated, that no prejudicial error appears, and the cause has been correctly tried.

No error.

(173 N. C. 55)

**VAN SMITH BLDG. MATERIAL CO. v.
TARBORO HARDWARE CO.
(No. 62.)**

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. JUSTICES OF THE PEACE ¶97—PLEADING—VERIFICATION.

Revisal 1905, § 488, which provides that when any pleading is verified every subsequent pleading, except a demurrer, must be verified, but which by its terms applies only to courts of record, does not require verified pleadings in an action begun before a justice of the peace, the pleadings in which may be either written or oral under section 1458.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 333.]

2. JUSTICES OF THE PEACE ¶97—"VERIFIED COMPLAINT"—ACCOUNT.

A paper consisting of a statement of an account owing by defendant to plaintiff, verified by plaintiff, which does not state the title of the cause, the name of the court, the name of the county, or the names of the parties, as required in complaints by Revisal 1905, § 467, is not a verified complaint within section 488, providing that when any pleading is verified, every subsequent pleading except a demurrer must be verified.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 333.]

Appeal from Superior Court, Edgecombe County; Allen, Judge.

Action by the Van Smith Building Material Company against John R. Pendee, trading as the Tarboro Hardware Company. Plaintiff's motion in the superior court on appeal from a justice of the peace for judgment on the pleadings denied, and he appeals. Affirmed.

This is an action, commenced before a justice of the peace, to recover \$165. The plaintiff filed the following paper before the justice of the peace:

"Complaint.

"Van Smith Building Material Co.,
"Dealers in Lime, Cement, Plaster and All
Building Material.

"Charleston, S. C., Feby. 4, 1915.

"Car No. 31516 A. C. L.

"Sold to Tarboro Hdw. Co., Tarboro, N. C.
150 bbls. (600 sks.) Dexter cement. Price, \$1.10.
\$165.

"State of North Carolina, County of Charleston.

"Personally appeared before me, Van Smith, who, being duly sworn, says that of his own knowledge the foregoing account is just and correct, and that no part thereof has been paid, and said Tarboro Hardware Co. is now justly due Van Smith Building Material Co. the sum of one hundred and sixty-five dollars, with interest from sixty days from date of invoice, which is April 5, 1915, date of invoice being Feby. 4, 1915. D. Van Smith.

"Subscribed and sworn to before me this 14th day of June, 1916.

"Given under my hand and notarial seal.

"[Notary Seal.] Notary Public for S. C.
"My commission expires"

And the defendant in person, in open court, orally denied liability. The action was tried before the justice and the statement of the pleadings in the return is as follows:

"Plaintiff complained as per verified account filed. Defendant denies liability."

The justice rendered judgment in favor of the plaintiff for \$120.50 and costs, from which the plaintiff appealed. In the superior court the plaintiff moved the court to require the defendant to file an answer to the verified complaint of plaintiff, setting up any defense he may have to such action. Motion refused. Plaintiff excepted. The plaintiff then tendered judgment in his favor for \$165, with interest from April 5, 1915, and for costs, which his honor refused to sign, and he excepted and appealed.

Jas. M. Norfleet, of Tarboro, for appellant.

ALLEN, J. The motions of the plaintiff are predicated upon the idea that a verified complaint has been filed, and that the defendant must therefore file a verified answer.

[1] The statute (Revisal, § 488), which provides that when "any pleading is verified, every subsequent pleading, except a demurrer, must be verified," applies by its terms only to courts of record, and a court of a justice of the peace is not only not a court of

record (Reeves v. Davis, 80 N. C. 209; Williams v. Bowling, 111 N. C. 296, 16 S. E. 176), but it is expressly provided that the pleadings in that court may be "written or oral" (Revisal, § 1458).

[2] If, however, it be conceded, as the plaintiff contends, that the statute (Revisal, § 488) applies and that a verified answer must be filed in all cases when the complaint is verified, he cannot take advantage of the position because he has not filed a verified complaint. The paper called a complaint does not state the title of the cause, the name of the court, the name of the county, or the names of the parties, as required in complaints by section 467 of the Revisal, and is properly designated by the justice in his return as a "verified account," which may be used as evidence under Revisal, § 1625. Nor is it verified as a complaint. Pell's Revisal, § 480, and cases cited.

It follows that the oral plea of the defendant, denying liability, raised an issue which could only be determined by a jury, and that the plaintiff was not entitled to have an additional pleading filed, nor to judgment.

Affirmed.

(173 N. C. 60)

PALMER et al. v. LATHAM. (No. 106.)
(Supreme Court of North Carolina. Feb. 28, 1917.)

1. MORTGAGES ⇐350 — POWER OF SALE — PLACE OF SALE.

A sale of land at the courthouse door of Moore county is valid under a mortgage providing that on default land shall be sold "at the courthouse door in Moore," though at the time of sale land had been placed in new county of Lee formed after mortgage was given; Revisal 1905, § 641, on execution sales, not being applicable, and section 1042 not precluding stipulations by the parties as to place of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1048.]

2. MORTGAGES ⇐330—SALE UNDER POWER—RETROACTIVE STATUTE.

A statute changing the place of sale cannot apply to mortgages on land executed before the enactment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1014.]

Appeal from Superior Court, Lee County; Bond, Judge.

Action by John Palmer and others against J. E. Latham to test validity of a mortgage foreclosure sale of land. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hoyle & Hoyle, of Sanford, for appellants.
Seawell & Milliken, of Sanford, for appellee.

CLARK, C. J. [1] The only question presented is the validity of a sale of land at the courthouse door in Moore county under a mortgage which provided that in case of default it should be sold "at the courthouse door in Moore." At the time the mortgage was executed (in 1906) the land lay in

Moore county, but prior to the time of sale (in 1915) it had been placed in the new county of Lee. There is no allegation of bad faith; the sole contention of plaintiff being that the land should have been advertised and sold at the courthouse door in Lee.

In *McIver v. Smith*, 118 N. C. 73, 23 S. E. 971, the court held that the place designated for the sale under the power sale in a mortgage controls. The appellant contends that mortgage sales are now governed in this respect by Revisal, § 641, which has been enacted since that decision. But that section of the Revisal is under the head of "Execution Sales" in the chapter on "Civil Procedure," and evidently refers to sales under the foreclosure of a mortgage by order of court and other judicial sales. Revisal, § 1042, providing for "Mortgage Sales," specifies that such sales should be advertised at the courthouse door in the county where the land lies, but does not require that the sale shall be made at that place; the object evidently being to give notice to creditors and to those in the neighborhood who would be most likely to purchase. This section further prescribes the length of notice "unless a shorter time be expressed in the contract," showing that the parties can stipulate as to the time. By the omission of any requirement therein as to place of sale that also is left open to contract. The presumption is that such sale was properly advertised. *Cawfield v. Owens*, 129 N. C. 288, 40 S. E. 62. Requirements as to advertising are directory only (*Shaffer v. Bledsoe*, 118 N. C. 279, 23 S. E. 1000), but requirements as to time and place of sale are mandatory (*Wortham v. Basket*, 99 N. C. 70, 5 S. E. 401). In *Eubanks v. Becton*, 158 N. C. 236, 73 S. E. 1009, the court quotes with approval from *Perry on Trusts*, § 602:

"If the power contains the details, the parties have made them important, and no change can be made even if the mortgagor would be benefited thereby, nor if a statute provides a different manner."

In *McIver v. Smith*, 118 N. C. 73, 23 S. E. 971, the court says:

"A mortgage is a contract, and the parties may affix such terms and conditions as they see fit, provided creditors or others interested at the time are not affected thereby."

"If the power provides that the sale is to be made on the premises or names any other place, of course, the sale must be notified for that place, and it must be made at that place." *Perry on Trusts*, § 602r.

If a mortgage or deed of trust specifies the place where the sale is to be made, it must be strictly obeyed. 27 Cyc. 1476.

[2] In *McConneaughey v. Bogardus*, 106 Ill. 321, and *White v. Malcolm*, 15 Md. 529, it was held that a statute changing the place of sale cannot apply to mortgages or deeds of trust executed before the enactment. In *Durrell v. Farwell* (Tex. Civ. App.) 27 S. W. 795, it is held:

"When a deed of trust provides that the * * * property shall be sold at the county seat of a certain county, and the county is afterwards subdivided, a sale made at the county seat of one of the new counties is void."

It not being denied that this sale under the mortgage was in all respects regular and fair, that there was a balance due on the note secured by the mortgage, and that the land was sold in exact accordance with the terms of the power of sale and at the place designated, the judgment is affirmed.

(173 N. C. 47)

SANDERS et ux. v. MAY et al. (No. 59.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. MORTGAGES — 413—INTERVENTION — EFFECT OF FINAL JUDGMENT.

Where, in suit to restrain foreclosure sale, judgment of dismissal was entered, and no appeal was taken, a trustee under a subsequent incumbrance could not, after completion of the sale, intervene, the sale not being judicial, and the proceeds not in custodia legis.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1187-1201.]

2. JUDGMENT — 217—"FINAL JUDGMENT."

A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 394.

For other definitions, see *Words and Phrases*, First and Second Series, Final Decree or Judgment.]

Appeal from Superior Court, Nash County; Stacy, Judge.

Suit by J. J. Sanders and wife against A. F. May and another, as administrators of W. R. Griffin, deceased, in behalf of the Citizens' Bank of Spring Hope, wherein B. E. Morgan, trustee, petitioned for leave to intervene. Decree denying the petition and dismissing the suit, without prejudice to separate suit by Morgan, and plaintiffs and intervenor appeal. Affirmed.

Jacob Battle, of Rocky Mount, for appellants. O. B. Moss, of Spring Hope, and F. S. Spruill, of Rocky Mount, for appellees.

BROWN, J. It appears from the pleadings and affidavits in the record that on January 25, 1908, plaintiffs borrowed from the defendant bank \$2,000, and gave to secure it a deed of trust to W. H. Griffin, trustee, conveying three lots or parcels of land in Spring Hope, described in the pleadings. W. H. Griffin, trustee, died before the foreclosure of the deed of trust and A. F. May and another qualified as his executors. The plaintiffs kept the interest paid up on said loan until on or about April 19, 1913, at which time the bank demanded its money, no part of which, except the interest, had been paid and all of which was long since due.

There were negotiations between plaintiff

and one H. L. Griffin for the purchase of one of the lots conveyed in the deed in trust, viz.: Lot No. 112, block 2, in the plot of Spring Hope. At request of the plaintiff this lot alone was sold under the power contained in the deed to make title, and according to affidavit of Attorney Moss, he bid it off at \$2,000 at plaintiff's request for Griffin, who, as plaintiff stated to Moss, had agreed to buy the property at that price. Griffin refused to take the property, and we find no legal contract binding him to do so. The bank afterwards had the three lots advertised at foreclosure sale to realize on its debt.

This action was brought by plaintiffs to enjoin perpetually any foreclosure and to cancel the deed in trust upon the ground that the debt was discharged by the first sale. We see nothing to support that claim, but in any event the matter was heard by Carter, Judge, on June 25, 1915, who rendered judgment passing upon all the contentions of the parties to the action, and dissolved the injunction. This judgment is set out in the record and appears to dispose of the rights of all parties to the action. No appeal was taken.

The three lots were duly advertised and sold under the deed in trust, and it appears that Morgan, the intervener, was present and participated in the bidding. After said sale, on May 1, 1916, Morgan, trustee, in a subsequent incumbrance, filed his petition asking leave to intervene, and that the sale be set aside and the first deed in trust canceled. The petition presents practically the same grounds, asserted by plaintiff and disposed of by the Carter decree.

[1, 2] The matter was heard by Stacy, Judge, at May term, 1916, who denied the petition and dismissed the action without prejudice to Morgan's right to bring an independent action if so advised. We think his honor was correct in his view of the case. The judgment of Judge Carter had already disposed of the case and had been acquiesced in by all parties to the action. "A judgment is final which decides the case upon its merits, without any reservation for other and future directions of the court, so that it is not necessary to bring the case again before the court." *Bunker v. Bunker*, 140 N. C. 18, 52 S. E. 237.

No intervener should at that late day be permitted to come in and have the same controversy heard and determined for the second time. The lots were duly sold under the deed in trust. The sale was not a judicial sale made under a decree of court, and the proceeds of the sale are not in custodia legis.

We agree with the learned judge below that if the Intervener Morgan is advised that he has a cause of action against the defendants, he should assert his rights in an independent action.

The judgment of the superior court is affirmed.

(173 N. C. 57)

MEEDER v. SEABOARD AIR LINE RY.

(No. 97.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. CARRIERS ⇐271—PASSENGERS—CARRYING TO DESTINATION.

A regulation established by a railway company, providing that certain trains shall not stop at certain stations, there being enough trains to serve the purpose of local travel, is reasonable, and a passenger having actual notice that a train will not stop at the station called for by his ticket cannot recover damages for being carried beyond such station.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1067-1071.]

2. CARRIERS ⇐283(4)—PASSENGERS—IMPROPER CONDUCT OF CONDUCTOR—PUNITIVE DAMAGES.

A passenger boarded a train that did not stop at the station called for by his ticket. The conductor, acting within his rights, informed him the train did not stop and that he would have to get off at H. Upon passenger's refusal conductor told him he would have to put him off, and later when passenger protested stated that if he was that kind of man he would give him ten cents to pay his way to N. Held, passenger was not entitled to punitive damages; there being no proof that what conductor said was rude, insulting, or humiliating.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1121.]

Appeal from Superior Court, Warren County; Stacy, Judge.

Action by John A. Meeder against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant appeals. Reversed.

The issues were as follows:

Did the defendant maliciously or willfully, wantonly, and rudely mistreat and humiliate plaintiff while a passenger on its train? Answer: Yes.

"What, if any, damage, is the plaintiff entitled to recover? Answer: \$200.

Murray Allen, of Raleigh, for appellant. T. M. Pittman, of Henderson, and B. B. Williams, of Warrenton, for appellee.

BROWN, J. The plaintiff sues to recover damages as a passenger because he was wrongfully carried by Ridgeway to Norlina, and for punitive damages because of insulting and humiliating conduct towards plaintiff by conductor of the train.

[1, 2] His honor charged the jury:

"Plaintiff having been given actual notice that the train on which he was riding would not stop at Ridgeway, the court charges you that the conductor would have been within his rights to have him put off at Henderson, and that plaintiff was not entitled to insist upon riding upon that train and stop at Ridgeway; and under that rule you will not consider any damages and not any inconveniences which the plaintiff suffered by reason of being put off at Norlina, and by reason of going home in the rain, or any sickness he may have contracted in consequence of such.

"Our court has held (*Hutchinson v. Railroad*, 140 N. C. 126, 52 S. E. 263, 6 Ann. Cas. 22) that a railroad has a right to make regulations that certain trains shall not stop at all stations provided there are enough to serve local travel, and it does not appear that there was not, and, plaintiff having knowledge of that

fact, it was his duty to obey the instructions of the conductor and have gotten off No. 4 and taken No. 20.

"(There is only one question for you to consider, whether the conduct of the conductor towards the plaintiff was such as to humiliate him on the train, or to bring him into ridicule in the presence of passengers on that train. Understanding that fact, the court charges you that, though the train did not stop at Ridgeway, yet he was entitled to courteous treatment; if the defendant discussed his rights on that train and humiliated and mistreated him, the defendant would be liable for such conduct, and punitive damages may be allowed therefor.)"

To the foregoing charge in parentheses defendant excepts.

The court correctly charged that the plaintiff was not entitled to recover actual damages because he was carried by Ridgeway to Norlina. We think, however, the court erred in submitting the question of punitive damages to the jury, but should have granted the defendant's motion.

The plaintiff testified:

"The conductor took my ticket and said, 'This train does not stop at Ridgeway, and you will have to get off at Henderson.' He said it in a rash and unbecoming manner. I told him that train did stop at Ridgeway. * * * The conductor gave me my ticket back and said, 'You will have to get off at Henderson.' I told him my ticket carried me to Ridgeway. He told me if I did not get off he would have me put off at Henderson. Coach was crowded that day. Those in front and behind me heard what he said. After we got to Raleigh, he said, 'Your stop is at Henderson.' After we left Raleigh he came through the car again and said my stop was at Henderson. I said, 'If you want me to get off, if you do not want to carry me to Ridgeway, then you can put me off.' I told him my ticket called for Ridgeway and I did not want to get off anywhere else. I refused to pay my fare to Norlina. He then said, 'If you are that kind of a man, I will give you ten cents to pay your fare to Norlina.' I got off at Norlina when the train stopped."

On cross-examination plaintiff testified:

"I told the conductor my ticket was for Ridgeway and I was determined to get off there. Don't know that I said that I was not going to get off anywhere else. I said that my ticket did not call for Henderson. Conductor did not say anything about a local train. I knew there was a local that came about 7 o'clock; No. 4 was a through train. Don't know the names of any conductors except Gibson. I asked him his name. I wanted to know the name of the man that carried me by. I told him that I was going to make a test case of it; I told him he was going to hear from me again. I thought about bringing a suit; don't know whether I told Gibson or not that I was going to bring a suit."

On redirect examination he testified:

"A local train passed Henderson about 7 o'clock that was the first train I could have

gotten home on. Decided to sue the railroad company because I thought the conductor treated me with ridicule and humiliated me."

In *Rose v. Railroad*, 106 N. C. 168, 11 S. E. 526, the conductor discovered soon after taking charge of the train that the plaintiff and his wife did not have proper tickets, and he said—

"in a 'brusque, decided manner' (addressing the husband), 'This is Halifax, if you are going to get off.' The husband replied, 'I have no intention of getting off, unless you order me to get off.' The conductor then said * * * 'very decidedly, rudely, and quickly,' 'Then I order you off.' The husband and wife got off, but came immediately back and paid the fare."

The court held that the right of the plaintiffs to recover punitive damages was erroneously submitted to the jury. The court said:

"A railway company cannot be held liable to answer in damages because its servant, who is required to collect fares and protect it against imposition by expelling those who have not paid in the time that elapses between stations that are often but a short distance apart, informs a husband in a brusque manner, in the presence of his wife, whose head is resting on a pillow, that they must pay or get off, and, after waiting until the train reaches the next station, says, in a decided or rude tone, that they must get off. The language was certainly such as it was the right, if not the duty, of the conductor to use, and the defendant cannot be held responsible for his failure, in the hurry of the moment, to modulate his voice so as to make it soft or gentle, especially when he was giving a command in the line of his duty, which the plaintiffs had shown themselves loth to obey. Conductors ought to be, and we hope generally are, gentlemen, and can therefore discharge a disagreeable duty in a considerate manner where it affects female passengers."

In *Ammons v. Railroad*, 140 N. C. 196, 52 S. E. 731, this court held that:

"To entitle a passenger to such damages, his wrongful expulsion from the train must be attended by such circumstances as tend to show rudeness, insult, 'aggravating circumstances calculated to humiliate the passenger'"—citing *Holmes v. Railroad*, 94 N. C. 318; *Rose v. Railroad*, 106 N. C. 170, 11 S. E. 526; *Knowles v. Railroad*, 102 N. C. 59, 9 S. E. 7.

The same rule applies where the conductor acts rightfully, but in a rude and insulting manner. The evidence of plaintiff does not come up to the standard. In the case of *Tomlinson v. Railway*, 107 N. C. 327, 12 S. E. 138, the facts are very similar to this, and punitive damages were denied. *Smith v. Railroad*, 130 N. C. 304, 41 S. E. 481, is very pertinent authority sustaining defendant's contention in this case.

We are of opinion that the motion to nonsuit should have been allowed.

Reversed.

(79 W. Va. 564)

BOLYARD v. BOLYARD et al. (No. 3130.)

(Supreme Court of Appeals of West Virginia.
Feb. 6, 1917. Rehearing Denied
March 13, 1917.)

*(Syllabus by the Court.)***1. PLEADING \Leftrightarrow 198 — GENERAL DEMURRER—PARTIES.**

A general demurrer by one of two defendants, to a count of a declaration, disclosing lack of right of action against him, on its face, is properly overruled.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 461-463.]

2. PARTIES \Leftrightarrow 92(2)—MISJOINDER OF DEFENDANTS—PLEADING.

Misjoinder of codefendants in an action at law, predicated on nonliability, not mere personal privilege, is matter of defense to be given in evidence under the general issue, and cannot be pleaded either in abatement or in bar of the action.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 150.]

3. HUSBAND AND WIFE \Leftrightarrow 319—NONSUPPORT—ACTION ON BOND—PLEA OF DURESS.

A plea of duress, founded upon an arrest in a lawful proceeding, is not sufficient, if it does not aver that the proceeding was instituted without just cause, or that, being founded upon sufficient cause, it was prosecuted for an ulterior or improper purpose.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1115.]

4. HUSBAND AND WIFE \Leftrightarrow 318 — PRINCIPAL AND SURETY \Leftrightarrow 7—BOND—VALIDITY.

A bond executed to a wife by her husband and another party as his surety is, in legal contemplation, void as between her and her husband, and she can maintain no action thereon against him, in a legal forum; but, if, such bond is not wholly invalidated by fraud, illegality of consideration, conflict with public policy, or a vice of like character, it is nevertheless binding upon the surety.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1114; Principal and Surety, Cent. Dig. §§ 8-12, 14, 16, 18.]

5. HUSBAND AND WIFE \Leftrightarrow 318—PENAL BOND—VALIDITY.

A penal bond, executed by a husband to his wife, by way of compromise and settlement of difficulties between them, binding him by its condition to resume and maintain his marital and family relations with her and their children and provide them support and maintenance, is founded upon a good and sufficient consideration, and is not forbidden by any positive law or public policy.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1114.]

6. HUSBAND AND WIFE \Leftrightarrow 319—BOND—SURETY—LIABILITY.

The surety in such a bond is liable thereon for a breach of its condition, in an action at law brought by the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1115.]

7. HUSBAND AND WIFE \Leftrightarrow 319—BOND—LIABILITY OF SURETY—DAMAGES.

The damages recoverable in such action may include compensation for loss of the husband's society, extra labor imposed upon the wife, and

mental suffering arising from disgrace and humiliation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1115.]

8. APPEAL AND ERROR \Leftrightarrow 1173(3)—REVERSAL AS TO COPARTY.

If, in such case, a verdict is found and a judgment rendered against both the husband and the surety, the judgment will be reversed and the verdict set aside as to the former, and the judgment affirmed as to the latter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4570.]

Error to Circuit Court, Tucker County.

Action by Ida A. Bolyard against John M. Bolyard and John H. Bolyard. Judgment for plaintiff, and defendants bring error. Reversed, and action dismissed as to John M. Bolyard, and affirmed as to John H. Bolyard.

Chas. D. Smith, of Parsons, and D. E. Cuppett, of Thomas, for plaintiffs in error. J. W. Harman, of Parsons, for defendant in error.

POFFENBARGER, J. The judgment for \$854.15, in favor of a wife against her husband and his father, complained of, is founded upon a bond in the penalty of \$1,000, executed and delivered by way of compromise and settlement of controversies or troubles between the husband and wife, as well as for procurement of the dismissal of a statutory proceeding in a justice's court against the former, for nonsupport. The bond bound the husband to renew housekeeping with his wife and family, within 20 days from the date thereof; to remain with his family, except when necessarily away, or absent with the wife's consent, but in no event for an unreasonable time, considering the purposes of the journey; to furnish her and their children, from the date of the instrument, suitable clothing and support, considering their station in life; to treat his wife kindly and as a husband should treat a wife; and not to desert or abandon her or the children.

The first count of the declaration treated the bond as one with collateral conditions, and the second treated it as an unconditional bond for the payment of \$1,000. Upon the demurrer, the court sustained the first count and adjudged the second to be insufficient. Pleas of marriage and duress were rejected by the court. What disposition was made of a plea of non damnificatus is not clearly disclosed by the record, but no issue seems to have been made upon it. The case went to the jury upon a general issue as to the form of which no complaint is made.

[1] Since the first count discloses on its face the relation of husband and wife, subsisting between the plaintiff and John M. Bolyard, the demurrer was no doubt predicated upon that relation. But, if it is sufficient as to J. H. Bolyard, the surety in the bond, the demurrer was properly overruled as to that count, for the demurrer was general and not limited to John M. Bolyard. *Clark v. Ohio*

River R. R. Co., 34 W. Va. 200, 12 S. E. 505; *Wheeling v. Black*, 25 W. Va. 286; *Henderson v. Springer*, 6 Grat. (Va.) 130. Lack of a cross-assignment of error, based upon the action of the court in sustaining the demurrer to the second count, renders inquiry as to the propriety of such action unnecessary.

The legal status of the bond, as between the husband and wife, is a threshold question in the case. Under the common law, a contract between husband and wife, in the ordinary sense of the terms, was a legal impossibility. Courts of law recognized no such thing as being possible. In equity, however, fair and reasonable contracts between them were recognized and enforced. It is unnecessary to cite authority for these elementary propositions. In some jurisdictions, the modern statutes enlarging the rights and increasing the powers of married women, respecting the ownership of property and the right of contract, are construed and interpreted as having authorized them to make legally binding contracts with their husbands. In this state, the statute has received a different construction. On more than one occasion, it has been declared that the husband and wife cannot contract with one another, and that the statute has not altered the common law in this respect. *Roseberry v. Roseberry*, 27 W. Va. 759; *Pickens v. Kniseley*, 36 W. Va. 794, 798, 15 S. E. 997; *Bennett v. Bennett*, 37 W. Va. 396, 399, 16 S. E. 638, 38 Am. St. Rep. 47; *Bruff v. Thompson*, 31 W. Va. 16, 23, 6 S. E. 352; *Carey v. Burruss*, 20 W. Va. 571, 576, 43 Am. Rep. 790; *Stockton v. Farley*, 10 W. Va. 171, 27 Am. Rep. 566. These statutes destroy the legal identity of husband and wife only for some purposes and to a limited extent. The common-law rule places the husband as well as the wife under disability as to contracts made directly between them. He could no more bind himself to her by his contract than she could bind herself to him in such manner. Nothing in the statute discloses intention to emancipate him from this disability. On the contrary, the effect of the statute is to diminish his power respecting his wife's property and enlarge hers. Hence there is clearly no basis whatever for an inference of intention either to relieve him from disability or enlarge his powers. The act as originally passed did not empower the wife to take separate property from the husband, by inheritance, gift, grant, devise or bequest. Code 1868, c. 66. It was amended so as to permit her to do so. Acts 1891, c. 109, § 2. Later, this amendment was eliminated. Acts 1893, c. 3, § 3. The legislative action thus disclosed indicates intention not to disturb the common-law rule as to contracts between husband and wife.

[4, 6] In the present state of the law, a married woman has full power and authority to contract with persons other than her husband and to sue in the courts of law for vindication

of her contractual rights with such persons. If, therefore, the plaintiff had made a separate contract with J. H. Bolyard, the father of her husband, upon sufficient consideration, she would have undoubted right to maintain an action against him, for the breach thereof, in her own name. He has joined her husband in a contract with her, as surety for the husband. Ordinarily, a principal contract is essential to the existence of a contract of suretyship. *Brandt, Sur. & Guar.*, § 163; *Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Stull v. Davidson*, 12 Bush (Ky.) 167; *Evans v. Raper*, 74 N. C. 639. This principle however, is not general in its operation. It is limited to those instances in which the contract is wholly prohibited by law, or has been procured by fraud. Mere personal incapacity of the principal in the contract does not relieve the surety. *Burner v. Nutter*, 87 S. E. 359. The disability of the husband and wife to contract with one another, though absolute in the legal forum, is purely technical. Their contracts are enforceable in equity, if just and fair. They are denied a legal status to the end and purpose that they may be always within the power of the chancellor for enforcement; annulment, or modification, as the equities of the situation require. The ban under which such contracts fall is only partial. They are not wholly bad, nor are they prohibited by positive law. They are merely unenforceable in courts of law, or by strict legal process. In the broad sense of the law, including the equity jurisprudence as well as the legal, they are valid. The partial condemnation does not rest upon anything vicious in the sense of immorality. It goes no farther than exclusion from legal cognizance, and this exclusion is effected merely to place them within the exclusive cognizance of that class of courts whose procedure and remedies are sufficiently flexible and varied to enable them to do justice under all circumstances. To put them on a par with contracts fraudulently procured and contracts prohibited by positive law, as being morally or economically vicious, would be logically indefensible. Accordingly it is generally held that a party making himself a surety for a married woman in a note that is void, for lack of power in her legally to bind herself, is bound, notwithstanding the legal invalidity thereof as to her. *Smyley v. Head*, 2 Rich. (S. C.) 590, 45 Am. Dec. 750; *Stillwell v. Bertrand*, 22 Ark. 375; *Kimball v. Newell*, 7 Hill (N. Y.) 116; *Magge v. Ames*, 4 Bing. 470; *Whitworth v. Carter*, 43 Miss. 61; *Davis v. Statts*, 43 Ind. 103, 13 Am. Rep. 382. This thoroughly fortified proposition being accepted as true, the liability of the husband's surety on an obligation given to his wife is self-evident, and requires no demonstration.

As the instrument is under seal, a consideration is presumed, but, if it were not, the circumstances recited in the condition there-

of and proved on the trial disclose a sufficient consideration. *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675; *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227; *Duffy v. White*, 115 Mich. 264, 73 N. W. 363; Page, Cont. § 428.

[2] Since the contract between the husband and the wife is void, in a legal sense, the plea setting up the relation of marriage, if proper at all, was one in bar of the action, not in abatement thereof. *Roseberry v. Roseberry*, cited. Inasmuch as there were two defendants, one of whom, the husband, was improperly joined, the plea was inappropriate. Its purpose was to effect an abatement of the action, as to the husband, for misjoinder, and misjoinder of defendants in an action is not pleadable as matter of abatement. It is matter of defense, admissible under the general issue. For that reason, it is not proper matter of a plea in bar, wherefore the court properly rejected the plea. *Harris et al. v. North et al.*, 88 S. E. 603.

[3] Setting forth nothing more than that the defendant John M. Bolyard was under arrest on a charge of nonsupport, on the date of the execution of the bond, and that, while so under arrest, he was threatened with trial and imprisonment under said charge, if he did not make, seal, and deliver the bond, and that he made, sealed, and delivered the same by reason of such threat and in fear thereof, the plea of duress was wholly insufficient. It neither showed that the arrest or prosecution was without cause or sufficient ground, nor that, being for sufficient cause, the proceeding had been instituted and prosecuted for any improper purpose. Under the statute (sec. 16c, c. 144, of the Code [sec. 5173]), a wife has the right to prosecute a criminal proceeding against her husband for gross neglect, failure or refusal to provide reasonable support and maintenance for herself and her minor children, and to cause him to be committed to the county jail for the offense, unless it shall appear that, owing to physical incapacity or other good cause, he is unable to furnish such support. When there is just cause for an arrest, it constitutes no ground of duress, unless it was made for an improper purpose. 10 Am. & Eng. Ency. Law, 323; 9 R. C. L. p. 714; *Baker v. Morton*, 12 Wall. 150, 20 L. Ed. 262; *Brown v. Pierce*, 7 Wall. 217, 19 L. Ed. 134. No improper motive or purpose on the part of the wife, in the prosecution of the husband under the nonsupport statute is intimated or suggested in the plea.

By objections to specifications of the bill of particulars, exceptions to the introduction of evidence over objections made, objections to instructions at the instance of the plaintiff, requests for instructions on their own behalf, refused by the court, and a motion to set aside the verdict and grant a new trial, based partly on the character of dam-

ages awarded, disclosed by special findings in the verdict, made in response to interrogatories propounded at the instance of the plaintiff, the defendants endeavored to limit the amount of the recovery to such sum as was necessary for the support and maintenance of the wife and the children. None of the several conditions of the bond were complied with, and the court, by its rulings upon the question raised in the many forms stated, permitted recovery for failure of the husband to return to his family and remain there, in consequence whereof the wife and children were subjected to exposure to the weather and extra labor, and reduced to the necessity and incident humiliation of asking assistance from neighbors, and also for abandonment and desertion, as well as for failure to maintain and support the wife and the children.

[5] Though inaptly and somewhat inaccurately expressed, in some instances, the purpose of the bond was to bind the husband to performance of his marital duty. This purpose cannot be regarded as being, in any sense, inconsistent with public policy. On the contrary, public policy and social order require the performance of the things he bound himself to do. They were just such things as the law itself required of him, but it did not afford remedies adequate to enforcement of full performance thereof. It was the purpose of the bond measurably to supply this defect in the law. Omission of the duties imposed by law upon the husband entail just such results as are relied upon here as elements of damages.

[7] Mental suffering, humiliation, mortification, and disgrace are matters against which insurance is not ordinarily provided by stipulation or otherwise, but the law in many instances compensates for them as injuries. No reason is perceived why things which sometimes constitute legal elements or grounds of damages may not be made the subject-matter of a contract for indemnity. Moreover, there is a well-defined class of contracts for the breach of which such damages are given, namely, promises of marriage. *Flint v. Gilpin*, 29 W. Va. 740, 3 S. E. 33; *Grubbs v. Sult*, 32 Grat. (Va.) 209, 34 Am. Rep. 765; 5 Cyc. 1019; 4 Am. & Eng. Ency. L. 897; 4 R. C. L. p. 156. Though such damages are not always recoverable in actions of tort, they are, when recoverable, deemed to be compensatory and not punitive. *Davis v. Telegraph Co.*, 46 W. Va. 48, 32 S. E. 1026; *Vinal v. Core & Compton*, 18 W. Va. 1; *Gatzow v. Buening*, 106 Wls. 1, 81 N. W. 1003, 40 L. R. A. 475, 80 Am. St. Rep. 1; 13 Cyc. 39. Between this contract and the breaches thereof and a promise of marriage and breach thereof, a very strong analogy is readily discoverable. In the latter case, courts of law give redress and award damages for injured feelings, because such damages are direct and immediate results of the breach.

There, the relation of marriage does not preclude right of action. As between a husband and wife, there can be no action at law, for reasons already stated, but an agreement between husband and wife is enforceable in equity. If there could be an action at law for violation of marital right, the rules governing the estimation of damages in actions for breaches of promise would logically apply. No good reason could be assigned for a different basis for determination of the damages. This contract supplies a basis of legal action, not afforded by the law itself. In other words, it confers a right of action upon the wife, which she would not otherwise have had. Having this, she stands in a situation strikingly analogous to a woman injured by breach of a promise of marriage and having a right of action therefor.

This argument would fail, if the matters set forth in the condition of the bond were not lawful subjects of contract, of course. But the right of contract is a very broad one. Agreements of a mere social character may be broken with impunity. The law takes no cognizance of them. Contracts founded upon illegal considerations or made in violation of law or forbidden by public policy are void and never enforced. Beyond these restraints upon liberty of contract, there are few, if any. The obligations sanctioned by this contract were not simply social. They are even more sacred and more deeply founded in law than those imposed by a promise of marriage. They are not forbidden by public policy. On the contrary, they are favored and upheld by it. "Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations, after a temporary separation had taken place." *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675.

The contentions founded upon the numerous assignments of error are nearly all adverse to the conclusion indicated in the foregoing observations, and no legal questions other than those already disposed of are discussed in the briefs. It would be useless to review, in detail, the rulings as to evidence and instructions, based upon these propositions. Some evidence tending to show the plaintiff had expressed disinclination to accept support from the husband was excluded, but this occurred after complete breach of the condition of the bond, and none of it tended to prove any actual tender of assistance. No error is perceived in these rulings.

[8] As to John M. Bolyard, the husband, the judgment will be reversed, the verdict set aside, and the action dismissed, but as to J. H. Bolyard, the judgment will be affirmed, agreeably to the rule of practice announced in *Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 187.

(79 W. Va. 651)

WIGGIN v. MARSH LUMBER CO. et al.
(No. 3183.)

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1917.)

(Syllabus by the Court.)

1. SALES — 152 — CONSTRUCTION OF CONTRACT — DELIVERY — TIME — DEFAULT.

Under a contract of sale of lumber to be manufactured and delivered f. o. b. cars at a specified village, on either of two certain railways having separate stations or sidings for loading, about one-half mile distant from each other, at the election of the vendee, when ordered and directed by him and not otherwise, and to be paid for on receipt of bill of lading and invoice from his inspector, the vendor is not required to store lumber at the village named, for compliance with the contract, nor to act at all upon mere general orders or permits from the vendee, to haul lumber to such village, containing no designations of quantities or loading places, nor any promise or expression of intent to take up and pay for the lumber otherwise than as provided in the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 357.]

2. SALES — 152, 345 — ACTION FOR PRICE — CONDITIONS PRECEDENT.

If, in a contract of sale of personal property, the vendee reserves to himself the right to name the time or place of delivery, or both, or the qualities or quantities of the articles to be delivered from time to time, or both, or the time, place, qualities, and quantities of partial deliveries, his orders, designating such things as he has reserved the right to prescribe, are conditions precedent to action on the part of the vendor; and, if ready and willing to make deliveries, he is not in default, except upon receipt of such orders and failure of compliance therewith.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 357, 956-961.]

Error to Circuit Court, Raleigh County.

Action by H. D. Wiggin against the Marsh Lumber Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

File & File, of Beckley, for plaintiff in error. Herbert Stansbury and McGinnis & Hatcher, all of Beckley, for defendants in error.

POFFENBARGER, J. The elaborate recital of facts of this case found in the opinion setting forth the grounds of the disposition of a former writ of error in it (87 S. E. 194) renders a restatement thereof unnecessary. The evidence adduced on the new trial awarded may differ, in some respects, from that upon which the former verdict rested, but the matter in controversy is the same. Some grounds of recoupment previously relied upon were not asserted in the second trial, but some additional items of set-off, wrongful deductions of freight, were claimed. As on the former trial, full defense was made under the general issue, and the jury found for the defendants.

As it sometimes happens, the terms of the contract were more closely observed and ad-

hered to on the second trial than on the first, and two provisions thereof, not specifically and clearly invoked on the former trial, became the basis of the court's instructions on the second. These were right of election as to the place of loading the lumber, reserved to the plaintiff, and the inhibition of the defendants from delivery otherwise than as ordered by the plaintiff. The first was that delivery should be made "f. o. b. cars at Surveyor, W. Va., on the C. & O. Railway or the Virginian Railway at the election of the said Wiggin," and the other, that "the remainder of said lumber" (all but the 50,000 feet to be furnished in October, 1908), should be "delivered when ordered and directed by the said Wiggin and not otherwise." On the former trial, the defendants sought only one very short instruction, telling the jury to find for the defendants, if they believed all the lumber ordered to be placed on the cars, by the plaintiff, had been "delivered f. o. b. cars Surveyor." The court gave it. In it, there is no express reference to these controlling provisions. For the plaintiff, the court gave six instructions on that trial, and refused two others requested. Two of those given related to claims of recoupment, not now involved. One of them absolved the plaintiff from duty to prove actual damages. Two of them left it to the jury to say whether the defendants had failed to deliver lumber as ordered by the plaintiff, but did not define an order for lumber as contemplated by the contract. Another told them they might consider the correspondence upon the inquiries submitted to them. One of the two refused would have placed upon the defendants the duty of furnishing the cars for carriage, and the other would have denied the defendants' right to set up a breach of the contract by the plaintiff, if they had treated it as continuing.

On the second trial, the defendants sought and obtained four instructions, the first of which told the jury the plaintiff could not recover liquidated damages, because of non-delivery of the 50,000 feet of lumber in October, 1908, as provided in the contract, if they believed from the evidence he had agreed to modify its terms as to that lumber; the second, that, if they believed the defendants hauled 150,000 feet of poplar lumber to Surveyor, in the summer of 1909, and permitted the plaintiff's inspector to inspect it and take from it such lumber as he desired, they should find he had waived their failure to haul it to the railroad in January, 1909, in compliance with his request; the third, that the statement in the letter of January 4, 1909, that the defendants might haul the oak lumber if they wanted to, although the plaintiff did not care particularly about it, was a mere permission to haul the oak, but not such an order as was contemplated by the contract of July 11, 1908, as to that lumber; and the fourth, that, although they

might believe the plaintiff gave the defendants any orders permissible under the contract of July 11, 1908, before the institution of the action, with which they failed to comply, yet if they believed from the evidence that it was agreed between the parties, after the institution of the action, that proceedings should be stayed and the contract completed, it then became the duty of each party to go on according to the terms of the agreement of July 11, 1908, and of the plaintiff to give orders as provided therein; and, if they should believe there was no proof that the plaintiff gave such orders, and the defendants did not have them and could not complete the contract for want thereof, they should find for the defendants, or rather that the plaintiff was not entitled to liquidated damages. The court refused to honor the request of the plaintiff for three instructions, two of which, Nos. 1 and 6, treated the contract as imposing absolute duty upon the defendants to deliver the lumber within one year and the extensions of time assented to by the plaintiff, and the other, No. 3, ignored the defendants' evidence, tending to prove the delivery of 150,000 feet of poplar lumber at the railway siding and at the end of the tramway, and also treated the contract as absolute and unconditional. It also refused to give plaintiff's instructions Nos. 2, 4, and 5, as drawn, but modified them and gave them as modified. One of these, No. 4, as requested and as given, directed attention to the provisions of the contract, respecting the character of the orders to be given, and one of them, No. 2, advised the jury that the Marsh Lumber Company had no right to demand of Wiggin that he receive at one time the 150,000 feet of lumber, the defendants claimed to have hauled to the siding and the end of the tramway. All of them, as requested, absolved the plaintiff from estoppel or denial of right, by his waiver of conditions. In this respect, the court amended them. At his instance, the court gave three other instructions, without amendment, Nos. 7, 8, and 9. The first of these advised the jury that the defendants, after breach of the contract by the plaintiff, could not set up such breach, if they had waived it; the second, that the plaintiff was not required to ship lumber furnished him at Surveyor, as soon as it was delivered there, but that he had a reasonable time after delivery in which to procure cars to load it; and the third, that the contract sued on was a continuing one until July 16, 1910, and that the plaintiff's right to recover could not be defeated upon the ground of his failure to perform the contract, prior to that date, if the defendants did not furnish him any lumber under the contract, after that date.

Differences of opinion between the trial court and the attorneys for the plaintiff, as to the effect of the decision of this court upon the former writ of error, were the inducing causes of the adverse rulings complained of.

Although the former verdict was set aside, careful examination and analysis of the opinion fail to disclose any purpose on the part of the court, to say the obligation of the contract on the part of the defendants was unconditional and absolute. On the contrary, it distinctly asserts the burden of conditions precedent resting upon the plaintiff. It says the duty of selecting the carrier and giving shipping directions falls on the plaintiff, and that, without performance of these duties, the defendants could not be required to load the lumber. Nor does it overlook or ignore the right of the defendants to have orders from the plaintiff, as conditions precedent. In support of the former verdict, failure of the plaintiff to furnish cars and designate the carrier was relied upon extensively in the argument, but it was held that failure to make one or more of the requisite selections named did not exonerate the defendants from compliance with express requirements as to delivery at the time and place specified by the contract, when so ordered, and that cars could be secured, the carrier elected, and destination given, after the assembling of the lumber. But the duty of the plaintiff to designate with each order the place of loading, the Chesapeake & Ohio siding or the Virginian siding, a right which he had reserved, and the inhibition of deliveries without orders, were not distinctly relied upon in the argument, nor observed at all in the requests for instructions. These vital and controlling provisions of the contract were practically ignored, both in the trial court and in this court. But when the case went back for a new trial, they were invoked. By their request for instruction No. 3, the defendants asked the court to tell the jury that their general order to haul lumber contracted for, or a mere permission to do so, without designation of the point to which it was to be hauled, was not such an order as was contemplated by the contract. Though their instruction No. 4 did not define the order contemplated by the contract, it did submit to the jury an inquiry as to whether orders were given as provided for by it. One of the instructions given for the plaintiff on the former trial told the jury lumber was to be furnished as ordered by the plaintiff, not as ordered by him in compliance with the terms of the contract defining the character of the order. Another told them it was the duty of the defendants to haul and place the lumber at a convenient place at Surveyor, if so directed by the plaintiff. These instructions declaring the plaintiff's right to order as he pleased were followed by another asserting liability on the part of the defendants, for failure to furnish the plaintiff 500,000 feet of lumber, on his orders to do so provided for by the agreement. The first two allowed the plaintiff to order as he pleased, and the third did not suggest any different theory to the jury, by its reference to the

agreement. The first two construed the agreement as one allowing the plaintiff to order as he pleased, and the third did alter that interpretation. On the second trial, the court refused to tell the jury the defendants were bound to place the lumber at a convenient place at Surveyor, when directed by the plaintiff, and told them it was the duty of the defendants to furnish the lumber, as ordered and directed by the plaintiff, or his agent, as provided by the contract. Two others given, at the instance of the plaintiff, did not so define or limit the order, but the definition was an explicit requirement of plaintiff's instruction No. 4, and of defendants' instructions Nos. 3 and 4. Their combined effect was to bring the conditions precedent into full and conspicuous view.

If the rulings of the court on the second trial are correct and the verdict is sustained by the evidence, no injustice will be occasioned by disregard of so much of the former decision as is not accordant with the law of the case as it is now developed. It did not mislead either the trial court or the jury, and application of correct principles of law will not result in a reversal of the judgment or award of a new trial. Under such circumstances, an erroneous decision on a writ of error may be disregarded on a second writ of error in the same case. *Pennington v. Gillaspie*, 66 W. Va. 643, 66 S. E. 1009; *Cluff v. Day*, 141 N. E. 580, 36 N. E. 182; *Bomar v. Parker*, 68 Tex. 435, 4 S. W. 499; *Bird v. Sellers*, 122 Mo. 23, 26 S. W. 668; *Bynum v. Apperson*, 9 Heisk. (Tenn.) 632; *Barton v. Thompson*, 56 Iowa, 571, 9 N. W. 890, 41 Am. Rep. 119. If the erroneous parts of the former decision had not been adopted, the costs here would have been adjudged against the plaintiff. These he then escaped. They will be no greater now than they would have been then. The costs of the second trial in the court below, which he may be deemed to have incurred as a result of the former decision, is comparatively a small matter, and, besides, he sought the privilege of a new trial and induced the error by which it was accorded him. Hence it is obvious that no substantial injustice will result. The responsibility for the error must be shared by all members of this court that participated in the decision, the trial court and the attorneys. When the case was previously in this court, it was earnestly considered in two conferences of all the judges as the court was then constituted.

[1] The practical and common-sense determination of the rights of the parties, evidenced by the two verdicts of juries, returned in disregard of the nisi prius court's instructions on the first trial and in accord with a reasonable interpretation of those given on the second, seems to conform to well-settled law. The contract was one of dependent covenants, or of covenants on the part of the vendor, dependent, as to obligation, upon the

performance of conditions precedent by the vendee. If the vendee in a contract of sale reserves to himself the right to name the place of delivery, the quantities in which deliveries are to be made, the mode of shipment, the instrument of conveyance, or the like, the vendor's covenant does not bind him to act, until the vendee has exercised his election. His designation as to the subject-matter of his reserved right of election is a condition either concurrent or precedent, performance of which the vendor may await. *Benj. Sales*, § 318.

"Where the place is fixed, but not the time, neither party, as will be seen, can ordinarily put the other in default until, in some way, the other has had reasonable notice of the time when delivery would be offered or demanded." *Mech. Sales*, § 1126.

"Where expressly or by implication the place of delivery is at the option of either party, that fact throws upon him the burden of taking the initiative, and it is his duty to give notice of the place at which the goods will be offered or demanded. If the contract fixes the kind or time of the notice, the contract must prevail; if it does not, reasonable notice would be required. Until such notice is given, the other party, if ready and willing to perform, is not in default." *Mech. Sales*, § 1127.

"If the place is specified but not the time, neither party can ordinarily put the other in default by tendering or demanding delivery at that place, unless reasonable notice of such act has been given the other, or unless the place or circumstances are such as to fairly make the act appropriate without previous notice; if the time or place is expressly or impliedly at the option of either party, he cannot tender or demand delivery until he has given reasonable notice of the time or place at which such delivery is to be made." *Mech. Sales*, § 1130.

If, in a sale of tobacco to be delivered f. o. b. cars at a certain place, there is no provision as to naming the carrier or the destination, the vendee must give the shipping directions before he can demand performance on the part of the vendor, or put him in default. *Hughes v. Knott*, 138 N. O. 105, 50 S. E. 586, 3 Ann. Cas. 903. If a contract of purchase of railroad spikes provide that shipping directions shall be given by the buyer, his failure to give them exonerates the seller; and, if he gives, and then countermands them, before they are acted upon, the seller is not in default. *Railway Co. v. Iron Co.*, 126 Ill. 294, 18 N. E. 735. From the multitudinous decisions illustrating the operation of the principle, the following may be regarded as accurate and representative: *Dwight v. Eckert*, 117 Pa. 490, 12 Atl. 32; *Rogers v. Van Hoesen*, 12 Johns. (N. Y.) 221; *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; *Harrow Spring Co. v. Harrow Co.*, 90 Mich. 147, 51 N. W. 197, 30 Am. St. Rep. 421; *Posey v. Scales*, 55 Ind. 282; *Weill v. Metal Co.*, 182 Ill. 128, 54 N. E. 1050; *Hunter v. Wetsell*, 84 N. Y. 549, 38 Am. Rep. 544; *Armitage v. Insole*, 14 Ad. & Ell. (68 E. C. L.) 727.

Stipulations as to quantities in which deliveries are to be made are equally essential and binding.

"Not only must the article delivered corre-

spond in kind with what is agreed upon, but it must also correspond in amount. Where a specific quantity or number is agreed upon, to be delivered at one time, that quantity or number must be delivered, and the seller will not perform his undertaking, if he delivers either more or less." *Mech. Sales*, § 1157.

"The precise amount to be furnished may also be left to be determined by one of the parties, and his determination, when made and manifested, fixes the quantity to which the contract applies." *Mech. Sales*, § 1170.

"The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once." *Norrington v. Wright*, 115 U. S. 188, 204, 6 Sup. Ct. 12, 15 [29 L. Ed. 366]; *Mech. Sales*, § 1216.

The provisions of the contract as to time, place, quantity, price, and all other conditions are material and binding upon both parties.

The plaintiff reserved to himself, in express terms, the right to fix the times of delivery and the kinds and quantities of lumber to be shipped, from time to time, within the year. He also held the right of election as to the exact place of each delivery. All were to be made at Surveyor, but each at one of two different points, one-half mile distant from each other, and, in every case, he had power of designation of the point of loading. All deliveries were to be made on board of cars. No other delivery would pass the title, shift the hazard of damages or loss, or entitle the defendants to payment. The prescribed mode and conditions of payment were remittance on receipt, from plaintiff's inspector, of bill of lading and invoice of lumber shipped.

The contract must be so construed as to make it operate reasonably and fairly. It contains no express provision as to interruption of the process of delivery, for the purpose of inspection. The parties did not likely contemplate the presence of an inspector, on the arrival of each wagon load or tramcar load of lumber; but such assemblage of lumber for inspection of shipments properly ordered, as may have been necessary, did not impose any duty upon the defendants to keep large quantities of lumber stored at or near the places of loading, for which no proper orders had been given, nor confer upon the vendee any right to demand it. However, it is unnecessary to construe the contract as to the rights and duties of the parties, respecting inspection. That part of it is not directly nor materially involved.

Of course, plaintiff's rights of election could have been waived. In so far as they had been reserved for his exclusive benefit and protection, and no doubt were, in some instances and to some extent; but such waivers were obviously only partial. No let-

ter found in the correspondence set forth in the former opinion, or in the present record, signified any purpose or intent to take up and pay for lumber not actually loaded on the cars, receipted for by the carrier and invoiced. Nor was there any promise to absolve the defendants from duty to remove lumber stored at one loading place to the other, in case shipment from the other should be desired. Nor did the contract impose any obligation upon the defendants to store lumber at Surveyor, for use in performance of the contract. They could keep it where they pleased, until called for by proper orders for deliveries. Until delivered, it was theirs, and they bore the hazards of loss and injury by fires, floods, thefts, and otherwise.

[2] Moreover, the plaintiff was not bound to accept any deliveries made without orders, except in so far as he waived his rights of election. No letter authorized shipment by such roads or cars, or at such times and in such quantities, as the vendors might elect, or promised inspection and payment, without delivery on board of cars of roads designated by the vendee, and he designated no road in any of the general letters relied upon. He ordered 150,000 feet of poplar lumber hauled at one time, without any indication of the places of loading or his intention as to the times at which, or the quantities in which, he would take it up and pay for it. He gave the defendants their option to haul some oak lumber. That was no order. He took up and paid for 164,919 feet of poplar, chestnut, and oak, a quantity far in excess of any specific orders found in the correspondence.

Such oral testimony as tends to prove proper verbal orders or demands for lumber, made through Callaway, the plaintiff's inspector, not honored and filled, is flatly and emphatically denied by Poteet, one of the defendants and manager of the defendant corporation, the Marsh Lumber Company. He swears every proper order was filled, and that the company always had ample lumber on hand with which to comply with the requirements of the contract and was ready and willing to do so, not always when ordered, but within extensions of time assented to by the plaintiff. Whether the contrary may be inferred from the correspondence and the repeated general demands and inquiries found in the plaintiff's letters and the replies thereto, as well as whether Callaway testified truthfully, was a question for the jury. There is nothing legally conclusive in them. Of course, the plaintiff could rightfully make inquiries, and there was a moral obligation upon the defendants to answer them frankly and truthfully, but they were devoid of the legal virtue and power to force the defendants to move or to put them in legal default.

Seeing no error in the trial court's rulings upon instructions and evidence, nor any

ground upon which it could rightfully have set aside the verdict, we will affirm the judgment.

(79 W. Va. 645)

MILLER v. SKAGGS. (No. 3182.)

(Supreme Court of Appeals of West Virginia.
Feb. 20, 1917.)

(Syllabus by the Court.)

1. EASEMENTS §15—GRANT—NECESSITY.

To raise an implied reservation or grant of an easement the existing servitude must at the time of the deed be apparent, continuous and strictly necessary.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 42-58.]

2. EASEMENTS §21—RIGHTS OF PURCHASER—BENEFITS AND BURDENS.

It is a general rule of the common law, applicable in such cases, that when the owner of two tenements sells one of them, or the owner of an entire estate sells a portion thereof, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 59.]

3. EASEMENTS §22—DRAIN—VISIBILITY.

An apparent easement need not be actually visible. It is enough that the facts and circumstances, fairly construed, will disclose it as in the case of a drain pipe under the surface into which the water is conducted from a roof.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 60.]

4. EASEMENTS §15—RESERVATION OR GRANT—NECESSITY.

The rule of strict necessity applicable to an implied reservation or grant of an easement is not limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 42-58.]

Error to Circuit Court, Summers County.

Action on the case for damages by Janet E. Miller against C. H. Skaggs. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. H. Sawyers and R. F. Dunlap, both of Hinton, for plaintiff in error. T. N. Read, of Hinton, for defendant in error.

MILLER, J. An action on the case for damages for obstructing a private sewer serving the adjoining properties of the parties and other properties and running under and across a corner of defendant's lot at the rear end thereof.

Plaintiff obtained a verdict and judgment for three hundred dollars, and defendant sued out the present writ of error.

One J. A. Graham once owned both properties, and then in connection with the owners of adjoining properties built and maintained the sewer in question. All properties served, including that of the defendant, are situated on a hill side; defendant's property faces Second Avenue, as does the property of one

Cundiff, at the corner of James Street and Second Avenue, and as does the hotel property also of plaintiff, that of the defendant being situated between the Cundiff property and plaintiff's hotel property; and the sewer in question after leaving the lot of defendant runs down between his property and the plaintiff's lot, and connects into the city sewer on Second Avenue. The property of plaintiff affected by the defendant's act complained of, however, fronts on James Street immediately back of the Cundiff property, and between it and the property of one James, and below it and the property of one Pucket, the other properties connected into said private sewer.

The sewer in question serves both as a sanitary and a storm sewer, and there is connected into it not only water closets, bath tubs, and sinks from the respective houses on the lots, but down spouts from the roofs thereof are also run into it, the latter on the plaintiff's property evidenced by terra cotta tiling projecting above the ground and plainly visible from defendant's property; and the lateral pipe or sewer from the Cundiff property crosses the entire width of defendant's property back of his house and is connected into the sewer before leaving his lot. The evidence shows that the main trunk of this private sewer occupies the natural channel for the drainage of the surface waters from the hill side and is practically coincident with an old drain or gutter once open and defined for a part of the way at least across defendant's lot by a stone curbing, but at the time of the sale and conveyance to defendant the sewer had been laid under ground and was in use and serving the properties of all parties connected therewith.

Defendant obtained his property by deed dated November 10, 1909, and the injuries complained of occurred on or about September 30, 1915. A few days prior to that time defendant had dug down to and torn up the sewer where it crossed under his lot, and stopped it up with old rags and clothing, completely shutting off the flow of the water and sewage, and a heavy rainfall occurring thereafter and at the time of the injury, the water and sewage backed up and overflowed the basement of plaintiff's house, resulting in the damages for which she sued.

Neither in the deed from Graham to his immediate grantee, nor in any of the intermediate deeds down to and including the deed from one Butler and wife to defendant was there reserved in terms any easement over the lot of defendant for the purpose of said sewer, and it is conceded that if such easement exists it is one implied in the original grant by Graham and the intermediate deeds referred to.

[1] In accordance with the weight of modern English and American decisions we have decided that an implied reservation or grant of an easement can only arise where

at the time of the deed or grant the existing servitude is apparent, continuous, and strictly necessary to the enjoyment of the dominant estate. *Hoffman v. Shoemaker*, 69 W. Va. 233, 71 S. E. 198, 34 L. R. A. (N. S.) 632, and authorities cited.

And there seems to be no material distinction in the application of this principle between an implied reservation and implied grant of such an easement, except that in a grant the terms of the grant according to the general rule is to be construed most strongly against the grantor in favor of the grantee. 9 R. C. L. 765, and cases cited.

[2] And there is a well recognized rule of the common law, applicable to cases of implied reservations or grants of such easements, namely, that where the owner of two tenements sells one of them, or the owner of one entire estate sells a portion thereof, the purchaser takes the tenement or portion sold with all the benefits and burdens which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. *Lampman v. Milks*, 21 N. Y. 505; *Seymour v. Lewis*, 13 N. J. Eq. 439, 78 Am. Dec. 108; *Washburn on Easements and Servitude* (4th Ed.) 95; *Harwood v. Benton*, 32 Vt. 733; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 672.

[3] That an underground pipe or conduit, such as a sewer, constitutes a servitude within the meaning of the authorities needs no further elaboration. The distinction between a way or road and an easement for a pipe line or sewer is noted in *Hoffman v. Shoemaker*, supra. Its continuous character is determined by the fact that it needs no intervention of other agency to keep it alive, and because in its nature it is continuous.

The grounds of defense interposed to plaintiff's theory of an implied reservation were that the alleged easement was neither apparent nor strictly necessary, so as to entitle plaintiff to continue the servitude upon defendant's property.

We said in *Hoffman v. Shoemaker*, supra, 69 W. Va. page 238, 71 S. E. 200, 34 L. R. A. (N. S.) 632, in accordance with the great weight of authority, that "an apparent easement need not be actually visible. It is enough that the facts and circumstances, fairly construed, will disclose it, as in the case of a drain pipe under the surface into which the water is conducted from a roof." In 10 Am. & Eng. Ency. Law, 405, apparent easements are defined as "Those the existence of which appears from the construction or condition of one of the tenements, so as to be capable of being seen or known on inspection." And in *Larsen v. Peterson*, 53 N. J. Eq. 88, 30 Atl. 1094, it was said that the mere fact that a drain or aqueduct may be concealed from casual vision will not prevent it from being apparent in the sense in which that word is used.

In the case in hand the general lay of the

land, the natural drainage, all tending from both sides of the sewer to that point; the knowledge which defendant must have had from the connections therewith from plaintiff's property, and from his own and other properties; the absolute necessity for some drainage and sewerage for the reasonable use of these properties, we think were sufficient, and must have rendered the existence of the sewer through his property reasonably apparent, and so as to charge him with notice thereof. The authorities cited and many that might be cited support this conclusion.

[4] But was the easement claimed one of strict necessity within the meaning of the authorities referred to? The rule of strict necessity has not been uniformly defined by the courts. But the greater number in weight and reason hold this rule not to be limited to one of absolute necessity, but to reasonable necessity, as distinguished from mere convenience. 9 R. C. L. 765, § 28; Wells v. Garbutt, 132 N. Y. 430, 30 N. E. 978; Dillman v. Hoffman, 38 Wis. 550; Paine v. Chandler, 134 N. Y. 385, 32 N. E. 18, 19 L. R. A. 99; Miller v. Hoeschler, 126 Wis. 263, 105 N. W. 790, 8 L. R. A. (N. S.) 327, note III b, 328. In John Hancock Mut. Life Ins. Co. v. Patterson, 103 Ind. 582, 2 N. E. 188, 53 Am. Rep. 550, it was decided that if the service imposed on one during unity of possession of two parcels was of a character looking to permanency, and discontinuance of such service would absolutely involve an actual and substantial re-arrangement of these parts of the estate in whose favor the service was imposed, to the end that it might be as comfortably enjoyed as before, then such necessity would seem to exist. Our case of Bennett v. Booth, 70 W. Va. 204, 73 S. E. 909, 39 L. R. A. (N. S.) 618, seems to be in accord with this principle of implied reservation.

A decision well illustrating cases where the rule of reasonable necessity should not be applied is Bussmeyer v. Jablonsky, 241 Mo. 681, 145 S. W. 772, 39 L. R. A. (N. S.) 549, Ann. Cas. 1913C, 1104: And Jones on Easements, § 156, says:

"The term 'necessary' is to be understood as meaning that there could be no other reasonable mode of enjoying the dominant tenement without this easement."

And in section 157, the same authority says:

"The degree of necessity that must exist to give rise to an easement by implied grant, or to an easement by implied reservation, where such an easement is recognized, and no marked distinction is made between a grant and a reservation, is such merely as renders the easement necessary for the convenient and reasonable enjoyment of the property as it existed when the severance was made. 'The degree of necessity is to be determined rather by the permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the

other.' The use of the right need not be absolutely necessary to the enjoyment of the thing granted. It is only requisite that the right shall materially affect the value of the thing granted."

On the trial below it was conceded that plaintiff had no way of drainage or sewerage by way of James Street, or through adjoining lots, and whether it was reasonably possible to get from her lot fronting on James Street by changing the course of the sewer so as to make it run through her hotel lot or in some other way; and whether the sewer through the defendant's lot was so apparent, as to charge defendant with notice thereof, were disputed facts properly submitted to the jury under the evidence, by instructions properly propounding the law of the case, and by the verdict of the jury these facts were found adversely to the contentions of the defendant, and we see no reason for disturbing that verdict or the judgment thereon. The judgment, therefore, will be Affirmed.

(79 W. Va. 639)

FRENCH v. McMILLION et al. (No. 3044.)
(Supreme Court of Appeals of West Virginia.
Feb. 20, 1917.)

(Syllabus by the Court.)

1. DEEDS ~~64~~ — CONTRACT — MERGED IN DEED.

Where a vendee of land, under a written contract of sale, subsequently procures a deed therefor to be executed to his wife, it will be presumed, in the absence of proof to the contrary, to have been executed in discharge of the contract which thereby becomes merged in the deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 266.]

2. CANCELLATION OF INSTRUMENTS ~~63~~ — DEEDS—CONTRACT OF SALE.

A decree canceling such deed for fraud in its procurement likewise annuls the contract of sale pursuant to which it was made.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 129.]

3. PARTITION ~~16~~ — PARTIES — EQUITABLE OWNER.

To authorize a party claiming only an equitable title to maintain a suit for partition, it is essential that his equity be complete, such as entitles him to demand a conveyance of the legal title.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52.]

4. ESTOPPEL ~~28~~ — WARRANTY DEED—HEIRS.

A deed with covenants of general warranty, purporting to convey lands in which the grantor has only a prospective inheritance, and to which he never becomes entitled because of his death within the lifetime of his ancestor, does not estop his children from asserting title as heirs of their grandparent.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 68.]

5. ESTOPPEL ~~45~~ — EXECUTION OF DEED — AFTER-ACQUIRED TITLE.

A married woman living with her husband is not, nor is her heir, estopped by her deed, or any covenant of warranty therein, from setting up against her grantee an after-acquired title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112.]

Appeal from Circuit Court; Raleigh County. Suit by G. T. French against Burnette McMillion and others. From decree for plaintiff, defendant McMillion appeals. Reversed, and bill dismissed.

J. E. Summerfield, of Beckley, for appellant. O. M. Ward and A. P. Farley, both of Beckley, for appellee.

WILLIAMS, Judge. From a decree partitioning a small tract of land among George T. French, the plaintiff, Burnette McMillion, and the infant children of Floyd McMillion, deceased, the defendant Burnette McMillion has appealed, denying plaintiff's title to any interest in the land.

The tract was formerly owned by Sarah Daniel and contained 39½ acres. She conveyed away two small lots out of the tract, 1.24 acres to Amanda Clay and 1.75 acres to Victoria McMillion, which are not here involved. She later also conveyed a lot of 2 acres to Ellen McMillion, which was not partitioned, but title to which is involved, the court below holding plaintiff to be entitled to the entire lot.

Sarah Daniel was twice married. By her first husband she had two sons, Burnette McMillion and Floyd McMillion. The last named died in her lifetime, leaving seven children, all of whom are infants. Sarah Daniel died in 1912, leaving the aforesaid son and grandchildren as her only heirs at law, who claim, by inheritance from her, all the land that was partitioned. Plaintiff claims the one-half of it by virtue of a contract of sale executed by Sarah Daniel to her son Floyd McMillion on August 30, 1905, by which she, being then a widow, bound herself to make to him a deed, with general warranty of title, for said one-half interest. No deed was ever made to him, but defendants contend that, pursuant to that contract and at Floyd's request, she executed a deed to his wife, Ellen McMillion, on September 18, 1905, and that the deed was afterwards set aside by decree of court for fraud committed by Floyd McMillion in its procurement, and that the effect of the cancellation of the deed was the annulment also of the prior contract, it having been consummated and merged in the deed. The record discloses that such a decree was made on April 5, 1906, on full hearing in a suit brought for that purpose in November, 1905, by Sarah Daniel against her son Floyd McMillion and his wife. Neither the deed to Ellen McMillion nor the decree setting it aside mentions the contract of August 30, 1915, and plaintiff contends that it was not affected in any manner by the decree annulling the deed.

[1, 2] That a contract of sale does become merged in a conveyance executed in pursuance of it to such an extent that the fate of the latter will determine its validity is a principle too well settled to be questioned. The lesser equitable estate created by the con-

tract is necessarily merged in and swallowed up by the legal estate created by the deed.

Although it is not directly proven the deed to Ellen McMillion was made in pursuance of the contract with her husband, still it is a fact fairly and properly inferable, we think, from the facts proven, as shown by the record in the suit brought by Sarah Daniel to avoid the deed. A copy of that record is made a part of the record in this proceeding. Floyd McMillion and his wife were both parties defendant to that suit, and it appears that the fraud for which the deed was set aside was committed by Floyd himself. Mr. J. W. McCreery, who prepared the deed, testified in that case, and it appears from his deposition that Sarah Daniel, Floyd McMillion, and his wife came to his office, about the 9th of September, 1905; that Floyd explained to him what he wanted done, and, quoting witness' language, "produced a deed that he had the one-half interest in the land for which he was to get the description, and he told me what the contract was for the deed, and I recollect that he said he was to furnish his mother fuel and to take care of her." There being no evidence of any other contract than the one of August 30th, it must be presumed that it was the one there produced by Floyd McMillion, and that the deed to his wife was made in fulfillment of it.

On the 24th of December, 1906, after the aforesaid deed had been canceled, plaintiff received a deed from Floyd McMillion and wife for the aforesaid half interest, the deed specifically referring to the contract of August 30, 1905, for description of the land intended to be conveyed. But in view of the merger of the contract in the deed to Floyd's wife, and the cancellation of the deed, he took nothing by that deed. Neither Floyd nor his wife was then seised of any interest in the land. In his amended and supplemental bill plaintiff avers that Floyd McMillion held a title bond from his mother for a one-half interest in the land, which was acknowledged on the 3d of November, 1905, but the only contract exhibited in the record is the one of August 30, 1905. Moreover, defendant Burnette McMillion denies that any such title bond as is described in the amended bill ever existed, and no proof was taken to establish that fact.

[3] But, regardless of the merger of the contract and deed, plaintiff must fail, because of the lack of proof of a complete equity in Floyd McMillion. The consideration for the contract with his mother was \$1 and other valuable considerations, and it is not proven what they were or that they have been performed. Plaintiff acquired no higher right by his deed from Floyd McMillion and wife than his grantor had. In order to prevail he must show that his grantor had fully performed his contract, and was in position to demand a deed from Sarah Daniel. He has not even attempted to do so.

[4] But it is further contended that plaintiff's title has become perfect by estoppel; that, Floyd McMillion having warranted generally the title to land, his children are estopped to claim title to it against his deed. This principle has no application. Floyd McMillion died before his mother, Sarah Daniel, died, and his children did not inherit the land from him, but inherited it directly from their grandmother. He was never at any time seised; having died before his mother, he never became her heir in fact. Hence his deed does not estop his children from claiming as heir directly from his mother, the portion he would have inherited if he had survived her.

[5] After the conveyance to Ellen McMillion for the one-half interest had been set aside, Sarah Daniel, on December 3, 1907, granted to her 2 acres out of the 39½-acre tract. The court adjudged plaintiff to be the owner of this 2 acres. There being no other conveyance from Floyd McMillion and wife to plaintiff than the one heretofore mentioned, we are unable to perceive any ground for the holding, unless the chancellor was of the opinion that Ellen McMillion, although a married woman, was estopped by her deed or covenant of warranty to assert an after-acquired title to the same land, and that such estoppel would operate likewise upon her heirs. Even if the doctrine of estoppel by deed applied to a married woman, her deed did not purport to grant more than the undivided half of the land, and neither she nor her heirs would be thereby estopped to claim title to the other moiety. But, under the law of this state, a married woman is not estopped by her deed or any covenant of warranty therein from asserting an after-acquired title to the land conveyed. Counsel for plaintiff insist that Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854, holds otherwise. We do not so interpret that decision. Mrs. Buford's heirs were held to be estopped by her covenants of general warranty because at the time she executed the deed her husband was living separate and apart from her and in another state, which the court held effected a restoration of her rights as a feme sole, and made her covenants as binding as if she had been unmarried. The facts here are different. Mrs. McMillion was living with her husband and he joined in the execution of her deed. At the common law a married woman was incapable of contracting, and it is essential to estoppel by deed that the party to be affected must have been *sui juris* when the deed was made. The statute (chapter 66 [secs. 3660-3683] Code of West Virginia) creating separate estates and empowering married women to contract with reference thereto, and to convey the same, prescribes a form or

method which must be followed in order to make their contracts and conveyances effective. If she is living with her husband, it is indispensable that her husband join in the execution of her contract or deed for the sale or conveyance of her real estate, and that she acknowledge it in order to its validity. And section 6, c. 73, Code (sec. 3809), respecting acknowledgments to deeds by married women, expressly provides that, when her acknowledgment is taken and certified in the manner prescribed:

It shall "operate to convey from the wife her right of dower in the real estate embraced therein, and pass from her and her representatives all right, title and interest of every nature which, at the date of such writing, she may have in any real estate conveyed thereby, as effectually as if she were, at said date, an unmarried woman; and such writing shall not operate any further upon the wife or her representative by means of any covenant or warranty therein contained."

See, also, *Sine v. Fox*, 33 W. Va. where at page 524, 11 S. E. 218, of the opinion, it is held that the covenant of warranty by a married woman is "inoperative and of no effect." Apropos to the question under consideration is the decision in *Central Land Co. v. Laidley*, 32 W. Va. 134, 9 S. E. 61, 3 L. R. A. 826, 25 Am. St. Rep. 797.

There is much conflict in the decisions by the courts of the various states respecting the doctrine of estoppel by deed as applied to married women. By statute in some of the states their covenants, respecting their separate estates, are made obligatory. But, according to the weight of authority, a statute simply authorizing a married woman to convey her real estate and to contract for the sale thereof, in conjunction with her husband, does not, by implication, empower her to make a covenant for title, which is personally binding on her. 2 Herman on Estoppel, § 582; 13 R. C. L. § 362, and numerous cases cited in note 10. *Jackson v. Vanderheyden*, 17 Johns. (N. Y.) 167, 8 Am. Dec. 378, is a leading case on this subject. See, also, numerous cases cited in Freeman's notes in the case of *Nash v. Spofford and Wife*, 43 Am. Dec. 426, 427.

Her covenant of warranty being inoperative, Ellen McMillion would not have been estopped to set up her after-acquired title to the two acres, nor are her heirs estopped to assert the title which they have inherited from her. Notwithstanding her warranty, her deed had no greater effect than to pass such interest as she then had in the land, and she had the legal right to acquire thereafter another and better title to the same land and assert it against those claiming under her.

These observations lead to a reversal of the decree and a dismissal of plaintiff's bill, and such will be the order of this court.

(146 Ga. 479)

DREW v. DREW. (No. 255.)

(Supreme Court of Georgia. Feb. 15, 1917.)

*(Syllabus by the Court.)***1. EVIDENCE §178(4) — BEST AND SECONDARY EVIDENCE—LOST DEED.**

A plaintiff in ejectment claiming under a deed as muniment of title may prove the deed by secondary evidence, provided the proper foundation is laid as to the execution and delivery of the original deed and its loss.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 584.]

2. EJECTMENT §85—PLEADING—ISSUES AND VARIANCE.

The plaintiff's petition was not supported by evidence upon a material and essential point, and the verdict was unauthorized.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 220-229.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by Mrs. Rachael C. Drew against J. S. Drew, Jr. Verdict and decree for plaintiff, motion for new trial overruled, and defendant excepts, and brings error. Reversed.

Mrs. Rachael C. Drew filed her petition seeking to have a lost deed to certain lands established, to recover possession of the lands, to cancel a deed held by the defendant, J. S. Drew, Jr., and for mesne profits. Upon the trial verdict was in favor of the plaintiff for the land in dispute, without rent. A motion for a new trial was overruled, and the defendant excepted to this ruling and to the refusal of a nonsuit.

The plaintiff alleged in substance as follows: Though J. S. Drew, Jr., is in possession of the land in controversy, the title to it is in the plaintiff. On August 27, 1895, J. S. Drew, Sr., who was the husband of the plaintiff and the father of the defendant, conveyed this land to the plaintiff for her natural life, with remainder to her two children. The deed of conveyance was never recorded, but was "lost and destroyed." A copy of the alleged lost deed was attached to the petition. By an amendment, which the court allowed, the names of the witnesses to the copy deed attached were changed, the date of the deed was changed, and the middle name of one of the grantees therein was changed. J. S. Drew, Jr., claims possession of the land under a deed from his father, executed on December 29, 1904, and recorded. J. S. Drew, Sr., died intestate on September 1, 1912. He, as agent, and under the reservations of his deed to the plaintiff, had the exclusive right to the possession of the land until his death. For this reason the plaintiff was not advised that the defendant claimed the right of possession. The defendant had actual knowledge that the deed to the land had been executed and delivered to the plaintiff, having read it over and studied its contents before the time when he claims to have purchased the land. He knew that J. S.

Drew, Sr., prior to his death returned the land for taxes in the name of the plaintiff. The plaintiff charges, on information and belief, that the defendant admitted that he knew, before purchasing the land, that his father had sold it to the plaintiff, but that it was the intention of the defendant to hold the land during the lifetime of the grantor, and that after the grantor's death, should the plaintiff seek to recover it in the courts, he would continue to hold by delaying the trial for at least ten years, and for that time enjoy the rents and profits. For this reason the defendant is holding the land in bad faith.

M. H. Blackshear, of Dublin, for plaintiff in error. J. S. Adams, of Dublin, for defendant in error.

GILBERT, J. (after stating the facts as above). This suit was brought to establish an alleged lost deed, to cancel an outstanding deed, and to recover possession of the land in dispute. The plaintiff was only one of the grantees named in the lost deed, and the defendant was the grantee in the junior deed. The plaintiff and the defendant claimed under a common grantor, who was dead, leaving children not parties to the suit. There was no demurrer to the petition. This court therefore will not pass upon the question of nonjoinder of parties, which was raised for the first time in the brief of counsel.

[1] 1. The plaintiff contended that the deed under which she claimed title was prior in date to that relied upon by the defendant; and her testimony was that her deed had been destroyed. A plaintiff in ejectment claiming under a deed as muniment of title may prove the deed by secondary evidence, provided the proper foundation is laid as to the execution and delivery of the original deed and its loss. Civil Code 1910, § 5829. For a full discussion of this subject see Powell on Actions for Land, §§ 171, 202. The destruction of a deed does not revert the title in the grantor. Holder v. Scarborough, 119 Ga. 256, 46 S. E. 93.

[2] 2. In the instant case no copy deed was introduced in evidence, in so far as the record discloses. There was some testimony that a deed was made by the grantor to the plaintiff and her two children. The children were not parties to the suit. It is claimed that the deed to which reference is made in the evidence is the same as that described in the petition, but there is nothing in the record to show any connection between the two. Treating the evidence as sufficient to show the existence and execution and delivery of the deed alleged to have been lost or destroyed, the only evidence as to its contents is the reference to the grantees as being the plaintiff and her children. Under such circumstances, if the plaintiff is entitled to recover,

certainly her right would be limited to the interest which she had under the deed, and which, according to the evidence, was that of a tenant in common with her children, and she could recover no more than her undivided interest. The petition alleges that the plaintiff has a life interest in the land, and in this respect the allegata and probata are at variance.

Under the charge of the court a verdict was rendered for the plaintiff for the premises in dispute, without rent. The court passed a decree establishing the lost deed, and canceling the outstanding deed, as prayed for, and awarding the premises to the plaintiff. The verdict and decree were unauthorized.

Judgment reversed. All the Justices concur.

(146 Ga. 496)

COLES v. BENNETT et al.

BENNETT et al. v. COLES.

(No. 262.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 977(4) — REVIEW — FIRST GRANT OF NEW TRIAL—STATUTE.

This case falls within the well-recognized rule that the first grant of a new trial will not be disturbed, unless the verdict was required. Civ. Code 1910, \S 6204.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3863.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action between W. P. Coles, trustee, and Pauline Bennett and others, executors. From the judgment, W. P. Coles, trustee, brings error, and Pauline Bennett and others, executors, take a cross-bill of exceptions. Affirmed on main bill of exceptions, and cross-bill of exceptions dismissed.

Lovick G. Fortson, of Atlanta, for plaintiff in error. J. E. Mozley and H. B. Moss, both of Marietta, for defendants in error.

HILL, J. Judgment affirmed on main bill of exceptions; cross-bill of exceptions dismissed. All the Justices concur.

(146 Ga. 504)

MADDUX v. JONES et al. (No. 269.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. MOTION FOR NEW TRIAL—AMENDMENT.

The grounds to the amendment to the motion for new trial, which complained of the omission, without request, to instruct the jury on the mental capacity of witnesses, and as to the amount of evidence necessary to support a verdict for the propounder, were not meritorious.

2. MOTION FOR NEW TRIAL—STATUTE.

The ground of the motion for new trial, based on alleged newly discovered evidence, did

not comply with the requirements of the statute on that subject, as set forth in Civ. Code 1910, \S 6086.

3. WILL CONTEST — SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict finding in favor of the caveators against the establishment of the will.

Error from Superior Court, Chatham County; W. G. Charlton, Judge.

Will contest between W. H. Maddox and Carrie Jones and others. Verdict for caveator, and caveatees bring error. Affirmed.

J. P. Dukes, of Pembroke, H. G. Dukes, of Savannah, and C. E. Alexander, of Prattville, Ala., for plaintiffs in error. D. C. Barrow and H. P. Cobb, both of Savannah, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 482)

ENGLISH v. ENGLISH et al. (No. 257.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

JUDGMENT \S 460(1)—SUIT TO VACATE—PETITION—CAUSE OF ACTION.

A. P. English, as guardian of the person and property of Margaret and George O. English, brought his petition against James E. English, for whom also he had been guardian, joining as codefendants certain named purchasers from James E. English of property which had been awarded to him in a division in kind in proceedings in the court of ordinary. It was charged that James E. English had taken to himself individually a deed to certain lands constituting a part of what was known as Morton's division in the city of Waycross, instead of taking it to the estate of Dan B. English, the father of his ward and of James E. English, as he should have done. The lots in Morton's division were a part of the property embraced in that which was divided in kind, and were awarded to James E. English. The plaintiff also alleged that James E. English, as attorney at law, filed in the court of ordinary the application of plaintiff for division in kind of the property belonging to the estate of Dan B. English, under which application appraisers were duly appointed; and they having made a division, the plaintiff was dissatisfied with it, believing it to be unfair and unjust and made at the instance of James E. English, and instructed him to discontinue and dismiss said proceedings, "and, under the assurance given, supposed that same had been done, whereas it appears that the return of the appraisers making the division as aforesaid was nevertheless made the judgment of the court of ordinary, which fact plaintiff did not ascertain until long subsequent thereto, having moved from Waycross to Jacksonville, Fla., and he did not become cognizant of these facts until long afterwards, upon visiting Waycross. The proceeding aforesaid was not only a fraud against plaintiff and his ward, but was illegal, not being in conformity with the requirements of law in such cases made and provided." It was further charged that certain advances made to James E. English were not taken any account of in the division, and that James E. English had sold and conveyed certain of the lots awarded to him, and had mortgaged others. The prayer was to set aside the division in kind, for cancellation of the deeds and mortgages,

for a redistribution of the property, and for an accounting. *Held*, that there was no error in dismissing the petition upon demurrer. From the exhibit attached to the petition it appears that the proceedings in the court of ordinary were regular on their face, and were filed in the name of the plaintiff; the name of James E. English not appearing as attorney in the case. Moreover, no act of fraud is alleged against the purchasers from James E. English, nor against the mortgagees; nor is it alleged that these purchasers or mortgagees had notice of the claim of any irregularity in the proceedings in the court of ordinary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 886.]

Error from Superior Court, Ware County; J. T. Summerall, Judge.

Suit by A. P. English, guardian of Margaret and George C. English, against J. E. English and others. Judgment for defendants, and plaintiff brings error. Affirmed.

F. V. Paradise and J. L. Sweat, both of Waycross, for plaintiff in error. Parks & Reed and James E. English, both of Waycross, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 497)

HART v. MANGUM, Sheriff. (No. 264.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

EXTRADITION — 31 — GROUNDS — FUGITIVE FROM JUSTICE.

In a petition for the writ of habeas corpus it was alleged that the defendant, the sheriff of Fulton county, Ga., illegally held the petitioner under arrest; that in July, 1911, he was arrested by officers of the state of Tennessee under an indictment in that state for the offense of burglary; that subsequently, and while he was thus in the custody of the proper authorities of the state of Tennessee, they voluntarily delivered him to the marshal of the United States, who took him to Memphis, Tenn., where he was sentenced by the district court of the United States to serve a sentence of five years in the federal penitentiary at Atlanta; that since then he has been continuously in the custody of the officers of the United States; that the sheriff of Fulton county holds him under an order of the Governor of Georgia, commanding his delivery to the officers of the state of Tennessee under a requisition issued by the Governor of that state, it being claimed that petitioner is a fugitive from justice from that state, which he denies. *Held*, that the denial of the writ of habeas corpus was proper. *Kelly v. Mangum*, 145 Ga. 57, 88 S. E. 556, and cases there cited.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 33.]

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Habeas corpus by F. H. Hart against C. W. Mangum, Sheriff. Judgment for respondent, and petitioner brings error. Affirmed.

Troutman & Troutman, of Atlanta, for plaintiff in error.

BECK, J. Judgment affirmed. All the Justices concur.

(146 Ga. 492)

VIRGINIA-CAROLINA CHEMICAL CO. v. WILLIAMS. (No. 256.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

EXECUTION — 38 — MORTGAGES — 139 — SECURITY DEED — TITLE — REDEMPTION OF MORTGAGED PROPERTY.

Where one conveys land to another by a security deed, and takes a bond for title to reconvey on payment of the debt, the deed conveys the legal title, and "leaves the grantor no interest in the land which can be subjected to levy and sale by a creditor whose judgment was obtained after the deed was executed." Before such levy and sale can be made, there must be a redemption of the property, and this can be accomplished only by the payment of the secured debt in full. Civ. Code 1910, § 9038; *Shumate v. McLendon*, 120 Ga. 398, 48 S. E. 10; *Ramey v. Denny*, 133 Ga. 751, 66 S. E. 918. The court, therefore, did not err in holding that the land in question was not subject to the execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 51, 98-102; Mortgages, Cent. Dig. § 278.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action between the Virginia-Carolina Chemical Company and G. H. Williams. Judgment for the latter, and the former brings error. Affirmed.

H. W. Dent, of Atlanta, and Burch & Burch, of Dublin, for plaintiff in error. Williams & Wylt, of Dublin, for defendant in error.

GILBERT, J. Judgment affirmed. All the Justices concur.

(146 Ga. 471)

COOPER v. RICKETSON. (No. 251.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1078(1) — ASSIGNMENTS OF ERROR — ABANDONMENT.

Assignments of error not argued in the brief will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

2. APPEAL AND ERROR — 733 — ASSIGNMENTS OF ERROR — SUFFICIENCY.

The assignment of error is too general and indefinite to question the validity of the judgment upon which the execution is based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025-3027.]

3. CLAIM TO LAND IN EXECUTION — EVIDENCE.

The evidence supports the judgment, which by consent of the parties was rendered by the court without a jury.

Error from Superior Court, Decatur County; E. E. Cox, Judge.

Suit by J. E. Ricketson against C. R. Cooper. Judgment for plaintiff, and execution levied, and E. L. C. Cooper, wife of defendant, filed a claim to the land, which was adjudged subject to *fi. fa.*, and claimant, after the overruling of her motion for new trial, brings error. Affirmed.

W. V. Custer, of Bainbridge, for plaintiff in error. Wilson & Bennett, of Waycross, and Harrell & Wilson, of Bainbridge, for defendant in error.

EVANS, P. J. J. A. Ricketson brought suit in the city court of Bainbridge against C. R. Cooper to recover an amount alleged to be due on three notes, each for the principal sum of \$500, which were alleged to be a part of a series of nine notes given by the defendant, containing a provision that failure to pay any of them or the interest thereon at maturity shall have the effect to render all of the notes due. The notes attached to the petition contained a waiver of homestead and exemption. The defendant was duly served, but made no defense, and the court rendered a judgment for the plaintiff for the sums claimed to be due, in which judgment it was recited that the defendant had filed no issuable defense. On this judgment execution was issued and levied upon a tract of land. Subsequently to the judgment the wife of the defendant applied for, and had set apart, a homestead in the land levied upon, and filed a claim to the land. The papers were returned to the superior court of DeKalb county. By consent of the parties the case was heard by the court without the intervention of a jury. The court adjudged the property subject to *fi. fa.* The claimant made a motion for new trial, which was overruled.

[1] 1. Beyond the usual grounds that the verdict was contrary to the law and evidence, the motion as amended alleges two grounds of error. One relates to error in refusing a continuance; but, as this ground is not argued in the brief of counsel, it will be treated as abandoned.

[2] 2. The other alleged ground of error is:

"The claimant moved that the levy be dismissed as to the property claimed by her, because not subject to execution, same being homestead property, and because it did not affirmatively appear that the right of defendant in *fi. fa.* to a homestead had been foreclosed, and because the execution was illegal and void, which said motion the court overruled and refused, and judgment entered up by the court finding said property subject, to which said ruling and judgment movant excepts, and assigns as error, because contrary to law, and because contrary to the evidence before the court."

Under this assignment of error the only point argued by the plaintiff in error is that the judgment of the city court of Bainbridge is void, because of having been rendered by the court without a jury upon a note the maturity of which was fixed by a default in the payment of the other notes. We think the assignment of error is too general to raise this question. However, attention is called to the sixteenth section of the act establishing the city court of Bainbridge (Acts 1900, pp. 104, 108), which authorizes the judge of that court to hear and determine all

civil cases of which the court has jurisdiction, and to give judgment therein without the intervention of a jury, provided that either party upon demand shall be entitled to a trial by jury. There was no demand for a jury in the action upon the notes.

[3] 3. The evidence supports the judgment, which by consent of the parties was rendered by the court without a jury.

Judgment affirmed. All the Justices concur.

(146 Ga. 469)

CALDWELL et al. v. FREEMAN. (No. 250.)
(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. OPENING DEFAULT JUDGMENT — FORMER DECISION.

Under the rulings in the case of *Cauley v. Wadley Lumber Co.*, 119 Ga. 648, 46 S. E. 852, the court properly overruled the motion to open the judgment of default.

2. DISMISSAL AND NONSUIT — 57 — GROUNDS — PROCESS.

The court properly overruled the motion to dismiss the action.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 129-133.]

3. APPEARANCE — 24(2) — DEFECTIVE SERVICE — WAIVER.

The defect in service upon one of the defendants was waived by appearance and pleading.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 120.]

4. PLEADING — 129(1) — PETITION — TRUTH OF ALLEGATIONS — FAILURE TO DENY.

There being no plea or answer in the case, and the petition being properly paraphrased, the allegations of the petition are to be taken as true; and, being thus taken, they require the verdict which the court directed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270, 274, 275.]

Error from Superior Court, Meriwether County; H. H. Revill, Judge.

Suit by the Bank of Haralson, continued by R. W. Freeman, receiver, against W. M. Caldwell and others. Judgment for plaintiff on notes, and decreeing cancellation of deed from defendant J. M. Caldwell to defendant H. D. Caldwell, and defendants bring error. Affirmed.

The Bank of Haralson brought suit against W. M., L. A., J. M., and H. D. Caldwell, to recover the amount of certain promissory notes signed by the three defendants first named, and to obtain a decree to cancel and set aside a deed conveying realty from J. M. Caldwell to his son, H. D. Caldwell, on the ground that this deed was fraudulent, and made for the purpose of defrauding petitioner, and delaying and hindering the collection of the debt sued on, and other debts of J. M. Caldwell. Afterwards the receiver of the bank, R. W. Freeman, was made a party plaintiff. The suit was brought to the August term, 1914, of Meriwether superior court, which convened on August 18, 1914. Defend-

ants retained an attorney at law to represent them. About three weeks before the court convened this attorney died. No appearance was made for the defendants at the August term, and the case was duly marked in default. At the trial term next succeeding the case "was continued by the plaintiff's counsel." No steps had been taken by the defendants to open the default. At the August term, 1915, a motion was made to open the default, and the defendants offered to plead instantler, showing that they had employed counsel as stated; that they believed a plea and defense had been filed, and, but for the fact that they had relied on the counsel so employed, they would have employed other counsel to represent them and to file a plea; and that they did not discover, until the August term, 1915, that the answer had not been filed. The court overruled the motion to open the default. A motion was then made, in behalf of H. D. Caldwell, to dismiss the case, upon the following grounds: That there was a misjoinder of parties and a misjoinder of causes of action; that the land conveyed by the deed which the plaintiff sought to have canceled was not sufficiently described; that W. M. Caldwell was a resident of Pike county, and the process attached to the second original was directed to the sheriff of Meriwether county; and that it was not alleged that W. M. and L. A. Caldwell were insolvent. The court overruled the motion and the defendants excepted. In a note made by the judge before signing the certificate to the bill of exceptions, he stated that counsel for defendants, during his argument on the motion to dismiss, said that he had no objection to a judgment being rendered against W. M., L. A., and J. M. Caldwell for the amount due on the notes in this suit. No evidence was introduced; and, the allegations of the petition not being denied, the court directed the jury to return a verdict and decree for the plaintiff for the principal sum due, together with interest, against the makers of the notes, and that the deed be delivered up and canceled.

J. F. Hatchett and McLaughlin & Jones, all of Greenville, for plaintiffs in error. N. F. Culpepper, of Greenville, for defendant in error.

BECK, J. (after stating the facts as above). [1] 1. While, under Civil Code, § 5656, a trial judge is vested with a wide discretion as to opening a judgment of default on motion made at the trial term, there is no provision of law authorizing him to entertain a motion to open a default at any subsequent term at which the case is called. *Thornton v. Coleman*, 104 Ga. 625, 627, 30 S. E. 782. To move to open a default at the term at which a case regularly stands for trial is purely a matter of grace; and this

privilege must be exercised, if at all, within the time prescribed by the statute whereby it is conferred. The foregoing restates the ruling made in the case of *Cauley v. Wadley Lumber Co.*, 119 Ga. 648, 46 S. E. 852.

[2, 3] 2, 3. There was no error in overruling the motion to dismiss as to W. M. Caldwell, who was a resident of Pike county. The process attached to the second original intended for service upon him should have been directed to the sheriff of Pike county, instead of to the sheriff of Meriwether county; but that afforded no reason to dismiss the case as to W. M. Caldwell, when the motion for such dismissal was made, not by him or on his behalf, but by and on behalf of H. D. Caldwell, who was not one of the joint makers of the note, but was the grantee in the deed from one of the joint makers. Besides this, W. M. Caldwell, as well as the other defendants, appeared before court and made a motion (equivalent to a general demurrer) to dismiss the case generally upon grounds other than that of the improper direction of the process attached to the second original; and, moreover, counsel for W. M. Caldwell and the other two makers of the note stated to the court, during his argument upon the motion to dismiss, that he had no objection to a judgment being rendered against W. M., L. A., and J. M. Caldwell for the amount due on the note. We think this was a complete waiver of any defect in the process, as the only recovery sought against W. M. Caldwell was a judgment for the amount of the note, and the only objection that H. D. Caldwell could have to the defect in service upon W. M. Caldwell was that the latter would not be bound by the judgment, there having been no proper service upon him.

[4] 4. There being no plea or answer in the case, and the petition being properly paraphrased, the allegations of the petition are to be taken as true; and, being thus taken, they require the verdict which the court directed. Hence the court did not err in directing a verdict in favor of the plaintiffs, awarding to them the amount of the notes, and decreeing a cancellation of the deed to H. D. Caldwell from his father, one of the joint makers of the notes.

Judgment affirmed. All the Justices concur.

(146 Ga. 483)

REED et al. v. WARNOCK. (No. 258.)
(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. NEW TRIAL — § 132(3) — MOTION FOR NEW TRIAL — BRIEF OF EVIDENCE — TIME — DISMISSAL.

A motion for a new trial, which includes a brief of the evidence, must be made during the term at which the trial was had. And where a motion for a new trial is made in term and no brief of the evidence is filed, and no order

of the court is taken extending the time at which the brief of evidence may be filed, it is proper to dismiss the motion.

(a) Where in such a case a motion for new trial was made, but no order of the court was taken in term to extend the time in which a brief of the evidence might be filed, but such an order was taken in vacation subsequently to the filing of the motion for a new trial, such order was a mere nullity.

(b) On the call of such a motion for a new trial set at a certain date in vacation, the court did not err in dismissing it, even though a brief of the evidence was then presented for approval by the court.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 275.]

2. APPEAL AND ERROR ¶299, 300—BILL OF EXCEPTIONS—REVIEW.

Where on the trial of a case exceptions pendente lite are filed to an interlocutory ruling of the court, which, if rendered as contended for by the complaining party, would finally dispose of the case, the excepting party can come to this court by direct bill of exceptions filed within 30 days from the date of the decision complained of; or, without making a motion for a new trial, he can secure a review of an order, ruling, or judgment, which necessarily controlled the final result of the case adversely to him. But if after final trial the losing party makes a motion for a new trial, which is afterwards dismissed by the trial judge because never perfected by the filing and approval of a brief of the evidence, he cannot, after the time for bringing such direct bill of exceptions has expired, in a writ of error complaining of the dismissal of the motion for a new trial, assign error on such exceptions pendente lite so as to have them considered by this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1740-1742.]

Error from Superior Court, Bacon County; J. I. Summerall, Judge.

Suit by E. W. Warnock against Miles Reed and others for an injunction, the appointment of a receiver, and the recovery of land. Judgment for plaintiff, and from an order dismissing their motion for a new trial, defendants bring error. Affirmed.

Arthur H. Codington, of Macon, and Dave M. Parker, of Waycross, for plaintiffs in error. W. W. Bennett, of Baxley, for defendant in error.

HILL, J. E. W. Warnock brought a petition against Miles Reed and others, seeking an injunction and the appointment of a receiver, and to recover certain land. At the trial a verdict and judgment were rendered in favor of the plaintiff. The defendants filed the usual "skeleton motion" for new trial, and obtained the following order of the judge:

"Read and considered. It is ordered that the plaintiff show cause before me, at Waycross, Ga., at 1 o'clock p. m. on the 11th day of December, 1915, why the foregoing motion should not be granted. It is further ordered that the plaintiff be served with a copy of this motion and order, and that this order act as a supersedeas until the further order of the court. The defendants having made a motion for a new trial in said case, on the grounds therein stated, and said grounds having been approved by the court, and it appearing that it is impos-

sible to make out and complete a brief of the testimony in said case before adjournment of court; it is ordered by the court that said motion be heard and determined on the 11th day of December, at 1 o'clock p. m., at Waycross, Ga., and that movant may amend said motion at any time before the final hearing."

The attorney of record for the plaintiff acknowledged due and legal service of the motion and order, and waived all other and further service. On December 11, 1915, at the time fixed by the court for the hearing on the motion for a new trial, the court made this order:

"Motion for new trial by the said defendants in the above-stated cause being assigned for this December 11, 1915, and both sides consenting to a continuance, it is ordered that the hearing on said motion for new trial be had before me at 10 a. m. on the 8th of January, 1916, at Waycross, Ga. It is ordered that said movants have until the final hearing of said motion for new trial to present for approval the brief of evidence in said cause, and to present their amended motion for new trial."

On January 8, 1916, the motion for a new trial came on to be heard at the time and place named in the order. The defendants then tendered to the trial judge for approval and filing a brief of the evidence adduced at the trial of the case. An amended motion for new trial was also tendered for approval and filing. The plaintiff moved to dismiss the motion for a new trial, upon the ground that no order was granted in term time allowing movants beyond the term in which to perfect their brief of evidence, and that the defendants had filed no brief of the evidence in the case during the term and before the adjournment of the court. On the hearing of the motion to dismiss the defendants offered to introduce evidence to the court to the effect that it had been impossible to prepare the brief of evidence before the adjournment of the term of the superior court at which the case was tried, and that they had been hindered in its preparation without fault by them. The trial judge excluded the evidence offered, and passed the following order:

"It appearing to the court that no order was granted in term time in the within case, allowing movant time beyond the term in which to file and present for approval a brief of the evidence in said case, and it further appearing that no brief of evidence was filed in said case during the term and before the adjournment of the court, and upon motion of counsel for plaintiff the within motion for new trial is for these reasons hereby dismissed. Granted and signed Jan. 8th, 1916."

The defendants excepted to this order and to the ruling declining to approve and permit the filing of the brief of evidence.

[1] All motions for a new trial must be made during the term at which the trial was had; and, when the term continues longer than 30 days, the application shall be filed within 30 days from the trial. A brief of the evidence is essential to the validity of the motion for a new trial. *Moxley v. Georgia Ry. & El. Co.*, 122 Ga. 493, 50 S. E.

339. And where no brief of the evidence is filed, and no order is taken extending the time at which such brief may be filed, a motion for a new trial will be dismissed. *Taliaferro v. Columbus R. Co.*, 130 Ga. 570, 61 S. E. 228. And see *Park's Code*, § 6089, and cases cited under head, *Brief of Evidence*. No subsequent order of the court can give it vitality. But it is argued that the order of November 17, 1915, was broad enough to entitle the defendants to perfect their brief and file it on January 8, 1916. And, further, that, even if they were not entitled as a matter of law to perfect and file their brief of evidence, they were entitled to show providential hindrance from doing so, and that on account of certain alleged conduct of counsel for plaintiff they were entitled to file their brief of evidence on January 8, 1916. The law is mandatory that the motion for a new trial, which includes the brief of evidence, must be made during the term at which the case was tried; and when the term continues longer than 30 days, the application shall be filed within 30 days from the trial, together with a brief of the evidence, etc. But if any good reason be shown to the court why the brief cannot be filed, an order can be taken extending the time for perfecting the brief of evidence and having it approved and filed. Defendant's counsel may have thought they did this, but a reading of the order taken in term time is sufficient to disclose an absence of such right. And the court below, construing its own order, took this view of it. The first order recites the fact that it was impossible to make and complete a brief of the testimony before the adjournment of the court; but, instead of following it with an order granting an extension of time within which to make and file such brief of the evidence, the order taken was to the effect that the defendants might amend the motion for new trial at any time before final hearing—an order which was not necessary at all. And the subsequent order in vacation, passed on December 11, 1915, allowing the defendants until the final hearing to present for approval a brief of the evidence, was of no force to grant such a right, as the court had lost jurisdiction to make such an order. It could only be done in term time. If the defendants were prevented from filing the brief of evidence in term time on account of providential or other good cause, it would have been an easy matter to take an order extending the time for such filing of the brief of evidence on that ground, and no doubt the court would have readily granted such order; and we cannot say as a matter of law, or by necessary implication, that the order taken amounted to one extending the time within which the brief of evidence could be perfected and presented for approval by the court. It is true this court has held that where a motion for new trial is made in term and an order taken for it to be heard in vacation, the term

of the court for that particular case has not adjourned, but is still open. *Herz v. Frank*, 104 Ga. 638, 639, 30 S. E. 797. But a valid motion must be made in term. Where a motion for new trial is made, and an order thereon is passed which shows that no brief of the evidence has been tendered for approval, the order should extend the time within which such brief of evidence can be completed and presented for approval, which in this case was not done in term, but later in vacation, when the judge had lost jurisdiction to so order.

[2] 2. There was an attempt to assign error on the *pendente lite* exceptions filed during the trial of the case in the court below. The exceptions *pendente lite* were filed within the time required after the rulings complained of were made, but the bill of exceptions was not presented to the trial judge for approval until after the expiration of the time allowed by law for such filing. *Bradley v. Saddler*, 54 Ga. 681. The defendants did not come to this court within 30 days from the final trial of the case on a direct bill of exceptions, assigning error on the rulings complained of in the exceptions *pendente lite*; but the assignments of error on these rulings are made in the bill of exceptions based on the judgment of the court dismissing the motion for a new trial. A party can come to this court by a direct bill of exceptions assigning error on *pendente lite* exceptions, without making a motion for a new trial, if the rulings complained of in such exceptions necessarily affected the final result of the case adversely to that party, as provided in *Civil Code*, § 6144; or if the rulings complained of, if rendered as contended for by the excepting party, would have been a final disposition of the case as provided in section 6138. But if, instead of availing himself of one of the methods above pointed out, the complaining party chooses to make a motion for a new trial, and such motion turns out to be void for the reasons pointed out in the first division of the opinion, and is by the court dismissed for that reason, it will not avail the plaintiff in error to assign error thereon in a bill of exceptions sued out on the judgment dismissing the motion for a new trial. Therefore, at the time the bill of exceptions was presented to the trial judge, it was too late to assign error upon the rulings complained of in the *pendente lite* exceptions. To avoid the result of such delay, an attempt was made to make a motion for a new trial, which being dismissed, error was assigned on that ruling, and also on the exceptions *pendente lite*. But such an effort was futile, as the motion for a new trial was never perfected, and amounted to nothing. A void proceeding of that character could not serve to extend the time for assigning error upon the rulings complained of in the exceptions *pendente lite*. In order to assign error in a bill of exceptions complaining of the dismissal of a motion for a new

trial, the motion for a new trial must have been a valid motion. It follows that the exceptions pendente lite cannot be considered; and, from the ruling in the first division of the opinion, that the court did not err in dismissing the motion for a new trial.

Judgment affirmed. All the Justices concur.

(146 Ga. 608)

AYER et al. v. CHAPMAN. (No. 303.)
(Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

1. TAXATION ~~§~~577—TAX FI. FAS.—VALIDITY.

Tax fi. fas. against the estate of O. and against O., issued after her death, were void, and a sale of the property under such fi. fas., though it had formerly been the property of O., was also void, and a deed executed by the sheriff in pursuance of the sale could not operate to convey title to the purchaser.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1164, 1170, 1171.]

2. ADVERSE POSSESSION ~~§~~55—PRESCRIPTION—SUSPENSION—TRUST ESTATE.

Where one named in a will as trustee for a life tenant and remainderman fails to accept the trust and to qualify, there is a vacancy in the trusteeship, and during such vacancy prescription does not run in favor of one in possession of the trust property, as against the remaindermen, until the death of the life tenant. The provision of Civ. Code 1910, § 4175, as to prescription against the estate of a decedent on which no representation is had in 5 years, does not apply to trust estates.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 272-275.]

3. ACTION TO RECOVER LAND—VERDICT.

Applying the foregoing rulings to the facts of this case, a verdict for the defendant was unauthorized.

Atkinson and Hill, JJ., dissenting.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Action by C. K. Ayer and others against T. L. Chapman. Directed verdict for defendant, motion for new trial overruled, and plaintiffs except and bring error. Reversed.

This was an action to recover land in the city of Augusta, which was devised under the will of Miss Olivia M. Oliver probated in 1868. The property was levied upon and sold at city sheriff's sale on November 5, 1889, under sundry city tax executions for taxes accruing many years after the death of Miss Oliver. The fi. fas. were issued by the clerk of the city council of Augusta against "the estate of Mrs. O. Oliver" and against "Mrs. O. Oliver," and the property was bought at the tax sale on the first Tuesday in November, 1889, by Charles G. Houston, the highest bidder, for \$130. Charles G. Houston went into possession of the property 12 months after his purchase, made numerous repairs and improvements, put his tenants in possession, and died in April, 1891. His father, Alexander R. Houston, duly administered upon his estate, and on November 2, 1891,

obtained from the court of ordinary of Richmond county an order authorizing a sale of the property in question, and immediately advertised and sold it at public outcry on the first Tuesday in December, 1891, when Miss Catherine J. Houston bought the property, obtained from A. R. Houston administrator an administrator's deed thereto, and immediately went into possession through her tenants. On April 7, 1892, Miss Catherine J. Houston conveyed an undivided half interest in the property to Mrs. Mamie F. Houston, and these two were in possession through their tenants until March 26, 1895, at which time Mrs. Mamie F. Houston sold her undivided half interest to Mrs. Elizabeth S. Houston, and from that date Mrs. Elizabeth S. Houston and Mrs. Catherine F. Fisher (formerly Houston) continuously occupied the property through their tenants until September 25, 1903, when they sold it to Thomas L. Chapman, the defendant, who went into possession and has occupied the premises up to the present time. The persons just mentioned made numerous repairs and improvements upon the premises, expending considerable money.

The plaintiffs claim under the will of Miss Olivia M. Oliver, the material portions of which are as follows:

"Item 1. I devise and bequeath unto my nephew, Walter J. Brookes, as trustee, and in trust for the sole and separate use, benefit, and behoof of his sister, Julia Euphemia Brookes, and her children, should she marry and have any, for and during her natural life, with remainder at her death to her child or children, and equally between them if more than one, all those several lots or parcels of land [described].

"Item 2. From the income by rent of said lots I devise and bequeath to Mrs. Caroline Oliver, wife of my nephew, James B. Oliver, and to William R. Oliver, son of William B. Oliver, the sum of one thousand dollars each, to be raised and paid from the said rents and incomes of said lots, but the property not to be sold to meet these bequests; and provided further, that if my said niece, Julia Euphemia Brookes, should die without having child or children surviving her, the property to descend to and become a trust estate upon Virginia Air [Ayer] and children, and Joseph E. [Josephine] Wood and children, under the same trusts and subject to the same charges and restrictions as heretofore held by the trustees for the said Julia Euphemia Brookes during her life."

There was evidence that Mrs. Julia Graham, formerly Julia Euphemia Brookes, died September 22, 1909. Walter J. Brookes and James B. Oliver were named as executors of Miss Oliver's will. The record of its probate in the court of ordinary showed that the named executors (who were nonresidents of Georgia) did not qualify, and that Julia E. Brookes (afterwards Graham) was appointed administratrix with the will annexed on May 12, 1893, the records in the ordinary's office showing no further act of administration upon the estate. C. K. Ayer, one of the plaintiffs, testified that he knew Walter J. Brookes, the trustee named in the will, and

never heard of his doing any act as trustee under the will, and that he died in 1868. Counsel for plaintiffs testified that he had examined the records in the ordinary's office from 1868, and also in the clerk's office, covering a period of about 16 years, and found no record that Walter J. Brookes had ever qualified as trustee under the will or accepted the trust or acted as trustee. There was no conflict in the testimony as to the continuous, open, and adverse occupation of the premises by C. G. Houston and those claiming under him, including the defendant, from November, 1890, up to the filing of the present suit, June 21, 1911. There was no question as to the regularity of the levy, advertisement, and other formalities required by law in the tax sale on the first Tuesday in November, 1889, other than the attack on the tax *fi. fas.* themselves as having been issued improperly against the estate of Olivia Oliver instead of against the property itself, or against the owner. It affirmatively appeared that all the plaintiffs had been 21 years of age for more than 7 years before this suit was brought, and that the youngest, Mrs. Fleming, at the time of the first trial was 35 years old.

The court directed a verdict for the defendant. A motion for new trial was overruled and the plaintiffs excepted.

Wm. H. Fleming, of Augusta, for plaintiffs in error. Garlington & Cozart and Callaway & Howard, all of Augusta, for defendant in error.

BECK, J. (after stating the facts as above) [1, 2] We are of the opinion that the court erred in directing a verdict for the defendant. The tax *fi. fas.*, under which the property in question was levied upon and sold at city sheriff's sale on November 5, 1889, were void. These *fi. fas.*, were issued out of the office of the clerk of the city council of Augusta, in favor of the city of Augusta, for city taxes. The *fi. fas.* for the years 1886 and 1887 were against "Est. of Mrs. O. Oliver," for the years 1888 and 1889 against "Mrs. O. Oliver," and the special tax *fi. fa.* for the year 1888 was against "Est. of Mrs. O. Oliver." Miss Olivia Oliver died prior to March 26, 1868. The deed from the sheriff of the city of Augusta to C. B. Houston, dated November 5, 1889, conveying the property, recited that the sale was made under the levy of tax *fi. fas.* issued out of the clerk's office of the city of Augusta in favor of the city of Augusta against "Est. of Mrs. O. Oliver," said deed having the original *fi. fas.* attached. These tax *fi. fas.* were void (*Miller v. Brooks*, 120 Ga. 232, 47 S. E. 646), and the deed executed by the sheriff of the city of Augusta in pursuance of a sale under the *fi. fas.* did not convey title to the purchaser. But whether the deed was good as a color of title, it is not necessary to decide. For, conceding that the deed was color of title, it was neces-

sary for the defendant, in order to defeat the plaintiffs in this case, to have acquired a good prescriptive title through the occupancy by himself and his predecessors in title of the premises in dispute for the prescriptive period after the right to have possession of the property had accrued to the plaintiffs or some one representing them; and under the facts of the case, no such adverse possession of the defendant and his predecessors in title as against the plaintiffs was shown. Whether or not Walter J. Brookes, who died in 1886, was by the terms of the will made trustee for the remainders created by the first and second items of the will of Miss Olivia Oliver, it is shown by uncontradicted evidence that he never accepted the trust, and was never in a position to represent either the life tenant or the remaindermen. Up to the time of the death of Miss Julia Euphemia Brookes (afterwards Graham) in 1909, there was no one clothed with the legal title to the remainder estate, but the trusteeship was vacant. Consequently prescription did not begin to run against the remaindermen until 1909, and the prescriptive period necessary to the maturity of a title by prescription, where land is held under a color of title, had not elapsed before suit was brought for the recovery of the land in controversy. The provision of Civil Code, § 4175, as to prescription against the estate of a decedent on which no representation is had in 5 years, does not apply to trust estates. *Jones v. Rountree*, 138 Ga. 757, 76 S. E. 55.

[3] It follows from what has been said that the verdict in favor of the defendant, which was rendered under the direction of the court, was not authorized and must be set aside.

Judgment reversed.

FISH, C. J., absent. EVANS and GILBERT, JJ., concur.

ATKINSON and HILL, JJ. (dissenting). As declared in the Civil Code, § 4163:

"Title by prescription is the right which a possessor acquires to property by reason of the continuance of his possession for a period of time fixed by the laws."

In section 4168 it is declared:

"Actual adverse possession of lands by itself, for twenty years, shall give good title by prescription against every one, except the state, or persons laboring under the disabilities hereinafter specified."

In section 4169 it is declared:

"Adverse possession of lands, under written evidence of title, for seven years, shall give a like title by prescription. But if such written title be forged or fraudulent, and notice thereof be brought home to the claimant before or at the time of the commencement of his possession, no prescription can be based thereon."

It will be perceived that the prescription referred to in the foregoing provisions operates in favor of the prescriber, the manifest purpose of which is security and settlement

of title to land as against the world, except the state and "persons laboring under the disabilities hereinafter specified." The exceptions just mentioned are all included in the following provisions of the Code. Section 4173 declares:

"No prescription works against the rights of a minor during infancy, of a person imprisoned during his confinement, or of an insane person so long as the insanity continues; but each of these shall have a like number of years, after the disability is removed, to assert his claim to realty or personalty against the person prescribing."

Section 4175 declares:

"A prescription does not run against an unrepresented estate until representation, provided the lapse does not exceed five years; nor against a joint title which cannot be severally enforced, and a portion of the owners labor under either of the foregoing disabilities; nor in cases of fraud debarring or deterring the other party from his action until the fraud is discovered; nor against a party who commences his action in time, but is nonsuited, or dismisses for one time, and recomences within six months."

One of the fundamental essentials of a prescription under either section 4168 or section 4169 is that the possession must be adverse. Where estates for life (section 3663) and estates in remainder (section 3674) are created by the same grant in the same land in favor of different persons, the possession of the life tenant is not adverse to the estate in remainder; accordingly in such cases prescription will not run against the remaindermen, based on the possession of the life tenant or his privy in estate, during the term of the life tenant. Under application of this principle, numerous cases are to be found which rule that prescription does not begin to run against remaindermen until the death of the life tenant. But if the grant creates several estates, as indicated above, in the same property, and the legal title to the land in fee simple by the terms of the grant is placed in a trustee for the purpose of holding title and securing the property to the life tenant, and also for the remainderman, and the trust be in all respects legal, valid, and executory, not only as to the life tenant but as to the remainderman, possession by a third person under a claim of right, which is hostile to the title of the trustee, will be adverse to the trustee and to the several estates included in the grant; and if the prescriber maintains his possession in all other respects as contemplated by the statute for the requisite period, he will acquire a good prescriptive title against the trustee; also against beneficiaries whose estates are represented by the trustee. *Ford v. Cook*, 73 Ga. 215. In Civil Code, § 3781, it is declared: "A trust shall never fail for the want of a trustee." The majority are of the opinion that Civil Code, § 4175, has no application to this case, in which, however, the writers do not concur. See *Jones v. Rountree*, 138 Ga. 757, 76 S. E. 55. But as prescription, under Civil

Code, §§ 4168, 4169, runs in favor of the prescriber against the world, except as against the state and the exceptions in section 4173 and section 4175, if the exception in the latter section referring to unrepresented estates does not apply, there is nothing to save the legal title vested in the unrepresented trust estate from the effect of the prescription; if it applies, the exception mentioned by its own terms does nothing more than allow, under specified circumstances, tolling of the prescriptive period by deducting 5 years from the possession of the prescriber. Referring to this section, it was said, in *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46:

"It does not appear whether, after the death of Nisbet, any other person was appointed trustee in his stead. If a successor was appointed, of course the statute of prescription would have run against him from the time of his appointment. As to the period elapsing between the death of the original trustee and the appointment of his successor, if there was one, then, even if section 2688 [Civil Code of 1910, § 4175] of the Code, which provides that 'a prescription does not run against an unrepresented estate until representation, provided the lapse does not exceed five years,' is applicable to a case of this kind, the running of the statute would not, under the ruling of this court in *Payne v. Ormond*, 44 Ga. 514, have been suspended if the vacancy exceeded 5 years. The record discloses nothing whatever with regard to this matter, and we are quite sure that the plaintiffs would not be entitled to claim the benefit of any such suspension without affirmatively showing that a successor to Nisbet was actually appointed within 5 years from the date of his death. They having failed to show the appointment of a successor within that time, there is nothing before the court which would enable us to say that the running of the statute of prescription was ever suspended at all."

The tax deed involved in the case for decision, though void, was sufficient as color of title. The will, properly construed in its entirety, created a valid estate which comprehended legal title to the land in fee simple, thus embracing the interests of the plaintiffs. The estate did not fall for the want of a trustee. The title of the defendant and his predecessors was not privity to the life tenants, but was hostile to the whole trust estate, and their possession was adverse to that estate for 19 years before institution of the suit. The uncontradicted evidence established a prescriptive title in the defendant, and there was no error in directing a verdict in his favor.

(146 Ga. 475)

MCCONNELL v. GREGORY. (No. 253.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. EVIDENCE ~~§~~ 265(8) — **ADMISSIONS IN PLEADINGS—USE AS EVIDENCE.**

When admissions are made in pleadings, and are withdrawn or stricken by amendment, they can be used as evidence by the opposite party upon the trial, with the right of the other party to explain or disprove them; but admissions in pleadings, after they are withdrawn or stricken by amendment, cannot be used as

solemn admissions in judicio, so as to effect an estoppel to deny them. *Alabama Midland Ry. Co. v. Guilford*, 114 Ga. 627, 40 S. E. 794; *Mims v. Jones*, 135 Ga. 541, 69 S. E. 824; *Norris v. Rawlings*, 138 Ga. 711, 76 S. E. 60.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1036.]

2. HOMESTEAD ~~§~~96, 99 — USURY ~~§~~115 — SECURITY DEED—EVIDENCE.

On an issue between a grantor and grantee in a deed to land given to secure a debt, where the deed was assailed as void by being infected with usury, there was introduced in evidence a writing, purporting to be signed by both parties, one day before the date of the deed and four days after the money had been advanced, which, without mentioning the deed, obligated the grantor to make to the grantee monthly payments of specified sums, and at a later date another sum, and obligated the grantee, upon the making of these payments, to convey the land to the grantor. The sums specified in the paper were not referred to as principal or interest, but the monthly payments were sufficient in amount to exceed the legal rate of interest on the amount specified as the last payment. Another paper was introduced, dated nearly two years after the money was advanced, purporting to be a bond for title from the grantee to the grantor, relating to the same land, which specified payments as mentioned above, and called the monthly payments, as interest on the larger sum. There was no evidence of delivery of this paper, and the grantor testified that he had never seen it before the day of the trial. *Held*, that it was not erroneous to permit the grantee to testify that the grantor owed him other money, that the interest charged on the loan secured by the deed was at the rate of 7 per cent., that the other money was at the rate of 12 per cent., that in drawing the paper called the bond for title the interest on both debts was comprehended by the monthly payments, and that no usury was charged on the loan.

The homestead exemption provided for by the Constitution of 1877 (Civ. Code 1910, § 3377) does not apply as against taxes or debts for purchase money of the property, for labor done thereon, for material furnished therefor, or for the removal of incumbrances thereon. Under this law, purchase money and debts incurred in removing incumbrances have the same status.

(a) Where money was borrowed and used to pay the purchase money of land, and in virtue of such payment the borrower received a deed for the land, and subsequently obtained a homestead under Civil Code 1910, § 3377, covering the land, the lender of the money was entitled to be paid the amount of his principal, with lawful interest, in preference to the homestead of the debtor. This priority of the lender of the money would not be affected by the fact that the lender may have charged usury. *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. 724; *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. 374, 84 Am. St. Rep. 204. The portions of the charge to the jury upon which error was assigned were in accord with the foregoing, and were adjusted to the evidence.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 147–153, 156; *Usury*, Cent. Dig. § 326.]

3. FORMER DECISION—RULINGS ON EVIDENCE.

When the case was here on a former occasion (*McConnell v. Gregory*, 141 Ga. 46, 79 S. E. 1128), it was ruled: "A conveyance of land executed by a borrower to secure a debt infected with usury is void and ineffectual to pass title. Civil Code 1910, § 3442. Therefore the maker of such a conveyance may, subsequently to its execution, have a valid homestead set apart in the property sought to be so conveyed,

which homestead will not be subject to a judgment recovered on the debt, notwithstanding the usury was eliminated when the judgment was taken. Applying these rulings to the evidence in this case, the court erred in directing a verdict finding the property subject." On the subsequent trial the judge submitted the case to the jury on conflicting evidence.

4. MOTION FOR NEW TRIAL—GROUND FOR REVERSAL.

The evidence authorized a verdict finding the property subject, and the grounds of the motion for new trial show no cause for reversal.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by M. M. Gregory against D. A. McConnell. Judgment for plaintiff, and defendant brings error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. Jos. A. Alexander, of Nashville, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur.

(146 Ga. 476)

COLLIER v. CARTER et al. (No. 254.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. WILLS ~~§~~88(4) — DEED OR WILL — CONSTRUCTION—POSTPONEMENT OF POSSESSION.

Where an instrument in the form of and attested as a deed contains a clause that it is "to go into effect at the" signer's death, and where there is no other indication as to the intention of the signer, and the paper is duly delivered, it will be construed to be a deed postponing possession.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 211.]

2. RULING ON MOTION FOR CONTINUANCE.

In view of the circumstances attending the trial and the character of the case, the court did not abuse his discretion in overruling the motion for a continuance.

Error from Superior Court, Echols County; W. E. Thomas, Judge.

Ejectment by Ora Lee Carter and another against John W. Collier, individually, and as administrator of estate of H. J. Collier, deceased. Judgment for plaintiffs, motion for new trial overruled, and defendant brings error. Affirmed.

Ora Lee Carter and Mrs. Jennie Bell Carter brought an action of ejectment against John W. Collier, individually, and as administrator of the estate of H. J. Collier, deceased. The verdict was for the plaintiffs. The defendant moved for a new trial, which was refused, and he excepted.

Upon the trial the plaintiffs introduced in evidence a warranty deed from H. J. Collier to Ora Lee Carter and Mrs. Jennie Bell Carter, dated March 9, 1911, conveying the land in dispute. Among other things, the deed stipulated that it was "to go into effect at the said H. J. Collier's death." Two of the attesting witnesses swore that they witnessed

the deed at the request of the grantor, and that the justice of the peace who witnessed the instrument died afterward. It appeared that about March 9, 1911, H. J. Collier went to the home of the husband of one of the plaintiffs, and while there delivered the deed to Mrs. Jennie Bell Carter, one of the plaintiffs, telling her, at the time of delivery, to take the deed; that he did not know when he would die; and he said:

"Here is the deed; this is yours; take it and take care of it, and at my death the property will be yours."

She retained possession of this deed continuously to the time of the trial. The defendant, John W. Collier, testified as follows:

"I do not recognize that as H. J. Collier's signature; it is not his signature, to the best of my knowledge."

This was the entire evidence for the defendant.

J. W. Haygood and Eldridge Cutts, both of Fitzgerald, and J. Munroe Bussell, of Ludowici, for plaintiff in error. J. G. Cranford and E. K. Wilcox, both of Valdosta, for defendants in error.

GILBERT, J. (after stating the facts as above). [1] The decisive question in this case is whether the instrument quoted in the statement of facts shall be construed as a deed, or as a will. Was it intended to pass title to the property in praesenti, with the right of possession postponed, or was it to be purely posthumous in its operation?

Under the previous rulings of this court, as well as the great weight of modern authority in other jurisdictions, we think it clear that the instrument is a deed, with the right of possession postponed until the death of the grantor. The tendency of the earlier decisions was to construe instruments as testamentary where the maker's intent appeared in any way to vest title after his death, without regard to the form of the instrument. Later a more liberal rule was followed toward giving to the instrument a construction which would accord with the intention of the signer, and which would uphold its validity. *Seals v. Pierce*, 83 Ga. 787, 10 S. E. 589, 20 Am. St. Rep. 344; *Wynn v. Wynn*, 112 Ga. 214, 37 S. E. 378; *West v. Wright*, 115 Ga. 277, 41 S. E. 602; *Brice v. Sheffield*, 118 Ga. 128, 44 S. E. 843; *Griffith v. Douglas*, 120 Ga. 582, 48 S. E. 129; *Isler v. Griffin*, 134 Ga. 192, 67 S. E. 854; *Hughes v. Hughes*, 135 Ga. 468, 69 S. E. 818; *Pruett v. Cowsart*, 136 Ga. 756, 72 S. E. 30; *Mays v. Fletcher*, 137 Ga. 27, 72 S. E. 408. The instruments in no two of the cases just cited are identical, nor is the instrument in any one of them identical with the instrument in the present case. They are all sufficiently similar to establish the principle already enunciated as the ruling on the instrument construed herein. That in the case of *West v. Wright*, *supra*, is a substantial duplicate

of the one now under consideration. At least, it presents no material point of difference in the clause under differentiation. In the case of *Isler v. Griffin*, *supra*, the writing recited that it was to take effect, not only after the death of the maker, but also "from and after the death of my father and mother, and not until then." This was held to be a deed, although possession was postponed to the contingency of the maker's death, and also to the death of the father and mother.

In *Phillips v. Phillips*, 186 Ala. 545, 65 South. 49, Ann. Cas. 1916D, 994, the instrument construed contained the language, "this deed is not to take effect until after my death," and it was held to be a deed. *Somerville, J.*, said:

"Courts have undertaken in innumerable cases to prescribe the general tests by which the character of an instrument in this regard is to be determined; but, while there seems to be a substantial uniformity of opinion as to the general principles to be applied, the cases themselves exhibit the utmost contrariety in the particular conclusions reached, even in the same jurisdictions."

In the opinion many cases are cited to sustain the rule, and in the notes appended thereto in Ann. Cas. 1916D, 994, recent cases in many states are cited and discussed, dealing with the rules of law applicable to the construction of an instrument which has the form of a deed, but which is limited to take effect at the death of the grantor, either by its express terms or by the mode of delivery. The early cases on this question are collated in the notes to *Hunt v. Hunt*, 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180, 7 Ann. Cas. 788, and *Ferris v. Neville*, 127 Mich. 444, 86 N. W. 960, 54 L. R. A. 464, 89 Am. St. Rep. 480. From the great wealth of authorities thus gathered and analyzed the general agreement of courts may be stated. (1) An instrument which is in the form of a deed to take effect on the death of a maker where there are no other indicia to prove the intention of the grantor, and the instrument can be held valid, either as a deed or as a will, the court will construe the instrument so as to prevent its becoming inoperative. (2) Whether such an instrument is to be construed as a deed or a will depends upon the intention of the grantor as to the passing of a present irrevocable interest, or whether no interest should pass until after the death of the grantor, and whether the grantor until then should have the right to revoke the instrument. (3) The intention of the maker of the instrument is to be ascertained from the whole construed together. (4) Looking to extraneous facts, the delivery of the instrument is some evidence that the same shall operate as a deed, although its terms provide that possession is postponed until after the death of the maker.

The instrument in the present case is in the form of a warranty deed. It is attested by two witnesses, and by an officer authorized in express terms of the law to witness

deeds. A will to be valid need not be witnessed by such an officer. This instrument was delivered on or about the date of its execution, and has remained thereafter in the possession of one of the grantees. Looking further to extraneous evidence, one of the witnesses swore that the grantor made the delivery in person, and accompanied the delivery with the statement that the grantee should "take the deed; that he did not know when he would die"; and he said:

"Here is the deed; this is yours; take it and take care of it, and at my death the property will be yours."

The construction announced is in harmony with the above-stated adjudication, as well as with equity and justice.

[2] In view of the circumstances attending the trial and the character of the case, the court did not abuse his discretion in overruling the motion for a continuance.

Judgment affirmed. All the Justices concur.

(146 Ga. 527)

GARLINGTON et al. v. BLOUNT et al.
(No. 279.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. REFORMATION OF INSTRUMENTS § 26 —
RIGHT OF ACTION—"PRIVY IN ESTATE."

Where one executes two security deeds conveying the same property to different parties, the grantee in the second deed cannot maintain a suit in equity to reform the first deed, although the description may be incorrect and be due to the mutual mistake of the parties. This is true because the second grantee has no privity in the estate conveyed in the first deed. Equity will correct mutual mistakes between the "original parties or their privies in law, in fact, or in estate." Civ. Code 1910, § 4573. It cannot be contended that the plaintiff is privy in law or in fact. He is not a privy in estate, because "a privy in estate is a successor to the same estate, not to a different estate in the same property." The grantee in the second deed is a stranger to the contract between the parties to the first deed, holds adversely thereto, and hence is not bound by its terms. To entitle one to maintain such an action as the present, he must be a party, or a successor to the party, under the same contract. *Pool v. Morris*, 29 Ga. 374, 382, 74 Am. Dec. 68.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 91-100.]

For other definitions, see Words and Phrases, First and Second Series, Privy.]

2. CAUSE OF ACTION—SUBROGATION.

The petition set forth no cause of action for subrogation of the plaintiff to the right of the bank whose mortgage deed was paid with the money loaned by the plaintiff. *Putney v. Bryan*, 142 Ga. 118, 82 S. E. 519 (2), and cases cited.

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action between A. E. Garlington and others, executors, and M. F. Blount and others. Judgment for the latter, and the former bring error. Affirmed.

M. B. Eubanks, of Rome, for plaintiffs in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 503)

WILLIAMSON et al. v. ANDERSON COTTON CO. (No. 288.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

PLEADING § 218(2)—DEMURRER—RULING.

The plaintiff in error made an attempt to bring this case to the October term, 1915, of this court, as on a fast writ of error; and it was then adjudged that, inasmuch as no order had been passed granting or refusing an injunction or appointing or refusing to appoint a receiver, a fast bill of exceptions would not lie, and that the bill of exceptions would be treated as an ordinary bill of exceptions to a judgment overruling a demurrer, returnable to the March term, 1916, and the case was transferred and entered on the docket of the March term. This now leaves in the case for determination only the question with respect to the judgment overruling the demurrer to the petition. Inasmuch as the judgment referred to, however, was rendered at an interlocutory hearing at chambers, prior to the appearance term of the case, and the court was without power at that time to render a decision on the demurrer, the judgment overruling it must be reversed. *Ivey v. City of Rome*, 129 Ga. 286, 58 S. E. 852.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 552, 553.]

Error from Superior Court, Jenkins County; H. C. Hammond, Judge.

Action between Susannah Williamson and others and the Anderson Cotton Company. Judgment for the latter, and the former bring error. Reversed.

Dixon & Dixon and W. Van Tyler, all of Millen, for plaintiffs in error. Thos. L. Hill, of Millen, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

(146 Ga. 473)

BENNETT v. SWAFFORD. (No. 252.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. BOUNDARIES § 46(3) — AGREEMENT OF OWNERS—EFFECT.

Where coterminous landowners, by parol agreement, fix the line between them and exercise acts of ownership over their respective tracts up to the agreed line, one of them will not afterwards be heard to deny his assent to the agreement.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 221-225.]

2. DIRECTION OF NONSUIT.

The trial court did not err in directing a nonsuit in this case.

3. ASSIGNMENTS OF ERROR.

There is no merit in the other assignments of error.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action by W. A. Bennett against A. B. Swafford. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. W. D. Bule, of Nashville, for defendant in error.

GILBERT J. [1] Bennett purchased 100 acres of land from Harrell. On payment of the agreed price Harrell executed and delivered a warranty deed to Bennett. Subsequently, with a view of selling the adjoining land owned by him on the south side of that sold to Bennett, Harrell, together with Bennett, undertook to locate the south line of the tract first mentioned. Both agreed that this line would cut off a portion of Bennett's house. On the trial Bennett swore that his agreement was not unqualified, that he insisted that the line thus located would not allow him the full number of acres conveyed to him by Harrell, but that for reasons not disclosed at the time, but stated on the trial, he agreed to the location of the line. At the same time a contract for the purchase of $7\frac{1}{4}$ acres additional was agreed to between the parties, and this conveyance was afterwards fully executed. This tract was one-half of an acre wide, and extended uniformly across the south side of the 100-acre tract. Bennett and Harrell located the lines of this tract, and blazed the south side adjoining Harrell's remaining land. Conveyance was taken to the wife of Bennett, who, before the filing of this suit, conveyed the $7\frac{1}{4}$ acres to the plaintiff. Harrell then sold to Swafford all of his remaining land adjoining the plaintiff on the south. Bennett and Swafford, then coterminous landowners, cut trees, cultivated, and otherwise took possession of their respective lands purchased from Harrell, and had actual possession to the agreed dividing line.

Whether Bennett had mental reservations in respect to the agreement, or whether he actually uttered qualifications, his actions were such as to constitute an agreement. He bought the second tract from Harrell for the avowed purpose of saving a portion of the improvements which he had erected upon the line claimed by Harrell. He paid for the additional land, and accepted a deed conveying the same, as already stated. Afterwards he acted upon the agreement, entered upon the second tract purchased, and exercised acts of ownership to the line established by him and Harrell. He will not be afterwards heard to deny his assent to the agreement. "A parol agreement between coterminous proprietors that a certain line is the true dividing line is valid and binding as between them, if the agreement is accompanied by possession of the agreed line or is otherwise duly executed, and if the boundary line between the two tracts is indefinite, unascertained, or disputed. Such an agreement is

not within the statute of frauds, because it does not operate as a conveyance of land, but merely as an agreement with respect to what has already been conveyed." *Farr v. Woolfolk*, 118 Ga. 277 (2), 45 S. E. 230. This is independent of the rule in Civil Code 1910, § 3821, with reference to acquiescence for seven years by acts or declarations of adjoining landowners.

[2, 3] The above-stated facts appearing on the trial, the court directed a nonsuit. The plaintiff excepted to this judgment, and assigned error on various other rulings. The judgment of nonsuit was proper; and in none of the other assignments of error properly made was there any merit.

Judgment affirmed. All the Justices concur.

(146 Ga. 580)

AMERICAN EXCH. NAT. BANK v. COUNCIL. (No. 292.)

(Supreme Court of Georgia. Feb. 28, 1917.)

(Syllabus by the Court.)

RECEIVERS \Leftrightarrow 182—ENJOINING ACTIONS.

A bank borrowed money from another bank and secured the loan by transfer and delivery of its customers' paper, with its incidental collateral. The borrowing bank failed, and a receiver was appointed in an insolvency proceeding. The receiver filed a petition to the court of his appointment, representing that a warehouseman had in his possession certain bales of cotton for which he had issued a warehouse receipt to the president of the defunct bank in his individual name, which cotton had been delivered by a customer of the bank to be applied on his indebtedness, which receipt had been mislaid and could not be found; and he prayed to be authorized to execute an indemnity bond to the warehouseman and to receive the cotton, and when so received to sell it and hold the proceeds as assets of the insolvent bank. An order was granted as prayed, and the receiver, upon giving bond to the warehouseman, obtained the cotton and sold it. Subsequently the lending bank intervened and set up the indebtedness it held against the borrowing bank, and disclosed the collaterals by which such indebtedness was secured, among which were two notes given by the customer who had delivered the cotton to the warehouseman. The lending bank also brought, in another court, an action of trover against the warehouseman for the cotton, predicated on being the holder of the warehouse receipt. Thereupon the receiver filed a petition to enjoin the trover suit and to require the lending bank to assert its claim in the equitable proceeding against the insolvent bank. The court granted an interlocutory injunction. *Held*, that under the undisputed evidence and the pleadings it was error to grant a temporary injunction.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 360.]

Error from Superior Court, Sumter County; Z. A. Littlejohn, Judge.

Suit for injunction by L. G. Council, receiver, against the American Exchange National Bank. Interlocutory order granted, and defendant brings error. Reversed.

Wallis & Fort, of Americus, for plaintiff in error. Ellis, Webb & Ellis, of Americus, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 438)

ATLANTIC COAST LINE R. CO. v. JACKSON et al. (No. 259.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

INJUNCTION ~~§~~32—SUBJECT—MAINTENANCE OF SUIT.

Separate actions were instituted in a city court by two women against a railroad company, for the homicide of an employé of the company. In each suit the right was predicated on alleged relationship as widow to the deceased. *Held*, that the court did not err, in an equitable suit instituted by the railroad company, in refusing to enjoin the suits in the city court, and to compel plaintiffs to intervene in the equity suit for the purpose of determining which, if either, was the widow of the deceased, with the right of the railroad company to contest the rights of both, and, if neither was shown to be the widow, that both plaintiffs be perpetually enjoined from prosecuting their suits in the city court, but, if one should be found to be the widow, that her suit in the city court be allowed to proceed and the suit of the other be perpetually enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 69.]

Error from Superior Court, Ware County; J. I. Summerall, Judge.

Suit for injunction by the Atlantic Coast Line Railroad Company against Mary Jackson and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Wilson & Bennett, of Waycross, and Bennett, Twitty & Reese, of Brunswick, for plaintiff in error. Parks & Reed and Crawley, Redding & Crawley, all of Waycross, for defendants in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

(146 Ga. 534)

REYNOLDS v. CALVERT MORTGAGE & DEPOSIT CO. et al. (No. 282.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

INJUNCTION ~~§~~158—DENIAL OF PRELIMINARY INJUNCTION—RES JUDICATA.

This was an action by the maker of a security deed to enjoin the sale of his land under a power of sale expressed in the deed, on the grounds: (a) That the deed was infected with usury, the amount thereof being specifically alleged; and (b) that, allowing credit for all payments made, the principal debt with legal interest had been fully discharged, thus leaving no ground for the exercise of the power of sale, if its legality be conceded. It was alleged that the defendant had contracted with the plaintiff as a building and loan association, which was no more than an assumed character, that the plaintiff, though having signed a certificate

of membership therein as a building and loan association, did so upon the direction of the agent of the lender, who used that form of contract as a cloak for usury, and that the real transaction was nothing more than a stated loan for which interest was charged in excess of the legal rate. These allegations touching the character of the transaction were denied in the answer of the defendant. At the interlocutory hearing for injunction the decision under the evidence depended upon whether the defendant was a building and loan association and as such entitled to charge certain monthly installments, dues, etc. The judge passed an order as follows: "Upon consideration the injunction heretofore granted is dissolved. I cannot find otherwise, from the evidence submitted, than that the petitioner was a stockholder in defendant company, a building and loan association." *Held* that, under the pleadings and the evidence, the judge was authorized to find that the defendant was a building and loan association, and that the relation of the plaintiff to it was that of a member, and the transaction involved mutual profits and losses between the parties. There was no error in refusing an interlocutory injunction.

(a) The statement in the judgment rendered that "I cannot find otherwise, from the evidence submitted, than that the petitioner was a stockholder in defendant company, a building and loan association," given as a reason for refusing the injunction, is not to be construed as a final judgment which will be conclusive upon the parties as to the character of the defendant company on the main trial.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341.]

Error from Superior Court, Ben Hill County; W. F. George, Judge.

Action for injunction by J. B. Reynolds against the Calvert Mortgage & Deposit Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Rogers & Rogers and Philip Newbern, all of Ocilla, for plaintiff in error. McDonald & Bennett, of Fitzgerald, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 579)

COLQUITT LIVE STOCK & SUPPLY CO. v. CITY OF COLQUITT et al. (No. 291.)

(Supreme Court of Georgia. Feb. 28, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS ~~§~~957(3), 979—STATUTES ~~§~~76(2) — SPECIAL OR GENERAL LAW — CONSTITUTIONAL PROVISIONS — INJUNCTION.

It was provided in section 7 of the charter of the city of Colquitt (Acts 1906, p. 765, as amended by Acts 1913, p. 692) that the authority of the city to levy and collect municipal taxes should be limited in amount to "not exceeding one-half of one per cent. upon all property, both real and personal, within the corporate limits."

(a) The provision of the charter of the municipality above mentioned was not violative of article 1, § 4, par. 1, of the Constitution of this state (Civ. Code, § 6391), on the ground that it was a special law on a subject for which provision was made by an existing general law. *City of Cochran v. Lanfair*, 139 Ga. 249, 77 S. E. 95.

(b) Accordingly a levy of the municipal taxes by the mayor and council in 1915, before the approval of the act creating the charter for the city of Colquitt (Acts 1915, p. 534), amounting to 2 per cent. on all the taxable property in the city, was without authority of law; and it was erroneous, upon a proper application based on the want of authority of the municipality to levy the tax, to refuse to enjoin the collection of the municipal tax based upon such unauthorized levy.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2018, 2019, 2120-2123; Statutes, Cent. Dig. § 78.]

2. RATE OF TAXATION.

It becomes unnecessary to deal with other questions made in the record.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Injunction by the Colquitt Live Stock & Supply Company against the City of Colquitt and others. Judgment for defendants, and plaintiff brings error. Reversed.

W. I. Geer, of Colquitt, for plaintiff in error. P. D. Rich, of Colquitt, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 536)

GUNBY v. ALVERSON et al. (No. 285.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. TRUSTS — 134 — CONSTRUCTION — LIFE ESTATE AND REMAINDER.

A deed between N. E. Gardner of the one part, and Charles W. Dill, trustee for Lizzie Ida Gardner and Mary Ellen Gardner, children of N. E. Gardner, of the other part, after reciting that the grantor was "desirous of securing to his said daughters, Lizzie Ida Gardner and Mary Ellen Gardner, and their children by any future husbands, a maintenance, support, and education," granted "unto the said Charles W. Dill, trustee as aforesaid, and to such other trustee or trustees as may hereinafter be appointed in the place and stead of the said Charles W. Dill or his successors, trustee for the said Lizzie Ida and Mary Ellen or their children, the following named property [describing the land]. To have and to hold the said named property to the said Charles W. Dill, trustee as aforesaid, with all the rights, members, and appurtenances thereof, together with all the improvements as I may choose hereafter to make thereon, and to such other trustee or trustees as may hereafter be appointed for the said Lizzie Ida Gardner and the said Mary Ellen Gardner, in trust for their sole and separate use, benefit, and behoof for and during their natural lives, and at their death or the death of either of my said daughters to be equally divided share and share alike among their children. But in case that either of my said daughters should depart this life having no child or children, or the issue of a child or children in life at her death, then and in that event the said property to go to and vest in the other daughter, or, in case of her death, her child or children, or issue of a child or children, if there should be any living; but if my other daughter should be dead without child or children, or the issue of a child or children living, then to go to and vest in any other child or children I may have living, share and share alike." Then follow cer-

tain clauses wherein the grantor directs a division of the property between the daughters when they shall attain the age of 21 years or either of them shall marry, and makes provision for advancements to his daughters from the income and for the enlargement of the estate from excess of income over advances, if any. The deed continues: "I hereby further direct and require that no part or portion of the corpus of the said estate shall ever be sold until the life estate is ended, for any purpose whatever, unless it shall become less profitable than ordinary investments, or my daughters should desire to change their residence to some other locality, or for some other like good and substantial reason; but if such reason should ever exist, the fund shall be reinvested, and before said sale shall be made I hereby direct that full and satisfactory reason shall be given, and clear and sufficient proof be made to the chancellor granting said order, that such necessity exists and that the proceeds of the sale when made shall be reinvested in like property, or property as substantial in permanent value and as productive in its yield of profits. I herein again direct that said property, at the death of either of my said daughters, shall vest in and become an absolute fee-simple estate in their child or children, or in the issue of their child or children, but if either or both of them should die without child or children or the issue of such child or children living at the time of their death, then said property shall be subject to the limitations and restrictions hereinbefore set forth." Held, that the trust thus created was projected beyond the life estate of the daughters, and embraced the estate in remainder given to the children of the daughters who might survive their parents.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177.]

2. TRUSTS — 193½, 203 — SALE OF TRUST ESTATE — JURISDICTION.

The judge of the superior court had jurisdiction at chambers to order a sale of the trust estate, on the petition of the trustee. In an action of ejectment brought by a child of one of the daughters against the successors in title of the purchasers from the trustee, who with their predecessors in title had been in adverse possession of the land for more than 20 years, it was not erroneous for the court, to whom the case was submitted by consent, to adjudge that the plaintiff was not entitled to recover.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 248, 248, 273-276.]

Error from Superior Court, Fulton County, Geo. L. Bell, Judge.

Ejectment by Mrs. E. H. Gunby against C. B. Alverson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Nathaniel E. Gardner, being seised and possessed of certain land, conveyed the same by deed, the material parts of which are:

"State of Georgia, Fulton County.

"This indenture, made and entered into this the fourth day of July in the year of our Lord one thousand eight hundred and sixty-six between Nathaniel E. Gardner, of the county and state aforesaid of the one part, and Charles W. Dill of the same place, trustee for Lizzie Ida Gardner and Mary Ellen Gardner, children of the said Nathaniel E. Gardner, all of the same county, of the other part, witnesseth that whereas the said Nathaniel E. Gardner, being free from debt, and being desirous of securing to his said daughters, Lizzie Ida Gardner and Mary Ellen Gardner, and their children by any future husbands, a maintenance, support and education, and being seized and possessed of

the estate hereinafter mentioned, being acquired by purchase:

"Now therefore the said Nathaniel E. Gardner, for and in consideration of the natural love and affection that he has and bears unto his said daughters, Lizzie Ida and Mary Ellen, and for the purpose of providing a support, maintenance, and education for them, and also in consideration of the sum of ten dollars to him, the said Nathaniel E. Gardner, in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, and delivered, and doth by these presents grant, bargain, sell, and deliver unto the said Charles W. Dill, trustee as aforesaid, and to such other trustee or trustees as may hereafter be appointed in the place and stead of the said Charles W. Dill or his successors, trustee for the said Lizzie Ida and Mary Ellen or their children, the following named property, to wit: [Four described lots in the city of Atlanta, one on Alabama street, one on Hunter street, two on Whitehall street, and a tract of land situated in Fulton county.] To have and to hold the said named property to the said Charles W. Dill, trustee as aforesaid, with all the rights, members, and appurtenances thereof, together with all the improvements as I may choose hereafter to make thereon, and to such other trustee or trustees as may hereafter be appointed for the said Lizzie Ida Gardner and the said Mary Ellen Gardner, in trust for their sole and separate use, benefit, and behoof for and during their natural lives, and at their death or the death of either of my said daughters to be equally divided share and share alike among their children. But in case that either of my said daughters should depart this life having no child or children, or issue of such a child or children in life at her death, then and in that event the said property to go to and vest in the other daughter, or, in case of her death, her child or children, or issue of a child or children, if there should be any living; but if my other daughter should be dead without child or children, or the issue of a child or children living, then to go to and vest in any other child or children I may have living, share and share alike.

"I further direct that my two daughters shall own said property in common during their minority or until one or the other of them shall marry, but when they shall attain the age of twenty-one, or either the one or the other of them shall marry, I direct that said property shall be equally divided between them by three competent disinterested men who shall be selected by their trustee for the purpose, who shall enter upon and make a fair estimate of said property, not only in relation to its permanent value, but also in relation to its average proceeds and profits, and when so estimated the property shall be described on separate lists by said appraisers and folded carefully and put in a hat, and my daughters shall draw for same, the oldest being entitled to draw, and the estate of my daughters shall thus be made separate.

"And I further direct that Charles W. Dill, trustee as aforesaid, shall advance to my daughters, if necessary, the whole of the income or profits of the property aforesaid; that he shall educate them in good style, and furnish them means and facilities to qualify and sustain them in the best society; and that neither of them shall be accountable to the other for any part of the proceeds of said estate, but they each shall use said proceeds as their circumstances and situation may require until said division shall be made, when their estate shall become individual and separate. But before said estate shall be divided, if there shall be an accumulation of means sufficient to buy a piece of property of any considerable value, then I direct that said proceeds shall be invested in property of substantial value which will afford a fair and reasonable profit with prospects for permanent increase, which property shall be subject

to the same division, limitations and restrictions as the estate hereinbefore and hereinafter set forth.

"I hereby further direct and require that no part or portion of the corpus of the said estate shall ever be sold until the life-estate is ended, for any purpose whatever, unless it shall become less profitable than ordinary investments, or my daughters should desire to change their residence to some other locality, or for some other like good and substantial reason; but if such reason should ever exist, the fund should be reinvested, and before said sale shall be made I hereby direct that full and satisfactory reason shall be given, and clear and sufficient proof be made to the chancellor granting said order, that such necessity exist and that the proceeds of the sale when made shall be reinvested in like property, or property as substantial in permanent value and as productive in its yield of profits.

"I herein again direct that said property, at the death of either of my said daughters, shall vest in and become an absolute fee-simple estate in their child or children, or the issue of their child or children; but if either or both of them should die without child or children, or the issue of such child or children living at the time of their death, then said property shall be subject to the limitations and restrictions hereinbefore set forth. In witness whereof the said Nathaniel E. Gardner hath hereunto set his hand and affixed his seal, the day and year above written."

At the time of the conveyance Lizzie Ida Gardner and Mary Ellen Gardner were minors. Mary Ellen Gardner died on December 26, 1871, when about 9 years of age, unmarried and childless. Lizzie Ida Gardner, who was born on March 4, 1857, married Clark Howell on November 4, 1874. Three children were born of that union; two of whom died in infancy, and the other is Eleanor Howell, who married Mr. Gunby. The mother of Mrs. Eleanor Howell Gunby, namely, Lizzie Ida Gardner Howell, died on July 2, 1912. The grantor, Nathaniel E. Gardner, was a widower at the time of the execution of this deed, and contracted a second marriage, the issue of which was one daughter, Mollie Edwards Gardner, who was born in December, 1872. On the petition of Charles W. Dill as trustee, an order was granted on December 31, 1872, by the judge of the superior court of Fulton county, sitting in chambers, authorizing a sale of a parcel of land embraced in the deed from Gardner to Dill, trustee, described as a lot in the city of Atlanta, on Broad street, 24 feet wide and 90 feet deep, with stated boundaries. This property was brought to sale pursuant to the order of the judge of the superior court, and by successive deeds from the purchasers at that sale their title passed to Charles B. and Virgil M. Alverson. Mrs. Eleanor Howell Gunby, upon the death of her mother, Mrs. Lizzie Ida Howell; instituted an action of ejectment against Charles B. and Virgil M. Alverson and their tenants in possession of this Broad street lot. The case was tried upon an agreed statement of facts, so much of which as may be material, in addition to such as has already been stated, will hereinafter appear. Plaintiff and defendants claim title from Nathaniel E. Gardner. The plaintiff contends that she is

the sole remainderman under the deed from Nathaniel Gardner to Dill as trustee, and is entitled to recover the property upon the death of her mother, the life tenant; and that her estate in remainder was unaffected by any order of court or decree in chancery relied upon by the defendants in aid of their claim of title. The defendants contend that the plaintiff did not take any estate in remainder under the deed from Gardner to Dill, trustee, and that they have title by prescription against her as an heir of her mother; that if the plaintiff took any estate under the deed, it was as beneficiary under the trust; and that the trustee's title in the parcel in dispute passed to the defendants' predecessors in title by virtue of the sale made pursuant to the order of the judge of the superior court. An estoppel growing out of the litigation concerning the property to which Dill, trustee, and others were parties, is also pleaded in bar of recovery. The court ruled adversely to the contentions and motions made by the plaintiff, and rendered a judgment in favor of the defendants. The plaintiff sued out a bill of exceptions complaining of this judgment.

Dorsey, Brewster, Howell & Heyman, of Atlanta, for plaintiff in error. Geo. Gordon, Robt. C. & Phillip H. Alston, Brandon & Hynds, Tye, Peeples & Tye, King & Spalding and Smith, Hammond & Smith, all of Atlanta, for defendants in error.

EVANS, P. J. (after stating the facts as above). [1] 1. The record in this case presents several questions, but they all hinge on the construction of the deed from Gardner to Dill, trustee. After careful study of its multifarious provisions, we have reached the conclusion that the trust therein created is projected over the entire fee. This being the decisive issue, we will proceed to state our reasons for the conclusion which we have reached.

The granting clause, to the "trustee for the said Lizzie Ida and Mary Ellen or their children," and the final paragraph of the tenendum clause, "I herein again direct that said property, at the death of either of my said daughters, shall vest in and become an absolute fee-simple estate in their child or children or the issue of their child or children; but if either or both of them should die without child or children, or the issue of such child or children living at the time of their death, then said property shall be subject to the limitations and restrictions hereinbefore set forth," reflect the grantor's conception of this contingency: One daughter might die leaving children and the surviving daughter might die childless, at which time the children of the daughter first to die would be in life. In this contingency the grantor must have intended either that one half of the estate would absolutely vest as a fee in possession in the children of the deceased daughter,

or the title to an estate in remainder would vest in the children of the deceased daughter as to such half, burdened with a life estate in the surviving daughter, which half would be augmented by the other half of the estate on the death of the surviving daughter without issue, with contingent remainder to other children of the grantor upon the prior death of any children of the named daughters of the grantor without issue. We think the latter was the grantor's intent as gathered from the full provisions of the deed. In order to fully protect this scheme, the granting clause to the trustee for the daughters or their children must have been used advisedly as projecting the trust over the whole estate. This view is strengthened by the recital in the beginning of this deed, that the grantor was "desirous of securing to his said daughters, Lizzie Ida Gardner and Mary Ellen Gardner, and their children by any future husbands, a maintenance, support, and education." The deed contains no suggestion that the grantor intended to split the estate granted to the trustee, so as to confine it to the daughters. Moreover, the deed contains certain "directions" to the trustee, which must be construed as definitive of the trust estate. One of these directions refers to the sale of the corpus of the estate. The grantor directs and requires "that no part or portion of the corpus of the said estate shall ever be sold until the life estate is ended, for any purpose whatever, unless it shall become less profitable than ordinary investments, or my daughters should desire to change their residence to some other locality, or for some other like good and substantial reason; but if such reason should ever exist, the funds shall be reinvested, and before sale shall be made I hereby direct that full and satisfactory reason shall be given, and clear and sufficient proof be made to the chancellor granting said order, that such necessity exists and that the proceeds of the sale when made shall be reinvested in like property, or property as substantial in permanent value and as productive in its yield of profits." The grantor's reference to a sale of the corpus under the restrictions he imposed must have been intended to refer to the fee of the estate. It is a well-recognized fact that the uncertainty of life gives a life estate a more or less speculative value. The precaution against an unwise change of investment so pointedly manifested by this grantor is strongly persuasive that he was striving to preserve the fee to his daughters and others beneficially interested in the grant. Except in the stated contingencies, he did not wish the property sold. Though this clause is chiefly restrictive, yet it contains an implied power to the trustee, upon clear proof to the chancellor, and with his official consent, to sell the corpus when the same becomes less profitable than ordinary investments, or his daughters should desire to change their residence to some other locality, or for some other like

good and substantial reason. It will be further observed that the grant is to the trustee "in trust for their [the daughters'] sole and separate use, benefit and behoof for and during their natural lives, and at their death or the death of either of my said daughters to be equally divided share and share alike among their children," etc. The phraseology of the granting and tenendum clauses of this deed does not contain technical words of conveyance to the children. Nor does any language in these clauses restrict the trust to the life tenant, as was the case in the devices under consideration in *Bull v. Walker*, 71 Ga. 195, *Carswell v. Lovett*, 80 Ga. 36, 4 S. E. 868, and *McDonald v. McCall*, 91 Ga. 304, 18 S. E. 157. However, we do not place our decision on the narrow technicality of the absence of the word "to" in the conveyance to the grantor's grandchildren, as we give effect to the grantor's intention by projecting the trust over their estate. We think, in view of the various contingencies expressed in this deed and the provision for future beneficiaries who may never exist, the implied authority to sell with the approval of the chancellor, the uncertainty of the events which finally determine the last taker of the property, and the provision for a division among the children of the grantor's daughters who survive their mothers, that the deed should be construed as passing the fee to the trustee. We wish to note that we have not overlooked the line of decisions, of which *Fleming v. Hughes*, 90 Ga. 444, 27 S. E. 791, may be cited as a type, that a conveyance to a trustee in trust for one for life, with remainder to the surviving children of the life tenant, and, in default of such children, with remainder over to others, passes the legal title to the trustee of the life estate only. In such cases there were no complications as to indeterminate remainders, implied power of sale, and other indicia reflecting the grantor's intention to convey the whole fee to the trustee. We have carefully examined the briefs of the plaintiff in error and the cases cited as relevant precedents, and we prefer to place our construction of this deed rather upon the whole instrument as defining the grantor's meaning than on any technical rule. This deed is *sui generis*, and is not molded on the form of any instrument in any of the cases to which our attention has been directed; and we decide the questions presented by an interpretation of its own terms as they reveal themselves.

[2] 2. The defendants claim title to the land in controversy as having been acquired in this manner: On August 26, 1867, N. E. Gardner filed a bill against Charles W. Dill, trustee of Lizzie Ida Gardner and Mary Ellen Gardner, to cancel the trust deed. A verdict was returned, finding that the deed be considered as operative and valid, and that the trust be executed by paying out of the trust property the costs, the fees of counsel for both parties, and an annuity of \$1,000

to the grantor; and that if the issues and profits of the trust estate be insufficient to pay these sums, the deficiency should be supplied from the corpus in such manner as the chancellor should direct. This verdict was made the decree of the court on May 19, 1869. Subsequently, judgments were obtained against N. E. Gardner on notes given for the purchase of some of the property included in the trust deed. Verdicts and judgments were also rendered in favor of certain plaintiffs who had been wards of N. E. Gardner, in actions to which Dill, trustee, was a party, and it was therein declared that the *fi. fas.* issuing on the judgments should first be levied on the property of N. E. Gardner, and if sufficient property belonging to him could not be found, then on the trust property held by Dill as trustee. Thereafter Dill as trustee filed a petition addressed to the Honorable John L. Hopkins, judge of the superior courts of the Atlanta circuit, reciting the foregoing legal proceedings and the decrees and judgments rendered therein, and alleging that he had made certain payments on them, that some of the *fi. fas.* were levied on the Whitehall street property, that a sale by the sheriff would sacrifice the property, that one of his cestui que trusts was dead and the other was at school, and that the income was insufficient to pay these several charges against the trust estate; and he prayed for authority to sell the Broad street property. N. E. Gardner was appointed guardian ad litem for his daughters, Lizzie Ida and Mollie E. Gardner, and as such guardian acknowledged service of the petition. On December 31, 1872, Judge Hopkins granted a chambers order empowering the trustee to sell the Broad street property. It was sold under this order and purchased by James W. English and John R. Wallace. The trustee conveyed the land to the purchasers, by deed dated August 13, 1873. These purchasers immediately went into possession of the land, and the defendants are their successors in title. The defendants and their predecessors have been in the actual possession of the land since 1873, a period of 39 years prior to the institution of the present action. In the former division of this opinion we have construed the trust deed as vesting the legal title in the trustee, and the purchaser at his sale acquired either the legal title to the fee or such color of title as would support prescription. Furthermore, the conceded facts are that the defendants and their predecessors in title have been in actual possession of the land for more than 20 years—a period sufficient to give prescription without being aided by color of title. Inasmuch as the legal title was in the trustee, prescription began to run with the possession of English and Wallace, and had ripened into title before the bringing of this suit. So, whether the deed executed in pursuance of the sale by the trustee under Judge Hopkin's chambers judgment be con-

sidered as passing the legal title or only as furnishing color of title on which to base adverse possession, the plaintiff was not entitled to recover. *Cushman v. Coleman*, 92 Ga. 772, 19 S. E. 46. Other questions made in the record are involved in these rulings, and are controlled thereby.

Judgment affirmed.

FISH, C. J., absent on account of sickness.

(146 Ga. 605)

RUDOLPH et al. v. WASHINGTON et al.
(No. 301.)

(Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

1. WITNESSES \S 149(1) — COMPETENCY — TRANSACTIONS WITH "PERSONAL REPRESENTATIVE"—DECEDENT—STATUTE.

In an action for land instituted by A. against the heirs at law of B., who died intestate, the heirs at law of B. are not to be deemed the "personal representatives" of B. within the meaning of Civ. Code 1910, \S 5858, par. 1, and A. is competent as a witness to testify in his own behalf as to conversations with B. affecting the merits of the case. *Boynton v. Reese*, 112 Ga. 354, 37 S. E. 437.

(a) The case of *Willis v. Bonner*, 136 Ga. 720, 71 S. E. 1048, and the cases cited therein, had reference to transactions where a husband or wife of the deceased person was a party to the case. The rulings there made will not be extended to a case like the present.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 555, 556, 651.

For other definitions, see Words and Phrases, First and Second Series, Personal Representative.]

2. EVIDENCE \S 273(3) — DECLARATIONS — CHARACTER OF POSSESSION.

Sayings of a deceased person in possession of land in favor of his interest are admissible in evidence to explain the character of his possession. Civ. Code 1910, \S 5767; *Wood v. Crawford*, 75 Ga. 733(5); *Godley v. Barnes*, 132 Ga. 513, 64 S. E. 546(3). See, also, *Causey v. White*, 143 Ga. 7, 84 S. E. 58(7).

(a) The issues raised by the pleadings, upon which there was evidence, were of such character that the error in rejecting evidence as complained of in the eighth amended ground of the motion for new trial requires a reversal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1113, 1114.]

3. APPEAL AND ERROR \S 843(2) — ASSIGNMENTS OF ERROR—CONSIDERATION.

Several grounds of the motion for new trial complain of the omission of the judge to charge the jury without request, upon matters depending upon the evidence; and one ground of the motion complains of a lengthy excerpt from the charge where the court attempted to instruct the jury upon a concrete statement of the case. As the judgment will be reversed upon the grounds above stated, and as the evidence may not be the same on another trial, it is unnecessary to rule upon the assignments of error based on the grounds just mentioned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3331.]

Error from Superior Court, Camden County; J. P. Highsmith, Judge.

Action between John Rudolph and others

and Hannah Washington and others. Judgment for the latter, and the former bring error. Reversed.

David S. Atkinson, of Savannah, and J. J. Moore, of Waycross, for plaintiffs in error. S. C. Townsend, of St. Mary's, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 504)

CITY OF WAYCROSS et al. v. TOMBERLIN et al. (No. 270.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS \S 269(2), 413(3) — PAVING STREET—METHOD OF ASSESSMENT.

By section 35 of the new charter of the city of Waycross (Acts 1909, page 1456), it was provided among other things that the city should have "power to levy an * * * ad valorem tax, not to exceed one per cent. on all the property, real and personal, within the corporate limits, * * * which is taxable under the laws of the state, for the purpose of supporting and maintaining and bearing the general expenses of said city government." In section 20 of the same act power was conferred to pave streets, etc., the provision for payment of the cost thereof was "to charge, assess and collect * * * as provided by the act of the General Assembly of Georgia amending the charter of the city of Waycross, approved the 22d day of August, 1905, providing for paving and improving the streets, alleys, sidewalks, etc., in said city, and assessing the cost thereof, etc. * * *" (Acts of 1905, p. 1220). In the act last mentioned was a provision for the cost of paving streets by assessment against abutting property in the proportion of one-third to each side of the street paved; and in streets in which were tracks of street railroad companies or other railroad company, the assessment for the cost of paving "the width of its track and for one foot on each side thereof," should be against such railroad property. In section 30 of the act of 1909, supra, authority was given to issue bonds for any of the following purposes: Building and equipping school buildings, extending and improving water works and sewerage system, "paving, macadamizing, repairing, repaving and improving the public streets," building and operating electric light power plants, gas plants, and street railway system, and other public utilities, including auditoriums and armories. It was provided, however, that before any bonds should issue for any of the purposes mentioned the question of issue of bonds should be submitted to a vote of the people and be approved by at least two-thirds of the qualified voters of the city. Otherwise than as stated, there was no provision expressed in any of the acts mentioned relative to the city paying the proportion of the cost of paving a street that would be left after exhausting the assessment against abutting property, or provision for the city to raise funds with which to pay any portion of the cost of paving. Held:

Under a proper construction of section 20 of the new charter, the municipality was given power to pave streets. The manner provided for paying for the improvement was by assessments against abutting property, and, in instances where railroad tracks occupied the streets,

against such railroad property, and any balance to be otherwise provided for.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 719, 1016.]

2. MUNICIPAL CORPORATIONS ⇐288(1), 959, 962—"GENERAL EXPENSE"—PAVING STREET.

When considering the provisions of the charter in its entirety, the power to levy a general ad valorem tax "for the purpose of supporting and maintaining and bearing the general expenses of said city government" was sufficiently broad to comprehend paving of streets as one of the general expenses of the municipality.

(a) A different construction is not required on account of the provision for incurring bonded indebtedness for street paving and other purposes after the issue of bonds has been sanctioned by two-thirds of the voters of the city at an election at which the question has been submitted. The municipality has a discretion to pave streets without creating a debt, when it can lawfully do so, notwithstanding its power to incur bonded indebtedness for such purpose.

(b) Where there is a levy of an ad valorem tax and it is recited in the levy that it is made for the purpose of paving specified streets, the tax thus imposed is for a "general expense" within the meaning of section 35 of the charter, and its character is not changed by terming it an "extraordinary levy."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 753, 2023, 2039.]

3. MUNICIPAL CORPORATIONS ⇐956(2)—TAXATION—CONSTRUCTION OF CHARTER.

The authority in section 35 of the charter, during any year, to levy an ad valorem tax of 1 per cent. (10 mills) on all taxable property in the city for the "general expense," was not exhausted for a given year by the levy of 5 mills to be appropriated to specified proper purposes; and it was competent in the same levy to include a separate item of 3 mills specified to be for the purpose of paving designated streets of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2011.]

4. MUNICIPAL CORPORATIONS ⇐956(2)—TAXATION—CHARTER—STATUTE.

The provision of Civ. Code 1910, §§ 864 and 865, embodying the act of 1874 (Acts 1874, p. 110), restricting the power of municipalities in regard to the amount of ad valorem tax that could be levied for current expenses, and defining "ordinary expenses," do not affect the provision in the new charter of the city of Waycross, adopted in 1905, authorizing the levy of an ad valorem tax for such purpose to an amount greater than that specified in those sections of the Code. *City of Cochran v. Lanfair*, 139 Ga. 249, 77 S. E. 95.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2011.]

5. MUNICIPAL CORPORATIONS ⇐864(2, 3), 957(3)—CURRENT EXPENSES—"DEBT."

A liability for a legitimate current expense may be incurred by a municipality without creating a debt within the meaning of article 7, § 7, par. 1, of the Constitution of this state (Civ. Code 1910, § 6563), provided there be, at the time of incurring the liability, a sufficient sum in the treasury which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year. *Tate v. City of Elberton*, 136 Ga. 301, 71 S. E. 420; *City of Dawson v. Waterworks Co.*, 106 Ga. 696, 32 S. E. 907.

(a) The principle just announced is also applicable where the money to satisfy the liability is provided for by the lawful assessment of property by the municipality to pay the cost of paving

a street for which the liability was incurred. *Monk v. Moultrie*, 145 Ga. 845, 90 S. E. 71; *Almand v. Pate*, 143 Ga. 711, 85 S. E. 909(5).

(b) The city having, under its charter, made valid assessments against abutting lots for portions of the cost of paving the streets, and levied a valid ad valorem tax on all the taxable property in the city to cover the balance of the cost, and upon the basis of such assessments and levy having made a contract for the pavement to be done during the current year and paid for when completed, the liability incurred by the city in making the contract did not amount to a debt within the meaning of article 7, § 7, par. 1, of the Constitution of this state (Civ. Code 1910, § 6563), limiting the power of municipal bodies to create debts. This provision of the Constitution does not operate as a limitation upon the taxing power of a municipality. *Commissioners of Habersham Co. v. Porter Mfg. Co.*, 103 Ga. 613, 30 S. E. 547.

(c) The case differs on its facts from *Sanders v. Mayor, etc., of Gainesville*, 141 Ga. 441, 81 S. E. 215, in which an assessment against property was resisted on the ground that the contract to do the paving for which the assessment was made was illegal, because the cost to be paid by the city extended over a series of years, and no provision for its payment was made in advance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1829-1831, 2018, 2019.

For other definitions, see *Words and Phrases*, First and Second Series, Debt.]

6. QUESTIONS INVOLVED.

As a debt within the meaning of the Constitution was not created, the question of the municipality creating a new debt without submitting the question to a vote of the people, or of exceeding the constitutional limit of indebtedness which the municipality could incur, was not involved in the case.

7. PAVING ORDINANCE—INJUNCTION.

Under the pleadings and evidence, it was erroneous to enjoin enforcement of the paving ordinance, collection of the tax, and performance of the contract for paving the streets.

Error from Superior Court, Ware County; J. I. Summerall, Judge.

Suit by J. A. Tomberlin and others to enjoin the City of Waycross and others from enforcement of paving ordinance, collection of tax, and performance of contract for paving. Judgment for plaintiffs, and defendants bring error. Reversed.

Andrew B. Estes, John S. Walker, C. L. Redding, W. J. Summerall, and D. T. Deen, all of Waycross, for plaintiffs in error. Parks & Reed and Wilson & Bennett, all of Waycross, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur.

(146 Ga. 547)

DELANEY et al. v. PLUNKETT, Sheriff.
(No. 288.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS ⇐17 — REGULATION—POLICE POWER.

The acts of the General Assembly approved November 17 and November 18, 1915, hereinaft-

er called the prohibitory laws or statutes (Laws Ex. Sess. 1915, pp. 77, 80), being acts to prohibit the manufacture, sale, keeping, etc., of intoxicating liquors, and containing, among other provisions, an inhibition against keeping intoxicating liquors in any place of business or public place, and also against the keeping of such liquors in excess of given quantities in any place whatsoever, are valid exercise on the part of the legislative body of the police power.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 21-23.]

2. INTOXICATING LIQUORS — 17 — KEEPING IN DWELLING HOUSE — CONSTITUTIONALITY.

The restriction as to amount of intoxicating liquors that a citizen is allowed to keep in a building used solely as a dwelling or residence is not unconstitutional.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 21-23.]

3. CONSTITUTIONAL LAW — 319 — INTOXICATING LIQUORS — 20, 130 — CONSTRUCTION OF STATUTES — DUE PROCESS OF LAW.

Construing these prohibitory laws in connection with the existing laws, liquors of the prohibited classes cannot be kept at all in certain places, cannot be kept in excess of limited quantities anywhere, and cannot be sold; and where such liquors are kept in excess of the quantities allowed, the keeping or possessing of them is unlawful. The qualities of property theretofore existing in them were taken away, and it was competent for the Legislature to declare that they should be seized, condemned, and destroyed upon order of the judge of the court having jurisdiction; and such provision was a valid exercise of the police power of the state, and not unconstitutional on the ground that it did not provide for a hearing.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 764; Intoxicating Liquors, Cent. Dig. §§ 23, 139½, 139.]

4. COMMERCE — 60(2) — INTERSTATE COMMERCE — INTOXICATING LIQUORS.

These prohibitory laws are not unconstitutional on the ground that they hinder, impede, and interfere with the power of Congress to regulate interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 92.]

5. CONSTITUTIONAL LAW — 187 — EX POST FACTO LAW — INTOXICATING LIQUORS.

These laws are not ex post facto in their character nor retroactive.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 530, 535.]

6. STATUTES — 114(6) — SUBJECT AND TITLE — CONSTITUTIONAL PROVISIONS.

The act approved November 17, 1915 (Acts 1915, p. 77), is not unconstitutional on the ground that it contains matter different from what is expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 147-149.]

(Additional Syllabus by Editorial Staff.)

7. WORDS AND PHRASES — "CONSTITUTIONAL RIGHT."

The expression "constitutional right" means a right guaranteed to the citizens by the Constitution and so guaranteed as to prevent legislative interference therewith.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Constitutional Right.]

Atkinson, J., dissenting.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Separate actions for injunction by Matthew

Delaney, P. C. Carr, E. M. Green, and A. A. Hett, Jr., against J. T. Plunkett, Sheriff of Richmond County. Judgment for defendant dissolving temporary restraining order and refusing the injunction, and each of the plaintiffs brings error. Affirmed.

On May 27, 1916, Matthew Delaney, P. C. Carr, E. M. Green, and A. A. Hett, Jr., each presented his petition praying for injunction against J. T. Plunkett, sheriff of Richmond county. Delaney alleged:

That the house in which he resided was a dwelling house in the city of Augusta, used solely as a dwelling house by him and his family; "that, having been notified that the prohibition law of the state would go into effect on the 1st of May, 1916, he had stored in his said residence, in the attic thereof, and sealed up, the following described spirituous liquors: 59 cases of whisky; 2 broken cases whisky; 17 ten-gallon jugs of whisky; 3 five-gallon jugs whisky; 34 casks beer (2 broken); 23 drums whisky; one half-barrel wine—remnants of a stock, and this was stored at said house for his own personal use, and for service of such liquors in his private residence in social intercourse such as he might determine, and was not stored there at such residence or kept at said dwelling either for sale or for any unlawful purpose whatsoever, nor were said liquors bought for the purpose of being stored at said place in anticipation of said law going into effect, but a great part of said liquors he had on hand long before the passage of the said prohibition law by the General Assembly of Georgia in November, 1915."

Petitioner is the owner of the personal property described; and while in the lawful possession of the same, on May 27, 1916, certain police officers, during his absence, came to his residence, and, exhibiting some warrant of search to his wife, proceeded to search the house under the warrant, removed therefrom the liquors described above, and carried them to the courthouse of the county, where, pursuant to the direction of the chief of police the liquors were delivered to the sheriff, to be disposed of by him as might be directed by the judge of the city court; and thereafter the judge of that court, without a trial or hearing, passed an order directing the sheriff to destroy all of the liquors. Said liquors were purchased in pursuance of petitioner's right as a citizen of the United States prior to May 1, 1916, and to be used in his own private residence in ordinary social intercourse between himself and his friends, for which no payment was to be made; and this property has been illegally removed and condemned, as above stated, and is about to be destroyed by the sheriff, and will be destroyed unless he is enjoined. Petitioner has never been arraigned, tried, or convicted of any offense whatever connected with or touching said liquors or any other whiskies.

P. C. Carr's petition was to restrain the sheriff from destroying 13 broken barrels of whisky, 56 barrels of whisky, 96 cases of whisky, 1 barrel of gin, one demijohn of gin (broken), and one broken case of whisky.

These liquors certain police officers of the city of Augusta, on May 18, 1916, after breaking into a private building appurtenant to the residence of Carr, seized and delivered to the sheriff, who was about to destroy them under an order of the judge of the city court. Green and Hett, each of whom had in his possession numerous casks and cases of the prohibited liquors, made similar complaints against the sheriff. The court granted a temporary restraining order in each case, requiring the sheriff to show cause, etc. On the hearing the sheriff, without filing an answer, urged a general demurrer. Upon considering the petition and the demurrer, the court dissolved the temporary restraining order and refused the injunction; and each of the plaintiffs excepted.

D. G. Fogarty and C. Henry & R. S. Cohen, all of Augusta, for plaintiff in error Carr. W. K. Miller, of Augusta, for plaintiff in error Delaney. Saml. H. Myers, C. A. Picquet, and L. L. Battey, all of Augusta, for plaintiffs in error Green and Hett. W. Inman Curry, of Augusta, and T. B. Felder, of Atlanta, for defendant in error.

BECK, J. (after stating the facts as above). It is unnecessary to take up each of the four cases stated above and deal with them separately. Most of the questions raised for adjudication by these bills of exceptions are common to all of the cases, and a question raised in one or more of the bills of exceptions which is not common to the others will be dealt with separately. Before deciding the point raised in one or more of the bills of exceptions that the petitioner had not violated the provisions of the act approved November 17, 1915, which relates to intoxicating liquors, prohibiting the manufacture, sale, keeping, etc. (Georgia Laws, Extraordinary Session 1915, p. 77), nor the provisions of the act approved November 18, 1915, relating to intoxicating liquors, prohibiting the delivery, reception, keeping, etc. (Georgia Laws, Extraordinary Session, p. 90), we will consider and dispose of the contentions that these two statutes (which will be hereinafter referred to as the act of November 17 and the act of November 18, 1915, respectively, and as the prohibitory laws or statutes when the two acts are considered and referred to collectively) are unconstitutional and void, because in material particulars they are offensive to indicated portions of the state and federal Constitutions.

[1] Whether the prohibitory acts of 1915 are invalid because they offend the provisions of the Constitution of the United States, or that of the state of Georgia, in the particulars indicated in the pleadings of the plaintiffs, depends upon whether those acts were a valid exercise of the police power of the state. The right of the state, under the police power, to regulate, restrain, or forbid the manufacture or sale of intoxicating

liquors, has been recognized and proclaimed by the courts of last resort in many of the states of the Union, and by the Supreme Court of the United States. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *In re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572; *Foster v. Kansas*, 112 U. S. 201, 5 Sup. Ct. 8, 97, 28 L. Ed. 629; *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. 6, 32 L. Ed. 346; *Southern Express Co. v. Whittle* (Ala.) 69 South. 652, L. R. A. 1916C, 278; *Ex parte Crane*, 27 Idaho, 671, 151 Pac. 1006; *Glenn v. Southern Express Co.*, 170 N. C. 286, 87 S. E. 136; *Preston v. Drew*, 83 Me. 558, 54 Am. Dec. 639; *Henderson v. Heyward*, 109 Ga. 373, 84 S. E. 590, 47 L. R. A. 366, 77 Am. St. Rep. 384. In the case last cited it is said:

"That the state has a right to prohibit absolutely the sale of whisky is no longer an open question, either in this court or in the Supreme Court of the United States. * * * Laws prohibiting the sale of whisky are upheld as constitutional upon the ground that its sale is against the best interest of the public at large, and is a business which, if not inherently evil, is of such a nature that its presence is a constant menace to the peace and good order of society, as well as the welfare of individuals. If this be true, it would seem to follow that the state might enact any law which would effectually prohibit the traffic."

Another Georgia case laying down the same general doctrine and bearing directly or indirectly upon several of the important questions involved in this record is that of *Cureton v. State*, 135 Ga. 660, 70 S. E. 332, 49 L. R. A. (N. S.) 182. In the case of *United States v. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, it is said:

"It cannot be denied that the power of the state to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, 'the power to govern men and things within the limits of its domain,' is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive."

It is unnecessary to multiply quotations from authorities stating in the broadest terms the scope of the police power in its applicability to the subject of regulating the manufacture, sale, and keeping for sale of alcoholic beverages. Forensic battles to extend and limit this power have been fought in the courts of last resort in nearly every state of the Union, and in the federal courts. So far as relates to the sale and the keeping for sale, the keeping in public places, and the manufacture of intoxicating beverages, the disputes which have arisen in regard to these subjects have very largely been settled. Counsel for the plaintiffs in these cases recognize this fact, but they insist that certain of the provisions of the prohibitory statutes of 1915 go beyond the permissible limits and amount to a destruction of rights guaranteed to the citizen under the state and federal Constitutions.

[2, 3] It is insisted that section 20 of the

act of November 17, 1915, is violative of the Fourteenth Amendment of the Constitution of the United States, which provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And it is also contended that the said acts of 1915, if they seek to make unlawful the keeping of alcoholic beverages for personal use and social purposes by a citizen in his private residence, are violative of the Fourteenth Amendment of the Constitution of the United States, in that they deprive him of his property without due process of law; no provision being made in said acts requiring notice to him nor due opportunity to be heard as to what purpose said property is kept and why it should not be condemned. It may be that the provision in these laws which prevents the keeping for personal and domestic use and social purposes at a citizen's private residence is drastic in its effects and constitutes a new step in legislation aimed at the liquor traffic and the use of alcoholic liquors as a beverage. But we cannot agree with the contentions of the plaintiffs that the acts are, on the grounds just stated, an infringement of any of the privileges guaranteed by the Constitution. In the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, Mr. Justice Harlan, delivering the opinion of the court, said:

"In the *License Cases*, 5 How. 504 [12 L. Ed. 256], the question was whether certain statutes of Massachusetts, Rhode Island, and New Hampshire relating to the sale of spirituous liquors were repugnant to the Constitution of the United States. In determining that question it became necessary to inquire whether there was any conflict between the exercise by Congress of its powers to regulate commerce with foreign countries, or among the several states, and the exercise by a state of what are called police powers. Although the members of the court did not fully agree as to the grounds upon which the decision should be placed, they were unanimous in holding that the statutes then under examination were not inconsistent with the Constitution of the United States, or with any act of Congress. Chief Justice Taney said: 'If any state deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.' 5 How. 517 [12 L. Ed. 256]. Mr. Justice McLean, among other things, said: 'A state regulates its domestic commerce, contracts, the transmission of estates, real and personal, and acts upon all internal matters which relate to its moral and political welfare. Over these subjects the federal government has no power. * * * The acknowledged police power of a state extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed.' 5 How. 588, 589 [12 L. Ed. 256]. Mr. Justice Woodbury observed: 'How can they [the states] be sovereign within their respective spheres, without power to regulate all their internal commerce, as well as police, and direct how, when, and where it shall be conducted in arti-

cles intimately connected either with public morals, or public safety, or the public prosperity?' 5 How. 628 [12 L. Ed. 256]. Mr. Justice Grier, in still more emphatic language, said: 'The true question presented by these cases, and one which I am not disposed to evade, is whether the states have a right to prohibit the sale and consumption of an article of commerce which they believe to be pernicious in its effects, and the cause of disease, pauperism, and crime. * * * Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed that every law for the restraint and punishment of crime, or the preservation of the public peace, health, and morals must come within this category. * * *

It is not necessary, for the sake of justifying the state legislation now under consideration, to array the appalling statistics of misery, pauperism, and crime which have their origin in the use or abuse of ardent spirits. The police power, which is exclusively in the states, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority.' 5 How. 631, 632 [12 L. Ed. 256]. * * * It is, however, contended that, although the state may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or Legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.' The argument made in support of the first branch of this proposition, briefly stated, is that in the implied compact between the state and the citizen certain rights are reserved by the latter which are guaranteed by the constitutional provision protecting persons against being deprived of life, liberty, or property, without due process of law, and with which the state cannot interfere; that among those rights is that of manufacturing for one's use either food or drink; and that while, according to the doctrines of the Commune, the state may control the tastes, appetites, habits, dress, food, and drink of the people, our system of government, based upon the individuality and intelligence of the citizen, does not claim to control him, except as to his conduct to others, leaving him the sole judge as to all that only affects himself. It will be observed that the proposition, and the argument made in support of it, equally concede that the right to manufacture drink for one's personal use is subject to the condition that such manufacture does not endanger or affect the rights of others. If such manufacture does prejudicially affect the rights and interests of the community it follows from the very premises stated that society has the power to protect itself, by legislation, against the injurious consequences of that business."

We have made the foregoing lengthy quotation from the opinion of the court in the *Mugler Case*, because, in an orderly and logical way, it leads up to and shows what, in the writer's opinion, would be the correct answer to one of the most serious questions made in this record, that is: Can the Legislature prohibit, under penalties, the keeping of intoxicating liquors in a citizen's residence for his own consumption? If the conclusion reached by the writer of the opinion from which the extract above is taken, and stated in the last sentence, that is, "If such manufacture does prejudicially affect the rights and interests of the community, it follows from the very premises stated that society has the power to protect itself, by legis-

lation, against the injurious consequences of that business," then it is competent for the Legislature, in the exercise of the police power, to forbid a citizen from keeping alcoholic liquors for his own use. The property right in a subject-matter of police regulation is always subject to a legislative exercise of the police power over that subject-matter. The manufacture for one's own personal use could hardly be more legitimately a subject of prohibitory legislation than the keeping for one's own use. That the right to manufacture for one's personal use or to keep for one's personal use is a right protected by the Constitution against legislative interference must be based upon the ground that such manufacture or keeping does not injuriously affect the rights and interests of the community and the other members of society, and that the prohibition against the personal use or manufacture can have no rational relation to the subject of legislation designed to prevent the sale and consumption of liquors, which the Legislature believed to be pernicious in its effects and the cause of disease and crime.

Whatever may be the truth of the contention, upon the one hand, that alcoholic beverages are injurious and pernicious in their effects upon the mind and body of the consumer, and the contention, upon the other hand, that such liquors have food value and if used in moderation they may be promotive of health, and that the temperate use of such drinks is not a menace to society, we are not bound, for the purposes of this decision, to concern ourselves seriously with these considerations. Upon the question whether or not the use of alcoholic beverages by a community is pernicious and productive of vice, crime, disease, and pauperism, it must be conceded that the members of the legislative body were authorized, by a knowledge of facts which are the common possession of intelligent and reading men and women in every community, to conclude that consumption of ardent spirits was productive of the evils attributed to them. That being true, they had a right to deal with the subject of prohibiting the use of ardent spirits in the exercise of the police power. And to take one other important step, whatever may be the opinion of any private individual upon the subject, it was also a question for the Legislature to settle, in view of the common knowledge as to the effect of even partial intoxication of an individual man or woman upon their conduct while in that condition, whether or not the prevention of consumption by an individual, in his residence or in a private place, did not bear a logical relation to laws intended to conserve the morals and guarantee the safety of the public. And again, if the prevention of the consumption of ardent spirits in private was one to be considered and acted upon in the perfection of effective laws upon the subject of the consumption of liquors,

then the keeping of intoxicating liquors by an individual in his residence or in his office or in some public place also bore a direct relation to the same question which affects the public.

One objection frequently urged to the passage of prohibitory statutes like those in question in this case is that such prohibitory laws do not in fact prohibit. The legislative body might well have concluded that the keeping of alcoholic liquors in any place, however private, was one of the effective means of removing the defect in prohibitory statutes just indicated. In the case of *Purity Extract Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, it is said:

"That the state in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. *Bartemeyer v. Iowa*, 18 Wall. 129 [21 L. Ed. 929]; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 [24 L. Ed. 989]; *Mugler v. Kansas*, 123 U. S. 623 [8 Sup. Ct. 273, 31 L. Ed. 205]; *Kidd v. Pearson*, 128 U. S. 1 [9 Sup. Ct. 6, 32 L. Ed. 346]; *Crowley v. Christensen*, 137 U. S. 86 [11 Sup. Ct. 13, 34 L. Ed. 620]. It is also well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government. *Booth v. Illinois*, 184 U. S. 425 [22 Sup. Ct. 425, 46 L. Ed. 623]; *Otis v. Parker*, 187 U. S. 606 [23 Sup. Ct. 168, 47 L. Ed. 323]; *Ah Sin v. Wittman*, 198 U. S. 500, 504 [25 Sup. Ct. 756, 49 L. Ed. 1142]; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 32 [29 Sup. Ct. 10, 53 L. Ed. 75]; *Murphy v. California*, 225 U. S. 623 [32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153]. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the Legislature, a notion foreign to our constitutional system.

* * * A strong illustration of the extent of the power of the state is found in *Silz v. Hesterberg*, 211 U. S. 31 [29 Sup. Ct. 10, 53 L. Ed. 75]. The state of New York by its forest, fish, and game law prohibited the possession of certain game during the closed season. The statute covered game coming from without the state. It appeared that Silz was charged with the possession of plover and grouse which had been lawfully taken abroad during the open season and had been lawfully brought into the state; that these game birds were varieties different from those known as plover and grouse in the state of New York; that, although of the same families, in form, size, color, and markings, they could readily be distinguished from the latter; and that they were wholesome and valuable articles of food. This court affirmed the conviction, saying (211 U. S. 40 [29 Sup. Ct. 10, 53 L. Ed. 75]). 'It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic

tic game. But, subject to constitutional limitations, the Legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."

It is well reasoned, in the case last referred to, that it was competent for the Legislature of the named state to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants; and it was also said, in the same connection:

"The state, within the limits we have stated, must decide upon the measures that are needful for the protection of its people, and, having regard to the artifices which are used to promote the sale of intoxicants under the guise of innocent beverages, it would constitute an unwarrantable departure from accepted principle to hold that the prohibition of the sale of all malt liquors, including the beverage in question, was beyond its reserve."

In the case of *Silz v. Hesterberg*, 211 U. S. 31, 29 Sup. Ct. 10, 53 L. Ed. 75, where it was held to be within the police power of the state to prohibit the possession of game during the closed season, even if brought from without the state, the court, in addition to what has been quoted above, said:

"In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. In other states of the Union such laws have been deemed essential, and have been sustained by the courts. *Roth v. State*, 51 Ohio St. 209 [37 N. E. 259, 46 Am. St. Rep. 566]; *Ex parte Maier*, 103 Cal. 476 [37 Pac. 402, 42 Am. St. Rep. 129]; *Stevens v. The State*, 89 Md. 669 [43 Atl. 929]; *Magner v. People*, 97 Ill. 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind under the claim that they were taken in another state or country. The object of such laws is not to effect the legality of the taking of game in other states, but to protect the local game in the interest of the food supply of the people of the state. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state, and as such to be declared void because contrary to the Fourteenth Amendment of the Constitution."

The ruling there made, as well as that in the case of *Purity Extract Co.*, supra, bears directly upon the question as to whether or not the Legislature can in the exercise of the police power, in enacting legislation to prevent the sale and consumption of intoxicants by the public, embody in such legislation prohibition against the keeping of such intoxicants, which provisions have a rational relation to the chief end sought to be accomplished, that is, traffic in such liquors and their general consumption. Inhibition against the keeping in any place, in a private residence as well as in a place of business, in prohibition laws has a direct relation to the main end sought, to wit, the stopping of the traffic in the objectionable beverages and their ultimate consumption. If any considerable number of citizens in any given community in this state can, upon a showing that the liquors are kept for personal use and

for social and domestic purposes in their own residences, keep on hand as much as was contained in the smallest of the stocks of liquors possessed by any one of the four plaintiffs whose rights and complaints are now being considered, would not the effectual enforcement of laws directed at the unlawful traffic in intoxicating liquors and the general consumption of them be rendered exceedingly difficult, or practically nullified?

There are some who entertain the opinion that the prevention of the traffic can properly be made the end of laws passed in the exercise of the police power, but that the prevention of the consumption of ardent spirits cannot properly be made the object of legislation. This does not comport with the conclusion reached, after mature consideration, by publicists of eminent ability and by courts, as announced by them in judicial utterances in cases involving legislation in many respects of the same general character as that which we now have under consideration. In the early case of *Lincoln v. Smith*, 27 Vt. 328, Bennett, J., delivering the opinion of the court, after restating certain of the principles laid down in the License Cases to which reference was made in the *Mugler Case*, supra, and after the citation of certain other cases, said:

"Though the act of our Legislature is entitled an act 'to prevent the traffic in intoxicating liquors for the purpose of drinking,' yet the primary object and end of the law is the prevention of intemperance, pauperism, and crime; and the prohibition of the traffic, is but the medium through which the object and end of the law is to be obtained. If it be once granted that the use of intoxicating liquors as a drink is worse than useless, and intemperance a legitimate consequence of such use, and that intemperance is an evil, injurious to health and sound morals, and productive of pauperism and crime, it seems to us that a law designed to prevent such consequences must clearly fall within the class of laws, denominated police regulations. The Legislature in passing the law in question doubtless supposed that the traffic and drinking of intoxicating liquors went hand in hand, and that they were even more than twin sisters, that they were not only born together, but that they would also die together, and that, by cutting off the one, the other would also fall with it. Whether the drinking of intoxicating liquors tends to produce intemperance, and whether intemperance is a gangrene, tending to corrupt the moral health of the body politic, and to produce misery and lamentation, and whether the law in question is well calculated to cut off or mitigate the evils supposed to flow directly from intemperance, and indirectly from the traffic in intoxicating liquors, were questions to be settled by the lawmaking power; and their decision in this respect is final, and not to be reviewed by us."

In the case of *Marks v. State*, 159 Ala. 71, 48 South. 864, 133 Am. St. Rep. 20, the court, speaking of various prohibition statutes, said:

"The objects and purposes of those statutes had been defined by the courts; and, being incorporated and re-enacted in the general law, they bring with them such judicial constructions. The main object and purpose of all is the same. Some may be restricted, and some more extensive and exclusive than others; but the main object and purpose of all, as said by Justice Somerville, in *Carl's Case*, 87 Ala. 17,

6 South. 118, 4 L. R. A. 808, is 'to promote temperance and prevent drunkenness. The mode adopted to accomplish this end is the prevention of the sale, the giving away, or other disposition of intoxicating liquors.'

In the case of *State v. Phillips*, 109 Miss. 22, 67 South. 651, L. R. A. 1915D, 530, it is said:

"If the object of prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course, the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end."

In the case of *State of West Virginia v. Adams Express Co.*, 219 Fed. 794, 135 C. C. A. 464, L. R. A. 1916C, 291, it is said:

"In trying to comprehend the legislative purpose in prohibition statutes it is important to remember that the ultimate end sought in prohibition legislation is not the prevention or restriction of the mere sale of intoxicants, but the prevention of their consumption as a beverage. The sale being the most usual and obvious means by which drinking is accomplished, legislation is more often directed against the sale. But it is upon the recognized evil of individual consumption as a beverage that the right of a state under its police power rests to enact prohibitive legislation; and in the exercise of that right it cannot be denied that the state may legislate not only against acts which would constitute a sale at common law, but against other acts within its borders, such as deliveries by common carriers, which tend to defeat or weaken its public policy of preventing the consumption of liquor as a beverage."

In the case of *Crowley v. Christensen*, 137 U. S. 87, 11 Sup. Ct. 13, 34 L. Ed. 620, Mr. Justice Field, delivering the opinion of the court, called attention to the contention that as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, "is not properly matter of legislation," and in combating this contention said:

"There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him."

[7] Part of what we have said above and a portion of the extracts from the opinions delivered in the adjudicated cases bear directly upon the constitutional right of a citizen to

keep and possess intoxicants for private and personal use, and still more of what is said above bears indirectly upon that question. By the expression "constitutional right," as just used, we mean a right guaranteed to the citizen by the Constitution and so guaranteed as to prevent legislative interference with that right. And if what we have said above, and what is said by other courts in the extracts from their judicial utterances which we have set forth, be sound, the absolute right of an individual to receive, possess, and keep on hand intoxicating liquors for his personal use, though kept in his residence, does not exist; his right to possess and keep alcoholic beverages is a right subject to legislative restriction, regulation, and prohibition. But before we leave this subject we will call attention to other judicial utterances bearing upon it and other questions involved in these records. In the case of *United States ex rel Zimmerman v. Oregon-Washington R., etc., Co.* (D. C.) 210 Fed. 378, the judge delivering the opinion said:

"The language of the Idaho statute is manifestly broad enough to make unlawful all intrastate shipments of intoxicating liquors (except certain shipments not material here), although intended for the personal use of the consignee. And in my judgment it should be so treated and considered by a *nisi prius* court sitting in another jurisdiction until it is otherwise interpreted by the courts of Idaho, and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of the statute. Nor am I prepared at this time to say that such a provision is unconstitutional. The Supreme Court of the United States held, in *Mugler v. Kansas*, 123 U. S. 662 [8 Sup. Ct. 273, 31 L. Ed. 206], that a state might lawfully prohibit the manufacture of intoxicating liquors for the personal use of the manufacturer, if in the judgment of the lawmaking power such manufacture would tend to cripple or defeat the effort to guard the community against the evils arising from the excessive use of such liquors, and that the courts should not, upon their views of what is best and safest for the community, disregard the legislative determination of that question. If, for the reason stated, a state may lawfully prohibit the manufacture of intoxicating liquors for the personal use of the manufacturer, why may it not for the same reason lawfully prohibit the transportation thereof for the individual use of the consignee? The question in either case would seem to be one of public policy, the determination of which belongs to the lawmaking power, and not the courts. I therefore assume for the purposes of this case that the laws of Idaho prohibit the intrastate shipment of intoxicating liquors into dry territory for the individual use of the consignee, and that such legislation is valid."

And we may add that the same line of reasoning, when the relation of keeping on hand in a private residence to the general purpose of a prohibitory statute is considered, leads to the conclusion that in the exercise of the police power the state may constitutionally enact a law inhibiting the storing and keeping on hand of a quantity of intoxicants, even though they be stored and kept in a private residence for the purpose of personal use. In the case of *Express Company v. Whittle* (Ala.) 69 South. 652, L. R.

A. 1916C, 278, the Supreme Court of Alabama said:

"If the right at common law to manufacture an intoxicating liquor for one's own personal use, out of one's own materials by the application of one's own personal effort, may be forbidden by appropriate legislation under the police power, as was expressly ruled in *Mugler v. Kansas*, supra, it cannot be logically or soundly asserted that the receipt or possession of more than a specified quantity at one time may not be forbidden by statute, especially when the sale or other disposition of intoxicants is forbidden in the state's effort to promote temperance and to suppress the evils of intemperance by visiting its power upon one of the means usually productive of intemperance, viz. the traffic therein, or, as has been before quoted from our *Marks* and *Carl* Cases, ante, to remedy the evil present in 'the use of intoxicating liquors as a beverage.' The power confirmed in *Mugler v. Kansas* must necessarily comprehend the lesser manifestation of a like power by regulating the quantity to be received or possessed at one time in 'dry territory' in the state. Furthermore, it would appear to be but the assertion of a self-evident truth to say that, since one may be validly forbidden to sell his intoxicating liquor to another, that other may be validly forbidden to buy the article from him; and, if one may be validly forbidden to sell, and necessarily validly forbidden to deliver, the article to another, that other may be validly forbidden to accept delivery. As to the seller, the prohibitions stated would operate upon him and upon his property, but not in the sense or with the effect of infringing any constitutional right or immunity (*Dorman's Case*, supra [34 Ala. 216]); whereas, in the case of the buyer, the prohibitions would operate in anticipation, qualifying his right, in the interest of the public welfare as determined by legislative authority, to acquire a property interest in the article above a defined quantity at one time."

See, in this connection, *State v. Phillips*, 109 Miss. 22, 67 South. 651, L. R. A. 1915D, 530. In the case of *Glenn v. Southern Express Co.*, 170 N. C. 286, 87 S. E. 136, the extract which we have just taken and set forth above from the case of *Express Company v. Whittle* (Ala.) 69 South. 652, L. R. A. 1916C, 278, is quoted with approval. The North Carolina court also, after pointing out that in the case of *Mugler v. Kansas*, supra, the Supreme Court of the United States held that it was within the power of the state to prohibit the manufacture of intoxicating liquors for one's own personal use, asks: "And, if this may be done, why may not the state limit the quantity which may be received for use?" To which we add, as we have done in connection with another quotation above, the question: Why cannot the state limit the amount which may be kept on hand in one's possession for his personal use? We are of the opinion that, in view of the relation of this question to the public good morals and safety, the Legislature may, in the legitimate exercise of the police power, say what quantity may be kept or possessed, even in a private residence for personal use; and in view of the relation of the fact of keeping or having possession of intoxicating liquors to the general purpose of prohibition laws, we do not see why it would not be competent for the Legislature to pro-

hibit altogether the keeping or having in one's possession any quantity of intoxicating liquors.

It is insisted with especial emphasis that section 20 of the act of November 17, 1915, is unconstitutional and void, on the ground that it is violative of that provision of the Fourteenth Amendment of the Constitution of the United States, which declares that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The section just referred to reads as follows:

"Sec. 20. Be it further enacted by the authority aforesaid, that no property rights of any kind shall exist in said prohibited liquors and beverages, or in the vessels kept or used for the purpose of violating any provision of this act or any law for the promotion of temperance or for the suppression of the evils of intemperance; nor in any such liquors when received, possessed or stored at any forbidden place or anywhere in a quantity forbidden by law, or when kept, stored or deposited in any place in this state for the purpose of sale or unlawful disposition or unlawful furnishing or distribution; and in all such cases the liquors and beverages, and the vessels and receptacles in which such liquors are contained, and the property herein named, kept or used for the purpose of violating the law as aforesaid, are hereby declared to be contraband and are to be forfeited to the state when seized, and may be ordered and condemned to be destroyed after seizure by order of the court that has acquired jurisdiction over the same, or by order of the judge of court after conviction when such liquors and such property named have been seized for use as evidence."

We do not think this section of the act is unconstitutional for any of the numerous reasons assigned. It is true that it does not provide for a hearing before any judicial tribunal after seizure of the intoxicating liquors kept in contravention of the provisions of the act; but, if what we have said in the preceding part of this opinion is sound, no hearing was necessary before the issuance of an order by the proper court for the destruction of the liquors seized and taken in accordance with the directions of this act. The liquors on hand in each case were in excess of the amount which the law allows to be in the possession of any one person at one time. Consequently its possession was unlawful. Under the provisions of the law, the person having it in his possession had no right to keep it for his personal use, nor for any domestic or social purpose. If he could not have it in possession, he could not handle it; and, of course, under our law as it stands, he could not sell it. Without reference to the dictum in the statute last referred to that "no property rights of any kind shall exist in said prohibited liquors," when the terms of the act which inhibit the selling and keeping of liquors are given their full force and effect, then the liquors no longer had any of the qualities of property; a thing that can-

not be kept for use and cannot be sold has none of the qualities of property. This conclusion follows logically and necessarily from our holding valid the inhibition against the keeping or possessing liquors in violation of the terms of the act. If the liquors kept in violation of the terms of the act lost their qualities as property, the provision that they might be seized, condemned, and destroyed violated no right of the possessors of the liquors. Numerous cases might be cited holding that legislative acts authorizing the seizure and destruction of intoxicating liquors kept in violation of law, after notice to and a hearing of the claimants, are not unconstitutional. And if the having on hand of liquors in the prohibited quantities, under the terms of the act which we are construing, was only *prima facie* evidence of the possession being unlawful, then it would be necessary for this act to have provided for a notice to and hearing of the claimants. Properly construed, section 20 of the act of November 17, 1915, relates merely to liquors the keeping or having possession of which is absolutely unlawful. And, that being the case, a hearing where it was admitted that the thing seized was liquor in quantities in excess of that allowed by law was entirely unnecessary. Suppose that a hearing had been had; what questions could have been raised before the judge? If it had been contended that the liquors seized were not intoxicating nor alcoholic, that they did not belong to any of the inhibited classes, or that they were not in quantity such as to make their possession unquestionably unlawful, and that they were about to be destroyed, then there would have been subject-matter for a hearing and a trial. So far as this act provides for the seizure, condemnation, and destruction of liquors, it provides for nothing more than for the seizure and destruction of that which it is absolutely unlawful to keep. And the seizure of these goods in the present cases, their condemnation, and the order for their destruction violated no constitutional right. In the case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, it is held:

"The provision in the statutes of New York (chapter 591 of the Laws of 1880, as amended by chapter 317 of the Laws of 1883) that nets set or maintained upon waters of the state, or on the shores of or islands in such waters, in violation of the statutes of the state enacted for the protection of fish, may be summarily destroyed by any person, and that it shall be the duty of certain officers to abate, remove, and forthwith destroy them, and that no action for damages shall lie or be maintained against any person for or on account of such seizure or destruction, is a lawful exercise of the police power of the state, and does not deprive the citizen of his property without due process of law, in violation of the provision of the Constitution of the United States."

In the opinion in that case it is said:

"It is not easy to draw the line between cases where property illegally used may be destroyed summarily and where judicial proceedings are necessary for its condemnation. If

the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a custom officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the Legislature to order its summary abatement. For instance, if the Legislature should prohibit the killing of fish by explosive shells, and should order the cartridges so used to be destroyed, it would seem like belittling the dignity of the judiciary to require such destruction to be preceded by a solemn condemnation in a court of justice. The same remark might be made of the cards, chips, and dice of a gambling room."

As we have pointed out above, the whisky seized in these cases necessarily had no value; for it could not be kept for use, handled, nor sold. It was deprived of all value by the terms of the act which we have upheld; and the vessels in which the liquors were contained were necessarily of but trifling value.

In certain of the cases which we have before us it was insisted that, where intoxicating liquors are kept for personal use in a building used exclusively as a dwelling, not for the purpose of sale or disposition contrary to law, but solely as one's own personal property, the inhibitory terms of the act did not apply; and attention is called to the last clause of section 2 of the act of November 17, 1915, which reads as follows:

"But this inhibition does not include, and nothing in this act shall affect, the social serving of such liquors and beverages in private residences in ordinary social intercourse"

—and to the language of section 7 of the same act, which reads as follows:

"That the keeping of the liquors or beverages, or any of them, mentioned in section 1 of this act, in any building not exclusively used for a dwelling, shall be *prima facie* evidence that they are kept for sale or with intent to dispose of same contrary to the law."

Our reply to this contention is that the language of section 2 and section 7, just quoted, is to be construed in *pari materia* with section 16 of the act of November 18, 1915, which makes it unlawful for any person to possess or have in possession at one time more than the stated amount of inhibited liquors. The section last referred to renders it absolutely unlawful to keep more than the stated amounts in any place. It is of general application, not limited to places of business nor public places, but applies to any place where liquors may be kept; while section 2 of the act of November 17, 1915, makes it unlawful for a person to keep on hand at certain stated places any of the prohibited liquors in any quantity whatsoever; and the language quoted from section 2 modifies the general provision in the section preceding that section, by allowing liquors and beverages to be kept and served in private residences, without stating in what quantities, but the limitation as to

quantity is supplied in section 16 of the act of November 18, 1915, and when that quantity is exceeded the liquors become contraband, even when kept in private residences. Section 7 of the act of November 17, 1915, which is also referred to, makes the keeping of liquors in any quantity in a place other than a private residence *prima facie* evidence that such liquor is kept for sale. There is no conflict in the provisions of these three sections. At first blush the sections may appear to be confusing in their provisions, but the language in all three sections is easily reconcilable and harmonizes with the general scheme of the legislative acts.

[4] There is no merit in the contention that section 20 of the act of November 17th is unconstitutional, as being in conflict with article 1, § 8, pars. 1 and 3, of the Constitution of the United States, on the ground that:

It "impairs the power of the Congress of the United States to raise revenue for the support of the government thereof, and to regulate commerce among the several states, as hindering and impeding the exercise of those powers."

It seems that in the decision in the case of *Clark Distilling Co. v. Railway Company* and *Clark Distilling Co. v. Express Company*, recently decided by the Supreme Court of the United States, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. —, upholding the Webb-Kenyon Act, the constitutional objection to the Georgia law, based on the contention that it impairs the power of Congress over interstate commerce, is disposed of adversely to the plaintiffs.

[5] The point is also made that certain provisions of these acts under consideration are in the nature of retroactive laws. The prohibitory acts were passed on November 17 and November 18, 1915. They did not become of force until May 1, 1916, about 5½ months after their passage, and the prohibitory declarations in these laws did not take effect until then, and did not seek to penalize the keeping or having of the prohibited liquors prior to May 1, 1916. We do not think, therefore, that the law was in any sense an *ex post facto* law or retroactive in its nature. Questions involving similar principles have been ruled before, but we think the citation of authorities for the proposition is unnecessary.

[6] There is no merit in the contention that the act of November 17, 1915, is unconstitutional because it contains matter different from what is expressed in its title, in that there is nothing in the title to indicate that there would be no property rights in liquor held and possessed by petitioners at their dwellings, and not kept for the purpose of sale or for the purpose of avoiding

the law. The title of the act declares it to be an act, among other things, to prevent evasions and violations of certain laws of Georgia referred to, and to make the enforcement thereof speedy, certain, and effective, which purposes are to be accomplished in certain ways pointed out in the title, among them being that of abolishing "all property rights in said liquors and in certain enumerated classes of physical objects when kept or used for the purpose of violating said laws." And, as we have already pointed out, the keeping of liquors beyond certain quantities, even in dwellings and private residences, was a violation of the law. Moreover, the inhibition against keeping liquors in private dwellings might well have been regarded by the Legislature as constituting a part of the measure necessary to prevent an evasion of the prohibitory laws.

There is no merit in any of the objections based upon constitutional grounds, which are not specially dealt with, urged against the validity of the statutes in question.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent, and ATKINSON, J., dissenting.

ATKINSON, J. (dissenting). In so far as section 20 of the act approved November 17, 1915 (Acts 1915, p. 77), is to be construed as denying a property right in certain liquors and beverages of the kinds described in section 1 of the act, which an individual might have had in those liquors in his possession in this state prior to May 1, 1916 (the date on which the act went into effect), and in so far as the act on the basis of such denial of property authorized summary destruction of liquors which a person lawfully owned and possessed in this state before the act went into effect, and which he continued to keep after the act went into effect, that part of the act amounts to divesting an owner of his property by legislation, and is violative of those provisions of the state and federal Constitutions which guarantee the right of private property and immunity from retroactive laws. What is here said also applies to so much of section 16 of the act approved November 18, 1915 (Acts 1915, p. 90), as purports to inhibit the keeping on hand of liquors for a use not illegal prior to the 1st day of May, 1916. While the opinion by the majority is supported upon all other propositions ruled, no reason is set forth in the opinion authorizing a ruling contrary to what is above said; nor do any of the decisions cited from the Supreme Court of the United States or from this court go to the extent of upholding a statute as drastic in its provisions as are those contained in sections 20 and 16 of the acts referred to above.

(146 Ga. 601)

WILLIAMS et al. v. WILKINSON COUNTY
et al. (No. 300.)

(Supreme Court of Georgia. March 1, 1917.)

*(Syllabus by the Court.)*1. TAXATION ~~§~~ 811(1)—TAX EXECUTION—IN-
JUNCTION—JURISDICTION.

Petitioners were not entitled to the injunctive relief sought, and the court properly refused to grant it.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1242.]

*(Additional Syllabus by Editorial Staff.)*2. TAXATION ~~§~~ 322 — PLACE OF TAXATION —
DISPUTE BETWEEN COUNTIES — STATUTE —
"MAY."

Under Civ. Code 1910, § 1079, providing that a county claiming the right to tax property returned in another county may apply to the superior court of the latter county, making taxpayer a party, for direction as to which county is entitled to tax, the word "may" is permissive, and does not have the mandatory force of "shall."

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 538, 539.

For other definitions, see Words and Phrases, First and Second Series, May.]

Error from Superior Court, Twiggs County; J. L. Kent, Judge.

Suit for injunction by W. C. Williams and others against Twiggs County and its Sheriff, and Wilkinson County and its Sheriff. Judgment for defendants and plaintiffs bring error. Affirmed.

W. C. Williams and other landowners filed their petition against Twiggs county and its sheriff, and Wilkinson county and its sheriff, alleging as follows: Petitioners are owners of lands lying near the boundary line between these two counties, which counties are contiguous. The authorities of Wilkinson county claim that the lands in question are in that county, while the authorities of Twiggs county maintain that they are in the latter county. From time immemorial up to the year 1898 petitioners and the people of the community in which the lands are located, as well as the officers of the two counties, believed the lands to be in Twiggs county. The land "was in fact in Twiggs county, and still is in Twiggs county." Up to and including the year 1898 petitioners paid state and county taxes on the lands in and to Twiggs county, and not to Wilkinson county. According to a survey made by O. C. Anderson in the year 1898, under an executive order given on May 11, 1898, the lands were found to be in Wilkinson county. This survey and the executive order referred to were void and of no effect as fixing the line between the counties (for reasons set forth in the petition); but petitioners "were not advised as to these infirmities in said survey, and acquiesced in the Anderson line because the county authorities of the two counties did so, and from and after the year 1898 up to the

year 1910 returned said lands for taxation and paid taxes in and to said county of Wilkinson." In 1909 the Governor of Georgia made an executive order appointing one Robert to survey and mark out the boundary line between the two counties, which he did, and returned to the office of the secretary of state a survey and plat indicating the line, known as the Robert line. This survey located the lands in question in Twiggs county. Wilkinson county filed its protest and exceptions to the survey; and the secretary of state, on March 8, 1910, after hearing entered an order determining the true boundary line between the two counties to be the line established by the Robert survey, which locates the lands of petitioners in Twiggs county. Petitioners are informed that the authorities of Wilkinson county claim that the Robert line and the proceedings just referred to were void, because the proceedings were had under an act of the General Assembly they claim to be unconstitutional; but petitioners were not aware of this infirmity, if it exists, not being skilled in the law, and acquiesced in the Robert survey. Believing that the Robert line was the true line, from the year 1910 to the year 1914, petitioners and their predecessors in title returned said lands for taxation in the county of Twiggs, and there paid their taxes, except for the year 1914. The authorities of Wilkinson county knew this and acquiesced therein, and made no effort to collect taxes upon said lands until the summer of 1914, when the tax collector of Wilkinson county issued executions for double state and county taxes upon said lands for Wilkinson county for the years 1912 and 1913, and these executions have been levied, and in pursuance of the levy the lands have been advertised for sale. The same authorities are threatening to proceed to collect taxes upon said lands for the years 1910, 1911, and 1914; and the authorities of Twiggs county are about to proceed to collect taxes upon these lands for the year 1914. Petitioners are willing to pay taxes to whichever county is lawfully entitled to the same; but they submit that it would be unjust and inequitable for them to have to pay the same to both counties, or to determine the difficult legal constitutional questions upon which the rights of the two counties as to said taxes are to turn. They pray that the two counties and the officers who are attempting to enforce the tax executions be restrained; that Wilkinson county be required to set up in this suit any claim which it has to state and county taxes upon the said lands for the years 1910, 1911, 1912, and 1913, against the county of Twiggs; and that the court determine to which of said counties petitioners should pay the state and county taxes for the year 1914. Wilkinson county and the sheriff thereof demurred to the petition, and moved to dismiss the action, upon the grounds that

Twiggs county was without jurisdiction of the demurrants; and that the petition was for interpleader between Wilkinson county and its sheriff, and Twiggs county and its sheriff, and was not good as such. They also filed a plea to the jurisdiction, and contended that they were improperly joined as defendants with Twiggs county and its sheriff. The judge, being of the opinion that the superior court of Twiggs county was without jurisdiction of Wilkinson county and its sheriff, and that on the allegations of the petition no substantial relief could be granted against any resident of Twiggs county, denied the injunction.

John R. L. Smith and Grady C. Harris, both of Macon, for plaintiffs in error. Hardeeman, Jones, Park & Johnston, of Macon, for defendants in error.

BECK, J. (after stating the facts as above). [1, 2] We are of the opinion that the court did not err in refusing the injunction prayed. The plaintiffs are not entitled to the relief sought. They allege in their petition that the lands in question are in Twiggs county, and not in Wilkinson county. Clearly, then, they are not entitled to injunctive relief against Twiggs county. Under the allegations of the petition the authorities of that county have a right to enforce their claims to taxes upon the lands by the issuance of tax executions, the levy thereof and the sale of the property, unless the owners come forward and pay the taxes. The petition showing on its face that the plaintiffs had no right to any substantial relief against Twiggs county, the superior court of that county was without jurisdiction of Wilkinson county and its sheriff. All this is clearly true independently of the act of 1903 (Acts 1903, p. 16), embodied in the Civil Code, §§ 1079-1081. But it is insisted by the plaintiffs that the dispute between the two counties comes within the provisions of the sections just referred to providing for cases in which "a county claims to be entitled to the return and taxation of any property returned or about to be returned in another county." In section 1079 it is provided:

"If a county claims to be entitled to the return and taxation of any property returned or about to be returned in another county, such county may apply to the superior court of such latter county, in a petition to which the taxpayer and all the counties claiming such taxes shall be made parties, for direction and judgment as to which county is under the law entitled to such return and taxes, the proceedings being in all respects the same as in other suits in equity, except that such petition shall be for final trial at the first term of the court, and shall, as in cases of injunction, be reviewed by a fast bill of exceptions to the Supreme Court."

It is urged by counsel for the plaintiffs that the provision just quoted, that in the case stated a "county may apply to the superior court," should be so construed as to

make the word "may" read "shall," thereby making the provision mandatory upon a county, in the situation contemplated by the law, and not merely permissive, to bring a suit against the county to which returns of property for taxation are about to be made. We cannot agree with this contention. We do not think the word "may" should be construed as having the force of "shall" in the provision of law quoted above. That provision confers the right upon a county, where it is about to be deprived of taxes rightfully payable to it, to have that question settled as between itself and another county; but it should not be so construed as to put it in the power of a landowner and taxpayer to force a county into litigation for the purpose of determining whether it is entitled to such taxes. To give the act the construction contended for might in some cases force a county into burdensome and vexatious litigation. We think, therefore, that the court properly refused the injunction.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(19 Ga. App. 411)

GRANTVILLE OIL MILLS v. HOGANSVILLE OIL MILL CO. (No. 7657.)

(Court of Appeals of Georgia, Division No. 2
Feb. 16, 1917.)

(Syllabus by the Court.)

1. SALES ~~§~~62, 370—CONTRACTS—CONSTRUCTION.

Where a petition shows that by one contract the plaintiff agreed to deliver to the defendant 50 tons of cotton seed at a stated price, and, by a subsequent contract with the defendant, obligated himself to furnish 50 tons of cotton seed at an agreed price, each of the contracts must be construed as entire; and no compliance with the terms of either is shown where the allegations of the petition show that the seller tendered under the first contract 41½ tons of cotton seed, and subsequently, under the second contract, tendered 54½ tons. Under these facts, as disclosed by the plaintiff's petition, the provisions of section 4131 of the Code of 1910 have no application, as the purchaser had the right to treat each of the contracts as breached, and to refuse acceptance of both tenders. *Brunswick v. East Point Mill Co.*, 11 Ga. App. 9, 74 S. E. 448; *Cartersville Groc. Co. v. Rowland*, 17 Ga. App. 42, 86 S. E. 402; *De Vaughan's Son v. Ohio Pottery & Glass Co.*, 12 Ga. App. 50, 76 S. E. 793; *Green v. Freeman*, 126 Ga. 279, 55 S. E. 45; *Central Georgia Brick Co. v. Carolina Portland Cement Co.*, 136 Ga. 693, 71 S. E. 1048.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 171-179, 1085.]

2. SALES ~~§~~370 — REMEDIES OF SELLER — STATUTE.

Especially is this true, under the facts of this case, where the petition shows on its face that the tender of the seed was accompanied by a draft for payment which included an overcharge of \$343.06. *Kaufman v. Austin*, 57 Ga. 87; *Johnson v. Latimer*, 71 Ga. 470.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 1085.]

3. SALES \Leftrightarrow 282 — GUARANTY OF WEIGHTS — BREACH.

The fact that the contract may have provided that the weights were to be guaranteed by the seller does not alter the rule here followed as announced by numerous decisions of our courts. Such a provision would operate as an express warranty of the correctness of the weights of such shipments, but would not relieve the seller from a substantial compliance with the terms of the contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 797, 798.]

4. DEMURRER—ERROR.

This case being controlled by the rulings cited, we think the judge erred in refusing to sustain the demurrer to the petition.

Error from City Court of Newnan; W. A. Post, Judge.

Action between the Hogansville Oil Mill Company and the Grantville Oil Mills. Judgment for the former, and the latter brings error. Reversed.

Hall & Jones, of Newnan, for plaintiff in error. W. G. Post, of Newnan, for defendant in error.

JENKINS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 376)

SOUTHERN STATES PHOSPHATE & FERTILIZER CO. v. CLARK.

CLARK v. SOUTHERN STATES PHOSPHATE & FERTILIZER CO.
(Nos. 8219, 8220.)

(Court of Appeals of Georgia, Division No. 1.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. MORTGAGES \Leftrightarrow 499—PROCESS \Leftrightarrow 160—PETITION TO FORECLOSE—RULE ABSOLUTE—AFFIDAVIT OF ILLEGALITY—PARTIES.

Where the entry of service of a rule nisi issued on a petition to foreclose a mortgage on realty purports to be signed by one assuming to act as a deputy sheriff, and an affidavit of illegality is interposed to the levy of the execution issuing upon the rule absolute based upon such service, which alleges that the person purporting to act as a deputy sheriff was not in fact such an officer, and traverses his return, the sheriff and the person making the return as a deputy sheriff must both be made parties to the traverse, and where both are not made parties, there is no such attack, upon the return as would justify, under the law, a judgment setting it aside, and on motion such a ground of illegality should be dismissed.

(a) The sheriff and the sureties on his official bond are vitally interested in the question raised by a traverse to a return made by one purporting to act as his deputy, and, in the absence of a proper traverse, to which not only the deputy sheriff making the return but also the sheriff himself is made a party, the return cannot be brought into question.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1478-1485; Process, Cent. Dig. § 223.]

2. MORTGAGES \Leftrightarrow 442—RULE NISI—RETURN—TERM OF COURT.

Where quarterly terms of the superior court in a particular county are provided for by law, and a rule nisi on a petition to foreclose a mortgage on realty is granted at one term, and the first day of the next regular succeeding term will occur within less than three months after the grant of the rule nisi, it should be made returnable to the first term thereafter for which lawful service can be had, or the next term but one.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1301.]

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Suit by the Southern States Phosphate & Fertilizer Company to foreclose a mortgage against Mrs. Essie Clark. Rule absolute granted, and a mortgage *fi. fa.* issued and levied, and defendant filed an affidavit of illegality, which, after the overruling of a motion to strike, was sustained in part and denied in part. Plaintiff brings error, and defendant filed a cross-bill of exceptions. Reversed on the main bill of exceptions, and affirmed on the cross-bill of exceptions.

Ira S. Chappell, of Dublin, for plaintiff in error. J. S. Adams, of Dublin, for defendant in error.

WADE, C. J. The act creating the Dublin judicial circuit (Acts of 1911, p. 81) provides that superior courts shall be held in the county of Laurens on the "fourth Mondays in January, two weeks; fourth Mondays in April, two weeks; fourth Mondays in July, two weeks; fourth Mondays in October, two weeks." As appears from the agreed statement of facts in the bill of exceptions, the Southern States Phosphate & Fertilizer Company filed at the January term, 1914, of Laurens superior court its petition to foreclose a mortgage against Mrs. Essie Clark on certain realty therein described. The petition was filed on January 28, 1914, and on the same day a rule nisi was signed and issued by the presiding judge, which required the defendant to pay into court the principal, interest, etc., by the first day of the July term, 1914, of said court, or to show cause, etc., why the same should not be done. This petition and rule nisi were served personally on Mrs. Essie Clark on January 29, 1914, the entry of service thereon being as follows:

"Georgia, Laurens county. I have this day served a copy of within petition and nisi personally on Mrs. Essie Clark. This January 29, 1914, J. W. Couey, Deputy Sheriff."

It is further recited in the bill of exceptions that a rule absolute was granted on August 8, 1914, during the regular July term of Laurens superior court, and on September 11, 1914, a mortgage *fi. fa.* was issued thereon by the clerk of said court, which was duly levied by the sheriff of Laurens county on June 7, 1915. From the record it appears that an affidavit of illegality was filed

by the defendant on June 17, 1915, upon the following grounds:

(1) That she "was never served with any process, nisi, or copy of nisi, or notice of the pendency of the suit whereon said execution is based, nor did she waive service, nor did she appear in or defend said suit"; (2) "the said execution issued illegally and is proceeding illegally for the reason the petition asking that the mortgage be foreclosed was filed at the January term, 1914, of Laurens superior court, and the rule nisi, calling upon the defendants to pay said money into court, was returnable to the July term, 1914, of Laurens superior court, whereas under the law the petition asking for the foreclosure, having been filed at the regular January term, 1914, of the superior court, should have been returned to the next term of Laurens superior court, and the next term of Laurens superior court after said petition was filed, and after said rule nisi issued, was the April term, 1914, of Laurens superior court, and said nisi calling upon the defendant to pay into court on the first day thereof at the April term, 1914, of Laurens superior court, whereas it called upon the defendant to pay into court on the first day thereof of the July term, 1914"; and (3) because, "said execution issued illegally and is proceeding by levy upon deponent's property illegally, for the reason the superior court of Laurens county as is at present constituted has no jurisdiction or power to foreclose a mortgage in the statutory form and in the manner and method in which the plaintiff undertook to foreclose its mortgage, for the reason there are four terms of Laurens superior court, convening every three months, and it is impossible to comply with the law with reference to the foreclosure of mortgages, for the reason that the law prescribes that the rule nisi shall be personally served upon the defendant at least three months before the next term of the court after which the same is filed or served by publication once a month for four months, and consequently there can be no service by either of the methods pointed out by law, for the reason that three full months did not intervene between either of the said courts, unless the court should adjourn on the first day, which it did not do at the January or July term, 1914."

The affidavit of illegality further stated that the entry of the sheriff showed that the defendant had been served on January 29, 1914, and this entry she traversed and declared to be untrue, but asserted, in the fifth ground that if the entry was correct, the execution was proceeding illegally, and issued illegally because—

"the April term of Laurens superior court, 1914, convened on the 27th day of April, 1914, less than three months from the time of the illegal service upon her of the rule nisi in said case, and the said April term is the [term of] court referred to in section 3276 of the Civil Code of 1910 as the one at which the money is directed to be paid by the defendant 'on or before the first day of the next term immediately succeeding the one at which such rule is granted,' and said rule having been granted at the January term, the next court immediately succeeding was the April term, and the service perfected upon her, if it was a service, was less than three months prior to the convening of the said April term."

The defendant further alleged that she did not owe the debt secured by the mortgage upon which the rule absolute issued, and that her traverse to the entry of the officer on the original petition and rule nisi was made at the first term after her atten-

tion was directed thereto, and since she had acquired knowledge either that the said entry appeared or that a rule absolute had been secured. On October 26, 1915, an amendment to the original affidavit of illegality was offered by the defendant and allowed by the court. This amendment set up that the defendant had never been legally served with the rule to foreclose the mortgage, for the reason that J. W. Couey, who purported to sign the entry of service as deputy sheriff of Laurens county, was not in fact an officer of the county of Laurens, authorized under the law to serve the same, and that the said process had never been served upon her by the sheriff of Laurens county, or by any legally authorized deputy of Laurens county, who had authority to serve the same; that the entry on the original rule to foreclose the mortgage showed:

"That it was served by J. W. Couey, deputy sheriff, and that at the time she filed her original affidavit she did not know that J. W. Couey was not a deputy sheriff authorized by law to serve processes, and for that reason she did not make the charge in her original affidavit, but that knowledge of the fact that he was not an authorized officer to serve the process came to her knowledge only to-day, and consequently she did not omit the facts set forth in this amendment for delay, nor does she now offer said amendment for delay," but that "she could not have ascertained at the time she filed her original affidavit of illegality that the said Couey was not an officer authorized by law to serve the said process, but took it for granted that his entry of service, in which it was stated that he served it as deputy sheriff, was correct, until she ascertained to the contrary, as aforesaid."

The agreed statement of facts in the bill of exceptions further recites that:

"The said J. W. Couey was a regularly appointed and sworn bailiff, serving at the January term, 1914, of Laurens superior court, and at the time of said service said court was in session; that said bailiff, J. W. Couey, was specially directed by J. J. Flanders, the regular sheriff of Laurens county, to serve this particular process on Mrs. Essie Clark."

Counsel for the plaintiff moved to dismiss the affidavit of illegality, upon the ground that while the entry of the officer making the return of service had been traversed, neither the officer making the return nor the sheriff under whom he was acting had been made a party to the case. The court overruled this motion, and refused to strike the affidavit of illegality upon this ground, and to this ruling the plaintiff excepted. The court then rendered judgment sustaining the affidavit of illegality on the ground that the officer making the return of service was a common bailiff of the court, and not a sheriff or sheriff's deputy, and was without authority to serve the said process; and to this ruling the plaintiff excepted. The court further rendered judgment against the affidavit of illegality so far as related to the grounds therein stated that there could be no legal foreclosure of a mortgage on realty in a court having four terms a year, as in the superior court of Laurens county. The plaintiff thereupon brought

the case to this court; and the defendant filed a cross-bill of exceptions, assigning error on the refusal of the court to sustain her affidavit of illegality for the reasons set out in the second, third, and fifth grounds thereof.

[1] Where service of process is effected or a levy is made by one who assumes to act as an officer having authority to make such service or levy, the service or levy is good even though the appointment or qualification of the person purporting to act as such officer be irregular; since his acts would be those of a de facto officer. *Twiggs v. Hardwick*, 61 Ga. 272; *Hinton v. Lindsay*, 20 Ga. 746 (3, 4); *Gunn v. Tackett*, 67 Ga. 725; *Oliver v. Warren*, 124 Ga. 549, 550, 53 S. E. 100, 4 L. R. A. (N. S.) 1020, 110 Am. St. Rep. 188. It is quite different, of course, where the person purporting to act as an officer does not assume to act as the particular officer having authority in the particular case. *Hartshorn v. Bank of Gough*, 15 Ga. App. 167, 171, 82 S. E. 805. The return of one purporting to act as an officer having authority to execute the particular process or do the particular thing stated in the return is prima facie presumed to have been made by authority, and when the record shows a valid return of service and it becomes necessary to resort to extrinsic testimony to show that there has been no service, or that the service was for any reason invalid, the return must be duly traversed; and where made by a deputy sheriff—

"both the sheriff and the deputy sheriff must be made parties to the traverse." *Bell v. N. O. & N. E. R. Co.*, 2 Ga. App. 812, 816, 59 S. E. 102, 105.

"The rule that the officer making the return is a necessary party to the traverse has been announced in many cases by our Supreme Court, and also in several cases by this court. In *O'Bryan v. Calhoun*, 68 Ga. 215, it is said that where there is a return by the officer, 'If the defendant intends to attack the verity of such return, he must take steps by filing a traverse thereto and by order to make the sheriff a party;' and the court assigns as a reason therefor that the sheriff and his securities on his official bond have a valid interest in the question raised by the traverse to his return, and should have an opportunity to be heard on the issue so made by the defendant. In *Southern Express Co. v. National Bank of Tifton*, 4 Ga. App. 399, 61 S. E. 857, it is said that where the return of the officer shows legal service, it can only be attacked by a traverse filed thereto, 'to which the officer making the entry is a necessary party.' In *O'Connell v. Friedman*, 118 Ga. 831, 45 S. E. 668, there was in the traverse no prayer that the officer making the entry should be made a party, and the record did not disclose that he was given any notice of the filing of the traverse; and the Supreme Court held that 'there was therefore no error in striking the traverse.' In *Southern Railway Co. v. Cook*, 106 Ga. 452, 32 S. E. 585, it was said: 'Another ground of the motion complained of the court's disallowing a traverse of the entry of service, which had been filed by the defendant. It does not appear from the record that the sheriff who made the entry was made a party to this traverse, or that any notice of its filing was given him. This alone was a sufficient reason for disallowing the traverse.' In *Elder v. Cozart*, 59 Ga.

202, it was said: 'It has been repeatedly ruled that the return of the sheriff is conclusive, unless traversed, and that the sheriff should be a party to the traverse, and that it must be made at the next term after notice of the entry.' In *Sanford v. Bates*, 99 Ga. 145, 25 S. E. 35, it was held that the truth of the return of service entered upon a declaration by a sheriff 'cannot be called in question without traversing the return and making the officer a party to the traverse. * * * In the absence of such traverse the entry of the service is conclusive.'" *Georgia Ry. & Power Co. v. Davis*, 14 Ga. App. 790, 793, 794, 82 S. E. 387, 389.

Quoting further from the decision in the same case, this court said that:

"Where the officer making the return is not made a party to the traverse thereof, there is no such attack made upon the return as would justify, under the law, a judgment setting it aside."

And, further, that:

"The statute providing for attack by traverse on an entry of service by an officer, being in derogation of the common law, as stated above, must be strictly construed, and since our Supreme Court has repeatedly declared that in order to make such a traverse good, the officer must be made a party, or otherwise the return, if valid and sufficient on its face, is conclusive, it follows that where such legal traverse is not made, the return stands as if no attack thereon was attempted, conclusive on the parties, since nothing could be done on an insufficient traverse to bring the verity of the officer's return in question or to destroy its vital force and effect."

In *Rawlings v. Brown*, 15 Ga. App. 162, 82 S. E. 803, this court again held:

"Where an entry of service purports to have been made by a deputy sheriff, the sheriff, as well as the deputy sheriff, should be made a party to the traverse."

And in *Producers' Naval Stores Co. v. Brewton*, 90 S. E. 735, it was held that:

"When the sheriff is not made a party, as well as the deputy who made the return, 'there is no such attack made upon the return as would justify, under the law, a judgment setting it aside.'"

See, also, *Wilkes v. Branch*, 90 S. E. 722; *Lamb v. Dozier*, 55 Ga. 677; *Sindall v. Thacker*, 56 Ga. 52; *Sanford v. Bates*, 99 Ga. 145, 25 S. E. 35.

As was held in *O'Connell Bros. v. Friedman Co.*, 118 Ga. 831, 45 S. E. 668, where there is in the traverse to the return of an officer, which appears valid on its face, no prayer that the officer making the entry be made a party, and the record fails to disclose that he was given any notice of the filing of the traverse, there is no error in striking the traverse.

In this case, it does not appear from the record that either the sheriff or his deputy was in any way notified of the pendency of the traverse to the return of service. It is true that in the agreed statement of facts incorporated in the bill of exceptions it is recited that J. W. Couey, who signed the return as a deputy sheriff, was not in fact such a deputy, but was a bailiff appointed during the term of the court, and specially directed by the sheriff to serve this particular paper on the defendant Mrs. Essie Clark; but no

statement of facts agreed to by the plaintiff and the defendant in the lower court could possibly affect the rights or liabilities of the sheriff or his deputy, and consequently the recitals in the bill of exceptions could not supply the omission to make the sheriff and his deputy parties to the traverse. Section 5566 of the Civil Code, provides that:

"The entry of the sheriff or any officer of the court, or his deputy, may be traversed by the defendant at the first term after notice of such entry is had by him, and before pleading to the merits; but this shall not deprive the defendant of his right of action against the sheriff for a false return."

In *O'Bryan & Bros. v. Calhoun*, 68 Ga. 215, the Supreme Court, in holding that where there is no return by an officer, "if the defendant intends to attack the verity of such return, he must take steps by filing a traverse thereto and by order to make the sheriff a party," assigns as a reason for this ruling that the sheriff and his sureties on his official bond have a vital interest in the question raised by the traverse to his return, and should have an opportunity to be heard on the issues so made by the defendant. It is true that the plaintiff and the defendant agreed that the return of service purporting to have been made by J. W. Couey, as a deputy sheriff of Laurens county, was not in fact made by a deputy sheriff, and that Couey had no authority to act as a deputy sheriff, but to this agreement neither the sheriff nor Couey, who purported to act as his deputy, are parties. It is clear, therefore, that upon motion the court should have stricken from the affidavit of illegality interposed the grounds setting up a lack of service, and the traverse to the return of the officer, which was valid on its face, no steps being taken or attempted to make the sheriff, and the officer making the return as his deputy, a party to the proceeding; for since the duty devolved upon the sheriff to serve the process himself, or have it properly served by some other officer having authority to effect legal service thereon, opportunity should have been afforded him, as a party interested, to defend his official acts, and to be heard on the question whether the person shown by the record to have been specially selected by him to serve this particular process, and who had actually served it, was competent to perform this duty; for if the sheriff selected an incompetent person to perform this service, he thereby incurred liability in the event loss was occasioned to the plaintiff; and if, on the other hand, the person selected by him to discharge for him this particular duty was legally competent to act, no such liability arose.

It is therefore unnecessary in order to determine the question raised by the main bill of exceptions, that we decide whether or not a bailiff, appointed to serve the court during its session and sworn to take all juries committed to his charge during the term to the

jury room or some other private and convenient place, etc., and to "discharge all other duties which may devolve upon" him as a bailiff, to the best of his skill and knowledge (Civil Code, § 4990), is or is not an officer who, during the term of the court at which he was appointed to act, might, by direction of the sheriff, serve processes of the court, or serve the particular process upon which judgment was rendered in this case. Nor is it necessary to determine whether or not a sheriff might, by requesting such a bailiff to serve a particular process, thus appoint a deputy sheriff by parol (*Matthis v. Pollard*, 3 Ga. 1), notwithstanding he could not legally appoint a bailiff to perform the general business of his office (*McGuffie v. State*, 17 Ga. 497, 498). The court, therefore, erred, as stated above, in declining to strike the particular ground of the affidavit of illegality based upon the failure of the defendant to make the sheriff and his deputy parties to the proceedings, and in thereafter sustaining the affidavit of illegality upon the ground that the service was made by one without authority, since the sole issue upon which the court sustained the affidavit of illegality had not been brought before the court for consideration in the only manner provided by law.

[2] 2. Section 3276 of the Civil Code of 1910, which provides how mortgages may be foreclosed on realty, says that the person applying and entitled to foreclose such a mortgage—

"shall by himself or his attorney, petition to the superior court of the county wherein the mortgaged property may be, which petition shall contain a statement of the case, the amount of the petitioner's demand, and a description of the property mortgaged; whereupon the court shall grant a rule directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted; which rule shall be published once a month for four months, or served on the mortgagor, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into court, as aforesaid."

It is obvious, where quarterly terms of the superior court are held, that when a rule is applied for and obtained during one term of the court, "directing the principal, interest, and costs to be paid into court on or before the first day of the next term immediately succeeding the one at which such rule is granted," the rule could not be published in time for the next succeeding term, and generally it would be impossible to serve the mortgagor or his attorney—

"at least three months previous to the time [on or before the first day of the next term] at which the money is directed to be paid into court."

The service required must either be personal or by publication. Leaving a copy at the defendant's residence will not suffice (*Dykes v. McClung*, 74 Ga. 382; *Meeks v. Johnson*, 75 Ga. 629, 630), nor will service

by an unofficial person be legal (*Falvey v. Jones*, 80 Ga. 130, 4 S. E. 264).

Quarterly terms being provided for in the act creating the Dublin judicial circuit (Acts of 1911, p. 81), it is apparent that if section 3276 be construed in connection therewith, in accordance with the contention of counsel for the defendant, who is the plaintiff in error in the cross-bill of exceptions, the effect would be to repeal section 3276 of the Civil Code, so far as the statutory foreclosure of mortgages on realty in the county of Laurens was originally authorized thereunder, since it would be absolutely impossible ever to put into effect the provisions of section 3276, authorizing service by publication for four months, and it would be practically impossible, except in very rare instances, to effect service of process issued under the provisions of that section three months before the first day of the next term immediately succeeding the term at which the rule nisi was granted.

In the act of 1911, which created the Dublin judicial circuit, there is nothing that even tends to suggest an intention on the part of the Legislature to repeal any of the provisions of section 3276; and, without considering whether such a general law as is embodied in that section could properly be repealed by an act having a local application only, it may be said that:

"Repeals by implication, however, are not favored; and it is only in so far as a statute is clearly repugnant to a former statute, and so irreconcilably inconsistent with it that the two cannot stand together, or is manifestly intended to cover the subject-matter of the former and operate as a substitute for it, that such a repeal will be held to result. The intention to repeal must be plain and unmistakable." *Johnson v. So. Mut. B. & L. Assn.*, 97 Ga. 622, 623, 624, 25 S. E. 358.

According to a familiar rule, where two constructions are possible, the courts will generally so construe an act of the Legislature as to give it a reasonable intentment. There was obviously no purpose on the part of the Legislature to deny to the superior court of Laurens county the power to foreclose mortgages on realty by the statutory proceeding authorized or allowable in counties where the terms of the superior court were originally or are now held six months apart, instead of only three months apart. It is disclosed by the agreed statement of facts in this case, and from the contentions of the defendant in her affidavit of illegality in the lower court, that the rule issued at the January term of Laurens superior court, 1914, and she was served on the 29th day of the same month. The rule in fact required the defendant to answer at the July term, 1914, but had the rule required her to answer at the next term of the court immediately succeeding the term at which the rule was granted, she would have been required thereby to answer at the April term, 1914, of the court, which convened on the fourth Monday in April, or, as set forth in the affidavit

of illegality, on the 27th day of April, 1914, less than three months from the date when the rule was issued (January 28th) or served (January 29th). The law does not generally require the doing of an impossible thing, and no statute should be construed as making such a requirement, unless its terms do not admit of any other interpretation. In *Vaughn v. Farmers' & Merchants' Bank*, 145 Ga. 338, 89 S. E. 195, it was held that:

"Where a rule nisi upon a petition to foreclose a mortgage upon realty was issued at the January term, 1915, of the superior court, and more than three months before the next term of the court, which convened on April 12, 1915, and at the latter term the mortgagor was required to pay the money into court, and personal service of the rule nisi was effected prior to the term at which the payment was required to be made, but too late to be due service to that term, it would go over and become returnable to the next succeeding term."

See, also, *Ray v. Atlanta Banking Co.*, 110 Ga. 305, 35 S. E. 117.

Since in that case the rule nisi was issued more than three months before the first day of the next term of the court, it is plain that if personal service had been promptly effected more than three months before the term at which the mortgagor was required to pay the money into court, the rule would have been returnable to the said next succeeding term, and a rule absolute could properly have been granted. The court held, however, that as it appeared that service was not effected more than three months before the next succeeding term after issuance of the rule nisi, though personal service was in fact had before that term, the case went over and became returnable to the next succeeding term. The ruling in that case, as well as in the *Ray Case*, supra, upon which it was based, is put upon section 5570 of the Civil Code of 1910. Applying this ruling, it would appear in the case under consideration that if the plaintiff had sought and obtained the rule nisi on a day during the January term, 1914, of Laurens superior court, which was in fact more than three months prior to the first day of the April term immediately succeeding that January term, the rule could (and perhaps should) have been made returnable to the April term, and if service was not thereafter effected at least three months before the first day of the said April term, then the case, under the holding in the *Vaughn Case*, supra, would have gone over to the July term, 1914. However, as less than three months intervened between the granting of the rule nisi (January 28th) and the day which was by law the first day of the next succeeding term of Laurens superior court (April 27th), it would have been futile to take a rule nisi, directing the defendant to appear at the April term, 1914, when neither by publication nor by personal service could she be lawfully notified of the pendency of the proceeding a sufficient length of time before the arrival of the term at which she would have been thereby direct-

ed to make payment or show cause why she should not do so. We hold, therefore, that where the next term immediately succeeding the term of the superior court at which a rule nisi to foreclose a mortgage on realty is applied for will not regularly begin on a day more than three months from the date when the rule nisi is obtained, it is proper, in counties where quarterly sessions of the superior courts are provided for by law, that the rule should be made returnable to the second term thereafter, which in contemplation of the statute must be held to be "the next term immediately succeeding the one at which such rule is granted," as being the "next" term at which it is legally possible to require the defendant to appear and answer. Certainly it is the first term at which the defendant could be required to answer in response to notice served upon him by publication four months, or personally at least three months, in advance of the term. Where, on the other hand, the first day of the next term immediately succeeding the term at which the rule nisi is granted is more than three months later than the day on which such rule is granted, the rule should be made returnable to such next succeeding term, and, as said above, if not served in time for that term, the cause can be carried over to the next term thereafter. This is the only reasonable construction that can be given to section 3276, when considered in connection with the act of 1911, providing for quarterly terms of Laurens superior court. We hold, therefore, that the trial judge did not err in overruling grounds 2, 3, and 5 of the affidavit of illegality.

Judgment reversed on the main bill of exceptions. Affirmed on the cross-bill.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 412)

J. L. BYRD & CO. v. INTERSTATE CHEMICAL CO. (No. 7743.)

(Court of Appeals of Georgia, Division No. 2. Feb. 16, 1917.)

(Syllabus by the Court.)

PROCESS \S 160 — **TRAVERSE OF ENTRY OF SERVICE—PARTIES—NOTICE.**

The defendant in execution having failed to make the sheriff of the county a party to the traverse of the entry of service (Civ. Code 1910, \S 5566), and having failed to give the sheriff any notice whatever thereof, the entry of service appearing to have been made by a deputy sheriff, who was made a party, the illegality proceeding could have had no other legal termination than in favor of the defendant in error (Georgia Railway & Power Co. v. Davis, 14 Ga. App. 790[2], 82 S. E. 387; Rawlings v. Brown, Governor, 15 Ga. App. 162[3], 164, 82 S. E. 803; Citizens' Bank of Bainbridge v. Fort, 15 Ga. App. 427, 429, 83 S. E. 678; Southern States Phosphate & Fertilizer Co. v. Clark, 91 S. E. 573, decided by this court this day); and while this fatal defect should properly have been reached by a

timely motion to strike the traverse, yet under the facts of the case the court did not err in directing, upon motion, a verdict for the plaintiff in execution and against the affidavit of illegality.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 223.]

Error from City Court of Nashville; C. A. Christian, Judge.

Proceeding between J. L. Byrd & Co. and the Interstate Chemical Company. Judgment for the latter, and the former brings error. Affirmed.

J. D. Lovett, of Nashville, for plaintiff in error. W. R. Smith, of Nashville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 368)

SMITH v. HARRELL. (No. 8204.)

(Court of Appeals of Georgia, Division No. 1. Feb. 16, 1917. Rehearing Denied March 2, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 273(7), 1005(2)—**TRIAL** \S 260(1)—**VERDICT—INSTRUCTIONS.**

The verdict of the jury, approved by the trial judge, is not without evidence to support it. The errors of law in admitting testimony in charging the jury, and in failing to charge certain principles applicable to the case as made (no request to charge having been submitted), are without merit. The court did not err in overruling the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. $\S\S$ 1620, 1621, 3860-3876; Trial, Cent. Dig. $\S\S$ 651, 689.]

Error from Superior Court, Lowndes County; W. E. Thomas, Judge.

Proceeding by W. N. Harrell against O. M. Smith. Judgment for plaintiff, and defendant brings error. Affirmed.

J. M. Johnson, J. G. Cranford, and O. M. Smith, all of Valdosta, for plaintiff in error. Dan R. Bruce and E. K. Wilcox, both of Valdosta, for defendant in error.

GEORGE, J. Harrell filed his petition for a rule against Smith, an attorney at law, upon the allegation that the attorney had charged and retained as a fee one-half of \$2,500, collected in certain litigation for Harrell; that the amount thus retained was unreasonable, there being no agreement fixing the amount to be paid the attorney; and that \$250 was a reasonable fee for the services rendered. The petition was duly answered, and the attorney claimed an express contract for fees, executed both by Harrell and an alleged copartner, the action in which the recovery was had being a joint suit in behalf of Harrell and another; that Harrell ratified the contract for fees made by his alleged copartner with the attorney; and that

in the absence of agreement the amount retained by him was authorized by the services actually rendered. The answer was traversed, the issues were submitted to a jury, and a verdict for the petitioner, for \$416.66 principal was returned. The defendant's motion for a new trial was overruled, and he excepts.

The evidence was in conflict, and, upon certain features of the case, strongly supported the contentions of the plaintiff in error. The verdict is not, however, without evidence to support it, and this court cannot interfere. Five excerpts from the charge of the court are excepted to generally, and, under the repeated rulings of this court and of the Supreme Court, if these charges state propositions of law which are in the abstract correct, we will not consider whether or not the charges are applicable or appropriate in the case. Not one of the charges complained of is found to contain an incorrect principle of law. There are seven grounds in the motion complaining of the failure to give certain instructions of law. It nowhere appears that any request, either oral or written, was made for these instructions or any one of them. Some of them were pertinent, but, so far as pertinent to the issues made by the evidence, were sufficiently covered by instructions given.

One exception to the admission of evidence is insisted upon. It appears that the court allowed a witness to say what amount, in his opinion, would be reasonable compensation for the services rendered by the attorney, based upon facts hypothetically stated. The objection to this evidence was upon the ground that "the hypothesis is not based on the facts proven." On careful examination of the evidence, we think the question propounded was based upon the material facts proven in the case.

The court did not err in overruling the motion for new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 401)

NAPIER v. STRONG. (No. 7543.)

(Court of Appeals of Georgia, Division No. 2.
Feb. 16, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 442(1)—PAROL EVIDENCE—WRITTEN AGREEMENT—COLLATERAL UNDERTAKING.

While parol evidence is not admissible to add to, take from, or vary the terms of a written agreement, the terms of an admitted collateral undertaking between the parties, which the writing does not purport to contain, may be proved by parol, if not inconsistent with the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1882.]

2. PLEADING \S 237(5), 395—CONFORMITY TO PLEADINGS AND PROOF—VARIANCE.

The plaintiff to a suit must recover upon the cause of action as laid in the petition; and a verdict in his favor is illegal when the evidence fails to support the cause declared on, even though a different cause of action may appear from testimony admitted without objection. But evidence, admitted without objection, which supports what is in fact the same cause of action may be sufficient to authorize a verdict of recovery, although such evidence might have been excluded on objection, if, under the facts of the case, the petition could have been so conformed to the proof by amendment as would thereby have rendered such testimony relevant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 606, 1333-1335.]

3. PRINCIPAL AND AGENT \S 119(2)—SPECIAL AGENT—AUTHORITY—PRESUMPTION.

While a special agent may be shown to have had authority as such to effect a fully consummated sale of certain property, no presumption arises therefrom of continuing authority whereby he would be authorized at a date long subsequent to the date of such sale to make an independent and supplemental agreement, though it might relate to the same subject-matter.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 392, 394.]

4. INSURANCE \S 220—TRANSFER OF PROPERTY—BREACH OF CONTRACT—EVIDENCE.

The evidence warranted the verdict, and the judge did not err in overruling the motion for new trial.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 490.]

(Additional Syllabus by Editorial Staff.)

5. TRIAL \S 252(1)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—REFERENCE TO PLEADINGS.

It is not good practice for the judge in his charge to refer to the contentions of the pleadings not supported by proof, for while the instructions may correctly state the law in the abstract, the jury might be misled thereby, though a caution may prevent the jury from being so misled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 596, 612.]

6. INSURANCE \S 220—TRANSFER OF POLICY—REPRESENTATION—RELIANCE.

If, when the sale of an insurance policy was effected on the sale of house, the vendor by her agent stated that the unexpired term extended for 4½ years, and accepted payment on that basis, the purchaser might rely upon the statements as forming an integral part of the contract of purchase, where the policy was in the vendor's possession.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 490.]

7. SALES \S 38(3)—REPRESENTATIONS—FACT OR OPINION—RELIANCE.

Where express representations constituting a part of the contract are made by the seller as to the existence of a fact, as distinguished from the mere statement of an opinion or judgment, the purchaser ordinarily has a right to rely thereon.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 67.]

8. INSURANCE \S 220—TRANSFER OF POLICY—ACTION FOR DAMAGES.

In an action for damages for the breach of a contract relating to an insurance policy bought of defendant on sale of a house, the fact that policy appeared to be canceled and returned to the vendor prior to the expiration of its repre-

sented continuance, did not affect her liability, where she not only inadvertently retained the returned premium, but failed to notify the plaintiff of the cancellation.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 490.]

Error from City Court of Macon; Robt. Hodges, Judge.

Suit by Mrs. M. L. Strong against Mrs. D. S. Napier. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. M. L. Strong brought suit against Mrs. D. S. Napier, alleging damages in the sum of \$800, on account of an alleged breach of contract relating to a policy of insurance bought by her of the defendant. It appears that Mrs. Napier sold to Mrs. Strong a house and lot in Macon, taking installment notes for the purchase money and giving a bond for title, obligating the seller to execute title upon the payment of the notes. All the negotiations and transactions involved in the sale, except the execution of the bond for title, were between E. Tris Napier, husband of the defendant, and J. B. Strong, husband of the plaintiff; and when the trade was completed the parties to this case were not present. The bond for title had been prepared and signed by Mrs. Napier three days previously, to wit, on February 25, 1911, and carried by her husband to his office, where the sale was concluded on February 28, 1911. At the time of the sale Mrs. Napier held a fire insurance policy for \$800 on the house in question. The policy on its face covered a period of 5 years, beginning May 25, 1909, and therefore had been running 1¾ years, and still had 3¾ years to run. In the trade as made by the husbands of the parties it was agreed that the purchaser of the house and lot should also take over the unexpired term of the insurance policy, by paying the amount of the unearned premium, and should leave the policy in the possession of E. Tris Napier to protect Mrs. Napier as to the purchase price of the property sold. This was done, and in furtherance of this agreement a loss payable clause was entered upon the policy. The plaintiff alleged in her petition that in consideration of the sale of the property insured and of the payment by her to the defendant of the unearned premium on the policy, the defendant agreed as follows: (1) To keep the property insured in the sum of \$800 as long as she (the defendant) had an interest in the property; (2) to cause other insurance in that sum to be issued if the existing policy should lapse or be discontinued; and (3) in any event to notify the purchaser should the property become uninsured.

It was shown that nearly 3 years after this transaction, to wit, on January 27, 1914, the insurance company canceled the policy and returned to Mr. E. Tris Napier the unearned portion of the premium, amounting to \$1.00, which was retained by him, and that no no-

tice of the cancellation was ever given to the plaintiff. The policy, as actually written, would have expired at the end of 4 months from the time it was canceled; that is, on May 25, 1914. In January, 1915, the property was destroyed by fire. The plaintiff introduced only one witness, J. B. Strong, her husband and agent. The substance of his testimony was that when he bought the policy from the defendant's agent, E. Tris Napier, the latter told him that the policy had 4½ years to run, when in fact it had only 3¾ years to run, and that had the policy remained in force for 4½ years, the property would have been insured at the time of the fire. J. B. Strong further testified as follows:

"I talked to Mr. Napier about this insurance after I bought the place and before the fire. I happened to be present after he had sold the last note. He sold it to a sister of his—the only way I know is by him calling her sister; I don't know her name. I had a conversation with him at that time. I told him that I would like to get the insurance papers as I had been there once before, and he said he was holding them to make him doubly sure for his money. I told him I wanted to strengthen my insurance, as they were building up all around me and I was afraid of fire and would like to increase my insurance. He said that he would attend to that. And again I asked him for it, as I had a good profit in the place and wanted to trade, and I called on him and he said, 'Call again; I am busy now.' And I called later, and he wheeled around and struck his fist on the desk, and said, 'I am going to hold you to our first trade.' And then I asked him if I could get the fire insurance policy, to have it strengthened, and he said he would look after that."

Whether this latter conversation was prior to the cancellation of the policy, or subsequent, the evidence does not disclose. A motion for nonsuit having been refused, evidence was introduced for the defendant; and the jury found for the plaintiff in the amount sued for. The trial judge refused to grant a new trial, and the defendant excepted.

Ryals & Anderson, of Macon, for plaintiff in error. E. C. Powers and W. D. McNeill, both of Macon, for defendant in error.

JENKINS, J. [¶] 1. It is ably contended by counsel for the plaintiff in error that no parol evidence regarding the insurance transaction should have been admitted, for the reason that the sale of the house and lot and the sale of the unexpired term of the insurance policy were all parts of the same transaction, as shown by the petition; and that since the bond for titles is in writing, and by law required so to be, it cannot be added to or varied by parol evidence. No principle of law is better settled than that which prohibits the admission of parol evidence to add to, take from, or vary the terms of a written contract; and in those cases where the contract must, under the statute of frauds, be in writing, it has been held that such a contract cannot be modified by a parol agreement, even if subsequently made. See *Wills v. Fields*, 132 Ga. 242 (1) 63 S. E. 828.

The principle invoked, however, cannot have proper application where the writing does not purport to contain the stipulations of an admitted collateral undertaking. Under the facts of this case, while the bond for title appears complete and unambiguous on its face, it in no wise purports to cover the admitted sale of the policy of insurance, as an incident to the sale of the realty. Since the answer itself admits an executed sale of the policy not embraced in the writing the sale of the policy must necessarily have been effected by a collateral agreement, and the plaintiff should be entitled to allege and prove the terms thereof, unless they were inconsistent with the writing.

In order to render parol evidence admissible for the purpose of making complete an incomplete contract, the fact that the contract is incomplete need not necessarily appear upon its face. The surrounding facts and circumstances of a contract are always proper subjects of proof (Civil Code, § 5792), and when from them or the admission of parties it is made to appear that the writing does not embrace all of the agreements, then collateral undertakings not inconsistent with the writing can be shown by parol. *Forsyth Mfg. Co. v. Castlen*, 112 Ga. 199 (6) 206, 37 S. E. 485, 81 Am. St. Rep. 28. In the present case the obligation assumed by the alleged parol undertaking of the defendant is not a new obligation added to the agreement made by the bond governing the sale of the realty, but grows out of and relates to the incidental sale of the policy of insurance. Section 5791 of the Civil Code provides:

"If the writing does not purport to contain all the stipulations of the contract, parol evidence is admissible to prove other portions thereof not inconsistent with the writing; so collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing."

See, also, *Carter v. Griffin*, 114 Ga. 321, 40 S. E. 290; *McCommons v. Williams*, 131 Ga. 313, 62 S. E. 230; *Shiels v. Stark*, 14 Ga. 429 (4).

[2] 2. The evidence for the plaintiff having been accepted by the jury in its verdict, this court considers itself bound thereby. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209; *Stricklin & Co. v. Crawley*, 1 Ga. App. 139, 58 S. E. 215; *Charles v. Brooker*, 1 Ga. App. 219, 58 S. E. 218; *Daughtry v. S. & S. Ry.*, 1 Ga. App. 393, 58 S. E. 230. The contention, however, as to whether the evidence in support of the petition conforms to the allegations therein made is one of law, and constitutes one of the questions we are called upon to determine. It is an elementary principle that there must be no variance between the cause of action declared upon and that proved. The rule is founded upon good reason; for not only is the opposite party entitled to have the basis of the plaintiff's contention distinctly and specifically set forth, but good pleading serves the additional pur-

pose of preserving an accurate record of the cause of action as a protection against another proceeding based upon the same cause.

In the present case Mrs. Strong brought her action for damages alleged to have been sustained on account of a breach of contract on the part of Mrs. Napier, whereby the latter had agreed, upon the purchase from her of the insurance policy (1) to keep the property insured in the sum of \$800, as long as she (the defendant) had an interest in the property; (2) to cause other insurance in that sum to be issued in case the existing policy should lapse or be discontinued; and (3) in any event to notify the purchaser should the property become uninsured. The sole proof, however, offered to sustain such contract and breach was to the effect that when the sale of the policy of insurance was effected, it was understood and agreed by the parties to the sale that the policy had 4½ years to run, whereas in fact the unexpired period was only 3¼ years, and that the property insured was destroyed by fire during the interval. It is manifest that there was here such a lack of correspondence between the allegations and proof as would have rendered such evidence inadmissible, upon objection made on that ground. And if such testimony related to a new and distinct cause of action from that alleged in the petition, even its admission without objection would not suffice to sustain the verdict. In the case of *C. R., etc., v. Cooper*, 95 Ga. 407, 22 S. E. 550, the court said:

"No plaintiff can recover upon a cause of action, however just or well sustained by proof, which is totally distinct and different from that alleged in his declaration, and this is so although palpably irrelevant evidence may have been received without objection."

In *Burdette v. Crawford*, 125 Ga. 577 (2), 54 S. E. 677, it is held:

"The plaintiff must recover upon the cause of action laid in the declaration; and a verdict for the defendant is required when the cause of action thus laid is not proved, although another cause of action in favor of the plaintiff against the defendant may appear from the defendant's testimony."

It will be noted, however, that in each of the cases just quoted from, the unauthorized evidence which was admitted (in the first case certainly without objection) was for the purpose of proving a new and distinct cause of action from that sued on. A different rule would apply when evidence is admitted without objection which might be rejected as not conforming to the allegations as laid, but which in fact relates to the same cause of action declared on. In such a case our courts have repeatedly held that a party waives his objection to the pleadings by allowing such evidence to go to the jury without objection; the reason for this just rule in such a case evidently being that had objection been made, the party tendering such evidence might have amended his pleadings so as to conform thereto. One of the principal

functions of amendments is to conserve this right. *Haiman & Bros. v. Moses & Garrard*, 39 Ga. 708 (3); *Savannah, F. & W. Ry. v. Barber*, 71 Ga. 644 (2a); *Gainesville & N. W. R. Co. v. Galloway*, 17 Ga. App. 702 (4), 87 S. E. 1093.

It is therefore clear that the proposition before us resolves itself into the question of whether the evidence for Mrs. Strong related to the same cause of action alleged in her petition, or whether it attempted to prove a new and distinct cause from that alleged. If the former be true, then the jury had a right to consider the testimony admitted without objection; but if it related to a different cause of action, then no matter how admitted, it could not support a legal verdict in plaintiff's behalf. There has been an admitted lack of entire harmony in the decisions of our courts upon the difficult subject here involved. The settled rule upon this subject seems to have been admirably stated by Chief Justice Simmons, in the case of *City of Columbus v. Anglin*, 120 Ga. 793, 48 S. E. 321, in which he said:

"He may allege additional facts to show the existence of his primary right, as long as he does not undertake to set up another and distinct right. And he may allege additional facts to show that the defendant has been guilty of the alleged violation of plaintiff's right. If there is substantial identity of wrong (which necessarily includes identity of the right violated) there is substantial identity of cause of action. This identity is not the same as that required between *allegata* and *probata*. A party is required to prove his material and essential allegations as he has alleged them, and, in the absence of amendment, may fail because of a variance, though the facts proved show substantially the same cause of action shown by the facts alleged. The two sets of facts may show substantially the same cause of action, and yet the proof of one will not sustain the allegation of the other. Not so with the test of an amendment. To avoid a variance is not the least important of the offices of an amendment. *Davis v. Hill*, 41 N. H. 329. So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action."

In this opinion the early rule laid down by Judge Lumpkin in *Maxwell v. Harrison*, 8 Ga. 61, 52 Am. Dec. 385, is reverted to and approvingly quoted as follows:

"The true criterion for determining whether an amendment is admissible, we take to be this—whether the amendment proposed is another cause of controversy, or whether it is the same contract or injury, and a mere permission to lay it in a manner which the plaintiff considers will best correspond with the nature of his complaint, and with his proof, and the merits of his case. For, while the plaintiff cannot introduce an entirely new cause of action, he may, nevertheless, add a new count, substantially different from the declaration, provided he adheres to the original cause of action."

Thus the rule as to the identity of the cause of action can in any case be best determined by applying the test as to whether the same or a different wrong is involved. In the instant case the essential wrong complained

of is the loss of the uninsured property at a time when, by the agreement of defendant, she had promised or guaranteed that the purchased policy would protect it. In the case of *City of Columbus v. Anglin*, supra, the following language is used:

"A number of tests have been suggested for determining whether an amendment adds a new cause of action. One general test is said to be, 'whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony.' 1 Enc. Pl. & Pr. 564. Other tests, some of them admittedly fallible, have been suggested in different cases, as: (1) Whether the original petition and the amendment would be subject to the same plea (*Goddard v. Perkins*, 9 N. H. 488); (2) whether the same evidence would support both (*Scovill v. Glasner*, 79 Mo. 449); (3) whether the same measure of damages is applicable to both (*Hurst v. Railway*, 84 Mich. 539, 48 N. W. 44); (4) whether both could have been pleaded cumulatively in the same count (*Richardson v. Fenner*, 10 La. Ann. 600); (5) whether an adjudication upon one would bar a suit under the other (*Davis v. Railroad Co.*, 110 N. Y. 646, 17 N. E. 733). Of these the last mentioned is probably the best and most useful, though even it comes back at last to the question whether the cause of action is the same."

Applying these tests, although in a measure they be admittedly fallible, the cause of action alleged and the one proven in the case at bar would appear identical.

[3] 3. The evidence shows that at a date not named, but manifestly long subsequent to the consummation of the sale of the house and lot and of the insurance policy, the agent of the purchaser made request of the agent who had negotiated the sale of the real estate and of the insurance, for the surrender of the policy, in order that it might be "strengthened," and that the latter replied that he would "look after that." We do not think the conversation as here outlined was sufficient to constitute a contract which could even be the basis of an action for a failure to increase the insurance, were the present suit maintained for that purpose. The subject-matter of the alleged agreement was in no wise entered into as to the period, rate, and amount of the insurance; and such would have been necessary in order to render a promise of this sort binding. But in no event do we think that such an agreement on the part of E. Tris Napier would bind his alleged principal, Mrs. Napier, unless his authority so to promise be specifically shown. Under the evidence it appears that E. Tris Napier was the special agent of his wife to deliver the bond for title and effect a sale of the policy of insurance. This is manifested by the testimony of the plaintiff's agent when, at the time of the sale, he interrogated E. Tris Napier as to whether Mrs. Napier had personally signed the bond for title and was informed that she had. The plea and answer of the defendant having itself alleged the sale and transfer of the unexpired term of the insurance policy, thus impliedly admitting the authority of her

agent to make the same, the plaintiff is thus relieved from proving the authority of her agent in so doing. As a general proposition, however, those dealing with a special agent are bound to ascertain his authority; and while the agent of the defendant may have been authorized to execute a definite contract which had been fully consummated, it does not follow that he had continuing authority to make an independent and supplemental agreement, though it might relate to the same subject-matter. The fact that E. J. Kinney, a witness for the defendant, testified that Mr. Napier was acting as agent for his wife throughout this transaction, is not sufficient proof of his authority so to act. In the case of *Neal v. Patten*, 40 Ga. 363, 364, the court held:

"A witness may state that one acted as agent, but this does not show his power to act, nor the extent of his authority."

And, further, the court said:

"The fact that he acted as agent does not prove his power to act any more than the fact that he sold proves his power to sell."

The evidence does not disclose any other proof than this of any authority on the part of defendant's agent, except what may be presumed by the admission in her answer already referred to. It is contended by counsel for defendant in error that the entire transaction shows such agency as should bind the defendant, but, as already stated, the mere fact that another may so act does not of itself prove the authority to act. The fact that the alleged agent in this case is the husband of the principal does not in any wise alter the rule. In the case of *Mickleberry v. O'Neal*, 98 Ga. 51, 25 S. E. 934, the court said:

"A husband may be the agent of his wife. If he professes to act as her agent, those dealing with him are bound to inquire as to his authority to act for her."

Nor can agency be proven by declarations or conduct of the alleged agent. *Americus Oil Co. v. Gurr*, 114 Ga. 624 (1), 40 S. E. 780. Therefore we are of the opinion that the answer of El Tris Napier to the request for the delivery of the policy for the purpose of strengthening it could in no event bind the alleged principal in the absence of proof of his authority to make the statement then made by him.

[4, 5] 4. There is no reversible error in the portions of the charge of the court complained of. It is not good practice for the judge, in his charge, to refer to contentions of the pleadings not supported by proof, for while such instructions may correctly state the law in the abstract, the jury might reasonably be misled thereby; but we think it apparent in the present case that the caution given in reference to such statement of the contentions made by the petition, some of which are not supported as pleaded, was sufficient to prevent the jury from being misled. The language used by him, just referred to, was as follows:

"I have thus submitted to you an epitome, an outline, a synopsis of the pleadings, the contentions of the parties to the case. * * * You will not take the statement on the part of the court of the pleadings in the case as having any evidentiary force or value whatever."

[6] 5. If, when the sale of the policy of insurance was effected, the defendant, by her agent, expressly stated that the unexpired term thereof extended for 4½ years, and accepted payment on that basis, we think the purchaser had a right to rely upon that statement as forming an integral part of the contract of purchase, it being shown that the seller retained possession of the policy, and it not appearing that the policy was present at the time. In *Burge v. Stroberg*, 42 Ga. 89, the court said:

"While representations made at the time of sale may amount to fraud, the right of action on the breach exists under the law upon the contract, irrespective of such fraud on the part of the seller."

See, also, *Terhune v. Dever*, 36 Ga. 648. Nor does it matter that such misstatements on the part of the seller were unintentionally and innocently made (*Newman v. Claflin Co.*, 107 Ga. 89 [1], 32 S. E. 943); nor that they were made by her agent when the agent was clothed with authority to effect such sale (*Alpha Mills v. Steam Engine Co.*, 116 N. C. 797, 21 S. E. 917 [3]; *Darks v. Scudder*, 146 Mo. App. 246, 130 S. W. 430; *First Nat. Bank v. Robinson*, 105 Iowa, 463, 75 N. W. 334; *Miller Supply Co. v. Mining Co.*, 159 Ky. 696, 167 S. W. 889; *Haynor Mfg. Co. v. Davis*, 147 N. C. 267, 61 S. E. 54, 17 L. R. A. [N. S.] 193).

[7] Where express representations constituting a part of the contract are made by the seller as to the existence of a fact, in contradistinction from the mere statement of an opinion or judgment, the purchaser ordinarily has a right to rely thereon. *Benjamin on Sales* (7th Ed.) § 613; *N. Ga. Milling Co. v. Henderson E. Co.*, 130 Ga. 113 (1), 60 S. E. 258, 24 L. R. A. (N. S.) 235; *Springer v. Indianapolis Brewing Co.*, 126 Ga. 321 (4), 55 S. E. 53; *Fletcher v. Young*, 69 Ga. 591; *Moultrie Repair Co. v. Hill*, 120 Ga. 730 (2), 48 S. E. 143; *Cook & Co. v. Finch*, 117 Ga. 541, 44 S. E. 95; *Christian v. Knight*, 128 Ga. 501 (2), 57 S. E. 763; *Burr v. Atlanta Paper Co.*, 2 Ga. App. 52, 58 S. E. 373.

[8] And the fact that the policy appears to have been canceled and returned to the seller together with the unearned premium thereon, prior to the expiration of the 4½ years, does not affect the defendant's liability, where it is shown that she not only inadvertently retained such returned premium, but even failed to notify the plaintiff of such lapse or cancellation. Under the facts as outlined, the duty was certainly imposed upon her of at least giving notice to the plaintiff of such cancellation, and herein lies the strongest and most undoubted equity in her favor which the facts of the case disclose.

Judgment affirmed.

(178 N. C. 41)

EDWARDS v. PROCTOR et al.
PROCTOR et al. v. EDWARDS.
 (No. 21.)

(Supreme Court of North Carolina. Feb.
 28, 1917.)

**CONTRACTS § 313(2) — RENUNCIATION EN-
 TITLING PARTY TO SUE.**

P. and H. employed E. to cut timber on their land. H. ordered E. to quit, but E. refused until told by P. When P. requested E. to quit, he refused, whereupon P. left him with remark, "Shut down for a few days and I will come back and let you know." The matter was left in this way, P. never informing E. to quit. Held that, even though P. and H. had given an option for purchase of the timber land to a third party, there was no absolute unequivocal breach of contract of employment going to the whole consideration, on their part, entitling E. to sue for damages at once.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1279.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Consolidated actions by R. W. Edwards against H. H. Proctor and another and by H. H. Proctor and another against R. W. Edwards. Judgment against Edwards, and he appeals. No error.

Plaintiff Riley W. Edwards brought an action in the superior court of Beaufort county against H. H. Proctor and L. Y. Holliday to recover damages for a breach of a contract by which they employed him to cut timber on their land, and they brought an action in Pitt county against him to recover a balance due on said contract to them by Edwards. The two cases were consolidated, and by agreement tried together in Beaufort county, and the following verdict rendered under the instructions of the court:

"(1) Did the plaintiffs and defendants enter into a contract for the cutting and manufacture of lumber as alleged in the complaint in Edwards v. Proctor et al.? Answer: Yes.

"(2) Did Proctor and Holliday wrongfully breach said contract as alleged by Edwards? Answer: No.

"(3) If so, what damage is Edwards entitled to recover? Answer: None.

"(4) Did Edwards wrongfully breach said contract with Proctor and Holliday, as alleged? No answer.

"(5) If so, what damages are Proctor and Holliday entitled to recover on account of said breach? No answer.

"(6) In what amount, if any, is Edwards indebted to Proctor and Holliday for money advanced over and above the value of the lumber delivered and other offsets? Answer: \$278.50."

Plaintiff Edwards alleged that Proctor and Holliday had committed a breach of the contract by ordering him to stop operations at the mill, which entitled him to sue at once for his damages. The evidence of plaintiff was that Holliday told him "to saw the logs he had already cut, and not to saw any more," to which Edwards replied that he would not stop, or could not stop, until Mr. Proctor told him to do so, and that he would have to come down, and then both tell him

to stop the cutting of timber. Holliday said he would send Proctor, and Proctor did go to the mill and told Edwards "that he wanted him to shut down," to which Edwards replied that he was not going to shut down until Proctor had paid him for the timber, and Proctor said, "Well, go on and cut the timber." When he walked off he remarked, "Shut down for a few days, and I will come back and let you know." He did not come back and tell Edwards what to do. Proctor and Holliday did not state why they wanted Edwards to stop the mill, but did say that they had given an option on the land.

Wm. Smith, plaintiff's witness, testified that Holliday had told him that he had just gone to Riley Edwards to see if he would shut down the mill and stop cutting the timber, and that he thought Edwards would do so. He also stated that Riley Edwards had said to him that Holliday wanted him to stop, but that he had told Holliday he would not do it until Proctor said so. Edwards stopped the mill, except a few days, when he sawed for some other parties.

The court held that the evidence did not show such a breach by Proctor and Holliday as entitled plaintiff to sue, and instructed the jury accordingly, directing the answers to the issues, the amount of recovery, \$278.50, being agreed upon by the parties. Plaintiff Edwards appealed.

Harry McMullan, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., for appellees.

WALKER, J. (after stating the facts as above). When parties enter into a contract for the performance of some act in the future, they impliedly promise that in the meantime neither will do anything to the harm or prejudice of the other inconsistent with the contractual relation they have assumed. The promisee, it also has been said (and this seems to be the better reason), has an inchoate right to the performance of the bargain, which becomes complete when the time for such performance has arrived and, meanwhile he had a right to have the contract kept open as a subsisting and effective one, as its unimpaired and unimpeached efficacy may be essential to his interests. Clark on Contracts (1904) pp. 445, 447; Frost v. Knight, L. R. 7 Exch. 111. It has therefore been held (the Massachusetts court dissenting from this view in Daniels v. Newton, 114 Mass. 530, 19 Am. Rep. 384) that, if one party to the contract renounces it, the other may treat the renunciation as a breach and sue for his damages at once, provided the renunciation covers the entire performance to which the contract binds the promisor. 9 Cyc. 635, 636, and notes. The authorities do not seem to be fully agreed as to the precise ground upon which the principle should rest, although it is almost universally

considered, and held, that it does exist. We need not stop to inquire as to the exact reason for the principle, but may well content ourselves with a general statement of it. A full discussion of it will be found in 9 Cyc. 635 et seq., and notes to the text; 6 Ruling Case Law, § 385, and in the cases hereinafter cited. It is said in Ruling Case Law, *supra* (omitting immaterial matter):

"When the promisee adopts the latter course, treating the contract as broken, and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. * * * His rights acquired under it may be dealt with in various ways for his benefit and advantage. Of all such advantages the repudiation of the contract by the other party, and the announcement that it will never be fulfilled, must of course deprive him. It is therefore quite right to hold that such an announcement amounts to a violation of the contract in omnibus, and that upon it the promisee, if so minded, may at once treat it as a breach of the entire contract and bring his action accordingly. * * * In order to justify the adverse party in treating the renunciation as a breach, the refusal to perform must be of the whole contract or of a covenant going to the whole consideration, and must be distinct, unequivocal, and absolute, although the renunciation need not necessarily be made at the place of performance named in the contract. It may be observed, however, that the renunciation itself does not ipso facto constitute a breach. It is not a breach of the contract unless it is treated as such by the adverse party. Upon such a repudiation of an executory agreement by one party the other may make his choice between the two courses open to him, but can neither confuse them nor take both."

We have not considered the measure of damages, as if there were a cause of action, for the reason that there was a nonsuit below, and it is therefore not relevant to the discussion. The law is well settled that the renunciation must be a positive, distinct, unequivocal, and absolute refusal to perform the contract in order to justify a suit at once for a breach and a recovery of damages therefor. 9 Cyc. p. 637; *Smoot's Case*, 82 U. S. (15 Wall.) 36, 48, 21 L. Ed. 107; *Hosmer v. Wilson*, 7 Mich. 294, 74 Am. Dec. 716; *Vittum v. Estey*, 67 Vt. 158, 31 Atl. 144; *Zuck v. McClure*, 98 Pa. 541. It is said in *Vittum v. Estey*, *supra*:

"As to a breach by renunciation, it is settled law in England and in many jurisdictions here that, when one party to a bilateral contract, before the time of performance on his part has arrived, repudiates the entire contract, or a part of it that goes to the whole consideration, and declares that he will no longer be bound by it, the other party may, if he pleases, act upon the declaration and treat the contract as thereby broken and at an end for all purposes except for bringing a suit upon it, which he may bring at once without waiting for the time of performance. Or, to put it as Lord Blackburn does in *Mersey Steel & Iron Co. v. Naylor, Benson & Co.*, 9 App. Cas. 434, 442, the other party may say: 'You have given me distinct notice that you will not perform the contract. I will not wait till you have broken it, but will treat you as having put an end to it, and if necessary will sue you for damages; but, at all events, I will not go on with the contract.' But declarations that do not amount to an absolute and unequivocal refusal to perform the contract cannot be treated as a re-

nunciation of it"—citing *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; and *Johnston v. Milling*, L. R. 16 Q. B. D. 460.

If we examine the proof in this case, no positive and absolute renunciation appears which gave the plaintiff a right to sue upon the contract for damages, as for a present breach of it. Holliday, it is true, had ordered the plaintiff Edwards to stop the mill after he had sawed the logs on hand or already cut. If the evidence had stopped here, the case might have been quite different from what we hold it is. But that is not all of it. Edwards refused positively to obey the order, or to consider it as a renunciation of the contract and a breach thereof. He insisted that the order must come from both of the parties, Holliday and Proctor, and that the former should send Proctor to see him, which was assented to and done. When Proctor came, he also told Edwards "to shut down," but this Edwards declined to do until he was paid for what he already done. Proctor then told him "to go on and cut the timber," and then added, as he walked away, "Shut down for a few days and I will come back and let you know." This left the matter open for an agreement as to what should be done, a few days being allowed for reflection, but never afterwards was there any positive, unequivocal, or unqualified order to quit. If Edwards wanted the matter settled by a distinct understanding as to what he should do, "go on or stop" it was easy for him to have inquired of the defendants and got an answer about which there could be no doubt or uncertainty. Instead of pursuing this course, being, as suggested, "behind with the defendants," he preferred to end the contract and sue for damages upon the theory that there had been a breach. He acted prematurely and inconsiderately in supposing that the time had arrived for him to proceed by suit to vindicate his supposed rights. The declarations of Proctor were not stronger or more unequivocal than those of defendant in *Dingley v. Oler*, 117 U. S. 490, 6 Sup. Ct. 850, 29 L. Ed. 984; a case much cited on this question and where the language was:

"We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein."

This was written in reply to a peremptory demand from plaintiff for a delivery of ice immediately, under a contract for the same. The defendant had promised to deliver later, if the price changed, and expressed the hope that a more favorable view would be taken upon reflection. The court said as to these facts:

"This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to [insist] that their expressions, sought to be converted into a renuncia-

tion of the contract, shall not be enlarged by constructions beyond their strict meaning."

The court also said that the implied request by the defendant in that case for further consideration, based upon the peremptory demand by the defendant, left the matter open. And so we think in this case, that when Proctor had said, "You may go on and cut," or used words to that effect, and there was no further order to shut down permanently, there was no such positive, absolute, and unequivocal renunciation of the contract and refusal to be further bound by it as constituted a breach entitling plaintiff Edwards to sue for his damages at once, and the matter was at that time left open for future agreement. The giving of an option for the sale of the lands to another which, so far as appears, was not accepted, and never passed any title to the land, did not constitute such a breach upon the facts of this case. It seems to be conceded that a sale under it was never consummated. There is, at least, no evidence that it was. There may be: First, a sale of lands; second, an agreement to sell land; and, third, what is popularly called an option. The first is the actual transfer of title from grantor to grantee, by an appropriate instrument of conveyance. The second is a contract to be performed in the future, and, if fulfilled, results in a sale. It is a preliminary to a sale, and is not the sale. Breaches, rescission, or release may occur by which the contemplated sale never takes place. The third, an option, originally is neither a sale nor an agreement to sell. It is simply a contract by which the owner of property (real estate being the species we are now discussing) agrees with another person that he shall have the right to buy his property, at a fixed price, within a time certain. He does not sell his land; he does not agree to sell it. He only transfers the right, or privilege, to buy at the election of the other party. The second party gets no land in present, nor an agreement that he shall have land, but merely the right to call for and receive land if he elects to do so. An option is unilateral, depending upon the will or choice of one of the parties for its conversion into a sale or even an agreement to sell. *Winders v. Kenan*, 161 N. C. 628, 77 S. E. 687. The cases relied on by plaintiff do not apply. The decisions in them were based upon different facts.

The plaintiff might have enjoyed the full benefit of his contract, if he had not stopped cutting the timber when he did. He had been overpaid for what he had done, and he risked nothing in suspending a few days. The jury found, without any serious contest between the parties as to the amount, that defendant owed a balance of \$278.50. The case shows that he had been advanced the sum of \$974.50, and from this was deducted "\$600 for the contract price of cutting 100,-

000 feet of timber, \$25 for building a house on premises, \$51 for cutting out a right of way, and \$20 for piling timber, leaving balance of \$278.50," the amount allowed by the jury under the instructions of the court. It seems, therefore, that plaintiff was engaged in a losing business, but if there was a prospect of its being profitable, he should not have thrown up the contract, but gone in with it to the end and reaped the profit. So far as we can see from the facts as they now appear, he would not have been interrupted in his work.

We think the case was correctly submitted to the jury.

No error.

(173 N. C. 33)

ANGE v. SOVEREIGN CAMP OF WOODMEN OF THE WORLD. (No. 14.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. INSURANCE ⚡697—FRATERNAL ORDERS—TORTS—ACTIONS—JURY QUESTION.

In an action against a fraternal insurer for injuries received in initiation into a subordinate lodge, the member being injured by a shock of electricity, which was administered to him as part of the proceedings, the question of defendant's liability held for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1838.]

2. INSURANCE ⚡697—FRATERNAL ORDERS—TORTS—LIABILITY.

A corporation may be held liable for negligent and malicious torts committed by its employees and agents, in the due course of their employment and within its scope, and hence a fraternal insurer is liable for negligent wrong committed by a subordinate lodge in initiating a member, where such wrong was within the scope of the subordinate lodge's authority.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1838.]

3. EVIDENCE ⚡93—ADMISSIBILITY—MATTERS PECULIARLY WITHIN PARTY'S KNOWLEDGE.

In an action against a fraternal insurer for injuries inflicted by subordinate lodge in initiating a member, the duty of showing want of authority of the subordinate lodge, etc., is upon the insurer; the matter being peculiarly within its knowledge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 115.]

4. ACTION ⚡12—CRIMINAL LAW ⚡31—DEFENSE.

No consent will bar a prosecution or prevent a civil action for acts causing damage which involve a breach of the criminal law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 35, 36, 50.]

Appeal from Superior Court, Washington County; Whedbee, Judge.

Action by Jesse Ange against the Sovereign Camp of the Woodmen of the World. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

See, also, 171 N. C. 40, 87 S. E. 955.

W. M. Bond, Jr., of Denver, Colo., for appellant. G. V. Cowper, R. H. Lewis, Jr., and R. A. Whitaker, Jr., all of Kinston, for appellee.

HOKE, J. [1] From the testimony introduced by plaintiff and the admissions in the pleadings, it appeared or there were facts in evidence tending to show that the defendant, the Sovereign Camp of the Woodmen of the World, was a corporation duly organized and doing an insurance business on the fraternal plan as a principal or controlling feature, and that the Jamesville lodge was a branch or subordinate lodge of defendant through which, with others of like kind, individuals were admitted as members of defendant lodge under an initiation or ceremony as prescribed by a ritual, prescribed and issued by the defendant, the sovereign lodge, to its subordinates or branches; that, on the — day of June, 1915, plaintiff, having applied for admission as member in defendant lodge, was being initiated by the local lodge at Jamesville and, as a part of the ceremony then exercised, plaintiff was blindfolded and carried into a room, was placed on a machine similar to a pair of platform scales, and told to pull a certain lever which would register his strength, as this was required by the lodge and by the defendant, the Sovereign Camp; that plaintiff thereupon pulled the lever as directed and immediately received a severe shock of electricity which threw him out on the floor and caused him serious and painful injuries; "that plaintiff was then carried to his room, was confined to his bed for some time, had several fits, has suffered serious and permanent injuries, and has since been unable to work. It was further shown that another individual had been admitted as member of defendant lodge a short time before the night in question, and that he too was placed on said machine and received an electric shock similar to that described by plaintiff.

A number of witnesses testified to the good health of plaintiff prior to his initiation, and that, since then, he has been under the care and attention of various doctors; that he had had fits and been unable to perform his work, etc. Upon this the evidence chiefly relevant to the issue as the case is now presented, we are of opinion that plaintiff's exception to his honor's judgment of nonsuit must be sustained.

[2] It is now fully established that corporations may be held liable for negligent and malicious torts, and that responsibility will be imputed whenever such wrongs are committed by their employes and agents, in the course of their employment and within its scope. *Moore v. Railroad*, 165 N. C. 439, 81 S. E. 603, 51 L. R. A. (N. S.) 866; *Huffman v. Railroad*, 163 N. C. 171, 79 S. E. 307; *Seward v. Railroad*, 159 N. C. 241, 75 S. E. 34; *Marlowe v. Bland*, 154 N. C. 140, 69 S. E. 752, 47 L. R. A. (N. S.) 1116; *Sawyer v.*

Railroad, 142 N. C. 1, 54 S. E. 793, 115 Am. St. Rep. 716, 9 Ann. Cas. 440; *Jackson v. Telegraph Co.*, 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Daniel v. Railroad*, 136 N. C. 517, 48 S. E. 816, 67 L. R. A. 455, 1 Ann. Cas. 718; *Denver, etc., R. R. v. Harris*, 122 U. S. 601, 7 Sup. Ct. 1286, 30 L. Ed. 1146; *Levi v. Brooks et al.*, 121 Mass. 501.

In many of the cases and in reliable text-books, the term "course of employment" is stated and considered as sufficiently inclusive, but whether one or the other descriptive term is used they have the same significance in importing liability on the part of the principal when the agent is engaged in the work that his principal has employed or directed him to do, and the conduct of the agent complained of occurs in the effort or endeavor to accomplish it. When such conduct comes within the description and constitutes an actionable wrong, the corporation principal, as in other cases of principal and agent, is liable not only for "the act itself, but for the ways and means employed in the performance thereof."

In *Reinhardt on Agency*, § 335, the position and the reason for it is very well stated as follows:

"If a legal wrong is committed by an accountable being, the party injured may obtain redress therefor in damages. If the wrong was committed by his authorized agent, or servant, the result is the same. By 'authorized agent' it is not meant to imply that the wrongful act itself must be authorized by the principal or master, or that any presumption of that nature must be indulged before the principal can be held responsible; it is sufficient if the agent was authorized to perform the act in the performance of which the wrong was committed, for the principal is responsible, not only for the act itself, but for the ways and means employed in the performance thereof. The principal may be perfectly innocent of any actual wrong or of any complicity therein, but this will not excuse him, for the party who was injured by the wrongful act is also innocent; and the doctrine is that where one of two or more innocent parties must suffer loss by the wrongful act of another, it is more reasonable and just that he should suffer it who has placed the real wrongdoer in a position which enabled him to commit the wrongful act, rather than the one who had nothing whatever to do with setting in motion the cause of such act. 'In such cases,' says Story, 'the rule applies (respondeat superior), and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him, through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency.'"

And again, in the same work, section 336, the author says:

"Of course, if the master or principal authorized or ratified the tort, or participated in it himself, he will be liable for the damages occasioned by it. But if he did not authorize or ratify it he will still be liable if it was done in the course of the agent's or servant's employment, and this is so even if the master or principal had actually forbidden the act to be done. The test is, whether the tort was committed in the

course of the employment of the servant or agent; if the wrongful act complained of was outside of the course of such employment, the master or principal is not liable, unless it was subsequently ratified."

It will thus be noted that if the wrong complained of is committed within the course of the agent's employment and within its scope, the principal may be held liable, though it went beyond his express direction and even contrary thereto.

Applying these recognized principles to the facts in evidence, as they now appear, it is the fairly permissible inference that this plaintiff, while being admitted to membership in the defendant, the sovereign lodge, through an initiation carried on by a local lodge as its agent and for which the defendant had prescribed a ritual, has received serious, if not permanent, injuries by reason of a violent electric shock, used as and purporting to be a part of the ceremonial. And if these facts are accepted by the jury, and they further find that injuries of that character were received as the proximate result of the agent's conduct in conducting the initiation to membership, the defendant would be properly held liable as for a negligent wrong, and must respond in damages to the sufferer. According to our interpretation of the present record, the position is in accord with the authorities heretofore cited, and is fully supported by well-considered cases bearing more directly on the question. *Thompson v. Supreme Tent, etc.*, 189 N. Y. 294, 82 N. E. 141, 13 L. R. A. (N. S.) 314, 121 Am. St. Rep. 879, 12 Ann. Cas. 552; *Mitchell v. Leech*, 69 S. C. 419, 48 S. E. 290, 66 L. R. A. 723, 104 Am. St. Rep. 811; *Kinver v. Phoenix Lodge*, 7 Ont. 377; *Grand Temple and Tabernacle of Knights of Tabor v. Johnston* (Tex. Civ. App.) 171 S. W. 490. This last case seems to have been carried, by writ of error, to Supreme Court of the United States, and we do not find that the same has, as yet, been reported or acted on, but the general principles, as stated, in the opinions of the state courts, are in accord with the other cases we have cited on the subject. Neither the ritual nor constitution or by-laws of defendant or of the local lodge, if any such exist, were offered in evidence by either party on the trial, and it does not appear whether plaintiff had access to them or not. The case has been disposed of on the general evidence as to the authority and conduct of the local lodge as set out in the preliminary statement.

[3] Whether in the further development of the cause, there may be facts available tending to show that the local lodge is not the agent of the defendant in the matter of admission to membership in the defendant, the sovereign lodge; whether, in the ritual prescribed by defendant, the authority of the local lodge is so regulated and controlled that the act of initiation could in no sense be held as coming within the course of the

agency of the local lodge and whether, in the ultimate issue, the plaintiff may be held to have knowingly consented to the ceremony as carried out and how far this may affect his right to recover, these are matters that may be relevant on the question of the company's defense, and some of them, being more particularly within defendant's knowledge, the proof or the offering of it would more properly come from the company. *Harper Furniture Co. v. Express Co.*, 144 N. C. 639, 57 S. E. 458, 12 Ann. Cas. 924; *Meredith v. Railroad*, 137 N. C. 478, 50 S. E. 1; *Mitchell v. Railroad*, 124 N. C. 236, 32 S. E. 671, 44 L. R. A. 515; *Lawson on Presumptive Evidence*, rule 5.

[4] And, in reference to the effect of plaintiff's consent, if there was any knowingly given, it may be well to note the decisions in this jurisdiction to the effect that no consent will bar a prosecution nor prevent a civil recovery for acts causing damage which involve a breach of the criminal law. *State v. Williams*, 75 N. C. 134; *Beil v. Hansley*, 48 N. C. 131.

Defendant cited and greatly relied upon the case of *Jumper v. Sov. Camp Woodmen of the World*, reported in 127 Fed. 635, 62 C. C. A. 361, as in contravention of our present disposition of the cause. In that case the court, in its opinion, refers to a ritual offered in evidence and tending to show that the injuries received were entirely outside of any part of the ceremony, as therein contained, and, further, to a position, as supported by the testimony or contended for by defendant, to the effect that the particular act causing the injury was not a part of the ceremony of initiation at all, but occurred after and when the claimant had become a member of the local lodge. Neither the ritual nor any provision of the same nor any evidence of the kind suggested was offered on the present trial, and we do not consider it permissible, assuredly it is not desirable to indicate, by anticipation, what effect such restrictive evidence, if it existed, might have on the plaintiff's right of action. Apart from this, the case relied on, in its general aspects, does not seem to be in accord with the principles of imputed responsibility for the torts of an agent, as it prevails in this jurisdiction.

On the record as it now stands, we must hold and direct that the judgment of nonsuit be set aside, and the cause, on proper issues, be referred to the decisions of the jury.

Reversed.

(178 N. C. 49)

MERCER v. FRANK HITCH LUMBER CO.
(No. 60.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. APPEAL AND ERROR \S 1032(2)—PREJUDICIAL ERROR—BURDEN TO SHOW PREJUDICE.

Where the record does not show the contents of a memoranda made by a deceased clerk to the exclusion of which defendant excepted,

so that it does not appear whether the memoranda would have any practical significance on the issue, the exception must be overruled, since the burden is on defendant to show prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4048, 4049.]

2. EVIDENCE \Leftrightarrow 355(7)—WRITTEN MEMORANDUM—DECEASED ENTRANT—FOUNDATION.

Written memoranda, made by a third person in the regular course of business, when relevant, are admissible, after it is shown that the entrant is dead or unavailable as a witness, and that the entries were made in the line of some duty or custom in the course of his business, that they are contemporaneous with the act to be proved, and that the entrant had knowledge of the facts contained therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1491.]

3. EVIDENCE \Leftrightarrow 355(7)—WRITTEN MEMORANDUM—KNOWLEDGE OF ENTRANT.

Memoranda made by a deceased clerk of measurements of timber made on delivery of the timber at defendant's mill are inadmissible to show the amount of timber cut from plaintiff's land, since the entrant could have no personal knowledge of where the timber had been cut.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1491.]

4. COMPROMISE AND SETTLEMENT \Leftrightarrow 5(2)—DISPUTED ACCOUNT—PAYMENT IN FULL SETTLEMENT.

When a party makes a payment, purporting to be in full settlement of a disputed claim, the acceptance of the payment by the other party with knowledge is an adjustment of the claim, which precludes further action thereon.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 12, 13.]

5. COMPROMISE AND SETTLEMENT \Leftrightarrow 24—DISPUTED ACCOUNT—QUESTION FOR JURY.

Unless the intention of the parties in making and accepting a payment on a disputed account is so clear that there could be no disagreement among men of fair minds as to whether it was in full settlement, the question of intention must be decided by the jury.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 95.]

6. COMPROMISE AND SETTLEMENT \Leftrightarrow 24—DISPUTED ACCOUNT—EVIDENCE.

Where the evidence showed that defendant had presented plaintiff with a statement of the amount he owed for timber cut on plaintiff's land and had tendered a check for the amount thereby shown to be due which plaintiff refused to accept, claiming it to be too small, and that a year thereafter defendant sent the same check to plaintiff, along with other checks for timber cut on other tracts, without stating on the face of the check that it was intended to be in full settlement of the disputed account, the court could not instruct the jury that the acceptance of that check by plaintiff was in law a settlement of the account, but plaintiff's intention in receiving and cashing the check was a question of fact for the jury.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. § 95.]

Appeal from Superior Court, Edgecombe County; Allen, Judge.

Action by W. P. Mercer against the Frank Hitch Lumber Company. Judgment for the plaintiff, and defendant appeals. No error.

The action was to recover a balance claimed to be due on a sale of timber, and which defendant contended had been fully paid for.

On the trial, there was evidence on the part of plaintiff tending to show, among other things, that, in May, 1909, he sold to defendant the timber to be cut from a tract of land in said county, containing 75 to 100 acres; that the timber in question was very large, long straw pine, and was to be paid for at \$3 per thousand, and the amount of timber had been estimated by witness at 500,000 feet; that the timber was cut and hauled off the land by defendant, and thereafter defendant sent plaintiff a statement, showing the amount at 212,500 feet; that plaintiff knew that there was a mistake, and had same carefully measured on the stump, getting the number of cuts to the log plainly marked by sawdust as each stock was sawed, and the amount was 430,000 feet, and, for the difference, plaintiff had never been paid. The persons employed by plaintiff to take these measurements testified as to the amount and to the care with which same had been ascertained. A witness by the name of Dupree, whom defendant alleged they had employed to measure the timber as it was taken off the ground, stated that this was not done as to all the timber cut; that he knew of 2½ trains of 40 cars each, 1,800 to 2,000 feet per car; that he had supposed another man was measuring it, but, after that time, he measured the timber and sent statements to each of the parties. It appeared also that plaintiff had sold defendant timber off of several other tracts of land in the county, about which there seems to have been no dispute, the issue between them being as to this tract of 100 acres adjoining H. T. Hinton et al. A witness, Frank Hitch, testifying for defendant company, said, among other things: That he did not have personal knowledge of the timber or the measurements. That the company had employed a man named Dupree to measure the timber as it was sent to the Atlantic Coast Line Railway station, and they had also the record of measurements of the timber at the defendant's mill, where it was unloaded by the railroad company. These were made by a man named Howard, who was dead at the time of the trial. That the books showed the amount of timber in dispute to be 212,558 feet at \$3 per thousand. The witness further testified that he had a statement made out by his bookkeeper, showing the account between plaintiff and the company, covering different transactions from 1904 down to and including this deal, and showing a balance due from defendant company on account of \$35.75; that part of this statement had been furnished by the witness, Dupree; that, in February, 1910, when plaintiff was in Norfolk, witness had showed him the statement, putting the amount from this disputed item at 212,558 feet and plaintiff objected to the amount as insufficient, and witness then offered him a check for the balance, as shown, which he declined to

take; that witness took the check back to the office and put it in the safe and a year or so after, when they had some transaction, about timber in another section of the county and in settling, the witness inclosed him this check, and called attention to it as being the check made out to him last year. This came back through the bank as paid. The statement of account did not accompany this check when it was sent, and was just the check for the amount of \$35.75. The plaintiff in his testimony denied that any such account was ever shown him, or that any claim was made that the \$35.75 was, or purported to be, any settlement for an alleged balance; that witness received the check in the mail with some other checks for timber, but no statement of what it was for and no attention was called to it; that witness supposed it was a check payable on account, and so indorsed it; that he had sold defendant several other tracts of timber after the timber in dispute was cut; that witness, in indorsing the check, did not intend or agree to take same in full. On this the evidence chiefly relevant offered by the parties, the cause was submitted to the jury, who rendered a verdict for plaintiff. Judgment on the verdict, and defendant appealed, assigning errors.

John L. Bridgers, of Tarboro, for appellant. F. S. Spruill, of Rocky Mount, and W. O. Howard, of Tarboro, for appellee.

HOKE, J. [1] Objection is made to the validity of the trial for that the court excluded the written memoranda of Howard, deceased, purporting to be a measurement of logs hauled from the land in controversy and left at defendant's mill by the Railroad Company, the memoranda described and referred to by the witness, Frank Hitch. It does not clearly appear from the record the exact amount of timber that these memoranda would have disclosed, but, in any event, we think they were properly excluded. If they included the same or a less quantity than defendant's books showed, they were without practical significance on the issue, for plaintiff admitted that such amount had been fully accounted for and he had deducted it from his claim. On that ground, the objection should be overruled, for the burden is on the defendant to establish reversible error. But if it be assumed that the memoranda, as made by Howard, would show an amount greater than that as contained in defendant's statement, but less than plaintiff claimed, we think his honor made correct ruling concerning them.

[2] It is well understood that written entries or memoranda, shown to have been made by a third person in the regular course of business, when otherwise relevant, may be admitted in evidence on the trial of an issue and as substantive testimony, but in order to their proper reception in this ju-

risdiction, and unless in strictness a part of the *res gestæ*, it must be made to appear that the person making them, sometimes styled the entrant, is dead at the time of trial or unavailable as a witness; that the entries were made in the line of some duty or custom pursued in the course of entrant's business; that they are cotemporaneous with the act to be proved; and that the entrant had knowledge of the relevant facts which they purport to contain. *Ray v. Castle*, 79 N. C. 580; *Chaffee v. U. S.*, 85 U. S. 516, 21 L. Ed. 908; *N. J. Zinc Co. v. Lehigh Zinc Co.*, 59 N. J. Law, 189, 35 Atl. 915; *Jones on Evidence* (2d Ed.) p. 401, § 319 (original section 323); 4 *Chamberlayne*, *Modern Law of Evidence*, §§ 2884, 2885, 2895, et seq. Applying the principles, it does not sufficiently appear at what time these memoranda were made by Howard, nor does it at all appear that he had any knowledge of the facts which alone would give his act of measurement significance, to wit, that the logs be measured with those that came off the tract of land in controversy, nor does it appear that this was otherwise established.

[3] The witness Hitch testifies that he himself had no personal knowledge of the relevant facts, but "naturally supposed" that the amount as given in and shown by his books was correct. On the record and accompanying facts as they now appear, all that Howard's entries could possibly show was that, at some time, not stated, he measured a certain lot of logs delivered by the railroad at defendant's mill, and which some one had reported to him had come from a tract of land of plaintiff. Unless this was satisfactorily established, the pile of logs measured by Howard was not a relevant fact. On the question, therefore, really in dispute between these parties, to wit, whether the amount of timber which defendant company had cut and removed from this particular tract of land of 75 acres exceeded the amount as shown on defendant's books, the memoranda would have afforded no aid to the jury, and were properly excluded. In this aspect of the matter, the case is not unlike one of the authorities just cited of *Chaffee v. U. S.* That was an action against distillers for selling whisky on which no tax had been paid, and which was supposed to have been shipped from their distillery along the Miami Canal in Ohio, and as evidence tending to show that the defendants had shipped whisky in excess of the quantity they had paid taxes on, the government offered the books of the collector of tolls on the canal, and entered therein in the handwriting of deceased clerks, purporting to have been made from the reports of captains of boats as to their cargo, etc. In holding that the admission of these entries constituted reversible error, Field, Judge, in reference to them, said:

"They were not competent evidence as declarations of the collectors, for the collectors had

no personal knowledge of the matters stated; they derived all their information either from the bills of lading or verbal statements of the captains. Nor were the books competent evidence as declarations of the captains, because it does not appear that the bills of lading were prepared by them, or that they had personal knowledge of their correctness, or that their verbal statements, when the bills of lading were not produced, were founded upon personal knowledge; and besides, many of the certificates were admitted without calling the captains who signed them, and without proof of their death or inaccessibility."

It was objected, further, that, on the facts in evidence, the court refused the defendant's prayer for instructions, in terms as follows:

"If you find from the evidence the fact to be that the defendant prepared a statement of all the business between the defendant and the plaintiff, showing the balance of \$35.75 by the defendant to the plaintiff, and offered payment of the amount of balance; that plaintiff excepted to the statement, and stated to the defendant that it was not enough; that some time afterwards the plaintiff accepted and cashed a check for the balance due as shown in said statement; then the court instructs that the payment to and acceptance by the plaintiff was in law a settlement, and you will answer the issue as to indebtedness, 'No.'"

[4] It is the well-recognized principle here and elsewhere that, when a dispute exists between two parties as to the amount of an account and one sends another a check or makes a payment clearly purporting to be in full settlement of the claim and the other knowingly accepts it, this will amount to an adjustment, and further action thereon is precluded.

[5] It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury. *Rosser v. Bynum*, 168 N. C. 342, 84 S. E. 393; *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243; *Armstrong v. Lonon*, 149 N. C. 435, 63 S. E. 101; *Kerr v. Sanders*, 122 N. C. 635, 29 S. E. 943. In *Rosser's Case*, supra, the position, as it prevails in this jurisdiction, is stated as follows:

"It is well recognized that when, in case of a disputed account between parties, a check is given and received, clearly purporting to be in full, or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. The position is very well stated in *Aydlett v. Brown*, 153 N. C. 334 [69 S. E. 243] as follows: 'That when a creditor receives and collects a check sent by his debtor on condition that it shall be in full for a disputed account, he may not thereafter repudiate the conditions annexed to the acceptance'—and is upheld and approved in numerous decisions of the court" (citing authorities).

And further:

"A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction; and, unless the language and

the effect of it is clear and explicit, it is usually a question of intent, to be determined by the jury."

[6] Under the principle so stated, the judge could not have given the instruction as prayed for, which amounts to direction that the receipt of the check, under the conditions suggested, as a matter of law, would conclude the plaintiff. The statement, showing that it was a balance due, did not accompany the check when sent. It was remitted a "year or so after the statement had been exhibited." There was nothing on the face of the check to show it was intended to be in full, and, according to defendant's own version of the matter, it was sent in a batch, or with several other checks, making payments for timber, arising from transactions entirely distinct. Plaintiff denies that any such statement ever was exhibited, showing the check was for a balance due and including an account for the timber in controversy, but, taking defendant's own version of it to be true, or such parts of it as appear in the prayer, the intent with which plaintiff received and cashed the check for \$35.75 was a question of fact, and properly referred by his honor to the jury.

We find no error in the record, and the judgment for plaintiff is affirmed.

No error.

(173 N. C. 97)

HUX v. REFLECTOR CO. (No. 176.)

(Supreme Court of North Carolina. March 7, 1917.)

1. EVIDENCE §471(3)—OPINION OR STATEMENT OF FACT.

Where plaintiff employé qualified as an expert, his testimony that the machine which injured him was unguarded, out of date, and about 40 years old was competent as a statement of fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2151, 2164.]

2. EVIDENCE §513(1)—EXPERT TESTIMONY—CUSTOMARY APPLIANCES.

An expert witness' testimony that the machine which injured plaintiff employé was not in general use, and was unguarded when he had worked for defendant is competent, especially in view of witness' special knowledge of the machine in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318.]

3. MASTER AND SERVANT §286(22) — JURY QUESTION—UNGUARDED MACHINERY.

Testimony that plaintiff employé, aged 17 years, lost his hand while removing paper lodged between the unguarded cogs of an out of date machine, with no prompt means of stopping it, made defendant's negligence a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1028.]

4. TRIAL §296(6)—ASSUMPTION OF RISK—SUFFICIENCY OF PRESENTATION OF ISSUE.

Failure to specifically submit the issue of assumption of risk is not erroneous, where the jury was instructed that plaintiff employé's contributory negligence barred recovery if the situation was apparently dangerous, and a rea-

sonably prudent man would not have attempted to place his hand in the unguarded machine.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 700.]

5. MASTER AND SERVANT *§* 203(1)—“ASSUMPTION OF RISK”—NATURE.

“Assumption of risk” is the employee’s assumption of the risks of an employment properly managed and with machinery in good condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-540, 542, 543.

For other definitions, see Words and Phrases, First and Second Series, Assumption of Risk.]

Appeal from Superior Court, Pitt County; Lyon, Judge.

Action by H. M. Hux, by his next friend, against the Reflector Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Harry Skinner and L. G. Cooper, both of Greenville, for appellant. Julius Brown, of Greenville and H. S. Ward, of Washington, N. C., for appellee.

CLARK, C. J. This is an action for personal injuries in the cutting off of the plaintiff’s right hand. The plaintiff was operating a job press for the defendant company. There was evidence that there were two presses working side by side, but that the plaintiff, a boy of 17, was in charge of both, and the one at which he was not immediately working became clogged, whereupon the plaintiff, under his duty of supervision, attempted to unclog it, but by reason of the cogwheels not being shielded, or boxed, his hand was caught between the two cogwheels, and, there being no lever by pulling which the gearing could be thrown out, or the machine stopped, he lost his hand.

[1] The first exception was to a question asked the plaintiff:

“State in your opinion if the press at which you were hurt was such a press as was adopted and in general use at that time.”

There was no exception to the answer, or motion to strike out, but plaintiff answered:

“No, sir. It was out of date and not equipped; it was old and worn, and was a machine about 40 years old. It was not equipped with lever, and there was no shield to cover the cogs; the machine was made in 1870 or something.”

This was competent as a statement of fact.

[2] The second exception is to the question asked another witness:

“If the jury should find from the evidence that, in the machine at which Mr. Hux was working and in which he was injured, the cogwheels were not shielded or boxed and had no lever for throwing the machine out of gear, or throwing the belt off of the shaft, in your opinion was that such a machine as was adopted and in general use at that time?”

There was no objection to the answer, or motion to strike out, and the witness answered:

“No, sir; not in general use at that time so far as my observation goes. The cogs in this machine were not boxed or shielded, when I left

there; I was not there when it happened. I was there before, but I was not working on the press.”

These witnesses had qualified as experts, and this evidence was competent. *Cotton Mills v. Assurance Corporation*, 161 N. C. 562, 77 S. E. 682; *Morrisett v. Cotton Mills*, 151 N. C. 31, 65 S. E. 514. Besides this evidence was further competent on account of the special knowledge the witness had of this piece of machinery. *Morrisett v. Cotton Mills*, supra; *Wilkinson v. Dunbar*, 149 N. C. 20, 62 S. E. 748; *Britt v. Railroad*, 148 N. C. 41, 61 S. E. 601; *Ives v. Lumber Co.*, 147 N. C. 306, 61 S. E. 70.

[3] The plaintiff testified that he was in charge of these two job presses, and was 17 years of age at the time of the injury. He was running one of the presses, and noticed that the other did not have a sufficient amount of ink. He inked it, and as he turned to leave he heard a noise in the press, a jumping sound, and found some paper lodged in the cogs. He took out about 5 inches of paper and reached over to pull out more, and as he did the arm of the press caught him, and shoved his arm into the press. He had no lever to stop it. The movement of the arm of the press which rolled the cogs shoved his hand between them and held it fast. These cogs were not shielded, or covered in any way, and the machine did not have a safety lever, or any lever, for throwing it out of gear or stopping it. If it had, he could have stopped it, and gotten the paper out, without injuring his hand. He added that the only method of stopping the machine was to get something to throw the belt off the shaft at the ceiling or to go to the other end of the house to cut the motor off. He further testified that the press was out of date, as did three other witnesses.

Upon the above synopsis of the evidence the judge properly refused to nonsuit the case. The machine at which the plaintiff was injured was 35 or 40 years old; the cogs were exposed and not boxed in any way; there was no safety lever or any other kind of lever to stop the machine. The machine was more dangerous than new machines, and it was not in general use. The plaintiff was doing his duty at the time he was injured, and the defendant’s general manager and floor boss both knew the defective condition of the machine and had seen it at work. The case was properly submitted to the jury. *Ainsley v. Lumber Co.*, 165 N. C. 122, 81 S. E. 4; *Steely v. Lumber Co.*, 165 N. C. 27, 90 S. E. 963; *Kiger v. Scales Co.*, 162 N. C. 133, 78 S. E. 76. In *Crech v. Cotton Mills*, 135 N. C. 680, 47 S. E. 671, where the plaintiff was operating four looms she went to get the necessary filling in a box in a passageway in front of certain unboxed cogwheels, and in bending down her clothing was caught in the cogwheels and she was injured. This

court sustained the refusal to nonsuit. In *Sibbert v. Cotton Mills*, 145 N. C. 308, 59 S. E. 79, the plaintiff was injured by unboxed cogwheels, and the safety lever was out of fix, and the court in setting aside the nonsuit held that it was the duty of the defendant to use reasonable care by proper construction and frequent inspection to keep the safety levers, which it had, in good condition, and it was liable if the plaintiff was injured by its failure to do so. In the *Oreesh Case*, supra, there were unboxed cogs, and in the *Sibbert Case*, supra, the safety lever was out of fix, and the court held that both these cases should have gone to the jury. In the present case there were both these defects. The plaintiff was injured by being caught in the cogwheels, which were not boxed, and the machine had no safety lever to throw the machine out of gear.

[4, 5] It was not error for the court to refuse to submit an issue as to assumption of risk, for the issue of contributory negligence was submitted, which was really the defense, for the plaintiff relied upon the defective machinery, and the court charged the jury:

"If you find by the greater weight of the evidence that a reasonably prudent man would not have attempted to take the paper from the cogwheels while the machine was in motion and you will find that the plaintiff did that, he would be guilty of contributory negligence and should not recover, and you will answer that issue, 'Yes'; or if you find that the situation there was apparently dangerous, and that a man of ordinary prudence would not have put his hand there to take out or put in paper, if the plaintiff did so, then you should find that the plaintiff was guilty of contributory negligence and should not recover."

This charge gave the defendant all which he is entitled to, whether it is called contributory negligence or assumption of risk. *Harvell v. Lumber Co.*, 154 N. C. 260, 70 S. E. 389. Assumption of risk is the assumption by the employé of the risks of the vocation or employment properly managed, and with machinery in good condition. But even if the defendant was entitled to have his plea of assumption of risk submitted to the jury, this was sufficiently done in the charge above quoted. *Golas v. Training School*, 169 N. C. 736, 86 S. E. 629; *Zollicoffer v. Zollicoffer*, 168 N. C. 328, 84 S. E. 349; *Hinton v. Hall*, 166 N. C. 477, 82 S. E. 847; *Irvin v. Railroad*, 164 N. C. 5, 80 S. E. 78; *Horton v. Railroad*, 162 N. C. 428, 78 S. E. 494; *Garrison v. Machine Co.*, 159 N. C. 285, 74 S. E. 821; *Roberts v. Baldwin*, 155 N. C. 276, 71 S. E. 319. There is no exception to the charge of the court.

It is passing strange that, in view of the repeated decisions of this court and the spirit of the age which demands care and humanity on the part of employers in protecting employes from avoidable injuries, cogwheels should still be unboxed or necessary safety levers omitted, to the infliction of

mutilation upon those who are earning their daily bread by the sweat of their brows.

We find no error.

(173 N. C. 62)

MILLER et al. v. JOHNSTON et al.
(No. 538.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. BOUNDARIES \S 40(1)—QUESTIONS FOR JURY—MONUMENTS—LOCATION.

The question what are the termini or boundaries of a grant or deed is matter of law, to be determined by the court, but the question where the termini are is a fact for the jury if the location is in dispute.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 196-203.]

2. BOUNDARIES \S 3(6)—CONTROL OF CALLS—CALL FOR A LINE.

A line called for in a description in a deed which is fixed and established is dealt with as a natural object and controls course and distance.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 24-29.]

3. BOUNDARIES \S 3(7)—CONTROL OF CALLS—DESCRIPTION.

Descriptive specifications in a deed, while useful when the location of a boundary is in doubt, cannot prevail against a known and controlling call.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. \S 30-33.]

4. DEEDS \S 114(3)—DESCRIPTION OF PROPERTY.

The addition of a further description in a deed will not be permitted to defeat a full and perfect description which fully identifies and ascertains the property conveyed or devised.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. \S 320, 321.]

5. WILLS \S 585(2)—CONSTRUCTION—ESTATES CREATED—BOUNDARIES—EVIDENCE.

Evidence gathered from the will and codicil held conclusive and satisfactory that it was not testator's intention to grant by a codicil the same lands formerly devised to his wife, so that claimants under such codicil could claim only to the line therein described, and not to the line described in the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 1275.]

6. WILLS \S 561(2)—CONSTRUCTION—PRESUMPTIONS.

The presumption that a testator intends to dispose of all his property cannot affect the construction of the devise of a part of the property to include another part, where there was still other property not specifically disposed of, but covered by a residuary clause.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 1222.]

7. WILLS \S 561(2)—CONSTRUCTION—ESTATES CREATED—BOUNDARIES.

A devise by a testator who owned eight lots in a row on a certain street which granted his tavern in which he lived, together with five half-acre lots, could not be construed to include the whole eight lots merely, because the tavern was within an inclosure on three lots, but the boundary was the farther line of the fifth lot.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 1222.]

The plaintiffs are children and grandchildren of Elizabeth A. Gudger, who died in 1912, and they claim under the will of James M. Smith, who acquired lots 38, 37, and 36 in 1816, and all of the other land covered by the plat, except lot No. 51, in 1840. James M. Smith made his will in 1850, and in addition to giving certain property to different children, he devised certain lands to his wife, Pollie, for life, and certain other lands to her absolutely. In 1854 he added a codicil to his will in which he recites that his wife had died, and he disposes of the property devised



to her, describing it as "the property in said will, real and personal, given to her for life and that property given to her absolutely." In 1856 he made changes in his will and added another codicil in which is the devise under which the plaintiffs claim, and as the plaintiffs contend that the devise to Elizabeth A. Gudger covers the same land as that devised to the wife, Pollie, as far as the land covered by the plat is concerned the two devises are given in parallel columns in order that the similarity and differences in description may be seen the better.

February 9, 1850.

1. I give and devise to my beloved wife Polly

2. the house and lots in which I now live in the town of Asheville

3. including the tavern and adjoining buildings, and outbuildings contiguous garden orchard, and adjoining lots

4. Beginning at Mr. Summey's line on the main street near my side's corner south of house

5. then with the main street a north course

6. (a) Crossing the hollow (b) to the line of the southern half-acre lot hereinafter devised to my daughters Ann Catherine Crook and Ruth W. Ripley

7. (a) Then with that line and (b) the line of the lot east of it an east course

8. to the new street running by Ephraim Clayton's,

9. and with that street a south course to the cross street

10. and with that and Mr. Summey's line to the beginning.

11. * * * for and during her natural life and no longer

February 8, 1856.

1. I give and devise to her the said Elizabeth A. Gudger

2. the house and lots in which I live

3. including the tavern and outbuildings contiguous on the east side of the main street

4. Beginning on the street and J. B. White-main street near my side's corner south of the tavern house,

5. and running with the main street including the five front half-acre lots

6. Passing below the fence north of the well

7. (a) and running with the lower or north line of the lower or fifth lot eastward by the east corner thereof (b) and the same course

8. to the street near Ephraim Clayton's

9. and south with that street to the corner near Z. B. Vance's office,

10. then with the cross street and the south line of my lot to the beginning including the orchard

11. * * * for and during her natural life with remainder to such children as she may leave her surviving and those representing the interests any that may die leaving children

There was also a residuary clause in the will of the said Smith which is as follows:

"All the rest and residue of my estate real, personal and mixed I direct to be sold by my executors at public or private sale as they may deem best. * * *

"The property real and personal herein left to my wife for life is intended to be embraced in the direction on this page, to sell the residue of my estate and divide the proceeds amongst my daughters. * * *

It was admitted that the devise to the wife of the testator, copied above, began at the letter A on the plot and ran to C, then to H, then to J, and back to A.

It was also admitted that the devise to Elizabeth A. Gudger and her children begins at A and runs north with Main street, the plaintiffs contending that the northern line of the devise was the line G, H, and the defendants claiming that the northern line was the line B, I. The tavern in which James M. Smith lived was located on lots 38 and 37 and in part on lot 36.

It was admitted that the line B, I, was the northern line of the fifth half-acre lot counting from A, and that the line G, H, was the northern line of the eighth half-acre lot counting from A, and of the fifth counting from the northern line of lot 36, the third lot on which the tavern was situate.

There was no dispute between the parties as to the location of any object referred to in the devise to the wife of the testator, or in the devise to Elizabeth A. Gudger and children except the fence and the orchard.

The plaintiffs offered evidence tending to prove that the fence was on the line S, T, and the defendants that it was on the line P, Q. The plaintiffs also offered evidence tending to prove that the orchard extended north of the line B, I, and the defendants that it was between the lines A, J, and B, I.

The jury returned a verdict in favor of defendants, and from the judgment rendered thereon, the plaintiffs appealed.

Jones & Williams, of Asheville, for appellants. Merrimon, Adams & Johnston, Martin, Rollins & Wright, W. R. Whitson, and Mark W. Brown, all of Asheville, for appellees.

ALLEN, J. (after stating the facts as above). The plaintiffs claim under the will of James M. Smith, and they cannot recover unless the land in controversy is a part of the land devised to Elizabeth A. Gudger and her children.

The plaintiffs contend that the court ought to have held as matter of law that the devise included the three half-acre lots Nos. 38, 37, and 36 as the lots on which James M. Smith lived, and in addition the five half-acre lots Nos. 35, 34, 43, 44, 45, and that, if this is not so, the location of the land is a question for the jury, and that error was committed on the trial of the issues.

The defendants contend on the contrary that there was no question for the jury, that the northern boundary of the plaintiffs is the line B, I, and that, while this ought to have been held by the court, it has been correctly decided by the jury under proper instructions.

[1] It has been settled since the case of Doe on dem. Tatem v. Paine, 11 N. C. 64, 15 Am. Dec. 507, that what are the termini or boundaries of a grant or deed is matter of law, to be determined by the court, and where these termini are is a fact to be left to the jury, when the location is in dispute (Jones v. Bunker, 83 N. C. 324; Redmond v. Stepp, 100 N. C. 212, 6 S. E. 727; Lumber Co. v.

Bernhardt, 162 N. C. 464, 78 S. E. 485), but if the court declares what the boundary is, and the location of this boundary is admitted, the whole resolves itself into a question of law.

[2-4] It is also a rule of construction that a line called for in a description, which is fixed and established, is dealt with as a natural object, and controls course and distance (*Fincannon v. Sudderth*, 140 N. C. 246, 52 S. E. 579; *L. Co. v. Hutton*, 159 N. C. 445, 74 S. E. 1056; *L. Co. v. Bernhardt*, 162 N. C. 464, 78 S. E. 485), and that descriptive specifications, while useful when the location is in doubt, cannot prevail against a known and controlling call (8 R. C. L. 1086; *Ritter Lumber Co. v. L. Co.*, 169 N. C. 94, 85 S. E. 438), nor will the addition of a further description be permitted to defeat a full and perfect description, which fully identifies and ascertains the property conveyed or devised (*Mayo v. Blount*, 23 N. C. 283; *Ritter Lumber Co. v. L. Co.*, 169 N. C. 94, 85 S. E. 438).

Applying these principles, it is clear that the line "running with the lower or north line of the lower or fifth lot eastward by the east corner thereof and the same course to the street near Ephraim Clayton's," whether the line B, I, or G, H, is the northern boundary of the land devised to Elizabeth Gudger and her children. Is the northern boundary on the line B, I, or on the line G, H?

[5] The evidence to be gathered from the will, including the codicils, is conclusive and satisfactory that it was not the intention of the testator to give to his daughter and her children the land formerly devised to his wife, and therefore that he did not intend to establish the line G, H, which is the northern line of the devise to the wife, as the northern boundary of the devise to the daughter. In the first place, if it was his purpose to give to his daughter and her children the same property devised to his wife, he could have done so by describing it as the land on the east side of Main street formerly devised to his wife, and the inference that he would have done so, if this was his intention, is reasonable when it is remembered that he was familiar with this mode of description, as he adopted it in the first codicil, after the death of his wife, in which he disposes of "the property in said will, real and personal, given to her for life and that property given to her absolutely." Again, the testator had devised certain lots to his daughters Catherine Crook and Ruth Ripley, and the lines of these lots were known, established, and beyond dispute. In the devise to his wife he begins at A and runs north with Main street to the lines of the lots devised to Catherine Crook and Ruth Ripley, while in the devise to Elizabeth Gudger and her children he begins at A and runs north with Main street to the north line of the fifth lot. Why this change in phraseology, and why this substitution of a line, which

has raised the present controversy, for a line established by the testator and used by him in the former description, if it was intended that the two devises should cover the same property?

A comparison of the descriptions in the two devises shows marked and irreconcilable differences. In the general description in the devise to his wife he disposes of "the house and lots in which I now live in the town of Asheville including the tavern and adjoining buildings, garden, orchard and adjoining lots," and in the devise to his daughter of "the house and lots in which I live including the tavern and outbuildings contiguous on the east side of Main street." If these two descriptions stood alone, it could not be contended that the devise to the wife did not include lots adjoining the tavern lot, which are not mentioned in the devise to the daughter, and the particular description leads to the same conclusion. Both devises begin at the letter A and run north with Main street. The devise to the wife runs to the line of the lot devised to Catherine Crook and Ruth Ripley, which is at H, while that to Elizabeth Gudger and her children runs to the northern line of the fifth half-acre lot, which, counting from A, is at B.

The devise to the wife runs from H with the line of Catherine Crook and Ruth Ripley and with the line of the lot east of the Crook and Ripley lot (lot 52) to Spruce street, giving a well known and identified line from Main street to Spruce street, while the line in the devise to Elizabeth Gudger and her daughter runs with the northern line of the fifth lot eastward by the east corner thereof, which, if the line begins at B, would take it to R, and then to Spruce street, and not with any other line, but following the same course as from B to R, indicating that there was no known line from R to Spruce street, and the line from B to R extended to Spruce street divides lot No. 54, an acre lot on Spruce street. If a line of another lot had run from the east corner of the fifth lot to Spruce street, the testator would have called for it as he did in the devise to his wife, but if there was no line, his only recourse was to follow the "same course" as he did in the devise to the daughter. The devise to the wife calls for Spruce street running by Ephraim Clayton's and the devise to the daughter Elizabeth for the street near Ephraim Clayton's, and Ephraim Clayton's is opposite the terminus of the line from B to R extended to Spruce street, and the calls for the orchard and the fence are merely descriptive, and cannot control the line called for.

[6] The presumption that a testator intends to dispose of all his property cannot affect the construction of the devise, for the reason that there was property of the testator which he did not dispose of specifically, and there is a residuary clause in the will.

We are therefore of opinion that the de-

wise to Elizabeth Gudger and her children does not cover the same property devised to his wife, and this practically establishes the line of the devise at the line B, I, because there are only two possible contentions upon the record, and that is whether the line H, C, or the line B, I, is the northern boundary of the devise under which the plaintiffs claim. If, however, we confined ourselves, not to a comparison of the two descriptions, but to a consideration of the devise to the plaintiff alone, we would come to the same conclusion.

[7] As we have heretofore shown, the general description in the devise to the plaintiffs contains nothing that would permit the extension of the line beyond the three lots on which the testator lived, and but for the language in the particular description "including the five front half-acre lots" we would be compelled to say that the fifth lot means what it says, and that, counting from A, the line B, I, would be this boundary, and we do not think the language quoted changes this construction of the devise, and that, on the contrary, it confirms it.

When the description begins at A and includes the five front half-acre lots running to the northern boundary of the fifth lot the natural construction is that these five lots are between the beginning point and the northern boundary of the fifth lot, and as there is nothing in the devise to show a purpose upon the part of the testator to begin the count of the five lots at any other place than the beginning point, and there are eight half-acre lots on Main street from A to H, and the fifth lot has for its northern boundary the line B, I, this is the line called for in the devise to the plaintiffs, beyond which they cannot claim. This is also the construction placed on the devise by the parties as it appears that the will of James M. Smith was probated in July, 1856, that Elizabeth Gudger lived on a lot adjoining that in controversy until her death in 1912, a period of 56 years, and that this action was not commenced until 1914.

[8] The Century Dictionary defines "include," "to confine within something" "to inclose" "to contain" "to comprise," and this definition is accepted by the courts.

"Include" is defined as "to confine within, to hold, to contain, to shut up"; and synonyms are 'contain,' 'inclose,' 'comprise,' 'comprehend,' 'embrace,' and 'involve.' *Webst. Dict.* So that, as used in *Comp. Laws S. D. § 1409*, providing that the sheriff shall be entitled to certain fees for summoning jurors, including mileage, the sheriff is not entitled to the mileage in addition to the fee. *Neher v. McCook County*, 11 S. D. 422, 78 N. W. 998, 999.

"The use of the word 'including,' in a legacy of \$100, including money trustee to a certain bank, cannot be construed as meaning in addition to, and therefore the devisee is not entitled to the sum of \$100 in addition to the sum trustee at the bank, but only \$100, including such sum. *Brainard v. Darling*, 132 Mass. 218, 219.

"A bequest of \$14,000 including certain notes, etc., is to be construed as embracing or constituting the notes as a part of the \$14,000, and not to mean that the notes are to pass in addition to that sum. *Henry's Ex'r v. Henry's Ex'r*, 81 Ky. 342, 344." 4 Words and Phrases, p. 3499.

[9] We therefore conclude that his honor should have held as matter of law that the devise to the plaintiffs did not cover the land in controversy, but, as the jury has found in accordance with this contention, it does not constitute reversible error to refuse to so hold. *Johnson v. Ray*, 72 N. C. 273.

We have, however, examined the exceptions relied on by the plaintiffs, and if we were of opinion that it was a question for the decision of a jury, we would hold that there was no error upon the trial. The only exception which would appear to be tenable is to the admission of the recitals in a certain deed, but it appears that his honor instructed the jury carefully that they could not consider the recitals.

The evidence excluded as to the declarations of Mr. Johnston had no bearing on the issue involving the boundary, and, at most, was an expression of doubt as to the construction of the will.

No error.

(173 N. C. 750)

STATE v. BURNETT. (No. 89.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. CRIMINAL LAW \S 1023(8)—APPEAL—OVERRULING DEMURRER TO INDICTMENT.

The judgment of the superior court overruling a motion to quash the indictment is interlocutory, and no appeal lies therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2591.]

2. CRIMINAL LAW \S 101(2)—JURISDICTION—TRANSFER OF CAUSES—STATUTE.

Under Pub. Loc. Laws 1913, c. 697, § 3, providing that the judge of the county court can transfer causes, civil and criminal, pending therein, to the superior court for trial, and section 4, giving the county court final, original jurisdiction over certain offenses, when the two sections are construed so as to reconcile them with each other, the county court can transfer to the superior court for trial a criminal cause over which it is given final, original, and exclusive jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 200, 205.]

3. STATUTES \S 181, 205—CONSTRUCTION AS A WHOLE—INTENTION OF LEGISLATURE.

The object of construction of a statute is to ascertain and effectuate the intention of the Legislature, and the statute must be examined as a whole and its different provisions reconciled, if possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 169, 198.]

Appeal from Superior Court, Wayne County; Stacey, Judge.

Elizabeth Burnett was charged with keeping a bawdyhouse, and from the order overruling her motion to quash the indictment, she appeals. Appeal dismissed.

The defendant was charged in the "county court of Wayne county" with the crime of keeping a bawdyhouse. The county court was created by Public Local Laws of 1913, c. 697, and by section 4 is given "final original" jurisdiction of all misdemeanors committed in the county, "to wit, of all crimes the jurisdiction of which is now or may hereafter be given to justices of the peace," and in addition thereto of the offenses specially named, and among them that of keeping a bawdyhouse, and at the end of section 4 it is provided as follows:

"All offenses enumerated above are hereby declared to be petty misdemeanors. And all crimes which under the common law are misdemeanors, wherein the punishment is in the discretion of the court, are hereby declared by this act to be petty misdemeanors, and final, exclusive, original jurisdiction thereof is hereby given to the said county court of Wayne county."

Section 3 of the act provides that:

"The judge of said court shall have power to transfer causes, civil and criminal, pending therein to the superior court of Wayne county for trial, and the judge of the superior court shall have like power to transfer to said county court for trial criminal and civil actions pending in the superior court that are within the jurisdiction of the county court."

When this case was called for trial in the county court, the judge of said court transferred it to the superior court without the consent of the defendant and notwithstanding her objection thereto. In the superior court, the defendant moved to quash the indictment, upon the ground that the superior court had no jurisdiction of the offense, the county court having original, exclusive, and final jurisdiction of the same. The motion was overruled. Defendant excepted and appealed.

Langston, Allen & Taylor, of Goldsboro, for appellant. Attorney General and R. H. Sykes, Asst. Atty. Gen., for the State.

WALKER, J. (after stating the facts as above). [1] An appeal does not lie in this case, the judgment of the superior court being interlocutory and requiring the defendant to answer over to the indictment (respondere ouster). It has been so held from the earliest period. *State v. Robinson*, 8 N. C. 188; *State v. McDowell*, 84 N. C. 799; *State v. Pollard*, 83 N. C. 597; *State v. Bailey*, 65 N. C. 426; *State v. Webb*, 155 N. C. 426, 70 S. E. 1064. But we will consider the question raised by the exception, as if it were properly before us, but merely for the purpose of deciding it as being important to the due administration of the law in the courts of the county and as we were specially requested by counsel to do so.

[2] We are of the opinion that the ruling of Judge Stacey was correct. By the Public Local Laws of 1913, c. 697, the jurisdiction to hear and determine criminal causes is given to the county court subject to the provision of section 3 for a transfer of any case to the superior court when the presiding

judge deems it proper that the particular case should be tried in the latter court. The clauses with reference to the "final original" and the "original, exclusive and final" jurisdiction of the court, as used in section 4 of the statute, are to be read in connection with the latter part of section 3 in regard to the transfer of cases from one court to the other. In other words, the Legislature simply created the county court and conferred jurisdiction upon it of certain criminal offenses, and this jurisdiction was made "original, exclusive and final," unless the county court, in its sound discretion, should deem it expedient that any particular case should be sent to the superior court for trial. This was intended to be, and is, a qualification of the broad jurisdiction given by the words of the statute above quoted. Under the statute permitting the removal of a case pending in the superior court of one county to that of another county, the county in which the suit was first brought may well be said to have original, exclusive, and final jurisdiction of any case removed by it, but this only means if it retains the case for trial to its end, and, if it is removed, its exclusive and final jurisdiction passes to the other court. This power of transfer was given, in order to promote the more convenient and expeditious trial of criminal cases in the courts of the county of Wayne. If this cause had originated in the superior court, and that court had, on proper objection to its jurisdiction, proceeded to try the case to final judgment against the defendant, a serious question might be presented which is not now before us, and the decision of which we need not anticipate. Nor is it necessary for us to say whether the county court had exclusive jurisdiction of this offense, for if it had jurisdiction at all, the power to transfer the cause to the superior court was vested in that court, and the superior court acquired jurisdiction by virtue of the transfer.

It is obvious from what we have said that *State v. Collins*, 151 N. C. 648, 65 S. E. 617, has no application to this case. There was no such clause respecting transfers in the statute construed in that decision.

[3] The rules for ascertaining the meaning of the Legislature are well settled. "The object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, to the end that the same may be enforced. This meaning and intention must be sought, first of all, in the language of the statute itself, for it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly." *State v. Barco*, 150 N. C. 796, 63 S. E. 673. "There can be no doubt about the intention of the Legislature, and it is the duty of the court to so construe the act as to effectuate that intention. And in construing it, 'every part should be viewed

in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible, intelligent effect to each. It is not to be presumed that the Legislature intended any part of a statute to be without meaning." *Tabor v. Ward*, 83 N. C. 293.

We must examine the statute as a whole. It cannot be supposed, when we do so, that the Legislature intended by the last words of section 4 to repeal the provision, so carefully framed and made an essential part of the legislation by section 8, especially when the two provisions can be so easily reconciled, and we are required to harmonize them if it can be done.

There was no error in the judgment of the court, but, for the reasons stated, the appeal is dismissed.

Appeal dismissed.

(173 N. C. 38)

SATTERTHWAITE et al. v. WILKINSON.
(No. 18.)

(Supreme Court of North Carolina. Feb. 28, 1917.)

1. WILLS §439—CONSTRUCTION—INTENTION OF TESTATOR.

The object of construction of the provisions of a will is to discover and effectuate the intent of the testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957.]

2. WILLS §470—CONSTRUCTION—INCONSISTENT PROVISIONS.

It is presumed that every part of the will expresses an intelligible intent, and every part must be considered in its construction, and not rejected if it is possible to reconcile it with the other provisions.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 958.]

3. WILLS §457—CONSTRUCTION—LEGAL EXPRESSION.

When language which has a clearly defined legal meaning is used in a will, it must be given such meaning in the absence of a contrary intent clearly expressed.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 975.]

4. WILLS §602(1)—CONSTRUCTION—POWER TO SELL—DEFERABLE FEE—"DISPOSAL."

Where a testator stated that he desired his son to be his entire heir after the death of testator's wife, on condition that, if the son die leaving neither wife nor issue, testator's brothers should be heirs, that, if he should live to be 21 years old and of sound mind, the property should be at his disposal, but that, if he should leave a wife or issue, they are to be his heirs, the son took a defeasible fee, and could make a valid conveyance of the property after reaching the age of 21, though he had a wife and issue living, since the expression "property to be at his disposal" means that it is property which he can dispose of, get rid of, part with, relinquish, alienate, effectually transfer, and if he could not convey it as against his wife and issue, he could not as against testator's brothers in the event that he had no wife or issue, so that that provision would be meaningless (citing 3 Words and Phrases, Disposal).

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1351, 1352, 1359.]

Appeal from Superior Court, Beaufort County; Whedbee, Judge.

Action by Eula B. Satterthwaite and others against W. H. Wilkinson. Judgment for the defendant, and plaintiffs appeal. Affirmed.

This is an action to recover a tract of land, and both parties claim under the will of Seth H. Tyson in which the property in controversy was devised as follows:

"It is my will and desire to lend unto my wife, Annie Tyson, during her natural life, all the balance of my estate, both real and personal of whatever may be found consisting of hogs, cattle, sheep, horses, poultry, household and kitchen furniture, farming utensils, land, negroes, cash, notes, accounts, etc., after the payment of all my just and lawful debts. I further leave it my will and desire that my wife, Annie Tyson, shall take care of, raise and educate our son, Geo. T. Tyson, and that she shall be at liberty at any time to sell or dispose of any part or parcels of the remaining property for to live upon herself and enable her to raise and educate our son, Geo. T. Tyson, with land and negroes, except those are not to be sold, but may be rented or hired out if she chooses.

"Should my wife, Annie Tyson, die before her son, Geo. T. Tyson, it is my will and desire that our son Geo. T. Tyson, should be the entire heir of the remaining property upon the following condition, viz.: Should he die leaving neither wife nor lawful bodily begotten heirs it is my will and desire that brothers Jno. O. Tyson and Thos. O. Tyson be the final heirs for the remaining property to be equally divided between them. N. B.—Should our son, Geo. T. Tyson, live to be twenty-one years old and of sound mind the property is to be at his own disposal, but should he not be of sound mind leaving neither wife nor lawful bodily begotten heirs, for brothers Jno. O. and Thos. O. Tyson to be the heirs as above described. But should our son, Geo. T. Tyson at his death (being of any age) leave wife or heirs as above described, they are to be the heirs."

Annie Tyson died leaving surviving her Geo. T. Tyson, who, after he became 21 years of age, and being of sound mind, conveyed the land in controversy by deed in due form to convey a fee simple, under which the defendant Wilkinson claims. The said Geo. T. Tyson died in July, 1916, leaving surviving him his widow and five children, who are the plaintiffs in this action.

His honor held, upon these facts and so adjudged, that Geo. T. Tyson had the power under the will of Seth Tyson to convey the land in controversy, and that the defendant was the owner thereof, and the plaintiffs excepted and appealed.

Daniel & Warren, of Washington, N. C., for appellants. Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellee.

ALLEN, J. [1] The object of construction in passing upon the provisions of a will is to discover and effectuate the intent of the testator.

[2, 3] It is presumed that every part of the will "expresses an intelligible intent, i. e., means something" (*Wooten v. Hobbs*, 170 N. C. 214, 86 S. E. 811), and this intent is not only to be "gathered from the language

used, if possible" (*Freeman v. Freeman*, 141 N. C. 99, 53 S. E. 620), "but, in seeking for his intention, we must not pass by the language he has used. If we do, we shall make the will, and not expound it." *Alexander v. Alexander*, 41 N. C. 231, approved in *McCallum v. McCallum*, 167 N. C. 311, 83 S. E. 250.

It is also a rule of construction that:

"Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can be possibly put upon them. Every string should give its sound." *Edens v. Williams*, 7 N. C. 31.

Or as expressed by Gaston, J., in *Dalton v. Scales*, 37 N. C. 523:

"In the interpretation of wills, it is the clear duty of the court to give effect to each and every part of the instrument, and, if it be possible, to reconcile all seeming repugnances between its different provisions. As the instrument is an entire act, intended to operate altogether and at the same moment, it is not to be admitted, unless the conclusion be irresistible, that the testator had two inconsistent intents, and has left a declaration of both these inconsistent intents, as constituting a law for the disposition of his property."

And also:

"When language is used having a clearly defined legal signification, there is no room for construction to ascertain the intent; it must be given its legal meaning and effect." *Campbell v. Cronly*, 150 N. C. 469, 64 S. E. 213.

We must then examine the whole will, must reconcile, if possible, apparently conflicting provisions, must assume that all language used means something, and give proper effect to words having a definite legal meaning, in the absence of a contrary intent, clearly expressed.

[4] When these principles are applied to the terms of the will before us, we find that the testator devises the land in controversy to his son, George T. Tyson, in language which the plaintiffs do not contend, standing alone, would not confer a fee simple estate, and he then provides that, if his son is of sound mind when he reaches 21 years of age (and both facts are found to exist), "the property is to be at his own disposal."

The ordinary meaning of "property at his own disposal" is that it is property which he can dispose of, get rid of, part with, relinquish, alienate, effectually transfer (3 Words and Phrases, p. 214), and this is the interpretation put on similar language in *Parks v. Robinson*, 138 N. C. 269, 50 S. E. 649, in which it was held that:

"Where a testator died, leaving a widow and minor children, and by his will gave to his wife 'during her natural life and at her disposal, all the rest, residue, and remainder of his real and personal estate,' that the wife was given an estate for life with a power to dispose of the property in fee."

This authority is approved in *Mabry v. Brown*, 162 N. C. 221, 78 S. E. 78, *Griffin v. Commander*, 163 N. C. 232, 79 S. E. 409, and in other cases.

We have then an express power in the son

to dispose of, to convey, without restriction and without qualification that it should not be exercised if he married and had children born to him, and we cannot refuse to give effect to this important provision unless irreconcilable with other parts of the will, and we do not think it is so. The son was not of age, was unmarried, and had no children when the will was made, and he and the wife of the testator were the only persons living to whom was due a moral or legal obligation, and they were the principal objects of his bounty. He gives his wife a life estate in real and personal property with power to dispose of any of it except land and negroes. He then provides that upon the death of the wife the son shall be the "entire heir," but that if he dies leaving neither wife nor children the property shall belong to two brothers of the testator, and that if he leaves wife and children they are to be the "heirs," but he also says:

"N. B.—Should our son, George T. Tyson, live to be twenty-one years old and of sound mind the property is to be at his own disposal."

If this does not mean the full and unqualified power to convey after he became 21, it means nothing, as he must die leaving wife and children or having none, and in one event the wife and children would say you cannot convey because there is a limitation over to us, and in the other the two brothers would take the same position because of his death without wife or child, and no condition could arise in which he could dispose of the property.

We are therefore of the opinion that this provision of the will must stand, and that full effect may be given to all parts of the will by adopting the construction that George T. Tyson took a defeasible fee with a general power of disposition, and it follows that the defendant acquired title under his conveyance.

Affirmed.

(178 N. C. 700)

VAN DYKE v. AETNA LIFE INS. CO. et al.
(No. 101.)

(Supreme Court of North Carolina. March 7, 1917.)

APPEAL AND ERROR 877(2)—RIGHT TO ALLEGE ERROR—MATTERS NOT AFFECTING APPELLANT.

Where defendant insurance company admitted liability, and all parties claiming an interest in the proceeds were joined, defendant would be fully protected by paying the money pursuant to the trial court's judgment, and is not interested in conflicting claims to the fund, and on defendant's appeal the court will not determine the rights of deceased's children in the fund, where they were represented, but do not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3563, 3564.]

Appeal from Superior Court, Vance County; Cooke, Judge.

Action by Mary Van Dyke, individually

and as executrix of the will of Robert L. Van Dyke, against the Aetna Life Insurance Company and others. Judgment for plaintiff, and defendant Insurance Company appeals. Affirmed.

This is an action to recover upon an insurance policy issued upon the life of Robert L. Van Dyke, and payable to his children. The said Robert L. Van Dyke died in 1916, leaving a will in which he bequeathed the money arising from the insurance to his wife for the payment of his debts, and appointing his wife his executrix. The wife is a party to the action individually and as executrix, and all of the children of the said Robert L. Van Dyke are also parties. The defendant insurance company does not deny its liability, but contends that the money arising from the insurance ought to be paid to the children and not to the executrix. Judgment was rendered in favor of Mary Van Dyke, and the defendant insurance company excepted and appealed. The children were duly represented, and do not appeal.

J. H. Bridgers, of Henderson, for appellant. T. T. Hicks, of Henderson, for appellee.

PER CURIAM. All persons who have any interest in the insurance money for which the defendant is liable are parties to this action, and are bound by the judgment, and it follows that the defendant will be fully protected by the payment of the money which it admits to be due.

As was said in *Hocutt v. Railroad*, 124 N. C. 217, 32 S. E. 681, the probability of a controversy between the wife and the children does not concern the defendant. It is therefore unnecessary to consider the questions discussed in the briefs as to the right of the insured to change the beneficiary by his will.

Affirmed.

(173 N. C. 32)

WHITE v. TOWN OF EDENTON. (No. 10.)
(Supreme Court of North Carolina. Feb. 28, 1917.)

1. ADVERSE POSSESSION \S 8(2)—STREETS.

Where a public street is legally established, adverse possession thereof will not bar the rights of a municipality.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. \S 44-50.]

2. EVIDENCE \S 358—MAPS—ADMISSIBILITY.

Though a map of a city had been kept in the office of the register of deeds of the county for over 30 years, and was generally recognized as showing the streets and lots, such map is not, there being no evidence as to its official character, admissible against the city, on the question whether a street had ever been legally established.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. \S 1500-1508, 1512.]

Appeal from Superior Court, Chowan County; Whedbee, Judge.

Action by E. C. White against the Town of Edenton. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Pruden & Pruden, of Edenton, and S. B. Shepherd, of Raleigh, for appellant. W. S. Privott, of Edenton, and Ward & Thompson, of Elizabeth City, for appellee.

BROWN, J. This is a controversy in respect to the title to a piece of land in the town of Edenton. The locus in quo is claimed by the plaintiff by deed constituting color and adverse possession and by defendant as a public street of the town. The case was before us at a former term, and is reported in 171 N. C. 21, 36 S. E. 170, which is referred to for issues.

[1] It is well settled, as stated by the learned judge in his charge, that once a public street is legally established, adverse possession by a claimant will not bar the municipality. It therefore is an important fact in controversy in this case as to whether the locus in quo ever was made a public street and so claimed and used by defendant. There was much evidence on both sides.

[2] For the purpose of showing that this land never was a public street or claimed as such, plaintiff was permitted to introduce what purported to be a map of Edenton upon which no such street is shown. The only evidence offered or relied upon to identify the map as an official map of the town is that of witness Byrum, who testified:

"That map has been in the register's office at least 25 years to my knowing. It was recognized by everybody as a plot of the town. Everybody that went in asked me what that plot was, and I told them a plot of the town; that was whenever they wanted to locate a lot. This plot was in the office before we moved to Edenton, and my father used to send me there when Mr. Small was then register. It struck me, and I asked Mr. Small what it was. I do not think I make any mistake if I say it had been on exhibition more than 30 years."

The admission of the map upon such evidence was an error well calculated to prejudice defendant. It was not identified in any manner as an official map of the town, and was not found in its possession, nor was it exhibited in its municipal office as a map of the town, but was found in the office of the register of deeds of the county. There is no evidence showing who made it or by what authority or that defendant has ever recognized it as an official map. The proof of its official character is entirely wanting.

This is not near so strong as a Virginia case in which the map was rejected. In *Harris v. Commonwealth*, 20 Grat. (Va.) 833, that court held:

"A map of a city, though made by a former city surveyor, and found in the office of the register of the city, in a book labeled 'Plans and Charts,' but not appearing to have been made by authority of the city government, or adopted by it, is not admissible in evidence to prove the location of a street."

New trial.

(173 N. C. 105)

HOLTON v. LEE. (No. 179.)

(Supreme Court of North Carolina. March 7, 1917.)

1. MALICIOUS PROSECUTION \S 60(5)—MALICE—IN CRIMINAL PROSECUTION—ADMISSIBILITY.

In an action for malicious prosecution, an order in a criminal prosecution, taxing prosecutor with costs, is not admissible against him to show malice.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 144, 145.]

2. MALICIOUS PROSECUTION \S 56—MALICE—PROBABLE CAUSE—BURDEN OF PROOF.

In an action for malicious prosecution, the burden is on the plaintiff to show that prosecution was instituted maliciously and without probable or reasonable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 112-116.]

3. MALICIOUS PROSECUTION \S 16—MALICE—CONCURRENT WITH LACK OF PROBABLE CAUSE.

To constitute malicious prosecution, there must be concurrence of malice and lack of probable cause.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 19-22, 50.]

4. COURTS \S 116(1)—COURT RECORDS—POWER TO AMEND.

The court below has the power to correct its own records and make them speak the truth.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 369.]

Appeal from Superior Court, Pamlico County; Lyon, Judge.

Action by O. D. Holton against Asa W. Lee. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The verdict was as follows:

"(1) Did the defendant, Asa W. Lee, cause the arrest and prosecution of the plaintiff, Church D. Holton, as alleged? Ans. Yes.

"(2) Was the same done without probable cause? Ans. Yes.

"(3) Was the same done without malice? Ans. Yes.

"(4) Has the criminal action terminated? Ans. Yes.

"(5) What damage, if any, has plaintiff sustained thereby? Ans. \$500."

Defendant appealed from the judgment thereon.

Brinson & Brinson and C. R. Thomas, of Newbern, for appellant. Z. V. Rawls, of Bayboro, for appellee.

WALKER, J. The plaintiff brought this action to recover damages for malicious prosecution. It appears that the defendant had prosecuted the plaintiff before a justice of peace for the larceny of money, and at the trial the defendant was discharged for the lack of evidence to show probable cause. It is substantially admitted in the pleadings that the criminal proceedings had terminated unfavorably to the prosecutor (defendant in this action), as the justice found that there was no probable cause upon which to bind the defendant (plaintiff herein) to court.

[1] The justice was called as a witness for

the plaintiff, and was permitted by the court to testify as to the contents of the record of his proceedings, from which it appeared that he had discharged the defendant (plaintiff in this action), as the evidence was insufficient to show probable cause, and that "the court was further of the opinion that said prosecution was frivolous and malicious and taxed the prosecutor (defendant in this action) with the costs." The defendant objected to this evidence, and excepted to its admission. This exception is sustained. It was admitted that this plaintiff had been discharged in the criminal proceeding because there was no probable cause, so far as shown by the evidence, and therefore it was not necessary to prove it. The only other fact contained in this record was the finding by the justice that "the prosecution was frivolous and malicious," and his order taxing him with the costs because it was so. The objection, therefore, was directed to this evidence as being incompetent to prove malice, and we are of the opinion that it was inadmissible, and we have so held in similar cases. *Coble v. Huffines*, 133 N. C. 422, 45 S. E. 760, citing *Casey v. Sevaton*, 30 Minn. 516, 16 N. W. 407, where the subject is fully discussed, and the reasons, which have induced the courts to reject such evidence, are clearly stated.

[2, 3] It was necessary to show malice, as it was one of the material elements of the cause of action:

"The burden of showing that the prosecution complained of was instituted maliciously and without probable or reasonable cause is, as we have seen, upon the plaintiff, and both of these elements must concur or the suit will fail; for if the prosecution were malicious and unfounded in matters of fact, but yet there was probable cause, the action for malicious prosecution cannot be maintained." *Newell on Malicious Prosecution* (1892) p. 473, § 12; *Stanford v. Grocery Co.*, 143 N. C. 419, 55 S. E. 815; *Downing v. Stone*, 152 N. C. 525, 68 S. E. 9, 136 Am. St. Rep. 841, 21 Ann. Cas. 753; *Motsinger v. Sink*, 168 N. C. 548, 84 S. E. 847.

Before punitive damages can be recovered express or particular malice must be shown. *Stanford v. Grocery Co.*, and the other cases above cited. There is another question in the case. The record shows that the jury found, by their answer to the third issue, that the plaintiff was prosecuted by the defendant without malice. If this be the true verdict, the defendant would be entitled to judgment, but plaintiff has applied for a writ of certiorari upon the ground that the issue submitted was, "Was the same done with malice?" to which the jury answered, "Yes"; that the original issues, upon which the judgment was given, have been lost, and those in this record are not correctly copied in the particular indicated, and the mistake was not discovered until the argument of the case here, when for the first time the defendant claimed that he was entitled to a judgment upon the verdict. The form of the

verdict becomes material for the purpose of deciding whether we shall grant the defendant a judgment or a new trial. There is no necessary conflict appearing in the record itself, but there is a conflict, between the record and the case, as the judge, in his charge, refers to the issue as being in this form. "Was the same done with malice?" Where there is a conflict between the record and the case, the former controls. *Threadgill v. Commissioners*, 116 N. C. 616, 21 S. E. 425. The second issue is, "Was the same done without probable cause?" And in form the two issues are alike; one containing the inquiry whether the prosecution was without probable cause, and the other, whether it was without malice. It may be, therefore, that the issues, as they now appear in the record, are correctly drawn.

[4] The court below has the power to correct its own records and make them speak the truth. Instead of retaining the case and issuing a writ of certiorari, we direct that the court ascertain what the truth is in regard to this controversy. If the third issue is correctly stated, judgment will be entered on the verdict for the defendant; but if it is not correctly stated, and the jury really answered it in favor of the plaintiff, then he will amend the record accordingly, and grant a new trial for the error in admitting evidence as above shown. The court may hear such evidence as is competent and pertinent to the inquiry, including that of the judge who presided at the trial.

Error.

(173 N. C. 701)

HOUSE v. BOYD et al. (No. 103.)

(Supreme Court of North Carolina. March 7, 1917.)

1. TRIAL \S 352(1)—SUBMISSION OF ISSUES—FORM.

Objection will not be entertained to the mere form in which issues are submitted, such as the submission of disputed questions of fact arising upon the pleadings and not upon the evidence, but if issues are so formulated that each party may introduce competent evidence upon any material matter in controversy and put in issue by the pleadings, they are sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 640.]

2. APPEAL AND ERROR \S 871(4)—WITNESSES \S 262—DISCRETION OF TRIAL COURT—RECALLING WITNESS.

The recall of plaintiff for further examination was a matter resting in the sound discretion of the trial court, and not reviewable unless grossly abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3856; Witnesses, Cent. Dig. \S 797, 899, 904, 1165.]

3. BROKERS \S 88(1)—ACTION FOR COMMISSION—QUESTION FOR JURY.

On evidence, in an action on an agreement to pay a commission of three-eighths of all the purchase price over \$30,000 for effecting the sale of standing timber, held that a motion to

nonsuit at the close of the evidence was properly overruled.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. \S 128, 129.]

Appeal from Superior Court, Halifax County; Muston, Judge.

Action by A. C. House against R. B. Boyd and others. Judgment for plaintiff, and defendants appeal. No error.

Civil action, tried at August term, 1916, upon these issues:

(1) Was plaintiff the agent of the defendants in procuring the memorandum of January 4, 1913, called the Palmer Camp contract? Answer: Yes.

(2) If he was not, did the defendants ratify the said contract of January 4, 1913? Answer:

(3) Was the plaintiff the agent of the defendants in the sale of the timber described in the complaint and on the terms therein stated? Answer: Yes.

(4) Did plaintiff contract with defendants to sell and estimate the timber in question as the agent of the defendants? Answer: Yes.

(5) If so, did the plaintiff render all the services to defendants called for in the contract with the defendants? Answer: Yes.

(6) What necessary and reasonable expense did defendants incur in estimating the said timber which plaintiff agreed to pay? Answer: None.

(7) What sum, if any, is plaintiff entitled to recover of the defendants? Answer: \$2,000 (two thousand dollars).

T. T. Hicks, of Henderson, Tasker Polk, of Warrenton, and Geo. C. Green, of Weldon, for appellants. G. E. Midyette and Peebles & Harris, all of Jackson, and W. L. Knight and W. E. Daniel, both of Weldon, for appellee.

PER CURIAM. The foundation of plaintiff's cause of action is an alleged agreement by defendants to pay him a commission of three-eighths of all the purchase price over \$30,000 for effecting the sale of standing timber on the lands purchased by defendants from G. E. Ransom.

[1] The defendants excepted to the issues submitted, and tendered other issues. We think the issues submitted present for decision of the jury such disputed matters of fact as arise upon the pleadings and not upon the evidence. When such is the case, objection will not be entertained to the mere form in which issues are submitted. If the issues are so formulated that each party to the action can introduce pertinent and competent evidence upon any material matter in controversy and put at issue by the pleadings, they are sufficient. *Clarks Code*, c. 2, \S 391-393.

The defendants excepted to the introduction of the deposition of P. D. Camp upon what ground we are not informed in the brief. We see no irregularity set out in the record, and the objection was properly overruled.

[2, 3] Defendants except to the courts allowing the recall of plaintiff for further examination. This is a matter resting in the

sound discretion of the court, and not reviewable unless grossly abused, as has been repeatedly held by this court. The defendants moved to nonsuit at close of the evidence. The motion was properly overruled.

The evidence of plaintiff, taken in its most favorable light for him, tends to prove that the defendants purchased the land and timber from G. E. Ransom for \$60,000; that they contracted with one Palmer and plaintiff to sell the timber on the land; that the final and last agreement was to pay Palmer two-eighths and plaintiff three-eighths of the purchase money received for the timber over and above \$30,000. The evidence tends to prove that the timber was sold to P. D. Camp, trustee, and the Camp Manufacturing Company, and \$39,007.44 received by the defendants therefor.

It is earnestly contended that plaintiff was not the agent of defendants in the sale of the timber, and not an efficient cause in effecting the sale. There is evidence upon the part of plaintiff, disclosing his efforts to sell the timber, from which the jury had a right to infer that he materially assisted in effecting a sale of the timber, and that he fully performed the agreement upon his part.

There are no assignments of error relating to the evidence, but quite a number to the charge and to the refusal of the court to give certain prayers for instruction. We have examined the charge as applied to each issue, and think the learned judge presented the case to the jury fully and clearly and with perfect fairness to both plaintiff and defendants.

The whose controversy seems to be largely one of fact, and in the trial of it, we find no error.

(173 N. C. 78)

WILLIAMS v. MAY et al. (No. 105.)

(Supreme Court of North Carolina. March 7, 1917.)

1. MUNICIPAL CORPORATIONS — 706(6, 7) — INJURY FROM AUTOMOBILE — ACTION — ISSUES.

In an action for personal injury when plaintiff's buggy was struck by defendant's automobile, the submission of the issues as to whether plaintiff was injured by defendant's negligence, whether plaintiff was guilty of contributory negligence, and the amount of damages, presenting every contention raised by the pleadings, was proper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. PLEADINGS — 248(10) — AMENDMENT — NEW CAUSE OF ACTION.

Where the original complaint alleged that plaintiff was injured by the negligence of one defendant and of the minor daughter of the other defendant in operating an automobile, an amendment alleging that the first defendant was employed by his codefendant to instruct his daughter in driving the automobile, and that such employé negligently ran the automobile against plaintiff's buggy, did not state a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 693, 694, 696.]

3. APPEAL AND ERROR — 1041(2) — HARMLESS ERROR — AMENDMENT OF COMPLAINT.

An amendment to a complaint was harmless, where it was unnecessary, and where, on the facts and evidence, plaintiff was entitled to recover upon the cause of action set out in his original complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4107.]

4. TRIAL — 165 — MOTION FOR NONSUIT — EVIDENCE.

The evidence introduced by plaintiff must be taken as true upon defendant's motion to nonsuit at the close of the evidence, and that offered by defendant need not be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

5. TRIAL — 165 — MOTION TO NONSUIT — SUFFICIENCY OF EVIDENCE.

Where, in any view of the evidence offered for plaintiff, the jury might have reasonably inferred that he was injured by the negligence of defendant's agent acting within the scope of his duty in operating defendant's automobile, defendant's motion to nonsuit was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

6. MUNICIPAL CORPORATIONS — 706(6) — USE OF STREET — INJURY FROM AUTOMOBILE — QUESTION FOR JURY.

In an action for personal injury from the negligence of a defendant, and the minor daughter of the other defendant whom he was teaching, in operating an automobile, evidence held to make the latter's negligence a question for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

Appeal from Superior Court, Chatham County; Stacy, Judge.

Action by John A. Williams against Benjamin May and another. Judgment for plaintiff, and defendant May appeals. No error.

This is a civil action, tried upon these issues:

(1) Was the plaintiff injured by the negligence of the defendant, Benjamin May, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

(3) What damages, if any, is the plaintiff entitled to recover? Answer: \$500.

From the judgment rendered, defendant May appealed.

Hoyle & Hoyle, of Sanford, and Hayes & Gibbs, for appellant. H. A. London & Son and Fred W. Bynum, all of Pittsboro, for appellee.

BROWN, J. [1] The evidence tends to prove that an automobile owned by the defendant May was being operated by his daughter Mary May, assisted by one Orendorff, a party defendant upon whom no summons has been served. The machine ran into the plaintiff's vehicle, in consequence of which he was seriously injured. The defendant excepted to the issues submitted by the court and tendered other issues which the court refused to submit. The issues submitted are in the usual form in cases of this

character and present every contention that is raised by the pleadings. They are similar to those approved by this court in *Clark v. Wright*, 167 N. C. page 646, 83 S. E. 775.

[2] The defendant excepts because the court allowed the plaintiff to amend his complaint, contending that the amendment allowed constituted a new cause of action. The original cause of action is that the plaintiff was injured by the negligence of Orendorff and the minor daughter of the defendant May. The amendment alleges that at the time of the injury the defendant Orendorff was in the employ of the codefendant Benjamin May for the purpose of instructing and teaching his minor daughter to drive the automobile, and that the said agent or employé Orendorff was negligent and reckless in permitting the automobile to run against the buggy of the plaintiff.

[3] We think that this is the same cause of action practically as is set out in the original complaint. The amendment seems to have been unnecessary, and is therefore harmless. Upon the facts in evidence, established to the satisfaction of the jury, the plaintiff was entitled to recover upon the cause of action set out in the original complaint.

[4, 5] The defendant moved to nonsuit at the close of the evidence, and also asked the court to charge the jury that there is no evidence for the consideration of the jury that the defendant Orendorff was the agent of the defendant May. The motion to nonsuit was properly denied. The evidence introduced for the plaintiff must be taken as true upon this motion, and that offered by the defendant must not be considered. If in any view of the evidence offered for the plaintiff the jury may have reasonably inferred that the plaintiff was injured by the negligence of the defendant's agent acting within the scope of his duty then the motion was properly overruled.

[6] There is evidence that the car belonged to the defendant May; that he had purchased it for the use of his family; that he permitted Orendorff to operate the car upon the public streets of Sanford for the purpose of teaching his daughter to run the car. At the time when the injury occurred his daughter was driving the car, after only a few days' experience, and Orendorff had his hand on the wheel. The plaintiff was in his buggy, to which a mule was hitched, resting under the shade of some trees on the right-hand side of Hawkins avenue in the center of the town of Sanford. The car of the defendant turned suddenly into Hawkins avenue from Carthage street. The plaintiff beckoned to the car and hollered to them to go back, but the signal was not obeyed. The car continued coming directly towards the plaintiff and on the wrong side of the street until it struck the buggy wheel, turned the buggy over, and threw the plaintiff to the ground

with great violence, in consequence of which he was painfully and permanently injured.

The evidence tends to prove that Orendorff, an employé of the Cadillac Company, was teaching the defendant's daughter to operate the machine by and with the consent of the defendant; that the defendant had purchased the machine for the use of his family. Taking all the facts offered by the plaintiff to be true, we think the jury may have reasonably inferred that the machine was being operated with the consent of the defendant, and that his daughter was being taught to operate it for the convenience of the family, and that the practice in operating the car was being conducted upon the public streets of the town by his daughter with the assistance of Orendorff.

The case, we think, differs very materially from *Livville v. Nissen*, 162 N. C. 95, 77 S. E. 1096. In that case it was in evidence that the son of the defendant took the machine of his father out of the garage not only without the latter's consent, but against his express orders, and used it for a pleasure ride, without his father's knowledge, and that the son was an experienced chauffeur. In this case, according to the evidence, Orendorff was using this machine to teach the defendant's daughter, and was acting for the defendant and within the scope of his duties, and while in pursuance of them the plaintiff was injured by his negligence. The evidence justifies these inferences, and consequently we think his honor very properly denied the defendant's motion. We think the charge of the court is free from error, and clearly and properly presented the case to the jury.

No error.

(178 N. C. 72)

HAM v. PERSON et al. (No. 100.)

(Supreme Court of North Carolina. March 7, 1917.)

1. JUDGMENT \Leftrightarrow 367 — SETTING ASIDE — GROUNDS.

Where a defendant employed counsel not residing in the town to which the summons was returnable, and who did not engage to go there especially to attend to the matter, and was told by such counsel that it was not necessary for him to attend, he was guilty of such inexcusable neglect as prevented setting aside the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 709.]

2. JUDGMENT \Leftrightarrow 366 — SETTING ASIDE — GROUNDS.

It is no ground for setting aside a judgment, when the defendant's counsel did not attend, that he made a mistake as to time when court would be held, where the summons on its face notified the defendant of the time when the term would begin.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 708.]

Appeal from Superior Court, Wayne County; Lyon, Judge.

Action by Rufus Ham against W. R. Person and S. W. Finch. Judgment for plain-

tiff, and from refusal of motion to set aside judgment, Finch appeals. Affirmed.

Butler & Herring, of Clinton, for appellant.
M. T. Dickinson, of Goldsboro, for appellee.

CLARK, C. J. This is an appeal from the refusal of a motion to set aside a judgment on the ground of excusable neglect. The action was brought by the surety to recover money paid by him for the defendants, who were principals in the note. The defendant Person did not set any defense to the action. The other defendant wishes to set aside the judgment to plead the statute of limitations.

[1] The court found as facts that after service of summons on the defendant Finch, who resides in Sampson, he employed counsel residing in Clinton to represent him in this action, which was returnable to Wayne, where the plaintiff and the other defendant reside. The counsel employed by Finch were not "counsel regularly attending the court" in which the action was pending, nor did they "engage to go there especially to attend to the matter." Finch, therefore, was chargeable with inexcusable neglect. The case of *Osborn v. Leach*, 133 N. C. 428, 45 S. E. 783, presents, in all material respects, the identical state of facts as in this case. That case cites many others exactly on all fours, among them *Manning v. Railroad*, 122 N. C. 828, 28 S. E. 963, which cites many others to the same effect, and has been repeatedly cited since with approval. See *Anno. Ed.* In that case, it was said:

"Our laws do not recognize this leisurely * * * and dilettante manner of attending to legal proceedings at long range. What would be left of the statute if every defendant demanded the same privilege of answering at his own convenience or by his own system? * * * As the answer was not filed at the first term, the plaintiff was, under the law, entitled to his judgment," as against any other defendant.

Indeed our decisions are uniform and without any exception that courts cannot be run upon any plan which requires that the summons of the court to appear and answer the complaint at the time specified shall be disregarded if not convenient to the counsel to attend, but clients must at least employ counsel "regularly attending the court where the case is pending or who shall engage to go there especially to attend the matter." In such case if the counsel does not attend to the matter, the client will have a cause of action against him for neglect to do so. But in this case, counsel did not attend that court and did not engage to go there specially. The neglect was that of the client in not securing counsel who by his implied contract, by reason of his regular attendance at such court, or by special agreement to go there, gave him assurance that the matter would be attended to. On the contrary, the judge finds that counsel, instead of agreeing to attend the court where the cause was pending,

told Finch that it would "not be necessary for him to go," and that he would not go. Finch, therefore, had the precept and order of the court to attend, "or that judgment would be rendered against him," but he preferred to take the statement of counsel that it would "not be necessary" for him to do so. The courts are for the dispatch of public business, and those who have business therein must either pay attention to it or abide any judgment rendered in the regular and ordinary course of procedure. The cost of the courts is heavy, and they cannot be run for the convenience of counsel, or of suitors contrary to the statutes in such cases made and provided.

[2] The judgment of his honor is supported by the unbroken precedents in this court. The decision in *Lumber Co. v. Lumber Co.*, 172 N. C. —, 90 S. E. 241, relied on by the defendant, in no respect resembles this case, for there the defendant's counsel assured him that he had employed local counsel in the court where the cause was pending, and that the client "reasonably and honestly relied upon such assurance." In this case the counsel did not regularly attend the court, did not undertake to employ resident counsel, and did not engage to attend himself. Counsel alleges that he made a mistake as to the time when court in Wayne would be held. The summons on its face notified defendant when the term of court would begin, besides "ignorance of law excuses no one," and this court has said, "The vicarious ignorance of counsel has no greater value." *Allen v. McPherson*, 168 N. C. 437, 84 S. E. 766; *Barber v. Justice*, 138 N. C. 21, 50 S. E. 445; *State v. McLean*, 121 N. C. 601, 28 S. E. 140, 42 L. R. A. 721; *State v. Downs*, 116 N. C. 1066, 21 S. E. 689.

Judgment was taken for want of an answer on Thursday of the second week of the term. The plaintiff was entitled to take judgment by the terms of the statute, by the notice in the summons served on him, and "according to the regular cause and practice of the courts." *Williams v. Railroad*, 110 N. C. 466, 15 S. E. 97, was expressly overruled in *Manning v. R. R.*, *supra*.

The judgment of the court below is affirmed.

(173 N. C. 87)

McPHERSON DRUG CO. v. NORFOLK SOUTHERN RY. CO. (No. 114.)

(Supreme Court of North Carolina. March 7, 1917.)

1. CERTIORARI ~~to~~ — RECORDER'S COURT — REVIEW — STATUTE.

As the statute establishing the recorder's court does not provide for an appeal, a litigant aggrieved by a judgment of such court should review the same by application to the next term of the superior court for a writ of certiorari, and not by appeal.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 19.]

2. APPEAL AND ERROR ⇨797(1)—RECORDER'S COURT—APPEAL TO SUPERIOR COURT.

Although the statute establishing the recorder's court does not provide for an appeal, and certiorari at the first succeeding term of the superior court is the remedy, where defendant's appeal was docketed at the next succeeding term in February, 1915, and duly calendared by consent at every succeeding trial term until November term, 1916, plaintiff had then lost his right to dismiss the appeal by delay and long acquiescence, and his motion to dismiss was made too late, and should have been denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8149, 8150.]

Appeal from Superior Court, Harnett County; Stacy, Judge.

Action by the McPherson Drug Company against the Norfolk Southern Railway Company. From a judgment of the superior court, dismissing defendant's appeal from a judgment of the recorder's court for plaintiff, defendant excepts and appeals. Reversed.

R. N. Simms, of Raleigh, and D. H. McLean & Son, of Lillington, for appellant. Baggett & Baggett, of Lillington, for appellee.

BROWN, J. Judgment was rendered against defendant in the recorder's court December 5, 1914, and an appeal was taken and duly docketed in the superior court before next ensuing term, February 5, 1915. The case has stood for trial on the civil issue docket at every term of the superior court until November term, 1916, when the motion to dismiss was first made. It appears in the case on appeal that it has appeared regularly on the calendar of cases set for trial with the knowledge and consent of plaintiff's attorneys.

[1, 2] His honor dismissed the appeal because the statute establishing the recorder's court failed to provide for an appeal, and that defendant should have applied for a certiorari at first succeeding term of the superior court. It is true the statute does not provide for an appeal, and that certiorari is the only remedy.

This case differs, however, from *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981. In that case the appeal was not docketed in superior court, and no certiorari was applied for at next term of that court. In this case the appeal was docketed at the next succeeding term in February, 1915, and the case was duly calendared by consent at every trial term since, and no motion to dismiss was made until November term, 1916. In the case cited, it is held that when the appeal is taken and duly docketed in the superior court, without objection, the jurisdiction of that court will attach, notwithstanding the failure of the statute to provide for an appeal. In this case the appeal was docketed at February term, 1915, and duly calen-

dared by consent at each succeeding term, and no motion to dismiss was made until November term, 1916; consequently the plaintiff has lost his right to dismiss by delay and long acquiescence.

The motion was made too late, and should have been denied.

Reversed.

(173 N. C. 108)

W. L. HALL & CO. v. NORFOLK SOUTHERN R. CO. et al. (No. 189.)

(Supreme Court of North Carolina. March 7, 1917.)

1. CARRIERS ⇨174—BILL OF LADING—SHIPMENT.

Under a bill of lading of cotton shipped by a defendant's line of steamers consigned to the shipper at a certain point, "order, notify care of A. C. L. R. Co.," it was the duty of such defendant to have delivered cotton to that point to the designated carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 747-765.]

2. CARRIERS ⇨188—CARRIAGE BEYOND DESTINATION—RETURN—CHARGES.

In such case, it was an entirely officious act to carry the cotton beyond the destination specified in the bill of lading for which no charge could have been made, and, having done so, it was such carrier's duty to have returned the cotton to destination at its own expense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 853-858.]

3. CARRIERS ⇨72—CONTROL OF GOODS—"ORDER NOTIFY"—EFFECT.

Where cotton was consigned to the shipper "order notify," the shipper retained the control of it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 243-250, 258-261, 266-269.]

4. CARRIERS ⇨73—CONTROL OF GOODS—REDELIVERY.

So long as goods remain the property of the shipper under a consignment to himself, "order notify," he may countermand any directions given as to their consignment, and may at any time during transit require their redelivery to himself.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 248, 249.]

5. CARRIERS ⇨202—ACTION FOR OVERCHARGE—QUESTION FOR JURY.

In a shipper's action to recover an overcharge paid to the carrier who had received goods which the initial carrier had carried beyond destination, and returned them, *held*, that it was error to direct a nonsuit.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906-915.]

Appeal from Superior Court, Pitt County; Stacy, Judge.

Action by W. L. Hall & Co. against the Norfolk Southern Railroad Company and others. Judgment of nonsuit, and plaintiff appeals. Reversed.

W. F. Evans, of Greenville, for appellant. F. G. James & Son, of Greenville, for appellees.

CLARK, C. J. The plaintiff on February 26, 1913, shipped 72 bales of cotton over the "Daniels Roanoke River Line" of steamers

(one of defendants), consigned on the face of the bill of lading to "W. L. Hall, Plymouth, N. C., order notify * * * care of A. C. L. R. Co." This cotton was delivered to said company at Jones' Landing on Roanoke river about 35 miles above Plymouth. The Daniels Roanoke River Line carried this cotton down Roanoke river, but instead of stopping at Plymouth which is located on that river, where both the Norfolk Southern and Atlantic Coast Line have wharves, carried the cotton on 25 miles further to Edenton, N. C., and there delivered it to the other defendant, the Norfolk Southern Railway Company, which hauled it back over their tracks to Plymouth and switched it to the track of the Atlantic Coast Line Railroad, charging the plaintiff \$72 in freight and \$4 switching charges, which the plaintiff had to pay, besides surrendering the bill of lading, before he could have the cotton delivered to the Atlantic Coast Line Railroad.

While there was no tariff rate, shown in the bill of lading, from Jones Landing to Plymouth by the tariff rates, which the defendants contend were in effect, the rate on a bale of cotton from Jones Landing to Edenton, which is 25 miles beyond Plymouth, was 50 cents per bale. When the witness learned that his cotton had been carried by Plymouth to Edenton he went to the latter town, and, finding the cotton in the hands of the Norfolk Southern Railroad Company, presented his bill of lading, and demanded that it be turned over to him there. This was refused, and subsequently the cotton was shipped back over the Norfolk Southern, and at that point he paid the agent as above 50 cents per bale, from Jones Landing to Edenton, and another 50 cents from Edenton back to Plymouth, and \$4 extra charges, making \$76.

[1, 2] According to the law of this state the Daniels Roanoke River Line could not have charged more from Jones Landing to Plymouth than to Edenton, and there was nothing in the bill of lading which authorized the cotton to be shipped via Edenton. It was the duty of the Daniels Roanoke River Line to have delivered this cotton to the Atlantic Coast Line Railroad at Plymouth, which is a well-known shipping point, and where the record states that the Atlantic Coast Line, in whose care this cotton was shipped, had a wharf. It was an entirely officious act to carry the cotton on to Edenton, and for this no charge could have been made; and, having done so, it was the duty of said com-

pany to have brought the cotton back to Plymouth at its own expense.

[3, 4] This cotton was shipped "order notify"—that is, the shipper retained the control over it; and as was held in *Myers v. Railroad*, 171 N. C. 193, 88 S. E. 149, quoting 2 Hutchinson, Carriers, § 660:

"So long as the goods remain the property of the bailor he may countermand any directions he may have given as to their consignment, and may at any time during the transit require of the carrier their redelivery to himself."

This doctrine is fully settled by the other authorities cited in *Myers' Case*.

[5] Besides in this case the shipper had not even consigned the goods by Edenton, nor over the Norfolk Southern Railroad Company, whose agency was not necessary in shipping goods from Jones Landing to Plymouth. It may be that the Norfolk Southern Railroad Company was the "friend" of the Daniels Roanoke River Line, and the Atlantic Coast Line Railroad was not, probably for the reason that the latter parallels the Daniels River Line from Williamston to Plymouth, and is to some extent a competitor; but if the Daniels River Line wished to give a job to its friend of hauling back the cotton from Edenton to Plymouth, and carried it on from Plymouth to Edenton for that purpose, it should have done so at its own expense, and not have doubled, or more, the mileage charged against the shipper. The unnecessary transportation from Plymouth to Edenton and back to Plymouth was 50 miles, being considerably more than the mileage from Jones Landing to Plymouth where it should have delivered the cotton on the wharf which the record states the Atlantic Coast Line had at Plymouth. The law will not tolerate such doubling of charges against the shipper.

On the facts in evidence the judge was in error in directing a nonsuit against the plaintiff who seeks to recover the overcharge against him. The plaintiff also joins a charge for the penalty in exacting the overcharge. This penalty is prescribed by statute to prevent imposition on shippers and consignees who have to pay the charges of carriers before they can get the goods, as the plaintiff had to do on this occasion. *Tilley v. Railroad*, 172 N. C. 363, 90 S. E. 309. We do not, however, pass upon the right of the plaintiff to recover the penalty, but leave that matter open until the facts are developed at the trial on the merits.

The judgment of nonsuit is reversed.

(120 Va. 481)

GRICE v. TODD.

(Supreme Court of Appeals of Virginia. March 15, 1917. Rehearing Denied March 28, 1917.)

LANDLORD AND TENANT §114(3)—TENANCY FROM YEAR TO YEAR—HOLDING OVER.

A tenant gave his landlord notice of intention to vacate. Owing to his inability to secure wagons to move his effects, he was compelled to hold over for three days, at the end of which time he sent the keys to the agent named in the lease explaining the circumstances, whereupon the landlord elected to hold him as tenant from year to year by reason of his having so held over. *Held* that, since no obligation will be implied in law from an act which is not voluntary, a contract of tenancy from year to year will not be implied.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 378-381.]

Appeal from Law and Equity Court of City of Richmond.

Action by Mary V. Todd against Edward Grice. Judgment for plaintiff, and defendant appeals. Reversed.

George Bryan, of Richmond, for plaintiff in error. S. A. Anderson, E. V. Farinholt, and R. R. Florence, all of Richmond, for defendant in error.

SIMS, J. The facts in this case are agreed, and are as follows:

"It is agreed that E. W. Grice was a tenant of Mrs. Mary V. Todd of the premises 509 W. Franklin street, Richmond, Va., under lease hereto attached as part hereof, and held over for one year thereunder, which year expired August 31, 1914; that he gave three months' notice to her that he would vacate at said expiration of said year; that he held over for three days after August 31, 1914, because, although he endeavored to obtain them, he could not get wagons to move his effects on August 31, 1914, to the apartment to which he wished to move; that on September 4, 1914, he vacated said premises, and sent the keys to the agents named in the lease; and that then said Mrs. Mary V. Todd elected to hold him as a tenant from year to year by reason of his having held over as aforesaid; that the said Grice denies his liability as such tenant. That the parties to these proceedings further agree that this matter shall be submitted to the judge of this court for his decision and judgment in this suit, a jury being waived."

It appears from this statement of facts that the case before us is not one where there was a holding over of the tenant beyond the expiration of the term of his lease, without more. The holding over of the tenant was for three days, caused by his inability to obtain wagons to move his effects, although he endeavored to obtain them. He vacated the premises on the fourth day after the expiration of his lease and tendered the keys of the premises to the landlady. The latter then elected to hold the former tenant as a tenant from year to year "by reason of his having held over as aforesaid," not by reason of his having held over, without more.

Such situation presents, in effect, a case where, after the term of the lease expired,

the former tenant held over, but gave notice to the landlady, explaining his possession on the ground that it was caused by circumstances over which he had no control, before the landlady exercised her right of election.

The judgment of the court below was for the landlady, plaintiff therein, the appellee here, against the former tenant, defendant therein, the appellant here.

We think there was error in the judgment of the trial court for the reasons hereinafter pointed out.

That judgment would have been right if this had been a case where there was a holding over of the possession by the former tenant, without more.

The uniform view of the American text-writers and authorities on the subject, where the doctrine of tenancy from year to year is recognized, is that when a tenant, who has previously rented for a term of years, or for one year, holds over possession of premises beyond his original term, without more, upon the election of the landlord to hold him as a tenant from year to year, the law implies a contract on the part of the tenant to remain and pay rent as a tenant from year to year. His holding over puts the tenant in the position of being in wrongful possession against the landlord. Such possession of the tenant is wrongful, but for technical reasons he is not yet a trespasser. He holds over by the laches of the landlord, who may enter at any time and put an end to the tenancy. Until the landlord takes some action in the matter, the former is a tenant by sufferance. In such situation, while the tenant is a tenant by sufferance, the landlord has the right of election to allow or refuse to allow the tenant to remain. The landlord may exercise the latter right, and, if he does, from that moment the tenant is a trespasser and may be ejected. If the landlord exercises the former right, he may do so in such express terms that the latter remaining in possession will become a tenant at will. But as the law does not favor a tenancy at will, it will not imply a contract necessary to create such a tenancy. In the absence of evidence of such an express contract, if the landlord exercises his right of election to allow the tenant to remain, without more, the law implies a contract on the part of the landlord that the tenant may remain as a tenant from year to year; such a tenancy being favored by the law in the interest of a more permanent tenure than that of a tenancy at will. Conversely, and for the same reason, where there is a holding over by the tenant, without more, and while such holding over exists, upon the election by the landlord aforesaid, the law implies a contract on the part of the tenant to remain and pay rent as a tenant from year to year. That is to say, in such situation, the contract creating a tenancy from year to year, whether on the part of the ten-

ant or landlord, is implied in law, from the voluntary acts of the parties, in the absence of any agreement. 1 Washburn on Real Prop. (6th Ed.) §§ 800, 825, 826, 829; 1 Minor on Real Prop., §§ 386, 389; 1 Taylor on Landlord and Tenant (9th Ed.) §§ 19, 22; Jones on Landlord and Tenant, §§ 201-209; 24 Cyc. pp. 1011-1014; King v. Durkee-Atwood Co., 126 Minn. 452, 148 N. W. 297, L. R. A. 1915A, 235; note to 16 Va. L. Reg. 496.

It is true that in a situation of a holding over of the former tenant, without more, very slight acts or act on the part of the landlord, which may be even inferred from a very short lapse of time, will be sufficient to conclude his election and make the person holding over his tenant, when the landlord is himself relying on the renewal agreement (Jones on Landlord and Tenant, § 205); but the election, however evidenced, must be exercised by the landlord before the obligation which the law implies on the part of the tenant arises.

However, in the instant case, we are relieved of any consideration of what act or acts of the landlady were sufficient to evidence her election, by the agreed statement of facts, which concludes that question by the affirmative statement that the landlady did elect as aforesaid and when she so elected.

It is also true that, in the situation referred to in the next preceding paragraph, the tenant has no such right of election as the landlord has. As to the latter, "his mere continuance in possession fixes him as a tenant from year to year, if the landlord thinks proper to insist upon it" (16 Va. L. Reg. p. 496, note; 1 Taylor on Landlord and Tenant, supra, § 19); or as another writer puts it, concerning the contract of the former tenant to remain as a tenant from year to year, which the law implies from the mere act of the former tenant of holding over, " * * * in reality the presumption is one of law, which cannot be rebutted" (Jones on Landlord and Tenant, § 210). The authorities also hold that the intention of the former tenant in holding over is immaterial.

All of the foregoing is true because the contract of the tenant, which is implied in law, from his holding over beyond the term of his former lease, is really not a contract in fact, although spoken of as such. The relationship of the parties is quasi ex contractu.

"The liability" (of the tenant) "exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded. * * *" 2 R. C. L. § 8.

Such an obligation may be implied in law, not only without the existence of an intention to create it, but even against a contrary intention, if equity and good conscience de-

mand it; as in case of a tort, theft, forcible taking of property (2 R. C. L. §§ 14, 15) or fraud (Id. § 18), or mistake, and in other cases.

With respect to both tenant and landlord, in the absence of express agreement, the law deals with the conduct of the respective parties in the light of the situation and attitude of the parties to each other, and implies a contract between them or an obligation of the one to the other, where *ex æquo et bono*, according to the principle on which the action of assumpsit is founded, it should be implied. If, however, the parties protect themselves from the contract or obligation which the law would imply in the absence of agreement between them, by express agreement, or by notice the one to the other followed by action thereon from which an express agreement may be ascertained, the law will not do violence thereto by implying an agreement in contravention thereof.

Similarly, "The law * * * will not imply a promise against the express declarations of the party to be charged, made at the time of the supposed undertaking, unless such party is under legal obligation, paramount to his will, to perform some duty." 4 Cyc. p. 326. And he is not under such legal obligation unless there is a demand in equity and good conscience that he should perform the duty.

The English rule is the same as that above referred to as prevailing in America, to the extent that the obligation of the tenant arising from his holding over, without more, is one implied in law, upon the exercise by the landlord of his right of election aforesaid, regardless of the intention of the tenant. Right on, etc., v. Darby, 1 T. R. 159; Bishop v. Howard, 2 B. & C. 100, 9 E. C. L. 41; Sauvage v. Dupress, 128 Eng. Rep. Reprint 163; Dougal v. McCarthy, 1 Q. B. 736; Digby v. Atkinson, 4 Camp. 275; Rigge v. Bell, 5 D. & E. Rep. 471.

There are other cases which indicate that in England the holding of the courts is more liberal than in America upon the inquiry as to when the obligation of a tenant holding over will be implied in law (see English cases referred to by the text-writers above cited); but there is no difference between the rule in England and America that, whenever the obligation is implied in law, it is implied regardless of the intention of the tenant. The law supplies the intention whenever it imposes the duty, but then only. This is a distinguishing characteristic of an obligation implied in law which is universal. It inheres in the very nature of it.

The inquiry, therefore, in the instant case, whether the tenant had in fact the intention to hold over the premises from year to year, is immaterial, both on principle and upon authority. But the true inquiry is: Was the situation of the parties, which was known to each other, and their conduct, such that

the law will imply a contract or obligation on the part of the tenant to hold over as a tenant from year to year? Will the law impose such duty on the tenant in such situation?

As we said in the case of *City of Norfolk v. County of Norfolk*, 120 Va. —, 91 S. E. 820:

"The fiction of an implied promise will not be indulged in every case, but only where in equity and good conscience the duty to make such a promise exists."

An action of assumpsit upon a quasi contract—which is the action in the instant case—is equitable in its nature. No recovery will be allowed in such an action which does violence to natural equity. Where an express contract, although not made, might possibly have been made by the parties, in their situation with regard to and dealings with each other and consistently therewith, or if not consistently therewith, in equity and good conscience it should have been made, the law will impose the duty and imply the necessary promise or promises to create such a contract or obligation; but not where the facts expressly proved in a case negative such possibility and also negative the existence of any demand in equity and good conscience that such a promise should have been made. That, as we stated in the case last cited, "would be in itself inequitable." *Id.* See, also, 2 R. C. L. on subject of Assumpsit. In such case there would be no legal obligation on the tenant paramount to his will as shown by his express declarations. 4 Cyc. supra. Hence the duty in question would not be imposed by the law.

In the instant case, the action of the tenant holding over was not voluntary according to the agreed statement of facts. If this was a mere pretense on the part of the tenant, or if the situation relied on by him to excuse his action as involuntary was brought about by his own default in the matter of making due efforts to provide a means of removal, so as to estop him from reliance thereon, the appellee might have taken issue upon the alleged necessity of the situation in which the tenant claimed to be placed. But by the agreed statement of facts we are relieved from any consideration of whether the action of the appellant was in truth involuntary. The agreed statement concludes this fact.

No obligation will be implied in law from an act which is not voluntary. 2 R. C. L. § 8; *Herter v. Mullen*, 159 N. Y. 28, 53 N. E. 700, 44 L. R. A. 703, 70 Am. St. Rep. 517; *Kegan v. Fosdick*, 19 Misc. Rep. 489, 43 N. Y. Supp. 1102.

Further:

The facts expressly proved in this case show, not only that the action of the tenant in holding over was not voluntary, but in addition that the appellee had actual notice brought home to her of the express declaration of the tenant that he held over invol-

untarily, and hence contrary to any idea of further contract, before the mind of appellee assented to the tenant's remaining over. In this situation of the parties, a meeting of their minds upon a contract in fact was impossible, and, in equity and good conscience, in this situation, there was no demand that the tenant should make such contract; hence the tenant was under no legal obligation paramount to his will, as shown by his express declaration, to make such contract. Therefore the law will not in such a case imply such obligation.

The American cases on the subject of the contract implied in law from the circumstance of the holding over of the former tenant beyond the expiration of his term are very numerous. Many of them are cited in the briefs of counsel for appellee and appellant; many are collated in L. R. A. 1915A, 235, note, and by the text-writers above cited. We do not find that any of such cases, which are thus cited or collated, upon examination, are in conflict with the conclusion above reached but one, and that is the case of *Mason v. Wierengo's Estate*, 113 Mich. 151, 71 N. W. 489, 67 Am. St. Rep. 461. In the last-named case it was held:

"The fact that a tenant for a term of years becomes seriously ill shortly before the expiration of his term, and after removal operations have actually begun, does not deprive the landlord of his right to treat the tenant's failure to complete the removal before the lease expires as a renewal of the lease for another year."

The holding in that case manifestly violates the principle upon which an obligation will be implied in law. This principle has been sufficiently discussed above and need not be again adverted to here.

The case of *Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94, 28 Am. St. Rep. 636, has also been called to our attention. That was a case where the tenant held over for three days after the end of the year on account of the illness of a boarder of a subtenant. There was also some other question as to whether the holding over was voluntary or involuntary on account of difficulty in procuring trucks or wagons for removal of tenant's effects; but under the facts of that case the court held that the holding over was voluntary, and that the tenant was liable for rent for another year. But there the lease contained a provision that the premises should be occupied as a private dwelling and a covenant not to sublet without the written consent of the lessor; and the tenant, without permission, had rented the premises to the subtenant, a boarding house keeper. Here this breach of covenant was a distinguishing feature in the case, operating against the tenant by way of estoppel, preventing his relying upon the incident of illness which arose, since it was because of his breach of covenant that this hindrance to his delivery of possession was made possible. The court reserved its decision upon the

case of an involuntary holding over in no way the fault of the tenant.

There are a few other cases where the obligation in question has been held as implied in law, where there were positions taken by the tenant and notice thereof given to the landlord which, if they had occurred after the tenant's term expired, would have been inconsistent with the possibility of any contract in fact to create a tenancy from year to year; but these positions were taken before the prior term of the tenant expired, and the holding over thereafter was unaccompanied by any notice to the landlord of any controlling necessity which rendered the action of the tenant involuntary (as in the instant case) before the landlord exercised his right of election aforesaid. Hence the holding over was left, as in other cases of holding over without more, for the law to act upon.

It should be noticed further that we do not discuss the circumstance that in the instant case a notice was given by the tenant under the statute in Virginia, before his lease expired, because under the authorities (L. R. A. 1915A, note, supra) it seems clear that such a notice does not differentiate the case from any holding over by a tenant after the expiration of his term; the instant case being a holding over after the date named in the notice when the premises should have been vacated.

Upon the whole case, therefore, for the reasons given above, we are of opinion that there was error in the judgment complained of, and it will be reversed.

Reversed.

(120 Va. 471)

CORBITT v. WRIGHT et al.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. DESCENT AND DISTRIBUTION §26—THEORY OF STATUTE.

The theory of the Virginia statute of descent and distribution is that on the death of an intestate the estate passes in coparcenary equally to the children, subject to widow's rights.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 76, 77.]

2. DESCENT AND DISTRIBUTION §105 — ADVANCEMENT — HOTCHPOT — AFFECTING PURCHASER BEFORE DISTRIBUTION.

In view of Code 1904, § 2561, providing that when an intestate decedent has had an advancement, it shall be brought into hotchpot, and he shall then be entitled to his proper portion, his purchaser before distribution is likewise bound and takes only his grantor's interest, and the doctrine of bona fide purchaser does not apply.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 398-401.]

Appeal from Circuit Court, Nansemond County.

Suit by James H. Corbitt against J. Etta Wright and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Williams, Tunstall & Thom, of Norfolk, and W. P. Lipscomb, of Suffolk, for appellant. J. R. Saunders, of Suffolk, for appellees.

WHITTLE, J. In a suit brought by appellant as purchaser of the interest of Thomas B. Wright in the real estate of which his father died seised against the other heirs for partition, the circuit court denied the relief sought by a decree which sets forth the following material facts: That Cornelius W. Wright, the father, died intestate on October 3, 1910, leaving real estate and survived by his widow and 14 children; that by deed dated February 20, 1912, Thomas B. Wright, a son, conveyed his undivided interest in the real estate descended to plaintiff; that at the time of the conveyance no suit had been commenced for the administration of the estate, nor had any report been filed of debts and demands against it; that decedent in his lifetime had made advancements to Thomas B. Wright in excess of his interest in the estate; that plaintiff was a purchaser for value from Thomas B. Wright, and at the time of the purchase had made no inquiry and had no knowledge of the advancements to his grantor.

Upon these facts the circuit court was of opinion that at the time of the conveyance Thomas B. Wright, by reason of the advancements, had no interest in the real estate in question, and that plaintiff could acquire, and did acquire, no other or greater interest than his grantor had therein; and, plaintiff in open court having expressed unwillingness to come into hotchpot, it was decreed that he had no interest in the estate.

[1] The theory of our statute of descent and distribution is that the estate of the ancestor at his death (subject to the rights of the widow, if there be one) passes in coparcenary equally to his children. And by Virginia Code 1904, § 2561:

"Where any descendant of a person dying intestate as to his estate, or any part thereof, shall have received from such intestate in his lifetime, or under his will, any estate, real or personal, by way of advancement, and he, or any descendant of his, shall come into the partition and distribution of the estate with the other parceners and distributees, such advancement shall be brought into hotchpot with the whole estate, real and personal, descended or distributable, and thereupon such party shall be entitled to his proper portion of the estate, real and personal."

[2] It results from this equitable method of settlement that, where the advancement to such descendant is equal to or exceeds his share in the estate, it bars his right to further participation. It is true the section does not in terms refer to a purchaser from the descendant; yet such purchaser is charged with knowledge of the public statutes of the state, and only buys and can only take the interest of his grantor in the estate.

Obviously the doctrine of bona fide purchaser has no application to the case. Ap-

pellant bought the heir's interest in the estate, and when that interest is ascertained he is entitled to that and to nothing more.

The general rule is thus stated in the article on "Descent and Distribution" in Cyc.:

"When an heir or distributee assigns his interest in an unsettled estate, the effect is to divest him of his title or right and vest the same in the assignee, who may maintain an action for such interest in his own name under the statutes allowing assignees to sue; but the assignment cannot in any way affect the condition of the administrator or of the estate. The purchaser or assignee occupies the same position that his assignor or grantor occupied, taking the interest granted, with all of the grantor's rights and subject to all of his liabilities."

The text is sustained by numerous authorities cited in the notes. 14 Cyc. 136.

The same doctrine is enunciated in *Ruling Case Law*, where it is said:

"The grantee of an heir's interest in the realty of his ancestor stands in the place of the heir, and in the same relation to the estate."

* * * His rights are no greater than those of the heir, especially when the deed does not purport to convey any particular tract, but merely such interest in the ancestor's lands as the grantor is entitled to as heir. * * * The fact that the heir has been advanced may be shown to reduce the interest received by the purchaser." 9 R. C. L. pp. 122, 123, and cases cited.

The decree of the circuit court is demonstrably right, and must be affirmed.

Affirmed.

(120 Va. 674)

VIRGINIA TRUST CO. v. RAYMOND.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. CARRIERS — §318(10)—INJURY TO PASSENGER — SUFFICIENCY OF EVIDENCE — OPPORTUNITY TO ALIGHT.

In an action for personal injuries to a street car passenger, evidence held to sustain both counts of the declaration, alleging a breach of the carrier's duty to give the passenger an opportunity to alight, and negligence in starting the car after the passenger had alighted; and before she had a reasonable opportunity to get out of the way.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1314.]

2. CARRIERS — §348(12)—INJURIES TO PASSENGER—INSTRUCTIONS—APPLICABILITY TO EVIDENCE—LAST CLEAR CHANCE.

In an action for injuries to a street car passenger, evidence that after she had alighted, and while the motorman and conductor knew she was in a position of danger, the car was started around a curve at a rapid rate, and the rear fender, swinging out, struck the passenger and injured her, is sufficient to warrant an instruction on the doctrine of last clear chance.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1403, 1405.]

Error to Circuit Court of City of Richmond.

Action by Margaret Raymond against the Virginia Trust Company, as receiver of the Richmond & Henrico Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gunn & Mathews and S. A. Anderson, all of Richmond, for plaintiff in error. L. O. Wendenburg and T. Gray Haddon, both of Richmond, for defendant in error.

WHITTLE, J. This case is before us on writ of error to a judgment in favor of the defendant in error, the plaintiff below, in an action to recover damages for personal injuries ascribed to the negligence of the plaintiff in error.

The plaintiff was a passenger on the defendant's car, her destination being the corner of Fifth and Louisiana streets, in the city of Richmond.

The declaration contains two counts. The first count charges that after the car had stopped at the point referred to for the purpose of allowing passengers to alight, and while plaintiff was in the act of getting off and before she could safely reach the pavement, the conductor and motorman negligently started the car forward, and thereby, without any negligence on her part, plaintiff was thrown to the ground and injured. The second count alleges that the defendant owed the plaintiff, as a passenger, the highest degree of care to protect her from injury by allowing her reasonable time after alighting from the car to get out of the way before putting the car in motion, and charges that she was a passenger and rang the bell to stop the car at her destination; that the car stopped to permit her to alight; that after she had stepped off, and before she had reasonable time to get out of the way of the car, and when by the exercise of ordinary care her peril could have been discovered, and it was apparent that if the car was moved it would strike her, the conductor and motorman in charge negligently started the car ahead, and the rear end of it caught in her clothes, without negligence on her part, and she was thrown down and injured.

[1] It is sufficient to say of the evidence that, from the standpoint of a demurrer thereto, it sustains both counts of the declaration. It showed that after the car had stopped to allow other passengers and the plaintiff to alight, and while she was in the act of getting off from the front end with one foot on the ground, and was attempting to put the other foot down, the car was prematurely started forward at a rapid rate of speed (as one of the witnesses testified, "The car went around the curve at a very rapid rate, more rapid than I have ever seen a car go around a curve, and I have been living on a curve ten years"), and before plaintiff could recover her balance and get out of the way, her clothing was caught by the fender on the rear end of the car as it swung around the curve and overlapped the track, and she was thrown down and seriously injured.

[2] The instructions given by the court covered every material phase of the contro-

versy. The only error assigned in regard to instructions is to No. 8, which reads:

"The court instructs the jury that wherever you are instructed that you may find for the defendant, should it be proven that the plaintiff was guilty of contributory negligence, those instructions are subject to this qualification: That even though you may believe from the evidence that the plaintiff was guilty of contributory negligence, yet this will not prevent the plaintiff from recovering in this case, if the jury shall further believe from the evidence that the motorman or conductor in charge of the defendant's car saw, or by the exercise of reasonable care and caution in keeping a lookout could have seen, that the plaintiff was in danger of being struck by the rear end of said car, should said car continue around the curve at Fifth and Louisiana streets, and that said motorman and conductor could have stopped said car by the use of ordinary care and caution in time to have prevented the rear end of said car from striking the plaintiff, but failed to do so, then the jury should find for the plaintiff."

This instruction correctly propounds the doctrine of the last clear chance, and was appropriate under the pleading and evidence. The motorman, who was at the front end of the car, saw the position of the plaintiff, and says she was standing close to the car, and he told her to get back, so that the rear end would not strike her, "I said, 'Watch out for the rear end!' and motioned with my hand." It was also in evidence that the conductor, who was standing on the step at the rear end of the car, saw her peril and motioned to her to get back. And the evidence of the defendant was that she did remove herself to a place of safety, but afterwards walked toward the car and was struck. This theory of the accident, however, was positively denied by the testimony of the plaintiff, whose version of the occurrence has already been given.

The duty of the jury with respect to these conflicting theories was correctly submitted to them for decision, and upon familiar principles their finding cannot be disturbed by this court.

We find no error in the rulings of the circuit court, and its judgment must be affirmed.

Affirmed.

(120 Va. 540)

NORFOLK & W. RY. CO. v. TUCKER'S ADM'X.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. MASTER AND SERVANT §204(1)—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—ASSUMPTION OF RISK.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), with specified exceptions, leaves open the defense of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 544.]

2. MASTER AND SERVANT §211 — INJURY — ASSUMPTION OF RISK.

The risk from a clod of clay projecting from the face of a sand bank, where it had lodged when prized from the top, was assumed by a

sand shoveler, experienced in the work; it being a part of the business of the shovelers, known and recognized by them, to remove such clods whenever they thought them dangerous, of which they were the sole judges.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 557.]

Error to Circuit Court, Prince George County.

Action by Margaret Tucker, administratrix of Rufus Tucker, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Wm. B. McIlwaine and J. M. Townsend, both of Petersburg, for plaintiff in error. Paul Pettit, of Petersburg, for defendant in error.

KELLY, J. Rufus Tucker was killed while at work for the Norfolk & Western Railway Company. In an action alleging that his death was caused by the company's negligence, his administratrix recovered the judgment under review.

The very simple work in which Tucker and other employes were engaged consisted in cutting down a sand bank and loading the sand therefrom, by the use of wheelbarrows, into railroad cars. The sand bank was 15 or 20 feet high. It was being operated by a number of men under the general charge and direction of a railroad section foreman, who visited the operation at more or less frequent intervals, varying from once a day to two or three times a week. Another employé, doing the same work and receiving the same pay as Tucker and the other laborers there, was also the timekeeper and leader or local boss or foreman of the force.

The top of the bank is covered with clay or earth, and below this is the sand. To get the sand from the bank, the men go to the top and prize it off with crowbars, thus causing the clay and earth and sand to "cave," or break away, and roll down to the foot of the bank. This process leaves the face of the bank at the top nearly perpendicular for several feet, sloping off thence with a considerable incline to the bottom, where the sand is shoveled into wheelbarrows and thence conveyed along a plank runway to the cars. Some 50 or more men were thus employed, but they worked in small squads at intervals of a few feet from each other, so that as the bank was cut back each squad made a sort of dent or scallop in the bank, thereby to a certain extent giving to each a separate working place, which was still further defined by the more or less cloddy clay and earth which the men discarded and threw to one side or the other as the several squads loaded the sand into their wheelbarrows.

A few days prior to the accident complained of, the top of the bank over one of these scallops had been prized off, and a clod of

mixed clay and sand was left sticking on or in the face of the bank about 4 feet from the top. This clod did not present a dangerous appearance, and for that reason, as well as because enough of the bank was already down to answer for the time being the purpose of the operation, it was left undisturbed for several days while a squad of hands, including Tucker, continued to load sand in the working place below it. This condition or situation was one which from the nature of the work was liable to arise at any time, and had frequently arisen in the previous course of the enterprise. After some days, but before the sand previously thrown down had all been loaded, the clod fell from the bank, breaking as it fell, and a piece of it struck Tucker, causing the injuries which are alleged to have resulted in his death.

There is some conflict in the evidence as to whether the clod projected from the bank, but none whatever as to the fact that it was plainly visible to the men below, and that none of them thought it was likely to fall. Tucker had worked for the defendant company for a number of years in this same employment, and was thoroughly familiar with the manner in which the operation was carried on. Being in point of service one of the oldest employes on the job, he was accustomed to "caving" the bank himself; the oldest hands generally being called on for that purpose. It was a part of the business of these men, known and recognized by all of them, to look out and care for the safety of themselves and of each other, and to prize down the bank, as they did do, whenever it seemed to them dangerous, whether they needed to prize it down for more sand or not. This duty rested no more upon the leader or foreman above mentioned than it did upon each and every member of the force, and it was a duty which, in the absence of any understanding with the company to the contrary, would, in view of the character of the work, have rested upon them as a matter of law from the implied contract on the part of the workmen; but it was also expressly brought to their attention and recognized by them, as affirmatively appears from the evidence. The plaintiff's decedent, Rufus Tucker, had been frequently charged with it during the course of his long employment with the defendant company in this branch of service.

[1] There were two counts in the declaration, one setting out a cause of action under the laws of this state, and the other a cause of action under the federal Employers' Liability Act. The trial court, upon the motion of the defendant, required the plaintiff to elect upon which count she would proceed, and she chose the latter, so that the doctrine of assumed risk is fully open to the railway company as a defense. South-

ern Ry. Co. v. Jacobs, 116 Va. 169, 81 S. E. 99.

The only negligence charged in the declaration was the failure of the defendant "to use due and proper care to provide for said plaintiff's intestate and for its other employes a safe place for them to work in, and particularly * * * to use due and proper care to keep and maintain the walls and sides of its said sand pits and banks * * * clear of such rock and dirt as were liable to fall down and injure or kill" those employed at work in the bank.

[2] All of the several assignments of error were waived at the hearing in this court, except one based on the action of the court in overruling the motion to set aside the verdict of the jury as contrary to the law and the evidence.

The motion should have been sustained. There is, as we conceive, no aspect of the case as disclosed by the evidence in which the verdict could be upheld. The accident resulted from a risk which was inherent in the employment and was perfectly well understood by the plaintiff's decedent. It was a common thing in the course of the work for clods to project from the face of the bank. If the men thought them likely to fall, they prized them down. If not, they let them alone. Of course, they knew there was a certain amount of risk in the latter course, and they themselves were the sole judges of the cases in which they should take the risk. Prizing the clods down or leaving them in place were the merest incidents of the work which they were employed to do. The principles of law exempting the master from liability under the facts of this case are too well settled to call for any discussion of them. They are fully discussed in many of the cases decided by this court, among them being *Jacoby Co. v. Williams*, 110 Va. 55, 65 S. E. 491, and *Fields v. Virginian Ry. Co.*, 114 Va. 558, 77 S. E. 501.

The judgment complained of must be reversed, and the cause remanded to the circuit court for a new trial, to be had, if the plaintiff shall be so advised, in conformity with the views expressed in this opinion.

Reversed.

(120 Va. 545)

CITY OF RICHMOND v. MAYO LAND & BRIDGE CO.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. EMINENT DOMAIN §200 — BURDEN OF PROOF—OWNERSHIP OF PROPERTY.

In proceeding by city to condemn an old bridge and approaches which connected with city streets, for purpose of constructing a new bridge, the burden is on the owner of the bridge to show that title to the approach to the bridge was in it, and not in the city.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 540.]

2. DEDICATION ~~6-11~~—BRIDGE APPROACHES—BRIDGES OF PUBLIC SERVICE COMPANIES.

Where a public service bridge company owned a bridge with a long approach which was indispensable to the use of the bridge and to the discharge of the company's duty to the public, it could neither expressly nor impliedly dedicate the approach to the city, since under City Code 1910, charter, § 19g, the city has power to close its streets, and the lawfulness of dedication depends, not on the probable use, but the possible use of the land dedicated, so that, if the approach were dedicated to the city, it might close it and destroy the use of the bridge.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. § 3.]

Error to Hustings Court of Richmond.

Suit by the City of Richmond against the Mayo Land & Bridge Company. From the decree rendered, the city brings error, and the defendant assigns cross-errors. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error. O. V. Meredith, Cutchins & Cutchins, and W. R. Meredith, all of Richmond, for defendant in error.

WHITTLE, J. By authority of an act of the General Assembly, approved March 15, 1906, the city of Manchester was annexed to and became part of the city of Richmond. Acts 1906, p. 370. By ordinance approved March 5, 1910, it was provided that the consolidated municipality should construct and maintain a modern up-to-date bridge across James river, either on the site of Mayo's bridge or so near thereto as to afford direct communication between Hull street in the city of Manchester and Fourteenth street in the city of Richmond. Accordingly, proceedings were instituted in the hustings court on behalf of the city against the Mayo Land & Bridge Company, owners of Mayo's bridge, to condemn the old bridge and site as a location for the new bridge.

It was conceded that the Mayo Land & Bridge Company owned the old bridge and the strip of land across James river on which it was erected; but, differences having arisen between the parties touching the company's alleged ownership of the approaches to the bridge, it was agreed that the commissioners should separately appraise the main structure and site and the northern and southern approaches, respectively. Thereupon the appraisers reported: (1) That \$112,000 would be just compensation for the bridge and site, including a brick building adjoining the dock at the northern terminus; (2) that \$5,500 would be just compensation for the strip of land lying on the north side of the river between the terminus claimed by the city as Fourteenth street and that to which the defendant company asserted title; and (3) that \$2,500 would be just compensation for the strip on the south side between the terminus claimed by the city as Hull street and that claimed by the defendant.

The city paid into court the \$112,000 which

was accepted by the defendant company and is not involved in this controversy.

At the hearing, the hustings court confirmed the report of the commissioners with respect to the \$5,500 assessment, but overruled their finding of \$2,500 for the southern approach to the bridge. A writ of error and supersedeas was awarded the city to the order allowing the former assessment, while the defendant in error assigned cross-error to the disallowance of the \$2,500. We shall consider these assignments in reverse order.

[1] 1. His honor, Judge Richardson, in a written opinion, disposed of the question involved in the cross-assignment as follows:

"As to the strip of land on the south side of the river heretofore mentioned and claimed by the Mayo Land and Bridge Company as its property, there is no competent evidence in this record to show that the said Mayo Land & Bridge Company, or their predecessors in title ever owned the said strip of land, and I am further of opinion and do decide that the said strip of land is, and has been for more than a century, a public street of the city of Manchester, * * * and that the Mayo Land & Bridge Company is not entitled to compensation for the same."

The record sustains that conclusion, which is strengthened by reference to the case of Mayo v. Murchie, 3 Munf. (17 Va.) 353. From the latter case it appears that when Col. William Byrd founded the "town of Manchester, by way of lottery," the agents appointed by him to superintend the laying off and bounding of the town expressly set apart "the slip of land which lies between James river and the lots of said town, near what is now called Mayo's bridge, as part of said town, to be annexed thereto, and held by the inhabitants, as a common, forever." Conformably to that plan, the property was conveyed by Col. Byrd to trustees for the town. It also appears that John Mayo subsequently obtained from Col. Byrd, for "a trifling consideration," a deed, without warranty, conveying to himself the above mentioned "slip." The appellate court declared the latter deed inoperative to pass title to the "slip," but modified the decree of the superior court of chancery for the Richmond district, so as to exclude from its operation ten feet of land between the river and canal belonging to Mayo.

The burden of proof rested upon the defendant in error to show title to the southern approach to the bridge, and we are of opinion that the evidence is insufficient for that purpose.

2. This brings us to the consideration of the remaining question: The action of the hustings court sustaining the title of the Mayo Land & Bridge Company to the approach to the bridge on the north side of James river, and directing the city of Richmond to deposit to the credit of the cause \$5,500, with interest, the amount ascertained

by the appraisers to be just compensation therefor.

This issue is greatly simplified by the following stipulation of counsel:

"It is agreed that the city of Richmond recognizes the original ownership of the Mayos in the strip of land beginning about 78 feet north of the canal connecting the basin and the dock, spoken of on some of the maps as the dock or canal; that the abutment or causeway began about this point and included the abutment or causeway of the bridge at the foot of Fourteenth street crossing this canal, which abutment and approach or causeway were the property of the Mayos, and a part of the approach, abutment, or causeway of the bridge proper; that from this point to the northern end of Mayo's bridge proper, the land, trestles, causeway, and retaining walls were at one time built by the owners of Mayo's bridge, and the trestle changed to a causeway as the land was filled up, either artificially or by natural accretions; and that this original approach or causeway is now the strip of land extending from the northern side of the canal down to the Mayo bridge proper at the present margin of the river; and that originally Fourteenth street stopped just north of the canal over which there is now and always has been a small bridge, owned by the Mayos at one time. The city recognizes the original ownership of the Mayos in the said strip of land and makes no claim to same by express dedication of the same by deed or grant; but relies upon an implied statutory dedication of said strip of land, causeway, or approach, and upon sundry actions of the council of the city of Richmond in treating the land in controversy as a public street and as an acceptance of the same and upon alleged recognition by the Mayo Land & Bridge Company of the implied or statutory dedication and the alleged acceptance as aforesaid. This agreement applies only to the northern abutment of Mayo's bridge."

The opinion of the learned judge of the hustings court contains an excellent discussion of the evidence bearing upon the alleged implied statutory dedication by the Mayo Land & Bridge Company of its northern approach to the bridge to the city of Richmond for a public street; and we agree with him that the city has not maintained that contention with the clear proof required of those claiming such dedication, but that the weight of evidence was the other way. *City of Norfolk v. Southern Ry. Co. et al.*, 117 Va. 101, 83 S. E. 1085.

[2] There is another view of the question, however, which renders it unnecessary to pursue that inquiry in detail. The Mayo Land & Bridge Company is a public service corporation, and the approach in question is indispensable to the use of the bridge, and the company's control of it is essential to the discharge of its duty to the public. Therefore the company could not expressly have dedicated the approach unqualifiedly to the city, because such dedication would have been in derogation of its charter obligation to the community at large and ultra vires and not binding upon the corporation. If this be so with respect to an express dedication, a fortiori must it be true of a dedication sought to be established by implication merely.

The city has power under its charter to close its streets and alleys (*City Code 1910, charter, § 19g*), and the lawfulness of a dedication, like the constitutionality of a law, must depend, not upon what use probably will be made of the property dedicated, but what use can be made of it by virtue of the dedication.

In *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950, 953, it was held:

"The franchises and powers granted to such corporations (public service corporations organized under legislative charters) are, in a large measure, designed to be exercised for the public good, and this exercise of them is the consideration of the public grant. Any contract by which the corporation disables itself to perform those duties to the public, or attempts to absolve it from their obligation without the consent of the state, is a violation of its contract with the state and is forbidden by public policy, and is therefore void."

The headnotes to the case were prepared by Mr. Justice Miller, who delivered the opinion of the court. At page 84 of 101 U. S., at page 953 of 25 L. Ed., he quotes with approval from the opinion of Chancellor Zabriske in *Black v. Canal Co.*, 22 N. J. Eq. 130, 133, as follows:

"It may be considered as settled that a corporation cannot lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority."

Justice Miller observes:

"For this he cites some 10 or 12 decided cases in England and in this country."

In elucidation of the principle, the chancellor, at page 399 of 22 N. J. Eq., says:

"That principle is that, where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions * * * is a violation of the contract with the state, and is void as against public policy."

A leading case on the subject is *Northern Pacific R. Co. v. Smith*, 171 U. S. 260, 18 Sup. Ct. 794, 43 L. Ed. 157.

The authorities sustain the proposition that the approach to a bridge, being an essential and inseparable part of it, cannot be dissevered, since that would deprive the public service corporation of the means of performing a nondelegable duty which it owes to the public. *Pittsburg, etc., R. Co. v. Dodd*, 115 Ky. 176, 210, 211, 72 S. W. 822, 74 S. W. 1096; 3 *Dillon on Mun. Corp.*, § 1678, note 1; *Clark on Corp. (Hornbook Ser.)* § 68, cases cited in note 73; *Hast v. Railroad Co.*, 52 W. Va. 396, 402, 44 S. E. 155.

For these reasons, we are of opinion that the decision of the hustings court upon both assignments of error is right and should be affirmed.

Affirmed.

(120 Va. 664)

VIRGINIA RY. & POWER CO. v. HUBBARD.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. DAMAGES §33 — COMPENSATION — AGGRAVATION OF PREVIOUS DISABILITY.

Where a female passenger was injured while on defendant's car, the fact that her previous affliction with a tumor aggravated the injury does not prevent recovery of all damages resulting, though there could be no recovery on account of any conditions existing before the accident and for anything that would have resulted independently of the accident, and an instruction to such effect sufficiently guarded defendant's rights.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 42.]

2. DAMAGES §158(5) — ACTIONS — EVIDENCE.

In an action by a female passenger for injuries received when an alleged drunken passenger fell and struck her in the abdomen, the declaration alleged that such drunken passenger fell with great force and violence upon and against plaintiff, injuring her back and inflicting serious internal injuries and bruises, whereby plaintiff became sick and diseased, and so continued for a long space of time, during all of which time plaintiff was prevented from attending to her lawful and necessary affairs, and was obliged to expend and did pay out a large sum of money in endeavoring to be cured of such bruises and injuries, and for a serious surgical operation necessitated by the accident, whereby plaintiff suffered great pain and anguish, both mental and physical. It appeared that at the time of the accident, and for some time before it, plaintiff had been afflicted with a tumor which she had not had removed, as it caused her no trouble and inconvenience, but that the accident so aggravated the tumor that a serious operation was necessary. *Held*, that the declaration was sufficient to warrant the admission of evidence as to the necessity of an operation on account of the aggravation of the tumor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 441.]

3. CARRIERS §284(1) — CARRIAGE OF PASSENGERS — DUTY OF CARE.

A carrier owes to its passengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers, and where a conductor in charge of a street car knew, or by the exercise of proper care ought to have known, that the intoxicated condition of a passenger was a menace to others long enough to have taken proper precautions to obviate the danger, he is guilty of negligence in failing to do so.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127.]

4. CARRIERS §318(1) — CARRIAGE OF PASSENGERS — ACTIONS — EVIDENCE — SUFFICIENCY.

Evidence *held* sufficient to warrant a finding that a conductor in charge of a street car was negligent in allowing an intoxicated passenger to stand in the car where he was likely to fall and injure other passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

5. CARRIERS §284(1) — CARRIAGE OF PASSENGERS — DUTY OF CARE.

A conductor in charge of a street car should not wait until a drunken passenger has committed some disturbing act before taking action, but should take proper precautions as soon as

such passenger gives reasonable cause to believe that he may injure others.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1125, 1127.]

Error to Circuit Court, Norfolk County.

Action by Lulle Harrell Hubbard against the Virginia Railway & Power Company. Judgment for plaintiff, and defendant brings error. *Affirmed*.

Williams, Tunstall & Thom, of Norfolk, and H. W. Anderson, of Richmond, for plaintiff in error. Rumble & Campe, of Norfolk, for defendant in error.

PRENTIS, J. The evidence in this case is sufficient to show that Mrs. Hubbard, while riding as a passenger on a car of the defendant company, was injured because a fellow passenger, Zimmer, who was standing in the aisle of the car, stooping over, talking to another passenger, when the car suddenly started, fell upon her, his hand or fist striking her in the abdomen, from which blow she immediately suffered very great pain and inconvenience. Mrs. Hubbard for some years previous to that time had had a fibroid tumor in her womb, which she had been advised to have removed, but which had not been done because, as she states, it had not caused her any trouble or inconvenience, had required no treatment, and had not interfered in any way with her efficiency or comfort. As the result of the blow an operation was made necessary. The accident occurred on Saturday, January 2, 1915. Immediately after the injury she was seized with violent pains and became unable to retain her urine. This condition continued until Wednesday, January 6th, when, upon the advice of her physician, she went to a hospital to undergo an operation. She was found to be too sore and sensitive for an immediate operation, and for this reason it was deferred until January 14th. Mrs. Hubbard was at this time 36 years of age, and it was necessary to remove the womb, both ovaries, and the Fallopian tubes.

The negligence relied on is that Zimmer was so much under the influence of liquor as to make it probable that, if allowed to stand in the aisle, just such an accident to some passenger as happened to Mrs. Hubbard was to be anticipated. There is irreconcilable conflict in the testimony as to the extent of Zimmer's intoxication, and the company urges, among other grounds of defense, that there was nothing whatever in his condition to indicate to the conductor of the car that he was at all dangerous to any one, and hence that there was no negligence upon which to base a recovery.

[1, 2] That it was error to permit evidence as to the aggravation of the injury growing out of the pre-existing tumor is alleged. Thus, counsel states that his assignments of error Nos. 1 and 3 involve "the question

whether there can be a recovery for the aggravation of a pre-existing disease when the declaration is framed on the theory that the disease was produced by the injury."

While this question was apparently left undecided in *Norfolk, etc., Co. v. Williar*, 104 Va. 679, 52 S. E. 380, it was determined in accordance with the view herein expressed in *Norfolk, etc., Co. v. Spears*, 110 Va. 113, 65 S. E. 482.

In the reply brief of the plaintiff in error this is stated:

"The whole point we make is that the declaration was silent as to the tumor in the plaintiff's womb. But the declaration does say in express terms that the injury the plaintiff received was due to the accident, while the proof shows that it was far more due to the presence, undisclosed by the declaration, of the tumor."

Our especial attention is called to *Whitlock v. Mungivan*, 36 R. I. 386, 90 Atl. 756, as support for the contention. In that case, however, the declaration merely alleged that the defendant, "with force and arms, a violent assault in and upon the body of the plaintiff did then and there make, and him, the plaintiff, did then and there, with like force and arms, beat, bruise, wound, and evil entreat, and other wrongs to the plaintiff then and there did," to the damage of the plaintiff, etc.; and there the court reversed the judgment because evidence had been admitted of the aggravation of a rupture and of the amount of medical expenses incurred, and also of the continuance of plaintiff's pain and suffering after the date of the issuance of the writ, and of his physical condition at the time of the trial, for the reason, as stated in the opinion, that, if it was desired to recover such damages, it was necessary to allege them. There is little support here for appellant's contention in the case now under consideration. In the declaration which we are now considering, the plaintiff alleges that Zimmer—"fell with great force and violence upon and against the said plaintiff, injuring the plaintiff's back and inflicting serious internal injuries upon the said plaintiff, and said plaintiff was otherwise greatly bruised, wounded, hurt, and injured, and also by means of the premises said plaintiff became and was sick, sore, lame, and disordered, and so continued for a long space of time, to wit, hitherto, during all which time said plaintiff was prevented from attending to her lawful and necessary affairs, and thereby also said plaintiff was obliged to expend, and did pay out and expend, divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of \$500, in and about endeavoring to be cured of the said bruises, hurts, and injuries so received as aforesaid, and in and about a serious surgical operation necessitated thereby, and during all of said time suffered and underwent great pain and anguish, both physical and mental, and had been, by means of the premises, permanently injured and impaired."

The only reason for the rule relied on is that the declaration should fairly give notice of the claim of the plaintiff, and under our statute, if the allegation is considered by the defendant to be too general and vague, he has the right to call for a bill of particulars and to require further specifications of such

claim. Here, then, the allegations of the declaration sufficiently advised the defendant of the purpose of the plaintiff to prove that a surgical operation was necessitated, that medical expenses had been incurred, that she had suffered great pain, physical and mental, and that her injuries were permanent; so that, even if the rule be as strict as is claimed, it is sufficiently met by this declaration, and we find no evidence in the record which is inadmissible under these allegations. We do not understand that it is denied that the aggravation of an existing disease may be proved, if sufficiently alleged; certainly the authorities are abundant to establish this proposition.

It is succinctly stated in 8 R. C. L. 436, thus:

"It is a general rule that one who negligently inflicts a personal injury on another is responsible for all the ill effects which, considering the condition of health in which the plaintiff was when he received the injury, naturally and necessarily follow such injury. Hence a defendant's liability is in no way lessened or affected by reason of the fact that the injuries would not have resulted had the plaintiff been in good health, or that they were aggravated and rendered more difficult to cure by reason of the fact that he was not in good health. In other words, where the presence of disease, or the existing physical condition, aggravates and prolongs the injury, and correspondingly increases the damages, such increased or added damages may be recovered."

This general statement of the law is amply supported by the authorities cited in the notes.

There have been many cases as to the necessity of alleging the aggravation of an existing ailment, if recovery is sought therefor, and there has been some conflict of opinion, but we believe the true doctrine is stated in 8 R. C. L. 622, in this language:

"It has been held that damages cannot be recovered for a mere aggravation of injuries previously received, where such aggravation is not alleged in the complaint; but the more liberal rule is that, where a wrong is committed, whatever the physical condition of the injured party, whether he be strong or weak, healthy or sickly, the harm done by such wrong, including the aggravation of existing ailments, if any, is the natural consequence of the defendant's act, and need not be specially averred."

In *Peshine v. Shepperson*, 17 Grat. (58 Va.) 472, 94 Am. Dec. 468, this court, in an action for trespass, and under an allegation that the defendant entered the store of the plaintiff "and then and there and from the said store took and carried away a large quantity of the goods and chattels of the plaintiff, to wit," etc., "all of great value, viz. of the value of \$5,000, and other wrongs to the plaintiff then and there did," adopted the most liberal rule, upon the ground that the plaintiff was entitled to recover for all such damages as were the natural, proximate, and necessary consequences of the act, allowed proof of injury to the credit and business standing of the merchant and injury to his business resulting therefrom, as to whether the business had been profitable or unprofitable, and as to the extent and character of the

business, as affording the best guide to the jury of which the nature of that case admitted.

We find no error in the refusal to grant the instructions offered by the plaintiff in error embodying the contrary doctrine; and its rights in this case were fully safeguarded by instruction No. 5, which was granted, and reads thus:

"The court instructs the jury that, if they believe from the evidence that the plaintiff had a fibroid tumor before she received the injury complained of, then the plaintiff can recover nothing on account of any conditions existing before said injury, or for anything that would have resulted from said conditions independently of the accident."

The allegations of the declaration were sufficient to admit proof of the existence of the tumor and of the immediate effect of the blow, of the physical pain preceding and succeeding the operation, of the operation itself, and of the condition of the plaintiff at the time of the trial.

[3] We are asked to reverse the judgment upon the ground that the verdict is contrary to the law and the evidence.

It is admitted (and the authorities are abundant to sustain the proposition) that if Zimmer was in such an intoxicated condition that the conductor in charge of the car knew, or by the exercise of proper care ought to have known, that his condition would probably become a source of danger or menace to other passengers on the car, long enough before the happening of the injury to enable the conductor to take proper precautions to prevent it, then it was his duty to take such precautions as were in his power to prevent the accident.

A carrier of passengers owes to all passengers a very high degree of care in protecting them from the negligence or wrongs of their fellow passengers. 8 Ann. Cas. 222; Ann. Cas. 1912C, 278; 4 R. O. L. 1181; Jansen v. Minneapolis, etc., R. Co., 112 Minn. 496, 123 N. W. 826, 32 L. R. A. (N. S.) 1206; Va. Ry. & Power Co. v. McDemmick, 117 Va. 862, 86 S. E. 744; Montgomery Traction Co. v. Whatley, 152 Ala. 101, 44 South. 538, 126 Am. St. Rep. 17; Murgatroid v. Blackburn, etc., Co., 3 Law Times Rep. 180.

We are urged to give careful attention to the evidence, upon the theory that, even considered as upon a demurrer to the evidence, the verdict and judgment are erroneous. Having done so, we are unable to differentiate this case from many others which have been previously decided by this court, where the evidence is conflicting.

[4] The verdict is sustained by the evidence of the defendant in error, Mrs. Hubbard, who states that Zimmer entered the front door of the car in a drunken condition; that he came in in an unsteady and rather loud and boisterous manner; that he stood with his back to the front door of the car and talked in a loud voice, and was unsteady all of the time; that he moved about

in the aisle of the car in a noisy and unsteady manner, trying to shake hands with other passengers; that the smell of whisky was strong upon his breath; and that one of the passengers told him to sit down or he would get into trouble. Another witness, Eanes, testified that he saw Zimmer enter the front door; that "he appeared to be a drunken man, to me—a man full of whisky"; that he leaned against the front door of the car; that he did not remember his words; that "he was just running on a whole lot of gab," and doing "a whole lot of talking," and that he was staggering and carrying on a whole lot of foolishness that a sober man would not do; that he was not using any profane or indecent language. Another witness, King, says that he had his attention attracted to Zimmer by his talking and standing and swinging from side to side; that he was intoxicated and unsteady on his legs, and looked as if he might fall over on somebody; that he was liable to fall and hurt himself, or hurt somebody else; that this lady (referring to Mrs. Hubbard) appeared to be annoyed; and that a lady sitting in the corner next to Zimmer appeared to be afraid he would fall on her. This latter statement is confirmed by a witness for the company, Branton.

After allowing for all of the exaggeration which, in view of the contradictory testimony introduced by the defendant, may be apparent, it appears that the fact that Zimmer's condition was dangerous to his fellow passengers is confirmed by some of the witnesses introduced by the defendant. For instance, Branton, when asked what was Zimmer's condition, answered:

"He got into the car; when he first came into the car, he stopped at the door and leaned up against the door, and stayed there talking and carrying on."

This witness also admits that Zimmer was not sober, and that Mrs. Branton, who was seated beside witness, was afraid he might fall on her. Brinkley, another witness for the defendant, stated that Zimmer "looked to be a little drinky," and on cross-examination said that he told Zimmer to go and sit down; but he replied that he had paid his fare and had a right to stand up. Another witness for the defendant, Blow, said that Zimmer always appeared to be about half full of liquor, and on this occasion he appeared to be about half drunk.

Zimmer boarded the car at Dinwiddie street, in the city of Portsmouth, and one or two blocks further on came inside. In a quarter of an hour, during the period in which the car was traveling two miles, the conductor passed him four or five times, and on one occasion, when he was stooping over and blocking the aisle, he called to him in a jocular way, "Heads up in front!" The record also shows that there was at least one vacant seat in the car which Zimmer could have been required to take.

This testimony was certainly sufficient to require the submission of the case to the jury, and from this evidence the jury were justified in inferring that Zimmer was in such an intoxicated condition that he was a source of danger and menace to other passengers on the car; that it was a reasonable inference to be drawn from his condition that just the accident which did happen might occur; and that the conductor either knew of his condition, or in the exercise of proper care ought to have known of it. The principles of law covering such a state of facts are well settled, and the high degree of care which the law imposes upon a conductor of a passenger car under such conditions made it the duty of the conductor in this case to exercise his authority and require the drunken or half-drunken passenger to take the vacant seat, or else to take some position in the car where the danger to his fellow passengers would be lessened.

[5] A conductor should not wait until a drunken passenger has committed some disturbing act before taking some action, but should take proper action commensurate with the probable danger whenever such passenger gives reasonable cause to believe that an accident is likely to happen. *Vinton v. Middlesex Railroad Co.*, 11 Allen (Mass.) 304, 87 Am. Dec. 714.

We find no reversible error in the proceedings.

Affirmed.

(120 Va. 423)

BOHANNON-KING & CO., Inc., v. VELLINES.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

APPEAL AND ERROR §1002 — REVIEW — VERDICT—CONFLICTING EVIDENCE.

Where there was a conflict of evidence as to speed of defendant's automobile which collided with decedent's bicycle, the location of the accident, and decedent's contributory negligence, and the jury, being the judges of the weight of the testimony, found for plaintiff, judgment will be sustained; since under the statute the Appellate Court is required to consider such cases as under a demurrer to the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

Appeal from Circuit Court of City of Norfolk.

Action by Fannie C. Vellines, administratrix of Herbert A. Vellines, deceased, against Bohannon-King & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Taylor and Jas. H. Willock, both of Norfolk, for plaintiff in error. Willcox, Cooke & Willcox, of Norfolk, for defendant in error.

PRENTIS, J. The only error alleged in this case is the refusal of the court to set

aside the verdict on the ground that it is contrary to the law and the evidence.

Vellines was riding a bicycle on Washington street, in the city of Norfolk, proceeding westwardly. The automobile of Bohannon-King & Co. was proceeding southwardly on Monticello avenue until it reached the intersection of Monticello avenue and Washington street, when it turned eastwardly into Washington street. At a point eastwardly from the intersection of Monticello avenue and Washington street the two collided, and Vellines was so badly injured that he subsequently died.

It is earnestly contended by the plaintiff in error that it was entitled to have the verdict set aside because Vellines was clearly guilty of contributory negligence, and that his administratrix cannot, therefore, recover.

There is the usual conflict of testimony as to the speed of the automobile, the precise location of the accident, the conduct of Vellines, and every other material fact in issue. The question involved, however, was properly submitted to the jury, and the evidence submitted by the plaintiff has some corroboration in the evidence submitted by the defendant. The jury were the judges of the weight of the testimony, and had the right to believe, as apparently they did believe, that the proximate cause of the accident was the failure of the driver of the automobile to keep a proper lookout at the time he turned the corner of Monticello avenue into Washington street; that the machine was going at an excessive rate of speed; that he made such a sharp turn at the corner as to pass within four or five feet of the northeast curb; that, if he had been keeping a proper lookout and controlling the machine, he could have avoided the accident, even after the peril of Vellines was discovered; and that, if he had been keeping a proper lookout and had made a proper turn so as to throw the machine on the south side of Washington street, the accident would not have occurred.

Under these circumstances, and under the mandatory provisions of the statute, requiring this court to consider such cases as upon a demurrer to the evidence, it is clear to us that there is no reversible error. The judgment will therefore be affirmed.

Affirmed.

(120 Va. 437)

CLAY'S ADM'R v. KELLY.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. PARTNERSHIP §313—SUIT FOR ACCOUNTING BY QUASI PARTNER—EQUITY JURISDICTION.

Where a partnership was formed to undertake a government contract, and thereafter one partner withdrew, with the consent of the others, but later came back into the firm solely to sign its assignment of the contract, the other partners agreeing to pay him 10 per cent. of the profits they might realize, the withdrawing

partner's relationship to the firm was not that of a full partner, but it was such as to entitle him upon the fundamental principles of equity jurisdiction to sue the other partners for a disclosure and accounting of his share of the profits; the relationship being of a fiduciary character, and some of the items making up the alleged profits being particularly within the other partners' knowledge.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 679, 729, 729½.]

2. PARTNERSHIP ~~§328~~(2) — SUIT FOR ACCOUNTING—EVIDENCE.

In a partner's suit against others for disclosure of and accounting for profits realized in the matter of a government contract, testimony disclosing the transaction whereby defendants, after the surrender of the plant by the party with whom the firm had contracted, arranged with other parties to complete the work, was admissible.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 780.]

3. PARTNERSHIP ~~§328~~(2) — SUIT FOR ACCOUNTING—EVIDENCE.

In such suit, the record of a receivership suit against the partnership was admissible to show the facts appearing therein as to the partnership's transfer of the contract, the disposition of the firm's assets, and the payment therefor, though plaintiff partner was not a party to such suit, having withdrawn from the firm before it was brought; the matters shown in the record not being within the rule of evidence as to res inter alios acta.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 780.]

4. PARTNERSHIP ~~§95~~—WITHDRAWAL—CONSIDERATION.

Where, after a partnership secured a contract with the government, one partner desired to withdraw, and the other partners terminated their relations with him, paying him \$500, he remaining bound as to the government and the firm's surety, such continuing obligation of his was sufficient consideration for the \$500 paid him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 142.]

5. PARTNERSHIP ~~§18~~—CONTRACTS—DURESS.

Where a partner, who had withdrawn from the firm with the consent of the other partners, was under no obligation or duty, contractual or otherwise, to the members of his old firm, he did not by duress procure his contract for a share in the firm's profits from a contract when he refused to sign a necessary assignment of the firm's contract, unless his partners agreed to pay him.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 4.]

6. PARTNERSHIP ~~§19~~ — CONTRACTS — CONSIDERATION.

Where a partner who had withdrawn from the firm by consent signed an assignment by the firm of its contract with the government, the act was sufficient consideration for the other partners' contract to give him a share in the profits, though when he withdrew from the firm he remained liable to the government and the firm's surety.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 5.]

7. PARTNERSHIP ~~§86~~—ACCOUNTING—PROFITS OF FIRM.

Where a firm agreed to pay a member who had withdrawn by consent a share of the profits realized by the firm from a government contract assigned by the firm, profits realized by the firm, after its assignee had failed to carry out

the contract, by turning the work over to others, were profits realized by the firm in the matter of the contract with its assignee, to a share of which the partner who had withdrawn was entitled.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 134.]

Appeal from Chancery Court of Richmond.

Suit by M. Kelly against S. P. Clay and others, wherein Clay died pending suit; the cause being revived against his administrator. From a decree settling the principles of the cause in favor of complainant and directing an account, Clay's administrator appeals. Affirmed.

Leake & Buford, A. W. Patterson, and Cutchins & Cutchins, all of Richmond, for appellant. A. L. Holladay and Kelley & Coulbourn, all of Richmond, for appellee.

KELLY, J. This suit in equity, for a disclosure and accounting, was instituted by Michael Kelly against S. P. Cowardin, James F. Bradley, Thos. E. Stagg, and S. P. Clay, his former partners in a certain construction contract. Pending the suit S. P. Clay died, and the cause was revived against his administrator. This is an appeal from a decree settling the principles of the cause in favor of the complainant and directing an account.

The transactions leading up to this litigation are simple enough in themselves, but any intelligent narration of them must necessarily be somewhat prolix.

On March 24, 1903, all of the parties named above, Cowardin, Bradley, Clay, Stagg, and Kelly, entered into a partnership agreement, under the firm name of Cowardin, Bradley, Clay & Co., for the purpose of bidding on a contract with the United States government for the erection of a water filtration plant in Washington city. Cowardin, Bradley, and Clay were to be the active managers. Stagg and Kelly were to furnish \$10,000 each, as the first capital of the firm, if the contract was awarded to it, and when the \$20,000 thus provided was exhausted, all the partners were to be equally obligated to assist in raising any needed funds. Except as here indicated, and as to the further obligation to assist the others in securing bonds needed for the bid and contract, Stagg and Kelly were not required to render any other services, but were to have an equal voice in the management of the affairs of the firm.

Their bid, of \$989,000, was accepted. A preliminary bond of \$150,000 was executed by all the members of the firm, and this was superseded in a few days by a final bond for \$200,000, likewise executed by each member, and also by a bonding company as surety; and, on April 6, 1903, the contract between the government and Cowardin, Bradley, Clay & Co. was duly executed.

About this time Kelly became anxious to sever his connection with the contract. It is

not entirely clear from the evidence that his written request for release stated all his reasons, but the material fact in this connection is that on April 4, 1903, he wrote a letter to the firm in which he said:

"I have been very much disappointed in financial matters and besides my health is failing very much; I find it impossible to raise the necessary funds to comply with my promises and wishes. I therefore ask most respectfully to be relieved of any and all obligations that I have entered into, and wishing you great success," etc.

On April 7, 1903, just one day after the contract was closed with the government, Thos. E. Stagg, acting for himself and for Cowardin, Bradley, and Clay, paid Kelly \$500 in cash, and Kelly signed a paper presented to him by Stagg, reciting the original partnership agreement, the contract between the partnership and the government, and containing also the following recital and agreement:

"Whereas, now the said M. Kelly expresses his inability to comply with one material condition of said copartnership, and desires to be released from the terms and obligation to provide the sum of ten thousand dollars, as aforesaid, but having by his aid and credit, jointly with each of said parties secured the necessary bond required by the United States government, and is bound for the completion of said contract:

"Now, therefore, this agreement witnesseth, that for and in consideration of the premises, as well as the sum of five hundred dollars, paid to the said M. Kelly, and in further consideration that the said M. Kelly shall be relieved of any duties and all further liability incurred by reason of the prosecution and completion of the aforesaid contract with the United States government, the said M. Kelly doth acknowledge his liability to the Fidelity & Deposit Company of Baltimore as the guarantor on said bond, and doth agree that he is not further interested in any way in the said contract with the United States government, and that he will not assert or make any claim for any profits arising thereunder."

This transaction was the end of Kelly's dealings with his former partners and of his knowledge of what they were doing under the contract, until he was requested to meet them in Washington on May 26, 1903.

Meanwhile Cowardin, Bradley, Clay, and Stagg, continuing in the enterprise under the firm name of Cowardin, Bradley, Clay & Co., began work under the contract with the government, and got together a small equipment, but were financially unable to make very substantial progress, and soon concluded that their only chance to realize any profit for themselves or to perform the obligations they had assumed was to transfer their contract to some other person or firm having the ability to carry it out. After some negotiations with other persons had failed to materialize, the contracting firm of May and Jekyll made a proposition which resulted in a contract, prepared by the attorney for May & Jekyll, by which they obligated themselves to take over and complete the work on terms which promised a substantial profit to Cowardin, Bradley, Clay & Co. This contract

as prepared, and as finally executed, designated Kelly as one of the partners in the last-named firm, required his signature, and upon its face made him in all respects a party thereto, bound by all its obligations and entitled to all its benefits, exactly as the other partners were. When it was explained to the attorney for May & Jekyll that Kelly was no longer interested in the contract, he insisted that Kelly's signature was essential in order to insure the approval of government representatives who would have to pass upon the contract. Thereupon, on May 26, 1903, Cowardin and others sent an urgent message to Kelly in Richmond, requesting him to come to Washington at once, and he did so.

Upon his arrival in Washington, the situation was explained to him, and he was requested to sign the contract. This he declined to do without some promise of compensation. The evidence is conflicting upon some points as to what followed, but it is clear that Kelly much preferred not to sign the contract, even for a consideration, and that without some consideration he would not have signed it at all. His attitude led to considerable acrimony among the parties. Cowardin and others sought the advice of their own counsel, and were advised to agree under protest to Kelly's terms. Thereupon Cowardin, Bradley, Clay, and Stagg signed and delivered to him a paper in these words:

"We and each of us, copartners under the firm name of Cowardin, Bradley, Clay & Co., hereby agree with Michael Kelly to pay him one-tenth of the profits that may be realized by said firm in the matter of the contract this day entered into by said firm with May & Jekyll of New York City."

Kelly disclaims any recollection of a protest, but the weight of the evidence shows that the other parties first offered him a written agreement to pay the 10 per cent., embodying in the writing a protest; that he indignantly refused to accept this; that they then offered him the paper above quoted, which he accepted, and accordingly signed the May & Jekyll contract; that then Cowardin speaking for himself and others, reminded all the parties present that he had protested against agreeing to pay the 10 per cent., "and intended never to make the payment."

On August 25, 1903, May & Jekyll, who were then apparently in a failing condition financially, entered into a written contract with Cowardin, Bradley, Clay, and Stagg, under the terms of which the contract of May 26, 1903, was canceled and the former firm surrendered to the latter the construction outfit on the site of the filtration plant, and all the rights and contracts connected therewith. And, on the same day, Cowardin, Bradley, Clay, and Stagg entered into a contract with the firm of Dean & Sibley (acting for the Sand Filtration Company of America then about to be incorporated and organized), whereby Dean & Sibley took over the construction plant and the work to be

done under the government contract, agreeing as a consideration for the transfer to pay the debts of May & Jekyll amounting to \$34,176.10 which had been assumed by Cowardin, Bradley, Clay, and Stagg, and also to pay the latter firm the sum of \$65,000. This last-named contract was, manifestly from the record, entered into with the knowledge, consent, and co-operation of May & Jekyll, and the two contracts of August 25th were essentially concatenated and interdependent. Kelly was not a party to either of them, but in each Cowardin and his associates agreed to hold the other parties harmless against any loss resulting from that fact.

Shortly thereafter, pursuant to one of the stipulations in the Dean & Sibley contract, a receiver was procured for Cowardin, Bradley, Clay & Co. in a suit instituted in the Supreme Court of the District of Columbia, and thereby certain technical difficulties, not necessary to notice further, were obviated, and the transfer of the government contract to Dean & Sibley was perfected.

The first assignment of error is that the court improperly overruled the demurrer to the bill. The ground of demurrer chiefly relied upon is that the allegation "touching the formation of a new partnership between Kelly and the defendants on May 26, 1903, is obscure," and does not sufficiently charge any such new partnership; and the argument advanced is that the existence of a partnership relation between the parties is essential to the standing of the complainant in a court of equity.

[1] The bill alleges the original partnership, the retirement of Kelly therefrom, and his subsequent coming back into the firm, for a purpose and upon a consideration therein specifically set out. The contract with May & Jekyll, filed with the bill, shows upon its face that he executed it as a member of the firm, and the collateral contract, also filed with the bill, defines the interest which he was to have in the profits realized "in the matter of" the former contract. The bill further alleges that Cowardin, Bradley, Clay, and Stagg realized \$65,000 in profits arising out of that matter, in addition to certain percentages retained by them on payments by the government while May & Jekyll were in charge of the plant, and other profits, the sources and amounts of which complainant does not know; and the prayer of the bill is for a disclosure and accounting. Complainant's relationship to the firm, as shown by his averments, was not that of a full partner, but it was such, and the subject of the controversy was such, as to entitle him, upon the fundamental principles of equity jurisprudence which underlie the jurisdiction in partnership cases, to bring his suit in that forum. The relationship alleged was, in form and substance, of a fiduciary character; some of the items making up the alleg-

ed profits were particularly within the knowledge of the defendants; the keeping of the account of all the profits was especially within their duty and power; and the case thus appears plainly one for equity jurisdiction. Merwin's Eq. §§ 581, 584; Lile's notes to same, p. 116; Wilson v. Miller, 104 Va. 446, 448, 51 S. E. 837. The demurrer was properly overruled.

There was also a motion made after the evidence was all in to dismiss the bill upon the ground that the proof failed to show a case for jurisdiction in equity, even if the allegations of the bill were sufficient for that purpose. The court overruled the motion, and its action in doing so is made the basis of the second assignment of error. In our view of the case, the evidence was entirely sufficient to establish the relationship and the character of the controversy upon which the complainant invoked the equity jurisdiction in his bill, and upon which we have sustained his resort to that forum. There was no error in overruling the motion.

The next ground upon which we are asked to reverse the decree is that the court overruled certain exceptions to testimony and evidence introduced by the complainant.

It appears that the cause was argued and submitted some time before the decree appealed from was entered, the court in the meantime having it under advisement; that on November 15, 1915, the decision was announced in a written opinion; and that on December 8, 1915, the decree was entered, containing the following pertinent recital:

"And this day at the entry of the decree carrying into effect the opinion of the court, the defendants, by counsel, moved the court to pass on the exceptions to the defendants shown in the depositions to have been taken to certain of the evidence of the plaintiff, especially their exception to the admissibility of said transcript of the record from Washington, and the court declined to pass on any of said exceptions because they were not pointed out and urged in the argument of the counsel at the time the cause was argued and submitted."

[2, 3] Independent of any question as to the waiver of these exceptions, the appellants have not been prejudiced concerning them. The exceptions relate to certain testimony disclosing the transactions whereby the appellants, after the surrender of the plant by May & Jekyll, arranged with other parties to complete the work; and it is insisted that the testimony was improper because the bill stated a case under which the complainant could only recover by showing that profits were realized directly from the May & Jekyll contract. We do not so understand the bill or the complainant's rights. The bill distinctly sets out the subsequent contracts and transactions, and claims a share in the profits derived therefrom by the appellants upon the theory that these profits were realized by them in consequence of the May & Jekyll contract, though not directly thereunder. This theory was justified by the terms of the cou-

tract which promised Kelly "one-tenth of the profits that may be realized by said firm in the matter of the contract with May & Jekyll," and the evidence was proper as tending to sustain that theory. And, with reference to the record of the receivership suit in the Supreme Court of the District of Columbia, which was introduced by the complainant, and to which this assignment of error is likewise directed, the same may be said. It is true, as pointed out by appellants, that Kelly was not a party to that suit, but the record was introduced by him, not against him, and was proper to show the facts appearing therein as to the transfer of the contract, the disposition of the assets of the firm, and the payment therefore, in all of which the appellants were parties and active participants. The matters shown in that record were not, as counsel for appellants contend, within the rule of evidence as to *res inter alios acta*. They were independent material facts, proved by the record, charged in the complainant's bill, and proper as evidence to support his case. See, *Broom's Legal Maxims* (8th Ed.) 958 et seq.

We come now to the assignment of error upon which we understand appellants to place their chief reliance, and naturally so because, if sound, it would furnish a basis for reversal, going to the merits and substance of the controversy rather than to the form in which the controversy is presented. This assignment challenges the validity of the contract for one-tenth of the profits on the grounds: (1) That it was obtained through duress; and (2) that it was without consideration.

To maintain the contention that the contract was obtained by duress, the appellants rely upon the testimony of Mr. Darlington, a distinguished member of the bar of the Supreme Court of the District of Columbia, who stated, as an expert and in answer to an hypothetical question, that in his opinion "the contract would not form a basis of recovery in the District of Columbia." The facts assumed in the hypothetical question brought the execution of the contract, in his opinion, within the doctrine of duress as announced "in the case of *Swift & Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, and particularly within the English case of *Parker v. Great Western Ry. Co.*, 7 M. & Gr. 253, cited and approved by the court in that case." Mr. Darlington's testimony is claimed by appellants to be conclusive, since the contract was made and was to be performed in the District of Columbia, and no evidence was offered in conflict with his statement of the law. It is perfectly apparent, however, that the hypothetical question assumed, or at least that he certainly understood it to assume, that there was some legal obligation on Kelly's part to sign the contract. This is the crucial point, both as to the alleged duress and the alleged want of

consideration. The law, as testified to by Mr. Darlington, does not seem to be different in the District of Columbia from the law elsewhere generally upon the subject of duress, as involved in this case. The doctrine as stated by Judge Harrison in *Harris v. Cary*, 112 Va. 362, 71 S. E. 551, Ann. Cas. 1913A, 1350, and as quoted and relied upon by appellants, is as follows:

"The doctrine appears to be well established that where one party has possession or control of the property of another, and refuses to surrender it to the control and use of the owner, except upon compliance with an unlawful demand, a contract made by the owner under such circumstances to emancipate the property is to be regarded as made under compulsion and duress. Nor can it be doubted that a contract, procured by threats inducing fear of the destruction of one's property, may be avoided on the ground of duress, there being nothing in such a case but the form of a contract, wholly lacking the voluntary assent of the party to be bound by it. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils, as inconvenience and loss by the detention of property, loss of property altogether, or compliance with an unconscionable demand."

[4, 5] This doctrine, however, does not apply here, because the element of an unlawful demand is lacking. The contract of April 7, 1903, whereby Kelly was released from any further obligation so far as Cowardin, Bradley, Clay, and Stagg were concerned, is not correctly interpreted in the hypothetical question answered by Mr. Darlington. The dominant purpose of that contract, to which he was not required to attach his signature, was not to sell Kelly's interest, but to release him from the contract and from all its burdens and obligations. He had, however, already been of service to his partners in securing the contract and giving the necessary bond, and he remained bound under both so far as the government and the surety company were concerned. This latter fact prominently appears in the release contract, and it was an abundant consideration for the \$500 which they paid him upon a final settlement and termination of their relations with him as an associate under the original contract. The opinion of the learned judge of the lower court deals somewhat elaborately with this phase of the case, and we quite agree with his conclusion that, "on May 26, 1903, Kelly was under no obligation of duty, contractual or otherwise, to the defendants." And this is necessarily the end of the contention that Kelly procured the contract for a share in the profits by duress. Being under no obligation to sign the May & Jekyll contract, and preferring not to do so at all, even for a consideration, there is no foundation upon which to rest any claim of duress in the procurement of the agreement which he now seeks to enforce.

[6] What has been said to show that there was no duress upon the part of Kelly practically disposes of the further contention that there was no consideration for the contract for a share in the profits. With no

obligation upon him to do so, he signed, at the instance of appellants, and with little opportunity for deliberation, an involved and complicated contract with May & Jekyll which appellants' counsel insist placed him under no further obligations and subjected him to no further risks then already rested upon him by virtue of the government contract and bond, and which, on the other hand, counsel for appellee insist enhanced and added very materially to those risks and obligations. The judge of the lower court took the latter view, and demonstrated the correctness of it in a partial analysis of the contract which, as he said, might have been still further elaborated in vindication of his conclusion. The numerous transactions and contracts involved render it impossible, in an opinion of reasonable length, to discuss them all in any great detail, and it must suffice here to say that no one, without obligation to do so and without consideration for doing so, could have been expected to become a partner with Cowardin and others in the May & Jekyll contract, and that there were risks and obligations incurred thereunder which were different from and in addition to those imposed by the original contract with the government. It is beside the mark to argue that Cowardin and others were about to fail, that their failure would have resulted in loss to Kelly under the government contract and bond by which he was still bound, and that if the deal with May & Jekyll succeeded it would inure to Kelly's benefit. If he had never been released from the original contract, he could not have been compelled to sign a second one. It was his privilege to choose between the risk of this first loss that seemed to face him and a second one which could very possibly have been greater than the first. His signature resulted in both a benefit to the appellants and a risk to himself. "A valuable consideration is a benefit to the party promising, or to a third person at his request, or an inconvenience, loss, or injury, or the risk of it, to the party promised." 4 Min. Inst. pt. 1, p. 22.

[7] This disposes of the substance of all the assignments of error, except one which charges that the court erred in finding that the defendants had realized profits from the contract of May 26, 1903. That contract was an indirect transfer of the government contract, and contained a stipulation that if May & Jekyll failed to carry out their contract, they should surrender the plant, upon specified terms, to "the parties of the first part" to complete the work. Kelly was one of the parties of the first part. He was not consulted when May & Jekyll failed, and the plant was surrendered to Cowardin and others under terms which, by mutual agreement,

were different from those originally specified for the surrender. The government contract was then completed, under the circumstances already briefly outlined, and appellants realized a profit of \$65,000. We have no difficulty in holding that this sum, as well as any net amounts they may have realized while May & Jekyll were doing the work, must be regarded as profits "realized by the said firm in the matter of the contract" with May & Jekyll. Appellants insist that this sum was profit from the government contract, and not from the May & Jekyll contract which failed of completion. The argument proves too much. A primary contention of the appellants is that it was the duty of Kelly to sign the May & Jekyll contract, since that contract provided a means of rescuing the parties from financial ruin; and, as a matter of fact, it was a very important factor in the final completion of the government contract. We have seen that Kelly was under no duty to sign the agreement, but it can hardly be consistently argued that profits which his signature to the May & Jekyll contract made possible were not in the contemplation of the parties as profits "realized from the matter of" that contract. The lower court disposed of this question as follows:

"As to whether there were any profits: The defendants did make gains or profits to the amount of a large sum; that these gains were profits arising from the contract has been decided by the Court of Appeals, District of Columbia, and by the Supreme Court of the United States, where the May 26, 1903, contract was up for consideration, see the case of Sand Filtration Corporation v. Cowardin, 29 App. D. C. 571, and the same case, 213 U. S. 560, 29 Sup. Ct. 509, 53 L. Ed. 833."

It is quite true that Kelly was not a party to the litigation between Cowardin & Co. and the Sand Filtration Corporation in the federal courts, and that the issues there were different from those in the instant case; but it is apparent from the opinion of the Court of Appeals of the District of Columbia and of the Supreme Court of the United States, cited above, that both courts regarded the profits realized by Cowardin & Co. as having been an outgrowth of the May & Jekyll contract. Nor do we see how they could be otherwise regarded. The chief consideration for the \$65,000 paid by the Sand Filtration Corporation was the plant and equipment acquired from May & Jekyll; and it was by virtue of the contract with them that the appellants finally secured the performance of the contract with the government.

The decree of the chancery court, in our opinion, was right in all respects, and it must be affirmed.

Affirmed.

(120 Va. 678)

WILLIAMS v. BOND et al.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. TRUSTS \S 244—DEATH OF TRUSTEE—DUTIES OF EXECUTOR.

The executor of a deceased person who during his life was charged with execution of a trust, which trust in part remained unexecuted on his death, has the duty under Code 1904, \S 3419, of completing the execution of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 351.]

2. TRUSTS \S 178—DEATH OF TRUSTEE—DUTIES OF EXECUTOR—ACTIONS.

Such executor therefore could properly bring suit to determine and construe the conditions of the will creating the trust where difference of opinion arose between him and the beneficiaries of the trust as to the respective rights of the parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 232.]

3. TRUSTS \S 316(1)—COMPENSATION OF TRUSTEE—WILLS—CONSTRUCTION.

Notwithstanding the will named an executor and provided, "I give my said executor the sum of \$500 as compensation for his services," after having created a trust placing the executor in charge thereof, he could collect a commission of 5 per cent. on the first \$300 and 2 per cent. on the remainder of the trust fund, which consisted of bank stock, when he transferred it to himself as trustee, and further 5 per cent. on dividends paid by him under the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. $\S\S$ 445-454.]

4. TRUSTS \S 316(2)—COMPENSATION—WILLS—CONSTRUCTION.

In such case, where the value of the stock was greatly enhanced during the trust period, the executor was entitled to compensation only on the basis of its value when it came into his hands, and not its value at the end of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. $\S\S$ 455-459.]

5. TRUSTS \S 178 — EXECUTION — ACTION — COSTS AND FEES.

Where an executor and trustee died, and his executor, being charged under Code 1904, \S 3419, with executing the trust, brought suit to determine the rights of the parties and his own compensation, he was entitled to his costs and a reasonable attorney's fee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. \S 232.]

Appeal from Circuit Court, Orange County.

Suit by Lewis C. Williams, as executor of John G. Williams, deceased, against Robert L. Bond and others. From the decree rendered, the complainant appeals. Amended and affirmed.

Thomas W. Bond, a prosperous citizen of Orange county, died on January 1, 1904, leaving a will whereby he provided for the division of his large and varied estate among his several children and grandchildren. The following provisions in his will are pertinent to this controversy:

"Third. I give and devise to said John G. Williams, in trust, my one hundred shares of stock in the State Bank of Orange, Orange, Virginia, to be held by him for ten years from the date of my death and the dividends on said bank stock for ten years are to be paid one-fifth to

each of my five children. * * * At the end of said ten years from my death I give and devise said hundred shares of stock to be equally divided among my five children, if living, and the descendants of any of them that may be dead. * * * Each one of my said children is to have the right during the said ten years to represent twenty shares of said bank stock, and to vote such shares at all the meetings of the stockholders of the said bank."

"Lastly, I nominate and appoint John G. Williams, of Orange county, Virginia, executor of this my last will and testament, and request the court in which it may be probated to permit him to qualify without being required to give security. I give my said executor the sum of \$500.00 as compensation for his services."

Codicil No. 1:

"I, Thos. W. Bond, do make this codicil to my last will and testament bearing date March 11th, 1900; I hereby request my children to whom I have given my stock in the State Bank of Orange, Orange, Virginia, to so vote said stock that John G. Williams shall hold the place in said bank now held by me, and I request that said John G. Williams to accept and hold said positions during the ten years said stock is to be held by him in trust."

Codicil No. 2, clause 3:

"The State Bank of Orange having been converted into the National Bank of Orange, Virginia, I hereby give and bequeath my one hundred and twenty-six shares of stock in the said National Bank to John G. Williams, in trust, to be held and disposed of by him, to the same parties, and in the same proportions, as the one hundred shares of stock were disposed of, under the third clause of my said last will and testament. * * * I hereby make the same request of my children in reference to said stock as was made, in the first codicil to my said will, in reference to the one hundred shares of stock in the State Bank of Orange."

The will and the codicils were all wholly in the handwriting of John G. Williams, who had been for years prior to the death of Thos. W. Bond his legal adviser and intimate personal friend, and who on January 4, 1904, four days after the death of Thos. W. Bond, qualified thereunder as his executor.

Within a few months after his qualification as executor, John G. Williams filed his bill in equity in the circuit court of Orange county, asking the advice and direction of the court upon certain questions which affected the distribution of the estate, and which he was unwilling to decide upon his own responsibility. To this bill all the parties interested were made parties, and the prayer of the bill, *inter alia*, was:

"That the court construe the will and instruct complainant in the due execution of the will, * * * and for all other relief, both general and special, as is consistent with equity and the nature of the case requires."

The cause, under the style of Williams, Executor, v. Bond, was regularly matured, and in November, 1904, a decree was entered therein which, among other things, directed that the executor should settle his accounts before a commissioner of the court. These accounts were fully inquired into and reported upon accordingly, and in November, 1907, a decree was entered which confirmed a final

report of the commissioner, recited a full and complete settlement of the estate by the executor, and ordered that the cause be stricken from the docket.

From the executor's accounts, approved, and settled as set out above, it appeared that the executor had turned over to himself as trustee the bank stock mentioned in the will and codicils, treating it as cash at a valuation of \$22,680, and had paid himself as commission thereon the sum of \$462.60, being 5 per cent. on the first \$300 thereof and 2 per cent. on the residue; and it further appears from the record in the instant case that the executor also paid himself a commission of 5 per cent. upon most, but not upon all, of the dividends actually paid out by the bank semi-annually to the beneficial owners of this stock held in trust by him.

John G. Williams was already a stockholder, and was elected a director and president of the bank within a few weeks after the testator's death, holding these positions until his own death occurred in September, 1911. His salary during this period was \$100 per year. His influence and counsel were valuable assets to the bank, but his office was an inactive one, and his duties do not appear to have been much more onerous or exacting than those of the other directors who served without salary. The stock of the bank was worth, according to its book value, \$181.62 per share when Mr. Williams was made president, and \$333.79 per share in January, 1914, at the expiration of the period fixed in the will for the stock to be held in trust. The record does not disclose exactly what its value was when Mr. Williams died.

Lewis C. Williams qualified as the executor of John G. Williams in October, 1911. In the early part of 1915 he brought the instant suit. The bill reviews the transactions of John G. Williams as executor of Thos. W. Bond's estate, shows that the bank stock is in the possession of the complainant, that he has been holding it as trustee since the death of John G. Williams, that the ten-year period has expired, that the stock should now be distributed among the parties entitled thereto, asks for instructions from the court in regard to it, and then proceeds to make the following allegations, which embody the gist of the present controversy, to wit:

"That the said bank stock was not intended and should not have constituted a part of the estate administered by the executor, John G. Williams, but, by the terms and effect of the will of the said Bond, was intended as a separate trust estate, to be managed independent of the executorship, an account of which was not necessary for the settlement of the executorial accounts.

"That the said John G. Williams, by mistake in settling his accounts as executor on March 6, 1905, before William C. Williams, commissioner in chancery of the circuit court of Orange county, in the cause of Bond, ex'r, v. Bond, etc., credited the estate of Thomas W. Bond with the then value of the bank stock, to wit, \$22,680, and charged the estate of said Bond in the same account, with a like amount, and with the

sum of \$462.60, 'John G. Williams, trustee's commission on \$22,680.'

"That notwithstanding such erroneous and mistaken view of his rights by John G. Williams, executor, your complainant is advised and believes that he is entitled to 5 per cent. commission on the value of the said 126 shares of bank stock as of the day of the expiration of the trust, to wit, on the sum of \$42,057.60, as of the 31st day of December, 1913, being ten years from the date of the death of the said Thomas W. Bond and the time set for the expiration of the trust.

"That the said sum to which complainant is entitled should be credited by the sum of \$462.60, heretofore paid to John G. Williams, executor, as per the account of William C. Williams, commissioner in chancery, above referred to."

The bill named as defendants the parties entitled to the stock and set out the shares therein which each was to receive. These defendants demurred to the bill, and also answered, contesting the position asserted by the complainant, averring that the executor, John G. Williams, was not entitled to any compensation at all except the \$500 mentioned in the will, and that he had improperly paid himself commissions on the bank stock and on the dividends thereon. They claimed, therefore, that they were either entitled to a judgment over against the estate of John G. Williams for the aforesaid commissions and accrued interest, or to have the court hold that the suit of Williams, Ex'r, v. Bond was a final and complete settlement, conclusive against all parties thereto.

The cause was regularly matured upon the pleadings already noted and upon the evidence produced by complainant and defendants, and upon a hearing the circuit court, without expressly passing on the demurrer, decreed:

"That Jno. G. Williams, executor of Thos. W. Bond, had the right to charge the commissions upon the bank stock in the bill and proceedings mentioned, as trustee, as per his settlement in the said suit of Thos. Bond's Ex'r v. Bond, etc., to wit, the sum of \$462.60, that being 5 per cent. on the first \$300 and 2 per cent. on the balance \$22,380, of the then value of the bank stock on March 7, 1906, and that the said executor was also entitled to a 5 per cent. commission on the dividends collected on the said bank stock for the period of ten years, and no longer, the limitation of his trusteeship under the will of Thos. W. Bond, deceased, or so much thereof as he actually collected and that the residue of the said 5 per cent. commission on such dividends, if any, should be paid to his executor, and doth further decide and decree that the said executor is not entitled to any commission on the enhanced value of the said bank stock or any commission on the dividends accruing thereon after the expiration of the ten years aforesaid, or any additional commission on the corpus thereof.

"The court doth further decree and order that the defendants are entitled to receive from Lewis C. Williams, executor of Jno. G. Williams, as aforesaid, the certificates of bank stock in the bill and proceedings mentioned; and the court doth order, adjudge, and decree that the said Lewis C. Williams, executor, as aforesaid, deliver to the said defendants or to Gordon & Gordon and Alex. T. Browning, their attorneys, the said certificates of the said shares of stock, to be divided and distributed among the said defendants in accordance with the will

of the said Thos. W. Bond, deceased; but the said stock shall not be delivered until the said defendants or their attorneys pay to the said executor any commissions to which he is entitled under the terms of this decree, if any such there be, the court being of the opinion that it is unnecessary to settle any further accounts of the trusteeship of Jno. G. Williams, deceased, or of the executor of the said trustee, it appearing that the said bank stock is the only unsettled matter of the said Thos. W. Bond's estate.

"And it is further ordered and decreed that the said defendants recover against the plaintiff their costs in this behalf expended."

From this decree Lewis C. Williams, executor obtained this appeal.

Williams & Mullen, of Richmond, and Shackelford & Shackelford, of Orange, for appellant. A. T. Browning, of Orange, and Gordon & Gordon, of Louisa, for appellees.

KELLY, J. (after stating the facts as above). [1, 2] The first question confronting us arises upon the contention of the appellees that the appellant's bill should have been dismissed on demurrer, and that therefore he has no standing whatever in this court. Treating the demurrer as having been overruled by implication, we are of opinion that the bill contained matter sufficient to warrant the court in entertaining the cause. The stock was in the possession of John G. Williams at the time of his death, and was held by him upon a trust which vested in him no discretion as to the time or manner of its disposition. This being true, Lewis C. Williams, under the provisions of section 3419 of the Code, was charged with the duty of "executing the trust or so much thereof as remained unexecuted." There was a wide difference of opinion between him and the owners of the stock as to what were the rights of his own testator in the matter of compensation; and the facts as developed left the circuit court, properly as we think, to sustain in a limited measure the view for which he contended. The subject of the suit was in the nature of a final accounting and settlement upon a trust fund, involving disputed claims, and the complainant followed a recognized and approved practice in seeking the aid and advice of a court of equity.

[3] The next and principal question is whether John G. Williams was entitled, as trustee, to any compensation in addition to the \$500 provided for in the will as compensation for his services as executor, and, if so, how much. The circuit court held that he was entitled to such additional compensation, and limited the amount to the commission previously collected on that account by Mr. Williams, or his estate, plus 5 per cent. on the dividends which accrued and were paid on the stock during the trust period of ten years and from which no trustee's commissions were deducted. This, in our view of the case, was correct.

When a testator fixes the compensation for an executor or trustee under his will, and

the executor or trustee named therein accepts the appointment, he is entitled to as much and is limited to as little as the testator has fixed. In cases where the language of the testator is susceptible of more than one construction, the question becomes one of interpretation which the courts must settle by ascertaining the probable intention and understanding of the parties. Where no compensation at all is named in the will, the rule is that the allowance shall be reasonable, being usually 5 per cent. on receipts, subject to increase or reduction of this rate under peculiar circumstances. These propositions are not controverted and are well settled. Code, § 2695; *Darling v. Cumming*, 111 Va. 637, 69 S. E. 940; *Allen v. Virginia Trust Co.*, 116 Va. 319, 82 S. E. 104; 11 Am. & Eng. Ency. L. pp. 1304, 1305. Applying them to the instant case, there is room for the contention that the testator intended the sum of \$500 to cover all the services of Mr. Williams imposed upon him by the will, but we cannot say that this contention is clearly correct, even upon the face of the will and uninfluenced by the interpretation which Mr. Williams placed upon it. This interpretation by him is entitled to no small consideration. He is shown to have been a lawyer of experience and ability, and a man of high character. He was the trusted friend and adviser of the testator, and prepared the will himself. It does not seem improper in these circumstances, and in the absence of any indication to the contrary, to assume that Mr. Williams correctly construed the will when he charged, as trustee, compensation in addition to what was allowed him as executor, and that in doing so he fixed a reasonable sum. It seems to us just and right, upon the face of the record before us, to attribute to him a correct understanding of the purpose of the testator and a faithful compliance therewith. It was clearly his idea that he was entitled to a commission upon the corpus of the fund represented by the bank stock, but not as much as 5 per cent. He therefore collected the much smaller sum of \$462.60. It was also clearly his idea that upon the smaller amounts of the semiannual dividends he should receive a commission of 5 per cent. straight, and this he collected upon most of them. All this seems fair and reasonable, and not at all out of accord with the probable intention of the testator as indicated by the terms of his will. In other words, what would appear to be the correct interpretation of the will has been put into practical effect by the man whom the testator trusted with its preparation and execution.

We cannot agree, therefore, either with the contention of the appellant that Mr. Williams proceeded upon an "erroneous and mistaken view of his rights," and charged too little, or, on the other hand, with the appellees' contention that he was entitled to no compensation at all as trustee; but we

are of opinion, as the circuit court evidently was, that the intention of the testator will probably be carried out and that substantial justice will be done by adopting the view upon which Mr. Williams undoubtedly acted.

[4] We have not overlooked the claim of the appellant that there should be a further allowance based upon the increased value of the stock as of the end of the ten-year period covered by the trust, but we do not think there is any substantial foundation upon which to rest such a claim. It is true, as urged by appellant, that Mr. Williams acted as counsel and as president of the bank at a small salary, but he was acting along with the other officers of the bank for the benefit of other stockholders, including himself, besides the Bond estate; and there is every reason to suppose that he was, as far as he desired, master of the situation and received a salary satisfactory to himself. His services as president and attorney were chargeable to the bank as a whole, and not to a part of the stock, and he doubtless fully realized and acted upon this principle.

[5] There is one respect, however, in which we think the decree of the lower court should be amended. The trusteeship having regularly devolved upon the complainant, and this suit having been brought in good faith and upon reasonable occasion, the court should have awarded the complainant his costs and a reasonable allowance as an attorney's fee. *Cochran v. Richmond, etc., Co.*, 91 Va. 339, 341, 21 S. E. 664; *Berkeley & Harrison v. Green*, 102 Va. 378, 381, 46 S. E. 387; *Wilson v. Langhorne*, 105 Va. 64, 68, 52 S. E. 841. We are not unmindful that it is somewhat unusual for this court to modify a decree in respect to costs, and allowances in the nature of costs, while affirming it in all other particulars. *Dillard v. Dillard*, 77 Va. 820; *Goodloe v. Woods*, 115 Va. 540, 551, 80 S. E. 108. As Judge Staples said in *Wimbish, Assignee, v. Blanks, Assignee*, 76 Va. 365, 369:

"When this court has determined that the decree of the lower court is right upon the merits, it is not much inclined to interfere with the decision with respect to the costs, unless in a case of palpable error."

The present case, however, appears to us to fall within the exception expressly recognized by the opinion in the *Wimbish Case* and the other cases cited.

We deem it unnecessary, under the circumstances of this case, to remand it for a reference upon the amount to be allowed as counsel fees. The amount, so far as it is to be paid from the trust fund, should not be large. There was reason for the suit but not, as we think, for the demand over which the greater part of the controversy was waged.

The decree complained of will be amended by directing that the appellant recover of the

appellees his costs in the lower court, that he be allowed the sum of \$150 as an attorney's fee, and that the bank stock shall not be delivered by him to the appellees until they shall have been paid him, in addition to the commissions they are required by the decree to pay him, the costs and allowance herein awarded him; and, as thus amended, the decree will be affirmed.

We are unable to hold, however, that he is the party substantially prevailing upon the appeal, and therefore, under the mandatory terms of the statute (Code § 3548), the costs in this court must be awarded to the appellees.

Amended and affirmed.

(120 Va. 453)

COLLIER v. HIDEN.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. BOUNDARIES—§30—PETITION TO DETERMINE—PARTIES—STATUTE.

Under Acts 1912, p. 133, providing that any person having an interest in realty, on petition filed in the court which would have jurisdiction in an action of ejectment, shall have the right to have ascertained and designated the true boundary lines as to one or more of the coterminous landowners, and that all persons interposed in coterminous real estate shall be made parties to the petition, parties entitled in fee in remainder to the land in which petitioner for ascertainment of boundaries owned only a life estate were necessary parties to the proceeding, and should have been made parties plaintiff or defendant to the petition.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 144.]

2. JURY—§25(2)—WAIVER—STATUTE.

By provision of Pollard's Code 1914, § 3186, a trial by jury is waived if neither plaintiff nor defendant demands it.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 155, 156.]

3. JURY—§19(14)—PETITION TO DETERMINE BOUNDARIES—STATUTE.

Acts 1912, p. 133, providing that trial by jury of a petition to determine boundaries may be waived by consent of parties, requires a trial by jury in each case arising under it, unless such trial is waived by the consent of parties plaintiff and defendant.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 123.]

Appeal from Circuit Court, Greene County.

Petition for ascertainment of boundaries by Hiram Hiden against Sallie Collier. From a decree for plaintiff, defendant appeals. Reversed.

John S. Chapman, of Stanardsville, for appellant. E. M. Averill, of Stanardsville, for appellee.

SIMS, J. This case involves a proceeding by petition to have ascertained and designated by the court the true boundary lines of real estate under Acts of Assembly 1912, p. 133.

The appellee was plaintiff and the appel-

lant defendant in the court below, hereinafter referred to as plaintiff and defendant.

The proceeding was erroneously had on the chancery side, instead of the law side, of the court, as the statute provides, but in the view we take of the case it is not necessary to consider the effect of that upon the validity of the process or otherwise.

There was no appearance by the defendant until after final order or decree in the case.

The plaintiff was the owner of a life estate only in his real estate; his wife and children being entitled thereto in remainder in fee. The latter were not made parties to the proceeding.

Trial by jury was not waived "by consent of parties," and the court below disposed of the case without a trial by jury.

There are five assignments of error in the petition before us praying that a new trial be awarded, only two of which need be considered, which are in effect as follows:

First. That the statute aforesaid requires that all persons interested in the coterminous real estate shall be made parties to the petition, and that therefore the wife and children of the plaintiff were necessary parties to the proceeding, being the owners in remainder in fee of the land in which the plaintiff owned a life estate only. It is not denied that the plaintiff, as life tenant, could alone file his petition, but it is alleged that under the statute he should have either had the remaindermen unite with him as plaintiffs or have made them defendants.

Second. That the said statute provides that "the trial by jury may be waived by consent of parties"; that without such consent the questions involved must be tried by a jury; that the record shows no consent of parties to waive a trial by jury, and hence the final order or decree in the case was void for lack of jurisdiction in the court to enter it.

We will consider these assignments of error in their order as stated above.

The statute in question is as follows:

"1. Be it enacted by the General Assembly of Virginia, that any person having an interest in real estate upon petition filed in the court which would have jurisdiction in an action of ejectment concerning such real estate, shall have the right to have ascertained and designated by the said court, the true boundary line or lines to such real estate as to one or more of the coterminous landowners. All persons interested in the coterminous real estate shall be made parties to the said petition which shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition.

"The trial shall be conducted as other trials at law and the same rules of evidence shall apply and the same defenses may be made as in other actions at law; the trial by jury may be waived by consent of parties, the judgment of the court shall be recorded in the common law order book and in the current deed book of the court, and indexed in the name of the parties to the petition. The court may upon application of either party to the petition, by order in term time or in vacation, direct such survey or surveys to be made as may be deemed neces-

sary. The judgment of the court shall, unless reversed, forever settle and determine and designate the true boundary line or lines in question, and be binding upon the parties to such petition, their heirs, devisees and assigns. The judgment of the court shall be subject to the review by the supreme court of appeals of the state upon writ of error."

First, with respect to the first assignment of error above mentioned.

[1] We are of opinion that this assignment is well taken. The statute, it is true, allows "any person having an interest in real estate" to file the petition provided for thereby; but it further, in express terms, provides that:

"All persons interested in the coterminous real estate shall be made parties to the said petition. * * *"

The statute is not free from ambiguity with respect to the meaning with which it uses the word "coterminous" in the sentence here quoted, in view of its use of the same word in its designation of "coterminous landowners" in the preceding sentence. The "landowners" referred to in the former sentence are clearly meant by the statute to be the owners of the land on the opposite side of the boundary line from the plaintiff, to wit, the defendants in the proceeding. When the statute, however, in the following sentence, does not designate those who shall be made parties to the petition as all "coterminous landowners," but "all persons interested in the coterminous real estate," the language would seem to have a broader meaning, and to include the owners of the land on both sides of the boundary line in controversy, to wit, both plaintiffs and defendants; and in view of the policy of the law and of this statute to lessen litigation, we think this meaning must be given to it.

We are therefore of opinion that the said parties entitled in fee in remainder to the land in which the plaintiff owned only a life estate, were necessary parties to the proceeding and should have been made parties plaintiff or defendant to the petition.

Second, with respect to the second assignment of error above mentioned.

[2, 3] It is true that the statute under consideration provides that the petition "shall be matured for hearing as provided for maturing an action of ejectment, except that it shall not be necessary to serve a copy of the petition," and that "the trial shall be conducted as other trials at law. * * *". If the statute had stopped there with respect to its provisions touching the procedure under it, no express consent of both plaintiff and defendant to waiver of the trial by jury would be necessary; for in other trials at law, by virtue of section 3166 of the Code of Virginia (Pollard's Code 1904) a trial by jury is waived if neither plaintiff nor defendant demand such trial. But the statute we have under consideration does not stop there, but goes on, and uses different language from said section 3166 with respect to the manner

in which the trial by jury may be waived, namely, it provides that "the trial by jury may be waived *by consent of parties.*" (Italics supplied.) We must interpret the language of the Legislature as we find it and give some meaning to this further provision of the statute. In doing so we cannot escape the conclusion that the statute requires a trial by jury in every case arising under it unless such trial is waived by the consent of parties both plaintiff and defendant.

We are therefore of opinion that this assignment of error is also well taken.

For the foregoing reasons, the order or decree complained of must be set aside and annulled, and a new trial granted.

Reversed.

(120 Va. 655)

VIRGINIA RY. & POWER CO. v. GORSUCH.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. TRIAL §69—REOPENING CASE—DISCRETION OF COURT.

Reopening the case to take additional testimony inadvertently omitted being within the trial court's discretion and not reviewable unless arbitrarily exercised, it was proper, in action against street railway for injuries to automobile passenger, to permit reopening the passenger's case to show ownership of the street car which struck the automobile.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 164, 165.]

2. NEGLIGENCE §93(2)—IMPUTED CONTRIBUTORY NEGLIGENCE.

That the wife owned an automobile which she sent to another city for her husband to use, and on her casual visit to the city, while riding with him in the automobile, it was struck by a street car, at a crossing, while she was engaged in conversation with another passenger and exercising no control over its operation, did not render negligence of the husband, if any, imputable to her, since the husband was in effect her bailee.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 149.]

Error to Circuit Court of City of Richmond.

Action by Mrs. Sophia Gorsuch against the Virginia Railway & Power Company. Judgment for complainant, and defendant brings error. Affirmed.

H. W. Anderson, A. B. Guigon, and Thos. P. Bryan, all of Richmond, for plaintiff in error. J. Kent Rawley and M. J. Fulton, both of Richmond, for defendant in error.

PRENTIS, J. A collision occurred at the intersection of Eighth and Grace streets, in the city of Richmond, on the night of September 19, 1914, between 11:30 and 12 o'clock, between a west-bound automobile and a north-bound street car of the Virginia Railway & Power Company. The occupants of the automobile were Mr. Thomas H. Gorsuch; his wife, Sophia; and their friend, Mr. John

F. Stephenson. The front part of the automobile was seriously damaged, and Mrs. Gorsuch was injured.

Mr. Gorsuch was employed by the Virginia Railway & Power Company to do some work in the city of Richmond in connection with dismantling certain plants on Brown's Island and re-erecting them on Belle Isle. His wife lived in the city of Baltimore. She owned the automobile referred to, but Mr. Gorsuch, shortly before the accident, had told her that he had so far to walk to his work it would be a convenience to him to have the use of the automobile in Richmond, and she had sent it to him, and it had been in Richmond and in his possession for about a week before the date of the accident. On the afternoon of the day of the accident, Mrs. Gorsuch came from Baltimore to Richmond for a visit, was met at the train by her husband with the automobile, and after a pleasure ride Mr. Stephenson was invited to go with them to a local hotel, where the party had something to eat with some beer (though there is no suggestion of intoxication), and after watching the dancing they started home about 11:30 p. m. Within one square after the automobile started, the collision occurred. At that time the surface of Grace street was torn up because the company was relaying or repairing its tracks at that point. The excavations made it necessary to provide a temporary crossing over the tracks at the place of the accident, which consisted of railroad ties laid alongside of each other, making a crossing about twelve feet wide.

1. One of the errors assigned is that after the evidence had been concluded, and the defendant company had demurred to the evidence because it had not been proved that the street car was the property of the Virginia Railway & Power Company, although the plaintiff, Mrs. Gorsuch, had rested and concluded her case, after the statement of the grounds of demurrer, the court allowed her to reopen the evidence and prove the ownership of the street car.

[1] There is no merit in this assignment. At that stage of the proceedings they were within the control of the trial court, and it was the duty of the judge to permit the plaintiff to prove a fact which had been inadvertently omitted, but about which there was no doubt whatever. Had the court refused to do so, it would have been reversible error. Matters of this sort are within the discretion of the trial court and will not be reviewed unless such discretion is exercised in an arbitrary or obviously improper manner. *N. & W. Ry. Co. v. Coffey*, 104 Va. 670, 51 S. E. 729, 52 S. E. 367; *Daniels v. Thacker Fuel Co. (W. Va.)* 90 S. E. 841; *Burns Bros. v. Morrison*, 36 W. Va. 423, 15 S. E. 62; *Cook v. Raleigh Lumber Co.*, 74 W. Va. 503, 82 S. E. 327.

[2] 2. Another error assigned is the failure

of the court below to instruct the jury that the contributory negligence of the husband, Mr. Gorsuch, should be imputed to Mrs. Gorsuch in bar of her recovery.

The doctrine of imputable negligence has been much discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. It seems to be well settled that the negligence of a husband driving an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. *Anthony v. Kiefner*, 98 Kan. 194, 150 Pac. 524, L. R. A. 1915F, 876, Ann. Cas. 1916E, 268; *Ann. Cas. 1912A, 649*; *Reading Township v. Telfer*, 57 Kan. 798, 48 Pac. 134, 57 Am. St. Rep. 355; 110 Am. St. Rep. 289; *Shultz v. Old Colony R. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Wachsmith v. B. & O. R. Co.*, 233 Pa. 465, 82 Atl. 755, Ann. Cas. 1913B, 679; *St. Louis & S. F. R. Co. v. Bell (Ok.)* 159 Pac. 336.

It is earnestly claimed, however, that, because of the fact that Mrs. Gorsuch owned the automobile involved in this collision, none of the rules above stated are applicable to this case, and that Mrs. Gorsuch, as the owner of the machine, had such control, or right of control, over it as to make her responsible for the negligence of her husband.

We cannot agree with this suggestion. Mr. Gorsuch was the gratuitous bailee of her automobile and had been for a week before the accident. His control of it while his wife remained in Baltimore was as absolute as if he had owned the machine, and the casual visit of Mrs. Gorsuch to Richmond did not change this control.

The case of *Hartfield v. Roper & Newell*, 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, decided in 1839, is instructive. Newell had demised his team for a term of two years, which had not expired at the time of the injury, to his son-in-law and codefendant, Roper. The accident, however, occurred when Newell, the owner of the team, was riding in the vehicle, and the court acquitted him of responsibility for the accident upon the ground that at the time thereof he had no control over the team and could not be made liable without proof of positive and active concurrence in the injury, quaintly adding, "a thing for which there is no pretense in the proof, and which implies a barbarous temper, which the law cannot presume in any one."

This appears from the case of *New Jersey Electric Ry. Co. v. N. Y., L. E. & W. R. Co.*, 61 N. J. Law, 287, 41 Atl. 1116, 43 L. R. A. 849. The New York, Lake Erie & Western Railroad Company, the owner of a certain locomotive and cars which had been injured in a collision between such locomotive and an electric car of the New Jersey Electric Railway Company. At the time of the accident the locomotive and cars of the plaintiff had been hired by the day and from day to day for the use of another company, the New York & Greenwood Lake Railway Company, which latter company was, with its own engineer, fireman, and employes, operating the same upon its own roadbed and rails at the time and place of the collision. The effort was made to impute the negligence of the operating company, the lessee, to the New York, Lake Erie & Western Railroad Company, the owner of the cars; but the court refused to take that view, saying, among other things:

"In a contract of bailment of things for hire, the bailor is not responsible to a third party for injuries occurring to such third party by reason of the negligent use of the thing hired by the bailee, nor for the negligence of the servants of the bailee in respect thereto. The bailee does not stand in the place of the bailor, nor represent him in such relation as to render the bailor liable for such injuries; nor are the servants of the bailee the servants of the bailor, or in any sense acting for him; and the contract of bailment is in so far entirely an independent one, and the liabilities of the bailor and bailee to third parties are essentially independent of each other."

The modern and better doctrine is that the negligence of a bailee of property, over whom the bailor is exercising no control at the time of the injury, is not imputable to the bailor. Hence a livery stable keeper is not prevented from holding a railroad company liable for negligently killing a horse because the negligence of the hirer, in whose sole control the animal was, contributed to the injury. *Gibson v. Bessemer & Lake Erie R. Co.*, 228 Pa. 198, 75 Atl. 194, 27 L. R. A. (N. S.) 690, 18 Ann. Cas. 535.

The proposition is also strengthened by *Sea Insurance Co. v. Vicksburg, S. & P. R. Co.*, 159 Fed. 676, 86 C. O. A. 544, 17 L. R. A. (N. S.) 925; *Currie v. Consolidated Ry. Co.*, 81 Conn. 383, 71 Atl. 356; *Ala. G. S. R. Co. v. Clarke*, 145 Ala. 459, 39 South. 816; *Van Zile on Bailments & Carriers* (2d Ed.) 1908, § 119; 3 R. C. L. 147.

We know of no reason for applying a different rule when the bailment is gratuitous.

The relation of Mrs. Gorsuch to Mr. Gorsuch, under the circumstances above referred to, was that of bailor to bailee, and, until she resumed control of the property, the operation of the car was as completely within his control as if he had been the fee-simple owner thereof.

Mrs. Gorsuch, at the time of the accident, was no more responsible for the negligence of her husband than the other guest who was

riding in the machine was responsible therefor. In order to defeat her recovery in this case, it would be necessary to prove that she was herself guilty of some negligence. This the record fails to show. She was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and, notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband, as is suggested in *Reading Township v. Telfer*, supra; Ann. Cas., vol. 22, 1912A, 649.

There is nothing then in this record to indicate any negligence on the part of the plaintiff in the action, *Mrs. Gorsuch*.

Where a passenger is in a private vehicle by invitation and is exercising no control over the driver, the negligence of such driver cannot be imputed to the passenger. If precluded from recovery it must be because of his own negligence. This case is controlled by the well-established doctrine announced in the case of *Atlantic & Danville R. Co. v. Ironmonger*, 95 Va. 632, 29 S. E. 319.

It follows from this that it is unnecessary to pass upon the question as to whether the evidence indicates that the negligence of her husband contributed to the accident. Whether it did or not, under the circumstances of this case, it cannot be imputed to her.

Mrs. Gorsuch made no claim in her testimony for damages for injury to the automobile, and her husband stated that the automobile had been repaired at his own expense. The court apparently eliminated this element of damage from the consideration of the jury, for the instruction as to damages limits the jury to the consideration of her physical and bodily injuries, mental suffering caused by the accident, and actual damages to wearing apparel and jewelry; and the jury unquestionably heeded this instruction, because they rendered a verdict for \$600, and the repairs to the automobile alone, according to the testimony, amounted to \$590.

The question as to responsibility for the accident was fairly submitted to the jury, and they were justified, upon the evidence introduced by the plaintiff, in inferring the negligence of the company from the failure of the motorman to keep a proper lookout for travelers upon Grace street, and in failing to moderate the speed of the street car in accordance with the city ordinance limiting

that speed to four miles an hour when crossing Grace street.

The judgment will therefore be affirmed. Affirmed.

(120 Va. 505)

MURPHY'S HOTEL CO., Inc., et al. v.
HERNDON'S ADM'R et al.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. EVIDENCE — 76 — PRESUMPTION — FAILURE TO TESTIFY.

No presumption arises from failure of claimants to testify; the execution and delivery of the notes evidencing the debts being solely in the knowledge of the debtor, who testified for them, and the consideration being equally in her knowledge, and there being no allegation of collusion between them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 96.]

2. WITNESSES — 397 — IMPEACHMENT BY INCONSISTENT STATEMENTS — EFFECT.

Any impeachment of a witness as to consideration by prior contradictory statements furnishes the opposing parties with no affirmative proof of lack of consideration.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1265, 1266.]

3. BILLS AND NOTES — 493(1) — CONSIDERATION — PRESUMPTION.

In the absence of affirmative evidence of lack of consideration, the prima facie presumption of consideration for a negotiable instrument, declared by Negotiable Instruments Law, § 24 (Code 1904, § 2841a), is sufficient as regards consideration for relief under a deed of trust securing a note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652-1657, 1659, 1660.]

4. FRAUDULENT CONVEYANCES — 301(1) — PRESUMPTION.

That the petition of one of those petitioning for relief under a deed of trust is filed by counsel for the debtor is no evidence of collusion between debtor and petitioners, especially in the absence of a pleading of fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 904.]

5. MORTGAGES — 86(1) — DEED OF TRUST — CLAIMS SECURED — PRESUMPTION.

A deed of trust by a remainderman being by its terms enforceable only on death of the life tenant, no presumption of invalidity of claims secured thereby arises from failure to assert claims thereunder before death of life tenant.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1350.]

6. MORTGAGES — 114 — DEED OF TRUST — DELIVERY OF NOTES.

Action not being on notes, but on deed of trust to secure debts, it is immaterial whether the notes, by which the deed of trust states the debts are evidenced, were delivered.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 223, 224, 241.]

7. MORTGAGES — 25(6) — DEED OF TRUST — EVIDENCE OF DEBT.

A deed of trust to secure debts is sufficient evidence of existence of the debts, in the absence of evidence of their payment subsequent to its delivery.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 42, 1364.]

8. MORTGAGES ⇨311—DEED OF TRUST—DECREETING RELEASE—PLEADING TO SUPPORT.

A decree directing release of a deed of trust to secure notes, in effect payable to holder or holders thereof, to be valid, must be based on some pleading raising the issue of there being any holder or holders thereof; and an ex parte report of a special commissioner is not such a pleading.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 919-929.]

9. MORTGAGES ⇨311—DEED OF TRUST—DECREETING RELEASE—NECESSARY PARTIES.

Decree directing release of a deed of trust is void, being made in a proceeding to which persons secured thereby are not parties, and of which they are not given notice.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 919-929.]

10. MORTGAGES ⇨315(1)—DEED OF TRUST—RELEASE UNDER DECREE—NOTICE OF INVALIDITY.

A release by the trustee of a deed of trust is not effective, so as to advance the lien of judgment creditors of the maker of the deed of trust; it showing on its face that it was under decree referred to therein, an examination of which, with the commissioner's report also referred to therein for the facts on which it was based, would show that the decree was void.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 942, 943, 945, 946, 948.]

Appeal from Chancery Court of Richmond.

Petitions by A. J. Bradley, administrator of John F. Herndon, deceased, and others, against the Murphy's Hotel Company, Incorporated, and others. Decree for petitioners, and respondents appeal. Affirmed.

A. B. Dickinson, of Richmond, for appellants. Wm. P. De Saussure, of Richmond, for appellees.

SIMS, J. This suit involves a controversy between appellants, judgment lien creditors of Mrs. Mary Lee Benet (formerly Mrs. Bitting) and appellees, who claim to be lien creditors of the same debtor by virtue of a deed of trust prior in date and time of recordation to the obtaining and docketing of the judgments of appellants.

Appellants claim that the debts of the appellees never in fact existed for lack of consideration; that the notes evidencing such indebtedness were never negotiated by the maker, Mrs. Benet—that is to say, were never delivered to appellees or to any one for them, so as to be beyond the control of Mrs. Benet; and that the deed of trust was released by a release deed valid as to appellants, so that the lien of their judgments attached to and binds the property conveyed by the trust deed giving the latter a prior lien thereon.

The property conveyed by the deed of trust was the interest of Mrs. Benet in the Ford trust estate. The latter consisted of real estate and personal property. The interest of Mrs. Benet was not expected to vest and did not become vested until the death of her mother, Mrs. Ford. The latter did not die until the fall of 1908. The character of this

interest in property and of the four original chancery suits successively instituted in the court below, involving said Ford trust estate, appears in a general way from the case of *Brown v. S. H. Ford et al.*, 91 S. E. 145.

The deed of trust in question, under which appellees claim, was duly executed June 11, 1898, and duly recorded on June 16, 1898. Edgar Allan, Jr., was the trustee named therein. The name of only one of appellees appears in this deed of trust, viz. Henry McBride. The debt asserted by him is secured by the deed of trust and is stated therein to be evidenced by the note of Mrs. Benet (then Mrs. Bitting), dated in January, 1896, payable 12 months after date to him or his order. The debts asserted by the other appellees, Williams, Sharp, and Herndon's administrator, secured thereby, are stated in the deed of trust to be evidenced by two notes of Mrs. Benet (then Mrs. Bitting), one note dated June 10, 1898, and the other April 10, 1897, both payable to her order and indorsed by her.

The deed of trust provided that at any time after the title to said interest in said property should by reason of the death of Mrs. Ford become vested in fee simple in Mrs. Bitting (later Mrs. Benet) the trustee should, upon request of the beneficiaries thereunder, or the holder or holders of any notes thereby secured, sell, etc. The deed of trust was placed on record by Edgar Allan, Jr., trustee. The notes in question were on June 11, 1898, the same day the deed of trust was executed, placed by the said maker of them in the hands of Edgar Allan, Sr., who was then her attorney at law, accompanied by a statement in writing, designated in the record as "Paper X," which was signed by Mrs. Bitting (later Mrs. Benet) and Edgar Allan, Sr. This paper in effect stated that Mrs. Bitting left in the hands of Edgar Allan, Sr., the notes above mentioned. This paper merely lists the note in favor of Henry McBride by stating that it was the note of Mrs. Bitting "to Henry McBride for \$400." It describes one of the other notes by stating that it was "her note for \$825, indorsed to Edgar Allan as attorney, to be applied to the payment of the following amounts: Solon T. Williams \$100, Thomas Sharp \$500, and Mrs. John L. Hopkins \$150" (the latter not involved in this suit), "the excess to be applied to payment of interest on the note of Thomas Sharp." It describes the remaining note in question as "her note of \$300, indorsed by her to Edgar Allan, attorney, for the payment of her indebtedness to J. F. Herndon." These notes and the paper X remained in the possession of Edgar Allan, Sr., until his death in October, 1904, and were found among his papers after his death.

Mrs. Ford died in the fall of 1908, as above stated. In March, 1909, Edgar Allan, Jr., and his mother, as executor and executrix of Ed-

gar Allan, Sr., deceased, and Edgar Allan, Jr., trustee (also as trustee in other deeds of trust not necessary to be mentioned), by petition, filed in the two of said original chancery suits first instituted, set up the fact that said notes and paper X were found among the papers of their testator, and alleged that the debts evidenced thereby were valid and subsisting debts, had never been paid by Mrs. Benet, and asking that their payment should be enforced against said interest of Mrs. Benet in said property, that an account of debts against such interest in such property be taken, with their liens and priorities, and that all of such debts be enforced and paid. None of appellees were made parties to this petition.

Accordingly decree was entered directing such accounts, and Commissioner Jackson Guy filed his master commissioner's report, dated June 25, 1909, in which he reported in favor of Henry McBride his said debt as evidenced by said note payable to him or order and secured by said deed of trust. He alike reported in favor of "Allan, Edgar's Executors," the debts evidenced by the two other notes in question above mentioned. With respect to the \$825 note, he reported that the paper X shows "that it was given by Mary Lee Benet to Edgar Allan as attorney, to collect and apply its proceeds to Solon T. Williams \$100, to Thos. Sharp \$500, and Mrs. John L. Hopkins \$150, the excess to be applied to the interest on the note of Thos. Sharp." Mrs. Benet states that these parties live in Seattle. The note itself is in the possession of the executors of Edgar Allan, deceased, but they make no claim to it. With respect to the \$300 note he reported that it was in the possession of same executors, but that the paper X shows "that it belongs to John F. Herndon, who, I understand, was the first husband of Mary Lee Benet, and is dead."

There was no exception to this report. However, it was never confirmed by any decree of court, but remained filed among the papers of the cause unacted upon by the court.

In this condition of the record, on December 22, 1910, certain special commissioners, who had been appointed by prior decree in said four original chancery causes, filed their report in such causes. These commissioners had been appointed to make sale of certain real estate involved in such suits composing a part of the said property, the interest of Mrs. Benet in which was conveyed by said deed of trust, and they were appointed for no other purpose. However, they reported that they had sold a certain piece of real estate; that the purchaser had had the title examined and found said deed of trust recorded as a lien thereon. The special commissioners further say in such report, "upon knowledge and belief," the following, in effect:

(1) That the McBride note "was never ne-

gotiated"; that no consideration therefor ever existed; that the special commissioners had no knowledge whatever as to McBride, and could not say whether he was living or dead, but that such note was never delivered to him, being then in the possession of Edgar Allan, Jr., trustee in said deed of trust, who laid no claim to it.

(2) That the two other notes in question were never negotiated or discounted; that no consideration therefor ever existed; that it was true that a paper was found among the papers of the late Edgar Allan, setting forth the manner in which the proceeds of such notes were to be applied, but that the latter was the attorney for Mrs. Benet, and such notes were in the possession of Edgar Allan, Jr., trustee, at the date of such special commissioners' report; and that he laid no claim to them. They added, with respect to the Herndon note, that they were informed that a loan was to have been made to Mrs. Benet by Herndon, and the note was executed for that purpose, but that the making of the loan was never consummated. The commissioners then say that they feel it their duty to ask for the removal of the lien of said deed of trust, and they "suggest to the court that Edgar Allan, Jr., trustee, may be made a party defendant to these causes, and may by an order entered herein be authorized and directed to execute and record a proper deed releasing the said deed of trust to him as trustee," as to the notes evidencing the debts afterwards asserted by appellees, and that he attach to and record with the release deed all of such notes.

No pleading was before or at that time filed putting in issue the facts stated in said special commissioners' report, or making Edgar Allan, Jr., trustee, a party defendant "to these causes," or in any cause, upon such issue. Nor was the executor or executrix of Edgar Allan, Sr., impleaded upon such issue, nor McBride, nor any of the other appellees; nor did any of these parties appear in this cause, at or before this time, and make or respond to any such issue, or have any notice of such decree being asked for. Nevertheless, on the same day on which said special commissioners' report was filed, to wit, on December 22, 1910, decree was entered in said four chancery causes directing Edgar Allan, Jr., trustee, to execute and record a good and sufficient deed releasing said trust deed as to the notes therein described, evidencing the debts of appellees.

Accordingly, on January 3, 1911, Edgar Allan, Jr., trustee, executed and recorded a release deed to Mrs. Benet of said deed of trust. In this release deed he referred to said special commissioners' report, and to what it "set forth" in regard to said notes never having been negotiated, and that they were "still in the possession of Edgar Allan, Jr., trustee, who made no claim to same," and to said decree of December 22, 1910, as his authority for releasing such trust deed.

The suit before us arose upon petitions and amended petition of appellees filed in April, 1912, in the four original chancery suits above referred to, and the issues made by answers of appellants to such petitions.

Mrs. Benet, by her answers to such petitions, admitted the validity of appellees' debts.

Upon these issues, Mrs. Benet testified in support of appellees' debts, and stated that she had always recognized their validity and wanted their lien enforced; that all of petitioners except Herndon's administrator were, at the times the debts to them were contracted, and have been since, citizens and residents of Seattle, in the state of Washington; that her indebtedness to McBride was for attorney's fees for representing her in suit for divorce against her former husband, C. C. Bitting; that her indebtedness to Williams was for professional services to her; that her indebtedness to Sharp was for board and maintenance of herself and little child; that the debt to Herndon was for money loaned her by him; and that, while Edgar Allan, Sr., was her attorney at the time said notes and paper X were delivered to him by her, such delivery to him was made to be held by him as attorney for appellees.

None of appellees except Herndon's administrator testified in the case.

Mr. R. H. Talley, one of the special commissioners aforesaid and also one of the appellants, a judgment creditor of Mrs. Benet, testified that the latter had always contended that the debts of appellees were not valid and that they should not have been reported by Commissioner Guy. Mr. Talley is corroborated in his testimony by Mr. Edgar Allan, Jr., and Mr. Stewart H. Ford.

Mr. A. J. Bradley, administrator of Herndon, testified that he was present at the interview between Mr. Talley and Mrs. Benet, and that she stated to Mr. Talley that the debts of McBride and Sharp were incurred for full consideration, that they were sacred, and that she wanted them paid.

There was another master commissioner's report—that of Commissioner Sheld—filed August 13, 1914, which reported in favor of the validity of the debts of appellees; that the decree of December 22, 1910, was void; that the said release deed executed thereunder was of no effect; and that the debts of appellees had priority of lien over the judgment of appellants. There were exceptions to this report by appellants, and on August 2, 1915, the decree complained of was entered, which, in effect, held as follows:

(1) That the execution and recordation of said deed of trust securing the payment of the notes involved in the controversy in this suit, and the delivery of such notes by Mrs. Benet to Edgar Allan, Sr., under the directions contained in the paper X with Commissioner Guy's report, taken in connection with the subsequent facts and circumstances shown in the record, constituted a valid lien on the property conveyed by said deed of

trust and an irrevocable appropriation of said notes and the security given therefor to the payment of the debts of appellees.

(2) That appellees were necessary parties to any proceeding seeking to affect the validity or priority of such lien.

(3) That as appellees were not parties to the proceeding in which the decree of December 22, 1910, was entered, such decree was void, and the release deed a nullity.

The petition of appellants on appeal from such decree contains four assignments of error, which are as follows:

"First. It appears from the record that upon filing the petitions of Sharp, McBride, and others, in April, 1912, the validity of the indebtedness evidenced by said notes, and of the delivery of said notes, and the bona fides of the transaction, were directly put in issue by the answers to said petitions. Although this was done, it appears from the record that neither of the petitioners ever appeared before the commissioner at any time or in any manner in these causes to testify or offer any evidence other than that of Mary Lee Benet herself in support thereof. It further appeared that all of said petitions were presented by the counsel of record for Mary Lee Benet herself in the combined four causes. It further appeared that for years prior to the filing of said petitions Mary Lee Benet had persistently denied the validity of the notes, the validity of the delivery thereof, and the validity of the lien by which they were secured. Your petitioners insisted before the commissioner and before the chancery court of the city of Richmond that under these circumstances the silence of Sharp, McBride, and others raised the presumption, which should be given effect to, that the indebtedness alleged in the petitions of Sharp, McBride, and others did not exist; that it was solely in their power to prove the existence of the indebtedness and the consideration therefor; that said notes had been delivered to Edgar Allan, Sr., for their benefit, if the fact existed, could have been proven by them; and that their continued and persistent silence for 14 years, although the validity of the transaction had been directly put in issue, that all of these facts and circumstances raised such a presumption against the petitioners that could not be overcome by the unsupported testimony of Mary Lee Benet, who had for years theretofore denied the validity of the whole transaction. *Copperthite v. Loudoun Nat'l Bank*, 111 Va. 70, 68 S. E. 392; *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843, 8 Ann. Cas. 623; *Kirby v. Tallmadge*, 160 U. S. 383, 16 Sup. Ct. 349, 40 L. Ed. 463.

"In addition to the burden of proof resting upon Sharp, McBride, and others, and in addition to the presumption raised by their failure to offer one word in support of the contention set up in their petitions, there is the suspicious fact that their petitions were presented to the chancery court by counsel for Mary Lee Benet, who herself offered the sole testimony in support of the contention alleged by Sharp, McBride, and others, though she had for years previous thereto denied it, and we submit that under these circumstances there should be no holding that this discredited testimony of Mary Lee Benet should be a sufficient basis for a decree re-establishing the notes and deeds of trust, when the chancery court by its decree of December 22, 1910, had distinctly declared that there had been no delivery of the notes, and, consequently, that the same constituted no lien upon her interest in the Ford trust estate.

"Second. Your petitioners further respectfully submit that under the circumstances developed in these causes there had been no sufficient de

livery of the notes to give Sharp, McBride, and others any vested rights in the premises.

"It appears that the notes had been executed by Mary Lee Benet and held by her in her possession until June 11, 1898; that on that day she delivered the notes to her own counsel, Edgar Allan, Sr.; that these notes were to be held by him until such time as the same could be collected, either through a sale of the property under the deed of trust, or by payment through decree of the court; that after such collection he was, under the provisions of the paper marked X and hereinbefore referred to, to apply the proceeds as therein directed. The chancery court held that these facts constituted an equitable assignment, or an irrevocable appropriation, which amounts to an equitable assignment, by Mary Lee Benet to Sharp, McBride, and others. This conclusion of the chancery court, we submit, is contrary to the uniform current of authority and should not be sustained.

"Third. It will be observed that there was no authority in the paper marked X, above referred to, nor otherwise shown to exist in the record, empowering Sharp, McBride, and others, or either of them, to collect the amount of the notes involved in this procedure. Edgar Allan, Sr., the attorney of Mary Lee Benet, was alone authorized to collect the proceeds of the notes when collected. Whether or not Edgar Allan, Sr., carried out those directions, was a matter purely between him and his client, Mary Lee Benet. Sharp, McBride, and others had no notice of the execution of the notes or of their possession by Edgar Allan, Sr. As between the trustee and Edgar Allan, Sr., Edgar Allan, Sr., stood in the position of beneficiary. Sharp, McBride, and others then had no such interest as rendered it necessary to make them parties to the proceeding for the release of the deed of trust. Edgar Allan, Jr., both in his capacity as trustee and as executor of his father's estate, was before the court, and under the circumstances it is submitted that they were the only necessary parties to that proceeding, and therefore the decree of December 22, 1910, was valid and binding, and cannot now be assailed in this proceeding. See *Stout v. Stout*, 104 Va. 480, 51 S. E. 833.

"Fourth. But, even if it were conceded that there was a delivery of the notes by handing them to Edgar Allan, Sr., the attorney of the drawer, and conceding, further, that the paper marked X constituted an equitable assignment, giving to Sharp, McBride, and others a vested right in the premises, and even if it were conceded that the decree of December, 22, 1910, were a nullity, yet the fact is that Edgar Allan, Jr., the trustee, did cancel the notes and executed a deed of release in proper form and had the same admitted to record. Whether the decree of December 22, 1910, constituted a proper authority to the trustee to execute the deed of release or not, the fact remains that he did execute it. The effect of this deed of release was to convey to Mary Lee Benet the title which had been conveyed to him by the deed of trust of June 11, 1898. It was an actual conveyance. *Evans v. Roanoke Savings Bank*, 95 Va. 204, 28 S. E. 323; and *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. 814, 27 L. Ed. 529.

"The effect, then, of the execution of this deed of release by Edgar Allan, Jr., trustee, was to reconvey the property to Mrs. Benet. Upon its reconveyance your petitioners immediately acquired a vested legal lien upon the property."

These assignments of error will be considered in their order.

[1-3] First. With respect to the first assignment of error.

This assignment of error raises the following questions for our decision:

(a) Is this a case in which the rule laid down in the cases of *Copperthite v. Loudoun Nat. Bank*, *Aragon Coffee Co. v. Rogers*, and *Kirby v. Tallmadge* (cited in the first assignment of error) is applicable?

The rule referred to is stated in the case of *Copperthite v. Loudoun Nat. Bank*, *supra*, as follows:

"When a defendant can, by his own testimony, throw light upon matters at issue necessary to his defense, and peculiarly within his own knowledge, if the fact exists, and fails to go upon the witness stand, the presumption is raised, and will be given effect to, that the fact does not exist."

In the case at bar it does not appear that the facts in regard to the execution and delivery of the notes in question were peculiarly within the knowledge—or, indeed, at all within the knowledge—of the appellees who failed to testify, or any of them. The sole matter within their knowledge was the consideration furnished by them, respectively, for their debts. This was not peculiarly within their knowledge. It was equally within the knowledge of their debtor, Mrs. Benet, who by her answers in the cause and by her testimony admitted the validity of the consideration. There is no allegation in the pleadings of any collusion between appellees, or any of them, and Mrs. Benet to perpetrate a fraud. Further, the deed of trust and the notes (section 24 of the negotiable instruments statute of Virginia) were *prima facie* evidence of valuable consideration. No affirmative evidence whatever was introduced by appellants of any lack of such consideration. If the utmost effect were given to the conflict in the testimony with respect to Mrs. Benet having made prior statements in contradiction of her testimony, such contradiction would not have supplied appellants with any affirmative proof tending to show that such consideration was lacking. The *prima facie* case of valuable consideration made by the deed of trust and the notes themselves is sufficient to support the decree complained of on the question of consideration.

This, therefore, is not a case in which the rule above referred to is applicable.

[4] (b) Was the circumstance that counsel for one of appellees, in filing petition of latter, was also counsel for Mrs. Benet, the debtor, evidence of fraudulent collusion between appellees and Mrs. Benet?

The position taken in this assignment of error that *all* of the petitions of appellees were presented by counsel for Mrs. Benet is not sustained by the record. Only the petition of Herndon's administrator was presented by the same attorney who was counsel for Mrs. Benet. However, this fact tends to support, rather than contradict, Mrs. Benet's testimony to the effect that she had always recognized the validity of the debts of appellees and their lien under said deed of trust and wanted the latter enforced. Certainly this in itself could not be considered as any proof of fraudulent collusion between

Mrs. Benet and appellees, and especially is this true in the absence of any charge of fraud in the pleadings.

[5] (c) In reference to the delay of appellees referred to, it is deemed sufficient to say:

Ten years of the delay by appellees in asserting their debts is explained by the fact that they could not assert them until Mrs. Ford's death in 1908. The record shows that they have been guilty of no unreasonable delay since that time.

We therefore cannot sustain the first assignment of error.

[6, 7] Second. With respect to the second assignment of error.

Counsel for appellants cite a number of authorities bearing upon their position, taken in this assignment of error, to the effect that there was no such delivery of the notes in question to or for the benefit of appellees as to negotiate them and set them afloat as existing debts.

In the view we take of this case, however, it is not necessary for us to discuss these authorities or to consider such question. The action of appellees was not upon the notes, but to enforce the deed of trust. The deed of trust was unquestionably delivered by Mrs. Benet to the trustee and by him duly recorded before the lien of any of the judgments of appellants came into existence. The deed of trust secured the payment of the debts in question. It is true the trust deed states that such debts are evidenced by the notes as described therein. But, upon suit to enforce the deed of trust, the delivery or nondelivery of the notes becomes an immaterial question. The deed of trust is in itself sufficient evidence of the existence of the debts, in the absence of any proof of their payment subsequently to its delivery.

As said by this court in the case of *Eacho v. Cosby*, 26 Grat. (67 Va.) 112, Staples, J., delivering the opinion of the court:

"But the question of delivery is only important when the action is on the note, or it is sought to charge one who is only liable by reason of being a party to the instrument. When a debt exists independent of the note, the action is often upon the original consideration. * * * If in such case the debtor executes a deed of trust or mortgage to secure the debt, and in the deed refers to a note, it will scarce be maintained that the deed is a nullity because there is a failure, fraudulently or negligently, to execute and deliver the note. The true inquiry is, Does the debt exist? Is it due? When this is satisfactorily ascertained, the form of the security is important so far only as it affects the remedy. It is not essential there shall be any bond or note whatever. The deed of trust or mortgage will be valid without any other evidence of the debt than * * * its own recitals."

Therefore we cannot sustain the second assignment of error.

[8] Third. With respect to the third assignment of error.

It is true that the deed of trust of record gave no notice that any of appellees was a

beneficiary thereunder, except McBride. It did give express notice that he was such beneficiary at the time of the execution of the deed of trust to the extent of the note payable to him or order. The other two notes in question were, as described in the deed of trust, in effect payable to the holder or holders thereof; that is, to bearer. The deed of trust, as it appeared of record, did itself, therefore, furnish prima facie evidence, and hence it gave notice, that it secured the payment of valid subsisting debts to the amount of those in question, in favor of the holder or holders of the notes. Hence no decree of court directing the release of such deed of trust could be valid, unless based upon some pleadings putting in issue before the court whether there was or were any holder or holders of such notes. The existence of an issue in a cause is essential to the exercise of the jurisdiction of the court. There must be some proceeding by which the issue between the parties in interest is presented to the court for decision, and, moreover, all such parties must be given an opportunity to be heard thereon. *Linkous v. Stevens*, 116 Va. 905-911, 83 S. E. 417; *Black on Judgments*, pp. 907, 908; *Graham v. La Crosse Ry. Co.*, 3 Wall. 704, 709, 710, 18 L. Ed. 247. Aside from the question as to the necessary parties to such a proceeding, appellants are confronted with the fatal defect in their case that there was no such proceeding at all. There was no pleading tendering such issue. The special commissioners' report was merely ex parte. It could in no sense be regarded as a proper pleading to put the necessary question of fact in issue. The decree was therefore void.

[9] Further:

The special commissioner's report referred to paper X. It was filed in suits, the papers and proceedings of which gave information of the contents of paper X and information of what the report of Commissioner Guy showed as to who were the real beneficiaries of the debts in question. Moreover, such papers and proceedings showed the allegations of the petition of the executor and executrix of Edgar Allan, Sr., that such debts were subsisting debts, and that the lien of such deed of trust should be enforced. Upon such disclosure of facts shown by the record of such suits, clearly appellees were all necessary parties to any proceeding seeking to obtain a decree of court therein affecting the release of the lien of the deed of trust. *Moorman v. Arthur*, 90 Va. 455, 473, 18 S. E. 869; *Simon v. Ellison*, 90 Va. 157, 158, 17 S. E. 836; 1 Barton's Ch. Pr. p. 232. None of them having been made such parties or having had any notice of such decree before it was entered, the decree was void for this reason also.

Hence this assignment of error cannot be sustained.

[10] Fourth. With respect to this assign-

ment of error. If the trustee had released the deed of trust in question by a deed of release, with nothing on the face of it to put the appellants upon inquiry as to his lack of authority to do so, the position taken in this assignment of error might be tenable, and the remedy of appellees might be solely by proceeding against the trustee for breach of trust.

As to the cases cited by counsel for appellants on this point: The case of *Evans v. Roanoke Savings Bank*, 95 Va. 294, 28 S. E. 323, involved a release on the margin of the deed book regular in form and in compliance with the statute, as it then existed, on the subject; and that of *Williams v. Jackson*, 107 U. S. 478, 2 Sup. Ct. 814, 27 L. Ed. 529, involved a release deed regular in its form, in which the payee of the note evidencing the debt secured by the deed of trust united with the trustee in the deed of release.

In the case at bar the release deed was not regular in form; it shows on its face that the trustee did not act of his own volition, but under decree of court, which decree is referred to. The release deed further refers to the ex parte special commissioner's report aforesaid for the facts on which such decree was based. The release deed itself, of record, therefore, put every subsequent purchaser for value and creditor upon notice of what an examination of the papers and proceedings in said suits would have disclosed, namely, that the decree of December 22, 1910, was void, for the reasons stated in the discussion above of the third assignment of error, and that the release deed in question was a nullity. Therefore the equities of appellants and appellees are not equal; the equities of the latter are superior to those of the former.

Hence this assignment of error cannot be sustained.

For the foregoing reasons, we find no error in the decree complained of, and it will be affirmed.

Affirmed.

(120 Va. 524)

CITY OF NORFOLK v. GRIFFIN BROS.
(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. CONSTITUTIONAL LAW §230(2)—LICENSES §6(2)—OCCUPATION TAXES—POWERS OF CITIES.

Norfolk City Charter provides that the city council may raise by taxes and assessments such sums as they deem necessary, and as it shall deem expedient, in accordance with the Constitution and laws of this state and of the United States. Tax Bill (Code 1904, p. 2238) § 90, provides that any person accepting contracts for work on any building requiring use of specified materials, or any other building material, shall be deemed a contractor, and that every contractor shall procure a license to carry on the business of a contractor. The city of Norfolk passed an ordinance requiring a separate license for doing the several kinds of work separately enumerated in the Tax Bill. *Held*, that the Tax

Bill limited the power of classification of the city, so that the ordinance, so far as it required a number of licenses for the same work for which the state required but one license, was invalid; the conflict between ordinance and statute being in violation of spirit though not letter of U. S. Const. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 687; Licenses, Cent. Dig. §§ 5, 6.]

2. LICENSES §6(1)—OCCUPATION TAXES—POWERS OF CITIES.

The powers of the municipality are strictly construed in respect to its taxation of occupations.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 5, 6.]

Error to Circuit Court of City of Norfolk.

Proceeding by the City of Norfolk against Griffin Bros. Judgment in the circuit court dismissing the city's appeal from the judgment of the police justice, and the city brings error. **Affirmed.**

Statement.

This case arises under the following state license statute and license ordinance of the city of Norfolk.

The state license statute, so far as material, is as follows:

"Any person, firm, or corporation accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, stone, brick, mortar, cement, wood, structural iron or steel, sheet-iron, galvanized iron, metallic piping, tin, lead, electric wiring, or other metal or any other building material; or who shall accept contracts to do any paving or curbing on sidewalks or streets, public or private property, using asphalt, brick, stone, cement, wood or any composition, or who shall accept an order for or contract to excavate earth, rock, or other material for foundations or any other purpose, or who shall accept an order or contract to construct any sewer of stone, brick, terra cotta, or other material, shall be deemed a contractor. Every contractor shall on the first day of May in each year procure from the commissioner of the revenue for the city or district in which he has his office a license to carry on the business of a contractor: * * * Provided, that no further license shall be required by the state for conducting said business in any part thereof. * * *" Code 1904, p. 2238, § 90.

The city of Norfolk license ordinance, so far as material, is as follows:

"59a. Any person, firm or corporation, whether they have office in the city of Norfolk or not, accepting orders or contracts for doing any work on or in any building or structure requiring the use of paint, wall decorations, stone, brick, mortar, cement, wood, structural iron or steel, sheet iron, galvanized iron, metallic piping, tin or any other building material or causing any work or labor to be done thereon or therein for which compensation is paid or received, shall for the privilege of transacting such business in the city of Norfolk pay a license tax to be ascertained in the following manner:

"*General Construction.* For the privilege of doing the carpenter work and superintending the general construction of any building operation, shall pay a license tax to be ascertained in the following manner: If the gross amount of all orders or contracts accepted for the year prior to May 1st, 1916, aggregates \$15,000.00 or less, the said tax shall be \$15.00, and a further license tax of fifty cents for each one thousand

dollars or fractional part thereof in excess of fifteen thousand dollars. And any person other than the owner thereof who shall act as superintendent of the erection, construction or repairs of buildings for which a permit is required and which such work is not done under a regular licensed person, shall pay the license tax required in this section. The license, so far as applicable, shall be estimated from the records and books as shown by the building inspector for the year preceding. And the commissioner of the revenue shall consult the books of the building inspector before issuing a license under this section.

"In the event that a contractor or builder is beginning business, the license tax shall be estimated upon the probable amount of all orders or contracts for the year succeeding May 1st, 1916, and any person who shall make a business of erecting or constructing houses for the purpose of selling or renting the same, and shall not employ therefor a contractor or person who shall act as superintendent who has paid the license tax and given the bond required by law, shall pay a license tax as above provided for. No license required under this section shall be transferred or pro rated.

"The inspector of buildings shall issue no permit unless the applicant shall have complied with the law requiring a license or bond, where either is required.

"And, in the event said person, firm or corporation taking out the license as above provided for engages as an incident to said contract or order, in the prosecution of any of the trades hereinafter specifically mentioned and defined in the succeeding paragraphs of this section, instead of subletting the same, he shall, in addition to the above license, pay the specific license on said trades as hereinafter defined.

"It shall be the duty of every person, firm or corporation accepting orders or contracts as hereinafter provided, who sublets any portion of the work so contracted for, to notify the commissioner of revenue of such sub-letting, giving the names and addresses of all persons, firms or corporations to whom any portion of the work is sub-let, and, upon failure so to do, the general contractor shall be presumed to be prosecuting the trades incident to said contract or order on his own account and liable for the specific license taxes thereon as hereinafter provided.

"1. *Brick Masons.* Any person, firm or corporation shall, for the privilege of transacting the business of brick masonry, hollow tile partition work, terra cotta or any other masonry work usually done by brick masons, pay a license tax of \$35.00. No license required under this section shall be transferred or pro rated.

"2. *Plastering Contractors.* Any person, firm or corporation shall, for the privilege of transacting the business of erecting metal or wood laths, plastering, stucco work, or other work usually done by plasterers, pay a license tax of \$25.00. No license required under this section shall be pro rated or transferred.

"3. *Roofing and Sheet Metal Work.* Any person, firm or corporation shall, for the privilege of furnishing or erecting metal, slate, tin, gravel or any other roofing, other than wood, including ornamental and sheet metal work, furnishing, repairing and installing hot air and latrobe heat, pay a license tax of \$20.00. No license under this section shall be transferred or pro rated.

"4. *Cement and Concrete Work.* Any person, firm or corporation shall, for the privilege of transacting the business of concrete and cement work, or the erection of building forms, or the installation of reinforcing steel for the same, pay a license tax of \$50.00. No license required under this section shall be transferred or pro rated.

"5. *Painters and Wall Decorators.* Any person, firm or corporation shall, for the privilege of doing painting, paper hanging or any other ornamental interior or exterior decorating, usu-

ally done by painters and decorators, pay a license tax of \$20.00. No license required under this section shall be transferred or pro rated.

"6. *Stone Masons.* Any person, firm or corporation engaged in furnishing and erecting stone for any building operation shall pay for the privilege of doing such business in the city of Norfolk, a license tax of \$25.00. No license required under this section shall be transferred or pro rated.

"7. Any person, firm or corporation engaged in any other branch of the building trade not mentioned or provided for in this ordinance, shall pay a license tax of \$50.00. No license required under this section shall be transferred or pro rated."

Facts of the Case.

The material facts are as follows:

The defendants in error, defendants in the court below, hereinafter referred to as defendants, on July 7, 1916, accepted an order or contract for doing work on a building or structure in the city of Norfolk, which building or structure required the use of "paints, wall decorations, stone, brick, mortar," etc. On the same day, to wit, July 7, 1916, the defendants applied to the commissioner of the revenue for the city of Norfolk and obtained from him a state license for accepting orders or contracts for doing work on or in any building or structure requiring the use of paint, etc., under the provisions of the state statute above quoted. At the same time the defendants applied to the same commissioner, the proper person authorized also to grant city licenses, for the same license from the city of Norfolk, which was not granted and could not be granted under the city ordinance above quoted, but the defendants were offered by said commissioner licenses under the provisions of said city ordinance necessary for them to carry out and perform their said order or contract, which the defendants refused to take out.

Thereupon the defendants proceeded with and completed the said building or structure without any license from the city. By proceedings under other provisions of said ordinance, not necessary to quote, the defendants were charged in the police court with beginning the erection of said building without having a city license, contrary to said ordinance, which subjected them to a fine of \$20 per day for each day of failure to pay said license taxes. The police justice dismissed the case, with costs against the city. On appeal by the city to the circuit court thereof, the judgment of the police justice was affirmed, and the appeal was dismissed, with costs against the city. From the latter judgment the writ of error in this case was awarded.

George Pilcher, of Norfolk, for plaintiff in error. Thos. W. Shelton, of Norfolk, for defendant in error.

SIMS, J. (after stating the facts as above). This case involves the single question of the power of the city of Norfolk to divide a single taxable privilege, consisting of the

right to conduct the business of a contractor, as classified and defined for the purpose of state taxation in the form of a state license, into several businesses so as to require several separate city licenses, one for each of the elements of right named in the city ordinance, which all accrue to the citizen under one state license.

In the case of *City of Richmond v. Richmond, etc.*, R. Co., 21 Grat. (62 Va.) at page 617, in the opinion of the majority of this court delivered by Judge Staples, in regard to the cities of the state, it is said:

"The authorities also establish that these corporations are mere auxiliaries of the government, established for the more effective administration of justice; and that the power of taxation confided to them is a delegated trust. In the exercise of this power they act as agencies of the state, and not by virtue of any inherent authority. And whether the Legislature may or may not utterly destroy this power of taxation in particular cases, still it must be exercised under the control and authority of the state. The manner of apportionment, the power of assessment and collection, the species of property which shall be the subject of taxation or exemption, are matters purely within the legislative discretion, except where the Constitution ordains the rule."

In the case of *Ould, etc., v. City of Richmond*, 23 Grat. (64 Va.) at page 467, 14 Am. Rep. 139, in the opinion of this court which was unanimous on this point (see *Humphreys v. City of Norfolk*, 25 Grat. [66 Va.] at page 99, for the point on which there was a division in the opinion of the court), it is said:

"The powers of public corporations are either express, implied, or incidental. And except as to such powers as are incidental, the charter itself, or the general law under which they exist, is the measure of the authority to be exercised. They have no inherent jurisdiction, like the state, to make laws, or adopt regulations of government. They are governments of enumerated powers, acting by a delegated authority; so that while the state Legislature may exercise such powers of government, within the description of legislative power, as are not expressly or impliedly prohibited, the local authorities can exercise those only which are expressly or impliedly conferred, and such as are incidental, subject to such regulations and restrictions as are annexed to the grant"—citing *Cooley*, 192.

This opinion then quotes from the charter of the city of Richmond a clause which, so far as material, is practically in the same words as the section of the charter of the city of Norfolk presently to be quoted, except that it refers in terms only to the laws of this state and of the United States, instead of to the Constitution and laws of this state and of the United States, and adds:

"This clause confers the general power of taxation, except only as it may be limited by the laws of the state and of the United States." (Italics supplied.)

The city of Norfolk, in the instant case, relies on the following clause of its charter as conferring upon it the power to require the license taxes as provided for in its ordinance above quoted, namely:

"For the execution of its powers and duties the city council may raise annually by taxes

and assessments in said city, such sums of money as they shall deem necessary to defray the expenses of the same, and in such manner as it shall deem expedient, in accordance with the Constitution and laws of this state and of the United States."

We see, therefore, from this provision of the charter itself that the exercise of the general power of taxation delegated thereby by the Legislature to the city of Norfolk may be limited by the laws of the state.

Now it is true, as counsel for the city of Norfolk contend, that such limitation, if it exists, must be by implication, i. e., by necessarily implied intention on the part of the Legislature. As said by this court in the case of *City of Norfolk v. Griffith-Powell Co.*, 102 Va. at page 120, 45 S. E. 891, in reference to the very same clause of the charter of the city of Norfolk above quoted:

"The Legislature may, without doubt, at any time, impose such limitation upon the delegated powers of taxation as it sees fit; * * * by necessary implication in its general revenue laws, or other enactment subsequent to the charter."

[1] Does the state statute law above quoted, which classifies the business of a contractor such as is therein defined, as the subject of state license taxation, limit the power of classification of the city under the clause of its charter above quoted to such state classification?

We think it does, by necessary implication.

It will be observed that this is not a question of power in the municipality to tax other subjects than and in addition to those taxed by the state. The city of Norfolk has that power under the clause of its charter above quoted. *City of Norfolk, etc., v. Norfolk Landmark, etc.*, 95 Va. 564, 28 S. E. 959. Nor is it a question of power to adopt a different method of laying the tax from that adopted by the state on the same subject—such as an ad valorem method instead of by license. It has that power, as was held by this court in the cases of *City of Norfolk v. Griffith-Powell Co.*, supra; *Newport News, etc., Co. v. Newport News*, 100 Va. 157, 40 S. E. 645; *Bradley v. Richmond*, 110 Va. 521, 66 S. E. 872. But this is a case involving the question of the power of the city of Norfolk to divide and make of one subject of taxation, as classified and defined by state law for state taxation, a number of subjects for the purpose of city taxation as numerous as it may choose, except as limited by an almost limitless number of kinds of work a contractor may have to do and of material he may have to use. This is a new and open question in this state and depends for its decision upon different considerations from those involved in the cases above cited in this paragraph.

The subject we are considering involves a question of the power of the city of Norfolk to tax an occupation, as the subject of taxation.

The state of Virginia has, by its revenue

laws, classified and defined certain occupations for the purpose of state taxation by the license system; among them, by the statute above quoted, the occupation of a contractor. It requires but slight reflection to perceive how oppressive upon occupations would be the effect of allowing municipalities to enact ordinances classifying and defining occupations for purposes of city taxation different from the classification made by state laws on the subject. This would be to allow the auxiliary government, established for the more efficient administration of justice, without any inherent powers to make laws or adopt regulations of government, to make laws and adopt regulations in conflict with those of the state, its creator. This conflict would destroy the uniformity of the operation of the tax laws of the city as compared with those of the state in respect to the persons upon whom they are operative. So important is this subject and so fraught with danger of oppression that even the Legislature is not without limitation upon its power of classification of occupations for purpose of taxation. The Fourteenth Amendment of the Constitution of the United States is held to apply to this subject, and it is held that, in the classifying of occupations and vocations by the Legislature for the purpose of state taxation, this limitation upon its powers—

"requires the same methods to be applied impartially to all the constituents of the class which is subjected to taxation, so that the law shall operate equally and uniformly upon all persons in similar circumstances. * * * The right to classify is not unlimited and unqualified. * * * " 4 Dillon, Mun. Corp. (5th Ed.) § 1409. (Italics are those of this author.)

In a note to the section last quoted it is said:

"Classification for the Purpose of Taxation is Subject to the Rule of Equality. In *Santa Clara County v. Southern Pac. R. Co.* [C. C.] 18 Fed. 385, Mr. Justice Field said: 'The first section of the Fourteenth Amendment places a limit upon all the powers of the state, including, among others, that of taxation. * * * Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result. * * * It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions. * * * The power of oppression by taxation without due process of law is not thus permitted; nor the power by taxation to deprive any person of the equal protection of the laws.'"

When the Legislature embodied in the charter of the city of Norfolk the limitation that its action under the clause of its charter above quoted should be in a manner "in accordance with the Constitution and laws of this state and the United States," the

charter in effect itself provided that the municipality should not in acting thereunder enact any ordinance of classification for purposes of taxation in conflict with a classification adopted by the laws of the state; for the inevitable result of such a conflict in enactment between the state and the municipality would be a violation of the uniformity in operation of laws sought to be attained by the provisions of the Fourteenth Amendment to the Constitution of the United States—which purpose, indeed, of attainment of uniformity so far as practicable, also underlies the provisions of our state Constitution and laws on the subject of taxation. It is true that, but for said limitation in its charter, the inquiry with respect to uniformity of operation of its ordinances would be confined in its scope to the corporate limits of the city of Norfolk, and if such operation was uniform within those limits there would be no violation of the rule of uniformity referred to. But, with such limitation in its charter, it is plain that the Legislature meant to make state boundary lines the limits of the scope of the inquiry as to the uniformity of the operation of such ordinance upon the subjects of taxation with respect to which the state has adopted a classification.

While, therefore, a conflict of the ordinance of the city of Norfolk with the state statute in such case, producing lack of uniformity in the operation of state and municipal laws, would not be a violation of the Fourteenth Amendment of the federal Constitution, it would be a violation of its spirit, and a direct violation of the said limitation in the charter of the city itself.

We are not unmindful of the fact that the decisions of this court above mentioned of *City of Norfolk v. Griffith-Powell Co.*, *Newport News, etc., Co. v. Newport News*, and *Bradley v. Richmond*, impinge in principle to some extent upon the conclusions expressed above, inasmuch as the difference in method of laying taxation thereby allowed to the municipalities of the state having such clause in their charter as that contained in the charter of the city of Norfolk, in some degree results in lack of uniformity in the burdens of taxation resting upon the citizens of the state. But the harmful results under consideration are not comparable to those which would arise from a difference in the classification of occupations as subjects of taxation, as aforesaid; and while we do not mean to impair the authority of the cases referred to as applicable to their allowance of a different method being adopted by a city from that of the state in the laying of taxes, we are unwilling to extend the doctrine of such cases to the classification of occupations as a subject of taxation.

[2] Further, the rule is that the powers of the municipality are more strictly construed in respect to its taxation of occupations.

As said by Cooley on Taxation (3d Ed.) p. 1101:

"Construction of Municipal Powers. The general rule that the powers of a municipal corporation are to be construed with strictness is peculiarly applicable to the case of taxes on occupations."

Further:

We find the following specifically laid down and held by the following authorities:

"* * * A city cannot divide a single taxable privilege and require a separate license for each of the elements of right that accrue to citizens thereunder." *Cooley on Taxation* (3d Ed.) p. 1103, citing *Ex parte Sims*, 40 Fla. 432, 25 South, 280, and *Canova v. Williams*, 41 Fla. 509, 27 South. 80.

The state revenue laws of the state of Florida, in imposing license taxes upon dealers in liquors, grouped the various intoxicants therein designated as spirituous, vinous, and malt liquors into one general class of merchandise, and provided that a dealer in any one or all of such several intoxicants should be subject to one state license tax. The city of Jacksonville acted under the special authority of its charter to "license and tax privileges," and under the power conferred upon municipalities generally by the general revenue laws of the state to "impose taxes on any business, profession or occupation not mentioned" in the general revenue acts. And the court held in the case of *Ex parte Sims*, supra, that the city of Jacksonville had no power to adopt an ordinance requiring two city licenses of dealers in liquors, one license to sell spirituous and vinous liquors either at wholesale or retail, and malt liquors at retail, and another license to sell malt liquors at wholesale. The court in that case said (italics below are those of the court in such opinion):

"The real inquiry, upon whose solution the ordinance must stand or fall, is: Can the city of Jacksonville by ordinance, under the delegated general power to tax privileges, segregate the several elements of right that accrue to the citizen under one *taxable privilege*, as recognized, defined and declared by the general statute law of the state, and tax each of such *elements* as a *separate and distinct* privilege of its own creation? * * *

"We are not now called upon to determine the extent of the city's power to fix the *amount* of licenses, or to create, classify or graduate licenses upon those occupations not specifically taxed by the state. * * *

"When, as in this ordinance, the city undertakes to curtail the privilege by constructing out of its constituent elements two separate taxable privileges * * * it has transcended the authority delegated to it, and the provisions of such ordinance imposing such special tax upon the one element of the privilege are unauthorized and void, being inconsistent with and in conflict with the general provisions of law, and not authorized by any charter act. * * *

"The general rule is that statutes conferring authority to impose taxes must be construed strictly. *Moseley, Governor, etc., v. Tift*, 4 Fla. 402. Another general rule universally recognized is that delegated corporate powers to municipalities, particularly grants of power that are out of the usual range and that may result in public burdens, or which, in their exercise, touch the right of liberty or property, or any common-law right of the citizen, must be strictly construed, and when in such construc-

tion there is any ambiguity or doubt as to the extent of the power it is to be determined in favor of the state or general public, and against the state's grantee. 1 *Dillon's Mun. Corp.* §§ 89-91; *Ex parte Mayor of Florence in Re Jones*, 78 Ala. 419; *City of Canton v. Nist*, 9 Ohio St. 439; *Kniper v. City of Louisville*, 7 Bush (Ky.) 599; *City of Brenham v. Brenham Water Co.*, 67 Tex. 542 [4 S. W. 143]; *Hanger v. City of Des Moines*, 52 Iowa, 193 [2 N. W. 1105], 35 Am. Rep. 286; *City of Corvallis v. Carille*, 10 Or. 139 [45 Am. Rep. 134]; *Minturn v. Larue*, 23 How. (U. S.) 435 [16 L. Ed. 574]; *Williams v. Davidson*, 43 Tex. 1; *Kirkham v. Russell*, 76 Va. 956."

The case of *Canova v. Williams*, supra, is to the same effect.

In the case of *Hotelling v. City of Chicago*, 66 Ill. App. 289, it was held that a city organized under the general law has power to license secondhand stores, but cannot require a separate license for each article in which such store deals. The court in this case said:

"The city has authority to license secondhand stores, but may it require one license for dealing in secondhand shoes—another for each separate article of clothing, furniture, etc., in which secondhand stores deal?"

"The absurdity of the logical result, if it be held that separate licenses for every article may be required, is conclusive against the power."

For the foregoing reasons, we find no error in the judgment complained of, and it will be affirmed.

Affirmed.

(120 Va. 492)

HODGES v. RICHMOND CEDAR WORKS.
(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. CONSTITUTIONAL LAW §70(3)—RIGHT OF PRIVATE OWNERS TO DRAINAGE—LEGISLATIVE ACTION—CONCLUSIVENESS.

The primary question of public use and necessity of drainage rights, having been determined by the Legislature under Code 1904, § 2576, is controlling on the courts, in the absence of palpable want of foundation for the legislative pronouncement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131.]

2. EMINENT DOMAIN §262(3)—REVIEW—PRESUMPTIONS—EVIDENCE NOT SHOWN.

In proceeding for establishment of right of private owner to drain across another's land, where none of the evidence is certified, the court on writ of error must presume that a proper case was made out, where judgment went for complainant.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 683.]

3. EMINENT DOMAIN §255—REVIEW—PRESERVATION OF EXCEPTIONS—CONSTITUTIONAL QUESTIONS.

The question whether Code 1904, § 2576, providing for establishment of private drains across lands of another owner, is constitutional, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 686.]

4. EMINENT DOMAIN §241—PRIVATE DRAINS—PROCEEDINGS—LOCATION—VALIDITY.

Under Code 1904, § 2576, providing for establishment of right of private landowner to drain across another's lands, where the owner petitions for the right, naming a certain location, the mere fact that the commissioners ap-

pointed recommended a change in location, which the petitioner accepted did not invalidate the proceedings.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 621-625.]

Error to Circuit Court, Norfolk County.

Suit by the Richmond Cedar Works against Hiram Hodges. Decree for complainant, and defendant brings error. Affirmed.

R. H. Bagby, of Portsmouth, for plaintiff in error. R. W. Mallet and W. W. Starke, both of Norfolk, for defendant in error.

KELLY, J. The Richmond Cedar Works, a private corporation, desiring to drain certain of its lands through the lands of Hiram Hodges, instituted this proceeding in the circuit court of Norfolk county, under the provisions of section 2576 of the Code of Virginia. The right of drainage was granted by the court, and thereupon Hiram Hodges obtained this writ of error.

The first contention made by the plaintiff in error, and made in this court for the first time, is that the statute under which the proceeding was conducted is, at least as applied to this case, unconstitutional, as authorizing the taking of private property for private use.

Statutes of the same general character as the Virginia drainage laws, embodied in sections 2576-2579 of the Code, have been in force in many of the states of the Union for a long period of years, and their constitutionality is too well settled to admit of serious doubt. 1 *Lewis on Eminent Domain* (2d Ed.) § 185; *Cooley's Const. Lim.* (7th Ed.) p. 767; 15 *Cyc.* 594.

[1] It is easy to conceive of individual cases of such mere private purpose as not to be within the legitimate scope of the statute; but the primary question of the public use and necessity of drainage rights in general has been determined by the Legislature, and this will be controlling with the courts, in the absence of something to show a palpable want of foundation for the legislative pronouncement. 1 *Lewis, Eminent Domain* (2d Ed.) § 158, p. 409; 15 *Cyc.* 581; *Cooley's Const. Lim.* (7th Ed.) p. 774.

In 2 *Min. Inst.* (4th Ed.) 25, 26, the distinguished author says:

"In Virginia, a right to drain one's lands through those of another, or under the beds of mill canals, may be acquired as an easement, by grant, reservation or prescription (*Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165), or by an order of the county court, the damages to be paid to the landowner being ascertained by means of a writ of *ad quod damnum*, by five commissioners, freeholders (any three of whom may act). *V. C.* 1873, c. 120. §§ 13 to 17; *V. C.* 1887, c. 114, §§ 2576 to 2579.

"A question has been raised as to the constitutional power of the Legislature to authorize the taking of one man's lands, although for just compensation, for the private benefit of another.

"It seems to be generally admitted that it is not competent to a constitutional government to do it. But where, although a private person is the immediate beneficiary, an advantage results to the public, the appropriation is there-

by legitimated. In the case under consideration, the public is or may be benefited in point of health, and of the increased production of the lands, so that there would seem to be no room to impeach the provision in question on the ground suggested. See *Cooley's Const. Lim.* 532 et seq., 538, and note 2.

"The public necessity which may exist for thus exercising the state's right of eminent domain is to be determined exclusively and finally (like all other political questions) by the Legislature, or as the Legislature shall direct. And the courts can interpose, if at all, only where there is no foundation for a pretense that the public is to be benefited thereby, if such a case can occur. *Cooley, Const. Lim.* 538; *People v. Smith*, 21 N. Y. 597; *Varick v. Smith*, 5 Paige (N. Y.) 159, 28 Am. Dec. 417; *Beekman v. S. S. R. R. Co.*, 3 Paige, 45, 22 Am. Dec. 684; *Id.* 686 et seq., elaborate and lucid notes of the editor."

[2] It is to be observed that the Virginia statute does not undertake to designate the particular circumstances under which the right of drainage shall be granted, but leaves it for the court to determine in each case whether it is proper to grant the right. In the instant case, none of the evidence is certified, and we must presume that a proper case was made out. See *Anderson v. Korns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

[3] Furthermore, the statute evidently contemplates that cases in which the right of drainage may be granted shall depend upon the facts of each case, and the facts here not being certified, it is very doubtful whether the constitutional question can be considered at all when raised for the first time on appeal.

In *Purdy v. Erie R. Co.*, 162 N. Y. 42, 56 N. E. 508, 48 L. R. A. 669, 672, the court said:

"The objection that the statute was an invasion of the defendant's property rights, and contravened, for that reason, either the Constitution of the United States or the Constitution of this state, does not anywhere appear in the record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose v. Crockcroft*, 44 N. Y. 415; *Delaney v. Brett*, 51 N. Y. 78."

This rule seems to apply, as we think it ought to apply, with especial force to cases where, as here, the constitutionality of the statute depends upon questions of fact as well as of law. 2 *Cyc.* 664, and cases cited in notes 44 and 45.

[4] The only other question raised by the plaintiff in error is that the statute was not complied with because the commissioners reported and the court approved a different location for the drain from that asked for in the original petition of the applicant. The essential facts in this respect are that the commissioners were directed by the court to report upon the propriety of granting the application, and also, in the very terms of the statute, to "inquire and report whether the mode of draining his land proposed by the applicant be proper," and to "describe the same specifically." The location proposed by the applicant was specified in its petition. A majority of the commissioners, after a view of the premises and a full hearing of all

the evidence submitted, reported that, in their opinion, it was proper to grant the application, and that the mode of draining proposed by the applicant was proper, subject to a change or modification which they recommended. The court, not regarding the report sufficiently specific to fully define the right to be granted, recommitted the same to the commissioners for an amendment, which was accordingly made. Their report, as amended, was confirmed, and the right of drainage granted did not in all respects conform to the specifications in the petition. In this we think there was no error.

The terms of the statute are very general, and no special forms of procedure are prescribed. There was no requirement that the applicant should proceed by petition or should specify in his application the mode of drainage proposed by him. It was sufficient that this mode be made to appear in some satisfactory way to the defendant landowner and to the commissioners, so that the latter might hear both parties, obtain full information, and report intelligently to the court with regard to the matter. There is nothing in the statute to indicate a purpose to confine an applicant to the mode of drainage originally contemplated or proposed by him, if he is willing to accept another which the commissioners and the court deem proper. The new or modified mode then becomes the "mode proposed by the applicant" within the meaning of the law.

Having due regard to the rule that such enactments must be strictly followed, we are of opinion that the proceedings in this case have fully and fairly complied with the Virginia drainage statute, and that the judgment must be affirmed.

Affirmed.

(120 Va. 620)

WASHINGTON & O. D. RY. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. DAMAGES ⇨26—BREACH OF CONTRACT—"CONSEQUENTIAL DAMAGES."

Consequential damage is such damage, loss, or injury as does not follow directly and immediately from the act of the party, but only from some of the consequences or results of such act; and while the right to recover such damages depends on whether they were within the contemplation of the parties when the contract was made, the knowledge or contemplation of the parties does not affect the nature of the damages so as to change consequential damages to direct damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 69, 236.

For other definitions, see *Words and Phrases*, First and Second Series, *Consequential Damages*.]

2. DAMAGES ⇨210(4)—INSTRUCTIONS—INTEREST.

Under Code 1904, § 3390, providing that the jury in any action founded on contract may allow interest on the principal due or any part thereof, and fix the period at which such inter-

est shall commence, and that in any action whether contract or tort the jury may allow interest on the sum found by the verdict or any part thereof, and fix the period at which it shall commence, it was error for the court in an action for the price of goods sold, where it was claimed that the original contract had been modified by certain correspondence, and where the declaration contained the common counts and a special count on the contract, and the evidence authorized a verdict for the plaintiff either upon the special contract, or upon the general assumpsit, to instruct the jury that if they found for plaintiff they should allow interest from the time plaintiff's demand accrued under the terms of the contract.

3. APPEAL AND ERROR ⇨1140(5)—DISPOSITION OF CASE—ORDERING REMITTITUR—INSTRUCTION AS TO INTEREST.

Where the trial court erroneously instructed the jury to allow interest to plaintiff if they found for him under a statute making such allowance discretionary, the Supreme Court can affirm the judgment on condition that plaintiff relinquish the allowance of interest.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4467.]

Sims, J., dissenting in part, and citing 4 Words and Phrases, *General Damages*.

Error to Circuit Court, Loudoun County.

On rehearing. Former opinion modified, and judgment reversed and cause remanded for a new trial, unless the allowance of interest was relinquished.

For former opinion, see 89 S. E. 131.

C. E. Nicol, of Alexandria, W. J. Lambert, of Washington, D. C., C. V. Meredith, of Richmond, J. J. Darlington, of Washington, D. C., and T. S. Martin, of Scottsville, for plaintiff in error. John J. Jackson, of East Pittsburgh, Pa., E. E. Garrett, of Leesburg, and Eppa Hunton, Jr., of Richmond, for defendant in error.

WHITTLE, P. This case is before us upon a rehearing of the judgment of this court pronounced at the June term, 1916. 89 S. E. 131. At the first hearing three principal questions were discussed, and the same questions are now submitted for our consideration. They are these:

I. Whether the true contract between the parties is alone evidenced by the printed draft bearing date April 12, 1912, or by that contract with the modifications proposed in the letter of May 31, 1912, written by the Westinghouse, etc., Co., plaintiff below, to the railway company, the defendant.

II. The correctness of the ruling of the trial court in excluding the parol evidence offered by the defendant in support of certain items of set-off filed with its plea. And

III. The correctness of the court's instruction in regard to the allowance of interest.

At the former hearing it was not deemed necessary to pass upon question I, since the decision was mainly rested on the construction of certain stipulations in the contract of April 12, 1912, which were not affected by the letter of May 31, 1912. Inasmuch, therefore, as we are disposed to adhere to the for-

mer decision of this court upon that branch of the controversy, it is not thought necessary to pass upon question I.

Clause 6 of the printed contract was originally as follows:

"The company shall not be held responsible for any loss, damage, detention or delay caused by fire, strike, civil or military authority, or by insurrection or riot, or by any other cause which is unavoidable or beyond its reasonable control, or, in any event, for consequential damages, and the receipt of the apparatus by the purchaser upon its delivery shall constitute a waiver of all claims for loss or damage due to delay."
* * *

But at the instance of the defendant the following stipulation was erased:

"And the receipt of the apparatus by the purchaser upon its delivery shall constitute a waiver of all claims for loss or damage due to delay."

The circuit court was of opinion that all items of set-off filed with the plea, "except perhaps the items for extra cost of overhead construction and extra cost of engineering," constituted consequential damages for which by the express terms of clause 6 of the contract the plaintiff in no event was to be held liable.

The printed contract also contained the following agreement:

"All previous communications between the parties hereto, either verbal or written, with reference to the subject-matter of this proposal, are hereby abrogated, and this proposal, duly accepted and approved, constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modifications shall be in writing, duly accepted by the purchaser and approved by an executive officer of the company."

We shall not repeat, nor add much by way of elaboration, to what has been so well said by Keith, P., upon this phase of the litigation.

[1] The term "consequential damage" is thus defined in Black's Law Dictionary:

"Such damage, loss, or injury as does not flow directly and immediately from the act of the party, but only from some of the consequences or results of such act." Black's Law Dict. (2d Ed.) p. 249.

Substantially similar definitions appear in all the authorities on the subject.

It is plain that the items of set-off filed with defendant's plea belong to the class of consequential damages as above defined; and, in view of the foregoing stipulations of the printed contract, we are of opinion that the trial court rightly rejected the parol evidence offered in support of the plea.

The fundamental error in the defendant's contention, as it seems to us, flows from the assumption that if at the date of the contract the parties contemplated that consequential damage might result from delay in delivery of the articles sold, such knowledge had the effect of converting what otherwise would have been consequential damage into direct damage. To the contrary, consequential damage must in fact and effect remain the same, whether in the contemplation of either or

both parties or not. It is, however, only when such damages are contemplated by both parties that they are recoverable. This mutual contemplation makes them recoverable, but does not change their character from consequential to direct damages. If the consequences are known, or such as ought to be known, to the seller when the contract is made, he will be liable unless he provides against them in the contract. If they are not such as he knows, or ought to know, will follow a breach, he will not be liable. It would therefore be vain and useless to contract against liability "in any event for consequential damages," unless the term is to be construed to refer to consequences in contemplation when the contract is made. Hence it must follow from the foregoing postulate that the mere fact that consequential damage might result from delay in deliveries of the articles sold was contemplated by the parties at the date of the contract could not ipso facto convert such damage into direct damage; and any argument based upon that false premise cannot be sound.

Certain expressions in some of the authorities would seem, at first blush, to support the contention that consequential damages under one state of facts may be direct damages under another. Upon analysis, however, it will be found that the authorities, notwithstanding some occasional confusion in terms, are practically unanimous in holding that consequential damages are of the same general character always, and that they may or may not be the subject of liability according to the facts of the individual case. The cases so insistently relied on to sustain the opposing theory are only persuasive because of certain expressions in the opinions, for the question here involved was not in issue in any of them. All that these cases decide is that certain resulting damages, which it was claimed were so remote as to bar recovery, could be recovered. It is conceded in this case that the damages claimed were not so remote as to be barred, but that while not too remote they were damages which resulted, not immediately from the alleged breach, but indirectly from the operation of an intermediate cause or causes. Such damages, nevertheless, are consequential and cannot be recovered in this case because of the express provision of the contract. Any other construction ignores that provision, for unless applicable to such damages as are here contended for, it is difficult to conceive of any damages to which the language could be applied.

Upon these considerations, we feel constrained to hold to our former conclusion on that question.

[2] III. The third question involves the correctness of the instruction of the court upon the allowance of interest.

The record shows that a majority of the jury were not in favor of allowing any in-

terest, and upon their request for information as to their duty in the premises, the court gave the following mandatory instruction:

"The court tells the jury that if they find for the plaintiff they should allow interest from the time the plaintiff's demand accrued under the terms of the contract—that is, from the time the payments became due and payable as set out in the contract—and this interest follows in this case and should be allowed because the defendant has introduced no evidence of damage which could be set off or allowed as against said interest."

Thereupon the jury gave interest upon \$81,652.19, the principal sum allowed by their verdict, at 5 per cent. from May 1, 1913, subject to a credit of \$791.13 as of that date, to March 16, 1915, the time at which the verdict was rendered.

Section 3390 of the Code of Virginia is as follows:

"The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence, and in any action whether on contract or for tort, the jury may allow interest on the sum found by the verdict, or any part thereof, and fix the period at which the interest shall commence. If a verdict be rendered which does not allow interest, the sum thereby found shall bear interest from its date, and judgment shall be entered accordingly."

Without meaning to hold that there has been a clear and unambiguous agreement for the payment of interest from a fixed and definite date, the jury may remit the interest between that date and the date of their verdict, we are of opinion that under the particular facts of this case the peremptory instruction of the court to the jury on the subject of interest was in conflict with the statute above quoted, and was such an invasion of the province of the jury as to constitute reversible error. The case was really before the jury in two aspects—one upon the special contract in its original form, and the other upon the contract as it was claimed to have been modified by certain correspondence. Moreover, there was some room to contend, and some apparent contention, at least upon the part of the defendant in error, that this contract as finally signed by its executive officers, was never accepted by the plaintiff in error. The declaration contained the common counts in assumpsit and also a special count upon the contract, and the evidence was such as to have made it possible for the jury to find for the plaintiff, either upon the special contract, or upon the general assumpsit. We think, under all the circumstances of the case, that the statute above quoted applied, and that the jury had the right, in their discretion, to fix the date from which the interest should begin to run.

For the error of the trial court in giving the instruction complained of, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial to be had therein in conformity with the views expressed in this opinion.

[3] If, however, the defendant shall, within ninety days from the date hereof, elect in writing to relinquish the interest upon \$81,652.19, the principal sum found by the jury, at 5 per cent. from May 1, 1913, subject to a credit of \$791.13 as of that date, to March 16, 1915, the date of the verdict (such relinquishment to be filed with the papers in the cause in the clerk's office of the circuit court of Loudoun county as part of the record), then said judgment shall stand affirmed. But in the event of a new trial, this provision is not to influence the jury in determining the question of interest.

There is authority and precedent for this disposition of this branch of the case. See *Buena Vista Co. v. McCandlish*, 92 Va. 306, 23 S. E. 781; *Moreland v. Moreland*, 108 Va. 107, 60 S. E. 730.

It may be added that so far as the question of consequential damages is concerned, it is immaterial whether the jury based their verdict upon the original contract or not, since under that contract such damages were stipulated against, and without it, on the other hand, the delivery dates upon which the plaintiff in error relies as the basis for its claim to such damages are eliminated.

Reversed in part.

SIMS, J. (dissenting). The following statement will disclose the reasons which force me to dissent from the majority opinion in this case:

What are Consequential Damages?

They are indirect damages, as distinguished from direct damages. 1 *Sutherland on Dam.* (3d Ed.) §§ 14, 15; 1 *Sedgwick on Dam.* (9th Ed.) § 111; *Anderson's Dict. Law*, p. 307; *Black's Law Dict.* (2d Ed.) p. 314; 5 *Am. & Eng. Ency. Law*, p. 6; *Hale on Dam.* (1896) p. 39.

Direct damages are the result of losses which proceed immediately (not necessarily in time, but causatively) from wrongful conduct, without the intervention of any intermediate cause. (We shall presently inquire more concretely, what are direct damages upon the breach of a contract?) *Hale on Dam.* p. 36; *Sedgwick on Dam.* § 111.

Indirect (consequential) damages are the result of losses which do not proceed immediately (causatively) from wrongful conduct, but from such conduct setting in operation an intermediate cause or causes (which, of course, is, or are, not independent), from which latter the losses directly result. *Hale on Dam.* p. 39.

Both direct and indirect (consequential) damages are recoverable if they are proximate. *Hale on Dam.* p. 36; *Sedg. Dam.* § 111; *Loiseau v. Arp*, 21 S. D. 566, 114 N. W. 701, 14 L. R. A. (N. S.) 855-858, 130 *Am. St. Rep.* 741.

Direct damages are always proximate and are recoverable whether they were in fact within the contemplation of the parties or

not. (In actions of contract the loss of the thing contracted for is almost necessarily contemplated by the parties, but in some cases the extent of the damage, although direct, is unexpected, and "whether the parties to the contract had in mind the damages which might result from a breach does not in the least affect their liability for a loss resulting from a breach. * * * Compensation is recoverable * * * if the loss is direct"—and also if indirect [consequential] if proximate, as we shall presently see.) Hale on Dam. pp. 38, 39; Sedg. Dam. §§ 111, 121, b.

Indirect (consequential) damages are sometimes proximate and sometimes remote. The former are always recoverable in actions of tort, and are recoverable in actions of contract unless the contract exempts from liability therefor. The latter are never recoverable, either in actions of tort or contract. Hale on Dam. p. 42; Sedg. Dam. § 111.

Indirect (consequential) damages are proximate when they are the natural (normal) and probable result (sometimes spoken of as the natural, uncoupled with probable, result) of the wrongful conduct. Hale on Dam. pp. 42, 48; Sedg. Dam. § 111.

We come now in the light of the elementary principles and rules above mentioned, to the inquiry as to—

What are direct damages upon the breach of a contract? and, negatively, what are not indirect (consequential) damages in such case?

"The *direct* consequences of a breach of contract is a *loss* of the thing contracted for. * * *" (Italics supplied.) Hale on Dam. p. 38.

What is the thing contracted for must depend upon the construction of the contract in question. That construction depends in part upon the surrounding circumstances known to both parties at the time the contract was made. *Shenandoah, etc., Co. v. Clarke*, 106 Va. 100, 55 S. E. 561; *Merrillam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531; *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 27 Sup. Ct. 450, 51 L. Ed. 731; 1 *Sutherland on Dam.* (3d Ed.) § 30, p. 149; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 750, 6 Am. Rep. 165; *Hydraulic, etc., Co. v. McHaffie*, L. R. 4 Q. B. 670; *Meyer v. Haven*, 70 App. Div. 529, 535, 75 N. Y. Supp. 261; *Sutherland on Dam.* (3d Ed.) § 50, pp. 149-151; Hale on Dam. pp. 61, 62; *Richardson v. Chynoweth*, 26 Wis. 656; 8 R. C. L. p. 27; *Hadley v. Baxendale*, cited below; and many other cases on this subject too numerous to cite.

What is known as the third rule in the case of *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179, 18 Jur. 358, 26 Eng. L. & Eq. 398, decides that if damages result from special circumstances, notice of which is given to a vendor at the time a contract of purchase is made, all damages may be recovered which are the natural and probable consequences of

a breach of the contract by the vendor under those circumstances. It does not hold that such damages are indirect (consequential), as counsel for defendant in error, plaintiff in the court below (hereinafter designated plaintiff) contend. Nor does it hold that such damages are direct. In truth, of necessity, in the very nature of the case, and under the elementary rules above mentioned, damages recoverable under the third rule in *Hadley v. Baxendale*, may be both direct and indirect (consequential) damages. All damages which are the natural (normal) and probable result of a breach of contract under the special circumstances referred to are recoverable under such rule. That is to say, both direct and indirect (consequential) damages. The limitation in this rule is that they must be the natural and probable consequences of a breach of the contract under those circumstances, i. e., the loss and damages must be proximate, which includes both direct and indirect (consequential) damages. Hale on Dam. pp. 58, 59. Hence this case does not hold that the damages recoverable under its third rule are solely indirect (consequential) damages, but the contrary.

Whether in a particular case the damages recoverable under the third rule in *Hadley v. Baxendale* are direct or indirect (consequential) must be determined by the result of the inquiry of whether they proceed immediately from the loss of the thing contracted for, without the intervention of any intermediate cause, such as above referred to, or from such loss setting in operation such an intermediate cause or causes from which latter the losses or damages directly result. In principle this is necessarily true. This inquiry unescapably attends every ascertainment of whether damages in any case are direct or indirect (consequential)—when due to special circumstances as well as in other cases. All causes from which loss and damage may proceed immediately (directly) are causes which also may set in operation other and intermediate causes from which latter also loss and damage may directly result. The loss of a thing contracted for may in every case cause direct and indirect (consequential) damages; in the former case they are direct; in the latter indirect (consequential) damages.

Accordingly we find that the authorities, in dealing with a situation where there is no intermediate cause between the breach of the contract and the damage resulting from the loss of the thing contracted for (that thing being ascertained from a construction of the contract in the light of the surrounding [special] circumstances), hold:

"If it appear by such circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or avoid an anticipated loss, the liability of the other for its violation will be determined and the amount of

damages fixed with reference to the effect of the breach in hindering or defeating that object. The proof of such circumstances makes it manifest that such damages are within the contemplation of the parties. Looking alone at a contract of this character, silent as to the circumstances which were in view, such damages are *consequential*, and sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between its breach and the injury to be compensated. If all such facts as are admissible to justify the proof of *consequential damages* were recited in the contract as the law connects them with it when known, or if the legal obligation which the law imposes by reason of them had been expressed in words by the parties, such damages would be *direct* and not *consequential*." (Italics supplied.) Sutherland on Dam. § 50, pp. 149, 150.

Discussing the third rule in *Hadley v. Baxendale*, viz. that "when, at the time of making a contract, notice is given the vendor of the purpose of making it, or of special circumstances affecting the quantum of damages likely to result from a breach, damages may be recovered for all the natural and probable consequences of a breach under those circumstances," Hale on Damages, p. 61, says:

"The reason for it is found in the fundamental principle of compensation underlying the entire law of damages. The amount of benefit which a party to a contract would derive from its performance is the measure of damages for its breach" (citing *Alder v. Keighley*, 15 Mees. & W. 117). "When defendant knows that plaintiff contracts for the purpose of securing a special benefit, he must be deemed to have contracted that plaintiff should receive such benefit, and he is liable for a breach accordingly. The intention of the parties must be arrived at by interpreting the contract in the light of the surrounding circumstances known to both parties, and such circumstances form as much a part of the contract as if they were written into it. If the special circumstances were in fact written into the contract, the damages arising from a breach under these circumstances would be *direct* and not *consequential*." (Italics supplied.)

The same author (Hale on Damages, pp. 61, 62) adds:

"If the contract of sale is made to enable the vendee to secure a special benefit and that object is known to defendant, the principle of just compensation requires him to make good the loss arising from his failure to deliver the goods" (citing *Hammer v. Schoenfelder*, 47 Wis. 455, 2 N. W. 1129; *Manning v. Fitch*, 138 Mass. 273; *Beeman v. Banta*, 118 N. Y. 538, 23 N. E. 887, 16 Am. St. Rep. 779). "In such case the contract interpreted in the light of the object for which it was made is more than a mere contract of sale."

Referring to the case of *Hammer v. Schoenfelder*, supra, where defendant agreed to furnish plaintiff, a butcher, with ice, knowing that it was needed to preserve meat of plaintiff, and there was a failure to supply the ice, in consequence of which plaintiff lost considerable meat, for which recovery was allowed, 1 Sutherland on Dam. p. 151, says:

"This case was not one of simple contract of sale. The special circumstances known to both parties, made it more than that in its aims and consequences, although the terms in which it was

made, considered alone, imported only a contract of sale. The vendor, knowing the purpose for which it was wanted, was held, by implication, to undertake to deliver it as agreed in order that the vendee should not suffer loss on his fresh meat from his inability to preserve it for want of ice. Such being the contract, the loss which occurred from its breach was the *direct* consequence thereof." (Italics supplied.)

"In such case the special circumstances become an implied element of the contract and of the duty thereby imposed." 8 R. C. L. p. 27.

Indeed, such is the effect of the holding in the *Hadley v. Baxendale* Case itself.

In the case of *Swift River Co. v. Fitchburg Rd. Co.*, 169 Mass. 326, 47 N. E. 1015, 61 Am. St. Rep. 288, cited in the opinion of this court upon the former hearing of the instant case, the defendant had no notice of the special circumstances.

A number of cases decided by the United States Circuit Courts, falling within the third rule in *Hadley v. Baxendale*, and where there was no intervening cause between the loss of the thing contracted for and the damage resulting from such loss, hold that the damages in such cases are direct. *Iowa Mfg. Co. v. B. F. Sturtevant*, 162 Fed. 460, 89 C. C. A. 346, 18 L. R. A. (N. S.) 575; *McDonald v. Kansas City, etc., Co.*, 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; *Northwestern, etc., Mfg. Co. v. Great Lakes, etc., Works*, 181 Fed. 38, 104 C. C. A. 52; and other cases cited in such cases.

To the same effect are also the following cases:

See *Richardson v. Chynoweth*, 26 Wis. 656.

In *Willey v. Fredericks*, 10 Gray (Mass.) 357, the action was for damages for breach of contract to build a proper wall. Owing to such breach of contract the owner lost the use of certain land. Held:

"Damages for the loss of the use of the land during such time are not remote, speculative or contingent, but the *direct* and immediate consequence of the defendants' failure to perform their contract and duty." (Italics supplied.)

Counsel for plaintiff take the position that in "substantive law, the whole realm of damages is divided into two classes, 'direct' and" (indirect) "'consequential.'" This position, as we have seen, is correct. Counsel thereupon, with great ability, press forward to and attempt to maintain the further position that as in "pleading and practice the whole realm of damages which can be recovered is divided into 'general' and 'special' damages. * * * and that 'special damages' are the same as 'consequential damages' which are not so remote that they cannot be recovered." That is to say, that all direct damages are general and all special damages are indirect (consequential) damages. The following authorities are cited and relied on to sustain this position: *Loesch v. Koehler*, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682-684; *Thomas v. Dingley*, 70 Me. 100, 35 Am. Rep. 310, 311, 314; *Battley v. Faulkner*, 3 Barn. and Ald. 294, 3 Common Law Rep. 290; *Laing v. Calder*, 8 Pa. 479, 49 Am. Dec.

533, 534; Sedg. on Dam. (4th Ed.) p. 682; Hale on Dam. pp. 38, 39, 223; Eaton v. Boston, etc., R. R., 51 N. H. 504, 12 Am. Rep. 147; Wallace v. Ah Sam, 71 Cal. 197, 12 Pac. 46, 60 Am. Rep. 534-537; 4 Words and Phrases, p. 3060; Lee v. Hill, 84 Va. 919, 921, 6 S. E. 473; Wood v. American Nat. Bank, 100 Va. 306, 309, 40 S. E. 931; N. & W. R. Co. v. Spears, 110 Va. 110, 113, 65 S. E. 482; Sutherland on Dam. (3d Ed.) § 14.

An examination of these authorities discloses that they do hold, it is true, that "special damages" must be specially pleaded or alleged to be recovered; but they fall short of holding that all general damages are direct and that all special damages are indirect (consequential) damages. It is manifest from these authorities that indirect (consequential) and special damages are not terms of identical meaning. They do not cover the same ground. It is true that their boundaries interlock. These boundaries cover in part the same territory of the law of damages, but they do not coincide throughout. These authorities do not hold that special damages may not also sometimes be direct damages. We have seen that they may be. These authorities do not hold that in such case special damages need not be specially pleaded or alleged to be recovered. On the contrary, Sutherland on Dam. (3d Ed.) § 14, in discussing direct damages, says:

"What these include. These include damages for all such injurious consequences as proceed immediately" (not necessarily in time but causatively) "from the cause which is the basis of the action; not merely the consequences which invariably or necessarily result and are always provable under the general allegations of damages in the declaration, but also *other direct* effects which in the particular instance naturally resulted and *must be alleged specially* to be recovered for." (Italics supplied.)

Special damages are distinguished from general damages by a wholly different test from that of whether they are direct or indirect (consequential); namely, by the test of whether the damages are implied by law, in which case they are general damages, or whether they are not implied by law but arise from special circumstances, in which case, whether direct or indirect (consequential), they are special damages and must be specially pleaded or alleged to be recovered; and the ultimate reason for the different character of pleading required with respect to general and special damages respectively, is, to prevent a surprise on the defendant and to enable the latter to properly prepare his defense. The application of this reason affords the fundamental test, and not the inquiry of whether the damages are direct or indirect (consequential).

As said by Hale on Dam. p. 223, cited by counsel for appellee, quoting from Chitty on Pl.:

"Special damages are such as really took place and are not implied by law. * * *

Again, the same author quotes from same authority in reference to its not being necessary to state descriptions of general damages in the declaration, "because presumptions of law are not in general to be pleaded or averred as facts," and proceeds with the quotation:

"But where the law does not necessarily imply that the plaintiff sustained the damages by the act complained of, it is essential to the validity of the declaration that the resulting damage should be shown with particularity. * * * And whenever the damages sustained are not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, which might otherwise ensue at the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it."

We reach the conclusion, therefore, both on principle and upon authority, that damages arising upon the breach of a contract in a case falling under the third rule in Hadley v. Baxendale may be both direct and indirect (consequential) damages. Those which proceed immediately (causatively) from the loss of the thing contracted for without the intervention of any intermediate cause, are direct damages. Those, if any, which do not proceed immediately (causatively) from the loss of the thing contracted for, but from such loss setting in motion an intermediate cause or causes from which latter the losses directly result, are indirect (consequential) damages; as would be also many other possible occurrences of damages which might have arisen under the contract in the instant case, which so far as we know have not arisen, or, at least, are not involved in the suit before us, but for which plaintiff was exempted from any liability by the clause in the contract with respect to "consequential" (indirect) damages.

Now what is an "intermediate" cause, such as referred to in the next preceding paragraph, in a case of a breach of a contract?

Manifestly it is a cause extrinsic to the contract when the latter is construed in the light of all the surrounding circumstances—in the light of the special circumstances of which the vendor has notice at the time of the making of the contract; that is to say, it is a cause of which such special circumstances gave the vendor no notice.

Coming now more specifically to the case at bar, the question is:

Did the damages claimed by plaintiff in error, defendant in the court below (hereinafter referred to as defendant), as to which the evidence tendered was excluded by the trial court, proceed from the operation of a cause or causes of which the vendor (the plaintiff) did not have notice at the time of the making of the contract, or immediately (causatively) from a cause or causes of which the vendor had notice?

It is, of course, not intended to conclude what the facts really are or might prove to be; but assuming, as we must, upon the con-

sideration of the admissibility of such evidence, that the statements accompanying the tender of such evidence would have been sustained by the proof, it appears that the items of damages claimed by defendant proceeded directly from a cause or causes of which the plaintiff had notice at the time of the making of the contract. Counsel for plaintiff, in the brief filed February 26, 1915, state:

"Each and every one of these items grew out of the fact that the plaintiff in error had leased from the Southern Railway Company the Bluemont division of its road and had covenanted to take over and operate the same on the 1st of July, 1912."

The plaintiff in the court below had notice of this lease at the time of the making of the contract in question and of the pertinent provisions of such lease. Such counsel then takes the position that:

"When the contract was entered into, it is clear that the possibility of such damages arising was in the minds of the parties, but that the defendant in error was unwilling to enter into the contract which it did and incur a liability for damages growing out of these peculiar circumstances * * * determined to protect itself against such damages by contract. * * *"

And hence:

"It provided in the contract that it should not be held responsible or liable in any event for consequential damages."

Counsel for plaintiff add:

"But for this provision in the contract it seems unquestioned that the defendant in error would be liable for the offsets in the bill of particulars, and because of this contract provision it is clear that it is not liable for these consequential damages."

Counsel for plaintiff, it is very true, contend that such damages were not direct, but indirect (consequential) damages; but it is not claimed that they were so because they proceeded from the operation of a cause or causes of which the plaintiff did not have notice at the time of the making of the contract. This is in effect admitted. (Of course, upon the assumption that the statements accompanying the tender of the evidence in question would have been sustained by the proof.) The position that such damages are consequential and not direct is based upon the contention that all damages arising from special circumstances are indirect (consequential) although the vendor has notice of such circumstances as aforesaid. This position has been considered above and found untenable, on principle and upon authority, as there set forth.

The conclusion, therefore, seems inevitable from the case as made by the statement accompanying said evidence, that the damages in question did not proceed from the operation of a cause of which the vendor (the plaintiff) did not have notice as aforesaid, but immediately from the said cause of which the debtor had notice.

Hence the further conclusions are inevitable (predicating that the statements accompanying the evidence aforesaid would be

sustained by the proof) that the damages in question are direct damages, not indirect (consequential) damages: and that the provision in the contract exempting the plaintiff "in any event, from consequential damages," does not protect it from liability for the damages claimed by defendant in this case.

The provision referred to in the contract would operate upon and exempt the plaintiff from liability for all damages arising from intermediate causes set in operation by the said cause of which the plaintiff had notice, from which intermediate causes losses directly result, and from other indirect (consequential) damages such as might result from many other possible occurrences, as indicated above. But the case before us does not present one in which any such indirect (consequential) damages are sought to be recovered.

That is to say, the application of the foregoing authorities to the instant case produces the following resultant conclusion:

The contract in the instant case impliedly contained—and it must be read and construed as if it in fact expressly contained, written into it—the special circumstances referred to in the statement accompanying the tender of the excluded testimony. Hence all damages which arose from a breach of such contract, which were the result of losses which proceeded immediately (causatively) from such circumstances without any intermediate cause, were the direct result of a breach of this very contract and direct and not consequential (indirect) damages.

The term "consequential" (indirect), used in the exemption clause of the contract referred to, is not broad enough in its meaning to cover direct, as well as indirect, damages arising from delay in delivery of the goods sold—which, indeed, counsel for plaintiff admit; but the exemption which plaintiff now claims it sought for itself by the use of this term in the contract amounts to this in effect. Even plaintiff, it is to be noted, cannot bring itself to make the claim of this exemption except indirectly, by the use of the contention that it is not seeking exemption under such term from direct damages for such breach of its contract. It can but admit that such term was not used with the intention of exempting it from such direct damages. Hence appellee admits, in effect, that it did not even propose to use in the contract the term in question with such meaning, although the effect of giving the construction to the contract for which it now contends would be to give such term that meaning. And, on the side of the appellant, it is manifest, in view of the statement accompanying the tender of the excluded evidence, that if such meaning had been expressed in the draft of the contract so as to have been so understood by appellant, it would not have been signed by it.

In this situation the court would be making for the parties a contract different from

that in fact made by them if it gave to the term "consequential" the effect now sought to be given it by appellee. Aside from all consideration of the accurate technical meaning of the phrase "consequential damages" is this fundamental and unsurmountable difficulty, which lies in the way of the construction of the contract for which counsel for appellee contend, and which is given it in the majority opinion of the court.

The Measure of the Damages.

Many authorities have been cited and relied on by counsel for appellant and appellee with respect to the proper measure of damages in the case at bar; whether the evidence rejected by the trial court was admissible as bearing upon the proper measure of damages in such case.

As we have seen, where the damages are direct, they may always be recovered. In such case they are certain in respect to the cause from which they proceed. But there is another rule as to certitude not laid down in the noted case of *Hadley v. Baxendale*, which is essential to the recovery, even of direct damages, as well as of proximate indirect damages, namely, they must be proved with reasonable certainty. *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875; *Bristol Ry. Co. v. Bullock, etc., Co.*, 101 Va. 652, 44 S. E. 892. And "the law adopts that mode of estimating the damages which is most definite and certain" in the particular case. *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718. The party injured "must do the best he can," "what he reasonably can," to avoid the injurious consequences under the circumstances in which he is placed. *Hale on Dam.* pp. 64, 66, 68, 69. In case of delayed delivery, if there is a market in which the vendee can supply the loss of the thing contracted for, he should avail himself of it, and whether he does so or not, the difference between the market value and that contracted for is the measure of damages; but when there is no market value, this rule has no application. *Trigg, etc., v. Clay*, 88 Va. 330, 13 S. E. 434, 29 Am. St. Rep. 723; *Sedg. Dam.* p. 281; *Sutherland, Dam.* § 46. Where there is no such market value and the vendor at time of contract has actual or implied notice of this fact, the vendee may recover lost profits if proved with reasonable certainty. *Richardson v. Chynoweth*, 26 Wis. 656; *Weston v. Boston Railroad*, 190 Mass. 298, 76 N. E. 1050, 4 L. R. A. (N. S.) 569, 112 Am. St. Rep. 330, 5 Ann. Cas. 825; *Greber-Borguis v. Nugent*, L. R. 15 Q. B. 85, 89; *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Gagnon v. Sperry, etc.*, 206 Mass. 547, 92 N. E. 761; *Consumers' Ice Co. v. Jennings*, 100 Va. 719, 42 S. E. 879; *Perry Tie Co. v. Reynolds*, 100 Va. 264, 269, 270, 40 S. E. 919; *Burruss v. Hines*, supra. Lost profits or lost gains are as recoverable as any other loss, if

proved with reasonable certainty. "Where a plaintiff is deprived of the use of property valuable for use and the property is something that can be replaced, his damages are the expenses of hiring the property which he is forced to substitute for it." *Weston v. Railroad Co.*, supra. It is true that the holding just quoted was not necessary for the decision of that case, but it is manifestly sound in principle as applicable to a situation where a hiring is the best course which the vendee can "reasonably" pursue, to minimize the loss under the circumstances in which he is placed. There are cases where the "real value" or "true value" is the measure of damages, there being no market value, as in *Loesch v. Koehler*, 144 Ind. 278, 41 N. E. 326, 43 N. E. 129, 35 L. R. A. 682-684, where there was no market value for the plaintiff's horses which were killed, but they had a real or true value for the particular use to which he could have put them. Such a measure of damages is properly resorted to where it is the "most definite and certain" which is applicable to the case in hand. It could have no proper application in the case at bar.

The evidence rejected by the court below should have been admitted as tending to prove the damages claimed by appellant.

It is not intended to be said that such evidence was sufficient to prove such damages "with reasonable certainty." There are manifestly some elements entering into the question which are absent from the items of the bill of particulars on their face; such as the expense which defendant would have had to bear had it been able to use the motive power intended and it had not been forced to use steam motive power instead. See *Bristol Ry. Co. v. Bullock, etc., Co.*, supra. But this and the like matters of fact, affecting the certainty and definiteness of the proof of the damages so as to entitle the defendant to have them allowed as a set-off are matters which would be developed in a trial of the case on its merits.

I think, therefore, that the evidence excluded by the court below should have been admitted, and for the reasons given above I cannot concur in that part of the opinion of the majority of the court which holds to the contrary.

I concur in the conclusion of that part of the majority opinion which reverses the case on the ruling of the court below on the subject of interest, as the instant case is one "founded on" the contract, and is not an action on the contract itself; but not in its affirmance of the judgment of the court below should the plaintiff submit to the terms stipulated in such opinion with respect to relinquishment of interest.

This being a dissenting opinion, it would serve no good purpose to deal therein with question "I" not passed upon in the majority opinion.

(79 W. Va. 666)

PATTERSON v. CLEM et al. (No. 3247.)
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §47(1) — JURISDICTION—DISMISSAL.

An appeal will not be dismissed in this court upon the ground that there is not the jurisdictional amount of \$100 involved, where it appears that the things contended for by the appellant, and which were not allowed to him by the lower court, exceeded in value or amount the sum of \$100.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-209.]

2. APPEAL AND ERROR §1022(3)—FINDINGS OF COMMISSIONER—REVERSAL.

A decree, confirming the report of a commissioner based upon varying opinions as to the rental value of real estate, will not be reversed, unless the findings of such commissioner appear to be plainly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4016.]

3. TENANCY IN COMMON §28(4) — RENT — ACTION FOR ACCOUNTING.

Moneys received by a cotenant in possession of land from a lessee in an oil and gas lease for the purpose only of continuing such lease in force will not be treated as rent, issues, or profits derived from the land in a suit brought by a joint owner for an accounting of such rents, issues, and profits, where it appears that such lease was surrendered without any operations being conducted upon the land thereunder, and without any ratification thereof by the party seeking contribution.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 79, 86.]

4. FORMER DECISION—ADHERENCE.

Point 3 of the syllabus in the case of McNeely v. South Penn. Oil Co., 58 W. Va. 438, 52 S. E. 480, approved.

Appeal from Circuit Court, Jackson County.

Suit by Clara May Patterson against John W. Clem and others. Decree for defendants, and plaintiff appeals. Decree affirmed.

John H. Riley, of Marietta, Ohio, for appellant. N. C. Prickett, of Ravenswood, and J. L. Wolfe, of Ripley, for appellees.

RITZ, J. This suit was instituted to partition a tract of land in which the plaintiff claimed to own a one-seventh interest, and to compel the defendant to account for the rents, issues, and profits derived therefrom. The defendant claimed to be the owner of the entire tract, and was in the possession of it for some time prior to the entry of the final decree in this cause. By that decree it was ascertained that the defendant owned six-sevenths of the tract of land and the plaintiff one-seventh thereof. An account was taken by a commissioner of the rents, issues, and profits for which the defendant was liable, he having been in possession of said land during the minority of the plaintiff. A number of witnesses were examined as to the rental value of the real estate, and the testimony of these witnesses fixed

its rental value at figures varying from \$35 per year to \$150 per year. Upon the whole evidence the commissioner found that \$70 per year was the reasonable rental value of the property, and this finding was confirmed by the circuit court. It also appears that while the defendant was in the possession of this property, claiming it as his own, he made a lease for oil and gas purposes, by the terms of which lease the lessee was to drill for oil and gas within a certain time, or, failing to drill for oil and gas, to pay the sum of \$150 per year for each year he failed to drill for oil and gas, in order to keep the lease alive. The lessee paid to the defendant these delay rentals for three years, but never operated upon the land, and at the end of that time surrendered the lease.

The plaintiff contends that the court below erred in not finding that the rental value of the real estate was more than \$70 per annum, she contending that it was \$150 per annum; and also in denying her participation in these delay rentals derived by the defendant from the oil and gas lease.

[1] A motion is made to dismiss this appeal because it is contended that there is not involved an amount sufficient to give this court jurisdiction. This motion cannot be sustained. If the appellant is correct in her contention there is involved a little more than twice as much in the way of rents, issues, and profits as she received, and also one-seventh of the delay rentals, which together would be in excess of the sum of \$100. The jurisdiction is not defeated because of the claim of appellee that appellant's contentions cannot be sustained. It is to determine this question that requires the exercise of this court's jurisdiction. This court will have jurisdiction on appeal or writ of error if the matter demanded by the plaintiff in error or appellant, and which he did not recover below, exceeds in value or amount the sum of \$100; and, even though this court should determine that his contentions are without merit, it would not thereby be deprived of jurisdiction, for the reason that such conclusion can only be reached by the court by the exercise of such jurisdiction.

[2] Plaintiff's contention that she is entitled to have the rental fixed at \$150 per annum, or at some amount in excess of the amount fixed by the commissioner, cannot be sustained. The evidence upon this question consists of the opinions of witnesses familiar with the land. The commissioner, after a review of these opinions, having found that \$70 per annum is the reasonable rental value, and this conclusion being supported by the evidence, his finding, confirmed by the circuit court, will not be disturbed. Moore v. Ligon, 30 W. Va. 146, 3 S. E. 572; Handy v. Scott, 26 W. Va. 710; Kane & Keyser Hardware Co. v. Cobb, 91 S. E. 454, decided at the present term of this court.

[3, 4] The contention of the appellant that she is entitled to receive one-seventh of the delay rentals on account of the oil and gas lease above referred to is answered by the case of *McNeely v. South Penn. Oil Co.*, 58 W. Va. 438, 52 S. E. 480, where it is held that no part of such delay rentals derived from an oil and gas lease are recoverable by a cotenant as part of the damages in a suit for waste; neither are they recoverable as rents and profits. It cannot be contended that this money is rents or profits arising from the land, nor is it derived as the result of any waste committed upon the land; it in no way grows out of the real estate, or any use made of the real estate, but is simply the result of the contract between the defendant and the lessee. *McNeely v. South Penn. Oil Co.*, supra, holds in the third point of the syllabus:

"In such case, rentals received by the cotenant in possession for delay in drilling, under a provision of the lease, constitute no part of the damages, and should not be included in the decree, nor are they to be accounted for as rents and profits, unless the lease is ratified or acquiesced in by the other cotenant."

This doctrine we approve, and it is an answer to plaintiff's contention in regard to this item.

The case of *Sommers v. Bennett*, 68 W. Va. 157, 69 S. E. 690, is relied upon by the appellant as supporting her contention that she is entitled to a part of these delay rentals. In that case a cotenant brought a suit for an accounting for rents, issues, and profits. By his bill he affirmed a lease which had been made for oil and gas by his cotenant and the lessee under which was then operating upon the land, and the court held that by affirming the lease, and accepting the lessee, he became entitled to all the benefits of the same.

In the case at bar the lease was never ratified by the appellant. It was canceled and surrendered long before this suit was brought and no oil or gas was ever produced under it, so that that case cannot be held to be authority for the contention made here.

We find no error in the decree complained of, and the same is affirmed.

(79 W. Va. 681)

Ex parte BARR. (No. 3265.)
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1917.)

(Syllabus by the Court.)

1. HOMICIDE \Leftrightarrow 354—MISDEMEANOR—IMPRISONMENT.

By section 9, c. 152 (sec. 5466) and section 4, c. 144 (sec. 5155) Code 1913, conviction of an attempt to commit voluntary manslaughter is but a misdemeanor, and a judgment on such verdict of imprisonment in the penitentiary is void. Explaining *State v. Ballard*, 55 W. Va. 379, 47 S. E. 148.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 731.]

2. HABEAS CORPUS \Leftrightarrow 29—VOID SENTENCE—IMPRISONMENT.

One so convicted and sentenced may be discharged from such illegal and void sentence on writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24.]

Habeas corpus by O. D. Barr. Petitioner discharged from an illegal sentence and remanded.

A. R. Stallings, of Elkins, and J. W. Harman, of Parsons, for petitioner. Wayne K. Pritt, of Parsons, and A. A. Lilly, Atty. Gen., and J. E. Brown, Asst. Atty. Gen., for respondent.

MILLER, J. On an indictment for an attempt to commit murder petitioner was found guilty of an attempt to commit voluntary manslaughter, upon which verdict the court adjudged that he be confined in the penitentiary for one year, and from which judgment of imprisonment petitioner seeks discharge upon a writ of habeas corpus.

[1] The indictment was found under section 9, chapter 152, Code 1913 (sec. 5466) providing:

"Every person who attempts to commit an offence, but fails to commit or is prevented from committing it, shall, where it is not otherwise provided, be punished as follows: If the offence attempted, be punishable with death, the person making such attempt shall be confined in the penitentiary not less than one nor more than five years. If it be punishable by confinement in the penitentiary, he shall be confined in jail not less than six nor more than twelve months, and fined not exceeding five hundred dollars. If it be punishable by confinement in jail, or fine, he shall be confined in jail not more than six months, or fined not exceeding one hundred dollars."

Section 4, chapter 144, Code 1913 (sec. 5155) provides, respecting the offense of which petitioner was found guilty, that:

"Voluntary manslaughter shall be punished by confinement in the penitentiary not less than one nor more than five years."

As the offense of voluntary manslaughter is punishable only by confinement in the penitentiary, and not by death, it is quite clear that an attempt to commit voluntary manslaughter is but a misdemeanor, an offense punishable by confinement only in the county jail, and by a fine, as prescribed by the statute.

The statute seems very plain on this question, and there would seem to be no room for doubt, but for an inadvertent expression in *State v. Ballard*, 55 W. Va. 379, 47 S. E. 148. That case was disposed of here upon the merits. Defendant as in this case was indicted for an attempt to commit murder, and found guilty of an attempt to commit murder in the second degree. If guilty as found by the jury the offense was a misdemeanor punishable by confinement in the county jail and by a fine, and the judgment of the court went accordingly. But on writ of error to this court it was found that under the facts and

circumstances proven defendant if the shot had proven fatal would not have been guilty either of murder in the second degree or voluntary manslaughter, and the judgment was reversed, the verdict set aside and the case remanded for a new trial. The expression in the opinion that: "The law affixes the same punishment to a conviction for an attempt to commit either murder in the second degree, or voluntary manslaughter" is correct, but it was an inadvertence to say that either of those offenses was punishable by confinement in the penitentiary. Clearly the judgment of imprisonment in the penitentiary is void, the offense being only a misdemeanor.

[2] But jurisdiction to discharge the prisoner upon habeas corpus is challenged; the remedy it is said is by writ of error, not habeas corpus. It is well settled that habeas corpus cannot be permitted to perform the function of an appeal or writ of error to review the errors or irregularities of a court of competent jurisdiction. But it is equally well settled if the judgment under which one is restrained of his liberty is void it may be assailed collaterally and that habeas corpus is the proper remedy. 12 R. C. L. p. 1196, and cases cited in note. And the same authority, at page 1209, lays it down that:

"If the vice of a sentence is not merely that it is of excessive duration but that it is of an entirely different character from that authorized by law, it is generally held that such sentence is void, and that the prisoner will be discharged on habeas corpus," citing note, 7 Ann. Cas. 145.

These authorities hold, however, with our case of *Ex parte Mooney*, 26 W. Va. 36, 53 Am. Rep. 59, that if any part of the sentence is legal the prisoner will not be discharged in toto, or so long as the legal portion of the sentence has not been paid or served. Otherwise if the entire sentence is void.

The judgment entered here on a former day discharging the petitioner from the illegal and void sentence, but remanding him to the custody of the sheriff, to be further proceeded against and for a proper judgment upon the verdict of the jury, we think fully sustained by the authorities.

(79 W. Va. 691)

BELKNAP v. BALTIMORE & O. R. CO.
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1917.)

(Syllabus by the Court.)

1. CARRIERS — 84 — CARRIAGE OF GOODS — DELIVERY AND ACCEPTANCE.

A carrier is bound to deliver goods intrusted to it for shipment at the place of destination named in the contract, and cannot compel the owner to accept them elsewhere.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 277, 290-293.]

2. CARRIERS — 140, 143 — CARRIAGE OF GOODS — DELIVERY — WAREHOUSING — RESHIPMENT.

Even though a consignee of goods does not call for them within such time after arrival as will prevent expiration of the carrier's liability

therefor as carrier, the latter is bound to hold them at the place of destination, as a warehouseman, for a reasonable time; and its unauthorized reshipment thereof from such place is wrongful and imposes absolute liability for their loss in the unauthorized transit and custody.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 609-610, 611-616, 625-630.]

3. CARRIERS — 115, 188 — CARRIAGE OF GOODS — CHARGES — LIABILITY FOR LOSS.

Charges founded upon a wrongful reshipment of goods from their destination, after delivery there, are illegal, and detention of the goods, on their return to the place of destination, for nonpayment thereof, is wrongful and subjects the carrier to absolute liability for loss thereof occurring within the period of such detention.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 501-507, 853-858.]

4. CARRIERS — 85 — CARRIAGE OF GOODS — RESHIPMENT — NOTICE — LIABILITY FOR LOSS.

A carrier's unauthorized and wrongful removal of goods from their place of destination, after delivery there, imposes upon it duty to notify their owner of the probable date of return thereto, and omission of such duty subjects the carrier to absolute liability for loss of the goods occurring between the dates of their return and the owner's knowledge thereof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316-321.]

5. CARRIERS — 85 — CARRIAGE OF GOODS — NOTICE TO CONSIGNEE.

In such case the general rule absolving the carrier from duty to notify the consignee of the arrival of goods at their place of destination and making it his duty to await their arrival and inquire about it does not apply. To make it applicable the carrier must give notice of the date of the return shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 316-321.]

6. APPEAL AND ERROR — 1027 — HARMLESS ERROR — RULINGS AT TRIAL.

If no verdict other than the one found and returned on the trial of a case would be consistent with the law applicable to the clearly established facts of the case, errors in rulings made in the progress of the trial are deemed harmless, and a new trial will not be granted on account thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033.]

Error to Circuit Court, Braxton County.

Action by R. L. Belknap against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Haymond & Fox, of Sutton, for plaintiff in error. Hines & Kelly, of Sutton, for defendant in error.

POFFENBARGER, J. This writ of error seeks review of a judgment for \$322.73 rendered on a verdict of a jury in an action of assumpsit for the value of certain property of the plaintiff intrusted to the defendant, a common carrier, for transportation, in the manner hereinafter stated, and alleged to have been lost by a breach of the contract of carriage, damages to other property shipped with it and delivered, and deprivation of use of all the property, occasioned by delay in transportation and delivery.

The property in question was a sawmill and machinery and appliances used in connection with it. Having loaded them in an open car of the Chesapeake & Ohio Railway Company, the initial and connecting carrier, at Peytona, Boone county, the plaintiff took a bill of lading showing consignment thereof to himself at Erbacon, Webster county, W. Va. The property was described in the bill of lading as follows: "1 car sawmill machinery." In addition to the larger pieces of machinery constituting the mill proper, there were a great many small articles in the car, such as wrenches, dies, cold-chisels, bolts, taps, saw teeth, guides, boxings, a square, a handsaw, a shovel, saw swedges, log trucks, an equalizing saw, belts, governors, pulleys, lubricators, and whistles. Some of these, valued at about \$190, were lost. The bill of particulars charges \$10 for breakage, \$7.73 for wrongful storage charges, \$15 for expenses of reloading, alleged to have been wrongfully caused by the defendant, \$100 for damages to the machinery by exposure to the weather, and \$200 as damages by deprivation of the use thereof.

The mill was shipped to Erbacon for use in the manufacture of some timber into wine and oil barrel staves, under a contract between the brother of the plaintiff and a firm known as Taylor & Messenger, at a point near a log railroad known as the Davis and Eaken road, and connecting with the Baltimore & Ohio Railroad at Erbacon. The contract required the mill to be on the siding of the Davis and Eaken railroad by March 1, 1914, and Taylor & Messenger were to furnish teams and drivers to haul it to the mill site. The car containing the machinery arrived at Erbacon April 9, 1914. That point was the destination named in the bill of lading; the initial carrier having refused to bill it through to its destination on the Davis and Eaken road. Soon after its arrival, the Baltimore & Ohio Railroad agent at Erbacon sent it to Birch River, but it promptly came back; and after some days, not a great many, on the suggestion of P. E. Eaken and without authority from the consignee and owner, he sent it to Sutton, W. Va. It arrived at Sutton April 21st, and the agent at that point, having been advised by a Mr. Ott Rader that the consignee, R. L. Belknap, resided at Gassaway, mailed him a postal card telling him it was there. Being absent from home and in Boone county, Belknap did not receive the card for some time, and, when he went to Sutton to see about the mill, it had been shipped to Clarksburg for storage. As to how long it remained at Sutton the evidence is very indefinite: the agent saying he does not know how long it was there. There is a suggestion in the record that it remained there about 40 days. Through the superintendent at Grafton the plaintiff procured reshipment to Erbacon, and it arrived there July 10, 1914, subject to a charge for storage which

the plaintiff considered unjust and exorbitant, and it remained there until September 12th. At that point the car stood on the siding for a week or 10 days, and then the machinery was unloaded and placed on the ground on the railroad company's right of way and imperfectly covered with tin roofing which constituted a part of the shipment.

The shipment of the car to Sutton was occasioned by the accidental interference of Rader and the error of the defendant's agent in acting upon his representation made through Eaken. He was a timber and mill man operating in the region around Erbacon, and at about the time of the arrival of Belknap's mill at that place he was expecting shipment of a part of one of his mills from some place in Pennsylvania to Erbacon. In fact, he had a mill and part of a mill coming from Pennsylvania, the complete one to Bison, and the part of one to Erbacon. When Belknap's mill arrived at Erbacon, somebody came and told him his mill was at that point, and he sent word to the agent by Eaken to ship it to Sutton. Afterwards he called up the agent at Sutton and ascertained from him that the mill belonged to Belknap, whereupon he informed the agent that Belknap lived at Gassaway.

As to when Belknap had notice of the return of the car to Erbacon, the evidence is very indefinite. As late as August 10, 1914, he wrote the agent at that point a letter of inquiry as to its location, and stated that he had understood it had been rebilled from Erbacon to Sutton and then taken to Clarksburg, and that the agent at Clarksburg had written him that it had been rebilled to Erbacon. On August 31, 1914, he took a letter from the agent at Sutton to the superintendent at Grafton, saying it had been at his station unclaimed for 40 days. Though he does not give the date of the period through which it remained there, it antedated the shipment to Clarksburg, and must have been in April and May. Before he went to Grafton, taking this letter with him, he had been at Erbacon to see about the mill, and this trip must have been made between August 10th and August 31st. The authorities at Grafton agreed to reduce the charges and he paid the reduced bill, under protest, September 12, 1914, regarding it as being still excessive. According to a bill dated July 21, 1914, the charges amounted to more than \$150. He says he paid something over \$100, but there is a receipt in the record for \$93.52.

The time intervening between the first arrival at Erbacon and the unauthorized reshipment to Sutton and the looseness or inadequacy of the arrangement made with Taylor & Messenger for acceptance of the mill on behalf of the owner are unduly emphasized in the argument. The delivery made at the point of destination, which, after a reasonable time, would have reduced the liability of the carrier to that of a ware-

houseman, in the event of failure of the owner to call for the mill in a reasonable time, was broken up and destroyed by the unauthorized reshipment. Notwithstanding the relaxation of the high duty of the carrier effected by termination of carriage and deposit of the property at the place of destination, it still remained under duty to keep it at that point for actual delivery into the hands of the owner, or his agent, upon application therefor. If goods are not called for on arrival, it is the duty of the carrier to store them until called for, or until they are sold, in conformity with law, for satisfaction of its charges. *I. & St. L. R. Co. v. Herndon et al.*, 81 Ill. 143. If right to take up the mill and send it to another place, for proper storage, in default of such application, be conceded, it was not sent away for that purpose. It was reshipped by mistake, and yet by a wrongful act. The company was bound to keep it at Erbacon for a reasonable time. Before the owner was located or identified and without any diligent effort to identify him, it was sent to another point, at the suggestion of a total stranger to it. The reshipment was made, therefore, in consequence of the carelessness of the carrier's agent. He had no right to act upon the information given by Eaken; for he does not even say Eaken represented himself to be the agent of Belknap. His testimony is that Eaken told him Rader and the Belknap boys were partners or something to that effect, and that they had a set to saw at Sutton. Moreover, if his informant had professed agency for the consignee, he would have acted upon the representation at his peril. He could not take Eaken's word for that. *Rosendorf v. Poling*, 48 W. Va. 621, 37 S. E. 555; *Dyer v. Duffy*, 39 W. Va. 149, 19 S. E. 540, 24 L. R. A. 339.

[1] The contract of shipment bound the carrier to deliver the goods at the place or station agreed upon. The owner could not be required to accept them elsewhere. *Moore on Carriers*, p. 238; *Elliott on Railroads*, § 1519; *Arthur v. Railroad Co.*, 38 Minn. 95, 35 N. W. 718; *Black v. Ashley*, 80 Mich. 90, 44 N. W. 1120; *Bank v. Champlain, etc., Co.*, 23 Vt. 186, 56 Am. Dec. 68.

[2] As the defendant could not compel the plaintiff to accept his property from it at any place other than Erbacon, the withdrawal thereof from that place and shipment to another, whether before or after the high duty of carrier was reduced to that of warehouseman, effected a destruction of the delivery made, and necessarily restored the relation of shipper and carrier. Having taken the property away from the place of destination, after delivery there, the carrier must necessarily be deemed to have restored or resumed the carriage, and placed itself in substantially the same situation as if it had deviated from the route of shipment and so occasioned a delay of delivery. Inasmuch as an unnecessary and unjustifiable deviation

is wrongful and constitutes a breach of the contract of carriage, the carrier's liability for loss incurred in the deviation is even heavier than that incurred while he is acting within his contract. He is then liable even though the loss is occasioned by an act of God or any other cause. *Hutchinson on Carriers*, § 294; *Powers v. Davenport*, 7 Blackf. (Ind.) 497, 43 Am. Dec. 100; *Railway Co. v. Dunlap*, 71 Kan. 67, 80 Pac. 34; *Louisville & N. R. Co. v. Odil et al.*, 96 Tenn. 61, 33 S. W. 611, 54 Am. St. Rep. 820; *Davis v. Jarret*, 7 Bing. 718. In the case last cited *Tindal, C. J.*, said:

"We think the real answer to the objection is that no wrongdoer can be allowed to apportion or qualify his own wrong, and that, as a loss has actually happened while this wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done."

The plaintiff's goods, while under shipment to Sutton and Clarksburg and back to Erbacon, were in the custody of the defendant at places at which it could not require him to accept them, and were also held in violation of the contract of shipment; for carriage beyond Erbacon was unauthorized. For any loss that may have occurred under these circumstances the defendant is manifestly liable.

[3] The charges of freight from Erbacon to Sutton, Sutton to Clarksburg, and Clarksburg to Erbacon, and demurrage at Sutton and Clarksburg, subject to which the property was redelivered at Erbacon, its place of destination, were founded upon the defendant's own wrongful act, and were therefore wholly illegal and unjustifiable, and there could have been no lien for them. They had no foundation other than the wrongful act constituting a palpable departure from the contract. The withholding of the property from the consignee for payment of such charges was just as wrongful and illegal as the transportation thereof from Erbacon to Sutton and thence to Clarksburg and back to Erbacon. If these charges had been made under the contract and not wholly without and beyond it, as in the case of reasonable doubt as to their validity or amount, the shipper might be deemed impliedly to have assented to their custody by the carrier, pending adjustment of the charges, and the latter would then have been chargeable with duty as a warehouseman; for both parties to the contract must necessarily have contemplated such a controversy. But, if property is withheld by a carrier and delivery thereof is refused for nonpayment of manifestly illegal charges, it is impossible to perceive any ground upon which the detention can be justified or deemed to be legally right. The shipper cannot be supposed to have impliedly assented to that. It is perfectly obvious that the detention of the property, after its return to Erbacon, for nonpayment of charges based

upon departure from the contract, is of the same character as the wrongful act for which the charges were made, the departure itself, and that it was an illegal act. No plea of ignorance of its character can be indulged, for everybody is conclusively presumed to know the law. Under such circumstances, on refusal of delivery upon demand and tender of the amount actually due, the owner has a right of action, and the carrier is liable to him for any loss that may occur within the period of wrongful detention, because it is wrongful and outside of the contract. *Hutchinson on Carriers*, § 805.

If there is ground for reasonable doubt as to whether charges are proper, detention of the goods by the carrier pending an adjustment thereof and determination of the proper amount does not constitute a conversion, so as to render the carrier liable for the value. *Moore on Carriers*, p. 280; *Hett v. Railroad Co.*, 69 N. H. 139, 44 Atl. 910; *Robinson v. Burleigh*, 5 N. H. 225; *Fletcher v. Fletcher*, 7 N. H. 452, 28 Am. Dec. 359; *Vaughan v. Watt*, 6 M. & W. 492; *Hollins v. Fowler*, L. R. 7 H. L. 757, 768. But, if the carrier has no lien for the charges for which he detains, he is liable in trover and conversion for detention after demand for the goods. *Chandler v. Beldon*, 18 Johns. (N. Y.) 157, 9 Am. Dec. 193; *Judah v. Kemp*, 22 Johns. Cas. (N. Y.) 411.

"Where the carrier wrongfully refuses to deliver the goods, it is liable as for a conversion, and the measure of damages is the same as in any other case of conversion, namely, the value of the goods in the condition they were in at the time of conversion, together with damages for the wrongful conversion by way of compensation for the loss of use of the goods, or legal interest from the date of the conversion less the freight charges." *Moore on Carriers*, p. 611.

Of course, the demand must be accompanied by a tender of any lawful charges constituting a lien on the goods, unless it is excused or rendered useless by the conduct of the carrier.

[4, 5] As the property was evidently not called for after its second arrival at Erbacon, earlier than August 10, 1914, and the loss may have occurred between July 10, 1914, and that date, it is necessary to determine whether the carrier's liability was absolute or qualified during that period. If the owner was not advised of its arrival nor bound to be at Erbacon awaiting it, the situation of the property throughout that period was a direct result of the original wrongful act, wherefore the liability would necessarily be absolute. Some time after the first arrival the property was demanded. Even though Messenger's testimony to the effect that he called for it more than once at Erbacon should be disregarded, it is clear that Belknap himself went to Sutton for it, when advised of its presence there. Then, if not before, the carrier had notice of the owner and of the mistake, through its agent, and so became obligated to return the prop-

erty to its destination. There is no proof that the owner was advised of the probable date of the second arrival or delivery. Hence it is manifest that he was under no duty to be at Erbacon awaiting its arrival. The rule announced in *Hurley v. Railroad Co.*, 68 W. Va. 471, 69 S. E. 904, *Hutchinson v. Express Co.*, 63 W. Va. 128, 59 S. E. 949, 14 L. R. A. (N. S.) 393, and *Berry v. Railway Co.*, 44 W. Va. 538, 30 S. E. 143, 67 Am. St. Rep. 781, making it the duty of the consignee to call for his goods in a reasonable time after their arrival, does not apply, because, under such circumstances, he has no means of knowing the probable date of arrival. Ordinarily he has notice of the date of shipment, and, if he does not, the fault is his, and he is bound to know the usual period of transit. In this instance it was the duty of the carrier to advise him of the date of shipment, at the least. It was a transaction between the carrier and the owner, not one between the owner and a third party, in which the carrier's obligation extended only to acceptance, transportation, and delivery. Here it had wrongful possession of the property and was bound to return it. It was not acting as a mere carrier.

While proof of tender of the legal charges, or excuse for nontender thereof, is, like the evidence as to most of the other material facts ragged and indefinite, it cannot be doubted that some time between August 10th and August 31st, the owner applied for his property and was ready and willing to pay such charges, nor that the defendant knew it, nor that it insisted upon payment of the illegal charges. He had to get a statement from the agent at Sutton and carry it to Grafton, before any reduction was made, and as late as September 10, 1914, he took advice from his attorneys as to the mode of procedure for recovery of possession of his property. Known unwillingness to accept what is due, if tendered, excuses actual production of the money. *Koon v. Snodgrass*, 18 W. Va. 325; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248.

[6] In view of the clear, full, and practically uncontradicted proof of the loss of the articles enumerated in the bill of particulars as having been lost, and the damages to the residue of the property, and of liability for the cartage or demurrage charge and the expense of reloading, making an aggregate exactly equal to the amount of the verdict, any errors that may have been committed in the admission of improper evidence or the giving of instructions for the plaintiff are obviously harmless. Admission of proof of loss of profits derivable from the contract with Taylor & Messenger and the giving of an instruction based on it may have been erroneous acts and likely were, but the errors, if any, were innocuous. No verdict other than that found and returned would be consistent with the law and the

evidence. Under such circumstances errors in rulings on the trial are deemed not to have been prejudicial. *Reilly v. Nicoll*, 72 W. Va. 189, 77 S. E. 897, 47 L. R. A. (N. S.) 1199; *Wiggin v. Dillon*, 66 W. Va. 313, 66 S. E. 689. The judgment will be affirmed.

(79 W. Va. 700)

LEROS v. PARKER et al. (No. 3184.)
(Supreme Court of Appeals of West Virginia.
Feb. 27, 1917.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE — 174 — TORTS — WIFE'S LIABILITY.

Although by the married woman's act, chapter 66, Code 1913 (secs. 3669-3683), the husband is not exonerated from the common-law liability for the torts of his wife, based as it is upon his presumed control over her person and conduct, yet by declaring that a married woman may sue and be sued as a feme sole, without joining her husband, where the action concerns her separate property, it imposes liability on her alone for the negligent management and control of such estate if therefrom injury results to another without fault on his part.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 694-700.]

2. NEGLIGENCE — 54 — CONDITION OF PROPERTY — LIABILITY OF HEIRS.

Where, by the death of the ancestor intestate, title to his real estate devolves upon his heirs, they are liable for the consequences of its defective maintenance, although decreed to be sold, but not then sold, to satisfy his liabilities; and, if by the removal of one or more walls of a building thereon, partially destroyed by fire, other walls are weakened so as to render them dangerous to persons or property, either because of the fire alone or jointly with other natural causes within the control of the owners, they are liable for any injury occasioned by the subsequent collapse or fall of one of such walls, the person injured being without fault in respect thereof.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 66, 67.]

3. APPEAL AND ERROR — 1066 — REVERSAL — INSTRUCTIONS — ISSUES AND EVIDENCE.

Where upon the trial of an action each party requests and the court grants binding instructions upon the facts relied on by him, based on inconsistent but separable theories of liability, this court will not reverse solely because the instructions failed to present all the facts proved in support of each theory submitted for jury determination.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4220.]

Error to Circuit Court, Summers County.

Action by Thomas Leros against C. L. Parker, one Martusi, and others. Judgment for plaintiff, and defendants bring error. Reversed, and action dismissed as to defendant Martusi, and affirmed as to all others.

T. N. Read, of Hinton, for plaintiffs in error. Wm. H. Sawyers and R. F. Dunlap, both of Hinton, for defendant in error.

LYNCH, P. To recover for an injury inflicted on him while in a restaurant, by the collapse of the wall of a building situate at the intersection of Summers street and

Third avenue in the city of Hinton and owned by the defendants, who are the heirs at law of J. A. Parker, deceased, plaintiff brought this action, and obtained the judgment charged to be erroneous. The place of the injury was a small adjoining building not owned by defendants. Parker died intestate prior to the year 1914, seized of valuable real estate in Hinton. After his death the building owned by him was destroyed by fire, except as to the side inclosures. The walls that remained standing along the street and avenue the defendant C. L. Parker removed down to the level of the second story, upon notice by the city; but he was not required to remove and did not remove, and did nothing to prevent the collapse of, either or any part of the remaining walls. Some of the brick from the wall that fell broke the skylight above the restaurant, struck the plaintiff while a guest therein, and inflicted the injury for which he sued.

To reverse the judgment and defeat recovery, defendants rely on an unexecuted decree entered in a creditors' suit against the heirs directing a sale of the estate of the decedent and the appropriation of the proceeds to the payment of his indebtedness; the intervention of a windstorm as the proximate cause of the injury; the introduction of inadmissible testimony and the exclusion of competent testimony; the giving and refusal of instructions; and the impropriety of a judgment against the husband of one of the Parker heirs.

[2] The title to the property, by the statute of descents, vested in the heirs by the death of the ancestor. They thereby became liable for the maintenance of the building in a reasonably safe condition. If its walls became dangerous as the result of the fire, who except the owners must respond to the demand for compensation by those who suffer from the consequences referable to the negligent maintenance of the property. None other than defendants could be held liable for an injury chargeable to such defects. The maxim of the law, the application of which now is timely and appropriate, is *sic utere tuo ut alienum non laedas*.

The contention that to effect a change in the condition of the property after the decree of sale, by removal or alteration of the walls, might operate as a contempt of court would have more merit if defendants had applied to that tribunal for permission, upon a petition assigning cause, to effect an alteration therein necessary to avoid any resultant injury to the person or property of another. It is not permissible to assume that the court, if requested, would withhold the permission to make such repairs or changes in the structure as would minimize the risk or probability of a danger threatened or imminent from the defective condition of the structure. Of that, however, nothing can now be said,

because defendants did not resort to that expedient. Nor, so far as disclosed, did they make any effort to avoid the legitimate consequences of the dereliction in the discharge of the duty legally imposed upon them to protect others from such risks.

On the second point urged nothing need be said, other than that the proof regarding the violence of the windstorm was submitted to the jury, who by its verdict determined that defense against the contention of the defendants. Their conclusion upon conflicting evidence on that phase of the inquiry submitted to them cannot be ignored, since it cannot be said the evidence was insufficient to support that finding.

The proof deemed inadmissible regards the injury to plaintiff's hand and two photographs introduced by him. The objection as to the first is that, while the proof tended to show a permanent injury, the declaration contains no averment as to such an injury. That criticism is not justifiable. The declaration does charge that plaintiff "was struck and wounded by many violent blows and wounds received from the falling of the brick," which struck him "with great violence and force, and thereby rent, tore and damaged" the apparel and clothing of the plaintiff, and on divers parts of his body inflicted other severe and dangerous wounds and bruises, thereby necessitating the amputation of one finger of his left hand, by means whereof he was then and there hurt, bruised, and wounded, and became and was sick, sore, lame, and disabled, and so remained and continued for a long space of time, and was prevented and hindered from transacting his necessary affairs and business for the period of 90 days. These averments were amply sufficient to justify the introduction of the testimony of which complaint is made.

Of the correctness of the photographs, it is true, the photographer did not testify; he was not called as a witness. Although he doubtless possessed better qualifications to speak accurately upon that subject, yet it cannot reasonably be held that other witnesses not engaged in that art, or qualified to speak with the same degree of certainty, were wholly incompetent. They said the photographs did accurately represent the condition of the plaintiff and of the interior of the restaurant as both were immediately after the accident.

Our examination of the instructions warrants the conclusion that the trial court did not err in giving or refusing them. The chief criticism is that plaintiff's instruction No. 1 was improper, because, being binding, it failed to state the proof introduced under the theory of a violent and unexpected windstorm, on which defendants sought to relieve themselves from liability. There was that omission, it is true. But it told the jury that "if they believe from the evidence" the plaintiff was without fault and defendants were

the owners of the property "and the wall was in their control" at the time of the injury, and they negligently permitted it to become and remain so defective as to cause it to fall, then they should find for him. These were the facts upon which the plaintiff relied, and if the proof thereof satisfied the jury that the injury resulted from the defective condition of the structure, notwithstanding the intervention of the wind, the instruction was not improper. Besides, for the defendants the court gave instructions inviting the attention of the jury to the ownership of the property, the decree of sale in the creditors' suit, and the "unusual and unexpected windstorm," and told them that if from these circumstances they believed the defendants were not negligent, their verdict should be not guilty. These directions were as positive, unequivocal, and binding as was the one given for plaintiff. Thus there was presented for consideration each theory on which the case was tried.

[1] That Martuff, the husband of one of the Parker heirs, was made a party defendant and included in the judgment is assigned also as a ground for reversal. By the common law, a husband is liable for the consequences of the tortious acts personally committed by the wife upon the person or property of another, whether instigated or procured by him or committed in his presence, with certain exceptions noted in *Gill v. State*, 39 W. Va. 479, 20 S. E. 568, 26 L. R. A. 655, 45 Am. St. Rep. 928. That rule obtained in this state at the time of the adoption of the present Constitution; and by section 21, art. 8, "such parts of the common law, and of the laws of this state as are in force when this article" went "into operation, and are not repugnant" to the Constitution were ordained to continue to be the law of this state until altered or repealed by the Legislature. See, also, section 5, c. 13, Code (sec. 334). This power that department of the state government has not deemed it necessary to exercise for the purpose of absolving him from such liability. *Withrow v. Smithson*, 37 W. Va. 762, 17 S. E. 316, 19 L. R. A. 762; *Kellar v. James*, 63 W. Va. 139, 59 S. E. 939, 14 L. R. A. (N. S.) 1003.

But the acts or omissions with which this opinion deals regard the separate real estate of the defendant feme covert; her failure to act when duty required activity to maintain her property so as to protect the person and property of another from injury, and not wrongs intentionally and personally done by her directly affecting the rights of others. It is an omission to act in relation to the separate real estate of a married woman, when the due observance of a legal duty demanded affirmative action, with which we are concerned. By our statute, the control and management of the separate real estate of a married woman is committed to her, subject to narrow limitations upon its disposal. That control and management and

the usufruct thereof, at the common law, devolved upon the husband as an incident of the marital relation. But, by chapter 66, Code (secs. 3669-3683), she is authorized to deal with it as if she were a feme sole. It is not subject to his control, nor liable for his debts. And as to it she may sue or be sued alone as if she were unmarried. He now has no right to use the real estate of his wife except as her agent. The statute frees her from that dominion and control which served as the basis for the common-law liability for her aggressive wrongful conduct, as for slander and assault or similar personal torts of the wife. In *Rowe v. Smith*, 45 N. Y. 230, she alone was held liable for injuries done by trespassing animals owned by her; in *Baum v. Mullen*, 47 N. Y. 577, for fraud in a contract for the sale of her real estate, although entered into by her husband; and in *Kowing v. Manly*, 49 N. Y. 192, 10 Am. Rep. 846, for a conversion, unless he aids or abets the wrongful act. In the same state, a married woman was held personally liable for an injury caused by the assault of a dog owned by her husband, the keeping of which on her real estate she permitted with knowledge of its inclination to attack and bite strangers, the husband being exonerated because not aware of any danger from that source. *Quilty v. Battle*, 135 N. Y. 201, 32 N. E. 47, 17 L. R. A. 521. The dog "was shown to have had vicious propensities to her knowledge, and on one occasion she interfered to protect it when a person whom it had attacked attempted to strike it in self-defense." The theory underlying all these decisions was that, as the wife owned and controlled the premises, her separate estate, she personally was liable for the consequences of such ownership and control. After citing the married woman's act in force in that state, the opinion in the case last cited states:

"There does not seem to be much room for doubt as to the scope and object of this legislation. It effectually removes the common-law disability of the wife which deprived her of the possession and control of her property during coverture, and, to that extent it extinguished the common-law rights and powers of the husband. Because it is in derogation of his common-law privileges it is to be rigidly applied and not extended by implication beyond its strict letter; but it is also a remedial act, and as to its clearly expressed subject-matter it should have a liberal construction. Full and absolute ownership of all property which the wife might have or acquire, with all its incidents, privileges and burdens, was evidently conferred upon her by this statute. In the acquisition and enjoyment of such property she shall be deemed to be an unmarried woman. Marital control of it was completely abrogated; not a trace of it was permitted to remain. Her husband is thus placed upon the same footing as a stranger, and has no greater authority than a stranger to impose a burden upon her separate estate, or to restrict or embarrass her in the exercise of exclusive dominion over it."

To us these deductions seem to be based on sound reason.

Although there is want of uniformity

among the decisions on the variant phases of liability due to the assumption of the marital relation, some of them have likewise construed or interpreted the married woman's acts in force in the jurisdictions represented by them. They hold that, although by these statutes the rights of a feme covert are enlarged, in respect of the ownership and control of her separate real estate, and do not exonerate the husband from the personal torts committed by her, yet that they do operate to discharge him from liability or torts committed by her in the management and control of such separate estate. *Wolff v. Lozier*, 68 N. J. Law, 103, 52 Atl. 303; *McFarlane v. Murphy*, 21 Grant Ch. (U. C.) 80; *Choen v. Porter*, 66 Ind. 196. The reason they assign is that, as thereby she is relieved of her common-law disabilities and empowered to supervise and direct the management of her own property free from the interference of her husband, she should, with the privileges and proprietary incidents, bear the burden of such enjoyment, with due regard for the rights of others. *Mayhew v. Burns*, 103 Ind. 328, 2 N. E. 793; *Russell v. Phelps*, 73 Vt. 390, 50 Atl. 1101; *Roberts v. Lissenbee*, 86 U. C. 136; *Eagle v. Swayze*, 2 Daly (N. Y.) 140. This liability necessarily results from the capacity conferred upon her to acquire, hold, and transfer property, and to deal with her separate estate as if she were unmarried. *Vanneman v. Powers*, 56 N. Y. 39; *Mayhew v. Burns*, supra; *Quilty v. Battle*, supra.

Judge Cooley, speaking of the influence exerted by statutes conferring upon married women the power to control property they own, and the liability for torts committed thereon by acts of omission or commission, says, while "it is not very clear how far the law of torts has been modified, * * * we should probably be safe in saying that so far as they give validity to a married woman's contract they put her on the same footing with other persons, and when a failure to perform a duty under a contract is in itself a tort it may doubtless be treated as such in a suit against a married woman"; and he adds cautiously, what alone is here pertinent, "The same would probably be true of any breach of duty imposed upon a married woman as owner of property she possesses and controls the same as if sole and unmarried." *Torts*, 118; *Boutell v. Shellabarger*, 264 Mo. 70, 174 S. W. 384, L. R. A. 1915D, 847. The case last cited, in vigorous language, discharged the defendant husband from liability for an injury occasioned to a passenger in an elevator operated in a building, the statutory separate estate of his wife.

[3] But these authorities do not necessarily warrant more than a reversal as to Martufi, under the authority of *Pence v. Bryant*, 73 W. Va. 126, 80 S. E. 137, and *Bolyard v. Bolyard*, 91 S. E. 529, decided February 6,

1917. Therefore as to him we reverse the judgment, set aside the verdict, and dismiss the action, and affirm the judgment as to his codefendants, with costs.

(79 W. Va. 684)

POCCARDI, Royal Consul, v. STATE COMPENSATION COM'R.

In re CUCCA CLAIM.

(No. 3031.)

(Supreme Court of Appeals of West Virginia.
Feb. 27, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇐388—WORKMEN'S COMPENSATION ACT—DEPENDENCY.

By paragraph 3, section 33, chapter 10, Acts of 1913 (Code 1913, c. 15 P, § 33, par. 3 [sec. 689]), to entitle one to participate in the Workmen's Compensation Fund he must have been at the time of the injury causing death a dependent in whole or in part for his or her support upon the earnings of the deceased employé.

2. MASTER AND SERVANT ⇐417(7)—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMMISSIONER—REVIEW.

Section 43, of said act (Code 1913, c. 15 P, § 43 [sec. 690]), does not, as does the English statute, and some of the statutes of the other states, make the findings of the court or commissioner on the question of dependency conclusive, and on appeal to this court the findings of the commissioner may be reviewed on the evidence before him.

3. MASTER AND SERVANT ⇐417(7)—WORKMEN'S COMPENSATION ACT—DEPENDENCY—QUESTION FOR JURY.

The question of dependency in England and in this country, under Workmen's Compensation Law, is one of fact and not of law, to be determined by the evidence in each particular case; but where the evidence is all certified and there is no conflict, a question of law, and not of fact, may be thus presented.

4. MASTER AND SERVANT ⇐417(7)—WORKMEN'S COMPENSATION ACT—FINDINGS OF COMMISSIONER—EFFECT.

While under our statute the finding of the commissioner is not conclusive, it should be treated as the finding of a judge, or the verdict of a jury, and should not as a general rule be set aside if there is evidence to support it.

5. MASTER AND SERVANT ⇐388—WORKMEN'S COMPENSATION ACT—RECOVERY—"DEPENDENT."

The word "dependent," in our act, as in the British act, and the acts of other states, means dependent for the ordinary necessities of life, for one of his class and social station in life, taking into account the financial and social position of the recipient. The extent or degree of the dependency is not important. If dependency existed at all right to participate in the fund is established.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

6. MASTER AND SERVANT ⇐388—WORKMEN'S COMPENSATION ACT—DEPENDENCY—DETERMINATION.

And the question in such cases is not whether the claimant could have maintained himself and family with the bare necessities of life without the assistance of the earnings of the injured or deceased employé, but whether he was actually dependent upon such earnings for his support and maintenance.

Appeal from order of State Compensation Com'r.

Proceeding under Workmen's Compensation Act by Gaetano Poccardi, Royal Consul, etc. (Raffaele Cucca and Anna Luigia Pirisi, claimants), to obtain compensation for the death of their son Giovanni Cucca. Compensation was denied by the State Compensation Commissioner, and claimants appeal. Order of Commissioner affirmed.

A. A. Lilly, Atty. Gen., and Frank Lively, Asst. Atty. Gen., for appellee.

MILLER, J. Upon an appeal from the final action of the State Compensation Commissioner, denying to the claimants, Raffaele Cucca and Anna Luigia Pirisi, respectively the father and mother of Giovanni Cucca, deceased, right of participation in the Workmen's Compensation Fund, as persons partially dependent on his contribution for their support.

Claimants are citizens and residents of the Kingdom of Italy; their son Giovanni Cucca, a subject of that Kingdom, was killed in a coal mine of the New River Collieries Company, at Eccles, West Virginia, in April, 1914.

The Commissioner found as a fact that the claimants had not proven themselves to be such dependents within the provisions of the Workmen's Compensation Act, as entitled them to participate in said fund, and denied them relief on this ground alone.

Paragraph (3) of section 33, chapter 10, Acts of 1913 (Code 1913, c. 15 P, § 33, par. 3 [sec. 689]), the statute then in force, defines "dependent," as used in said act, to mean "a widow, invalid widower, child under the age at which he or she may be lawfully employed in any industry, invalid child over such age, father, mother, grand-father or grand-mother, who at the time of the injury causing death is dependent in whole or in part for his or her support upon the earnings of the employé."

Claimants are, therefore, of the class or classes of persons entitled to participate in said fund if in fact dependents. The evidence of dependency presented by them consisted of very brief affidavits, one by the father, of November 8, 1914, supplemented by another explanatory of the first, of January 18, 1915; one of January 18, 1915, by a neighbor and frequent visitor in the father's home, and who had assisted him in his correspondence with his son in the United States; another of June 21, 1914, by four witnesses, and four certain so called transmission receipts, showing remittances by deceased to his father in Italy as follows: One of December 29, 1911, for 100 lire; one of April 4, 1912, for 200 lire; one of August 5, 1912, for 150 lire; and one of January 2,

1913, for 250 lire. There is also filed another receipt of November 21, 1912, showing transmission to decedent's grandmother, not a claimant, of 20 lire.

The substance of the affidavits of the father is that deceased was in the habit of sending him on an average of 1500 lire annually, or an average of 125 lire per month, of which he used 90 lire in the exclusive support of the family, "family" being explained in his supplemental affidavit to mean himself and his wife, deceased's mother, though he sent that amount for the family, for, he says, he used to provide for the needs of the family with his work; the balance of the money to remain subject to the disposition of the son. The affidavit of the friend and neighbor is to the effect that he assisted the father in correspondence with the son and read a letter from the latter in which, as his testimony is translated, the son "stated that he would have sent 125 lire monthly for the support of his parents," and that the father answered saying "that for his support and that of his wife he would have used ninety lire, and that he would take care of his children with his own work, the remnant he would have saved for and on account of his son," that the son "replied to the disposition of his father authorizing him to spend even more." The affidavit of the four persons is that during the time the son was in America he "provided to the support of his family with an average of about 1500 lire yearly, and that the said family has no other means besides the earnings deriving from the daily work of the father Raffaele Cucca." How these witnesses were qualified to testify to these facts does not appear.

There is no evidence as to what estate claimants possessed, nor as to the amount of the father's earnings; nor is there any sworn testimony as to his age, or the character of his employment, nor as to his social station, except what may be inferred from the other facts shown; nor is there any evidence as to the earning capacity or earnings in fact of the other members of the family; nor as to how much of these earnings was actually used or actually necessary for the support of the family; the only evidence submitted on these questions being the certificate of the mayor of the home town in Italy showing that the other members of the family consisted of two brothers and two sisters, and stating that this family is "in poor economical conditions."

[1, 2] Does this evidence, as a matter of law, conclusively establish the fact of dependency? It will be observed that there is no evidence of any actual remittances by deceased to claimants within one year of his death; the correspondence referred to by one of the witnesses between father and son is not produced, or accounted for. Whether deceased actually sent any money to claimants within the year preceding his death is left to

be inferred from the general statement that deceased was in the habit of sending his father about 1500 lire yearly, a fact which no doubt could and should have been shown by positive evidence, if the fact was as we are asked to infer. So far as appears there was no legal obligation on deceased to contribute to the support of his father's family. For aught that appears he may have ceased to do so for at least a year prior to his death. Our statute giving right to dependents to participate in the Workmen's Compensation Fund is limited to one of the class enumerated, "*who at the time of the injury causing death is dependent in whole or in part for his or her support upon the earnings of the employé.*" On this evidence the Commissioner might, perhaps, have found differently, but was he bound to do so, and can we properly say he erred in his conclusions? We do not think we should say so. He was not satisfied with the proof of dependency. He has the power at any time to change his prior rulings on a better showing. Section 40, chapter 10, Acts 1913 (Code 1913, c. 15 P, § 40 [sec. 696]). Section 43, chapter 10, Acts 1913 (Code 1913, c. 15 P, § 43 [sec. 699]), does not as does the English statute, and the statute of Massachusetts, and perhaps the statute of other states, make the findings of fact by the Commissioner conclusive. *Herrick's Case*, 217 Mass. 111, 104 N. E. 432; *Powers v. Hotel Bond Co.*, 89 Conn. 143, 93 Atl. 245; 1 *Honnold on Workmen's Compensation*, p. 823, section 242, and cases cited; *In re Janes*, 217 Mass. 192, 104 N. E. 556, 4 N. C. C. A. 552. Our statute says:

"The supreme court, on such appeal, shall determine the right of the claimant and certify its decision to the commission, and, if it determines the right in his favor, the commission shall fix his compensation within the limits and under the rules prescribed in this act."

This statute no doubt gives us right to review the findings of the Commissioner on the evidence presented to him.

[3] And it seems to be now settled law in England, under the English act, and in the states of this country having workmen's compensation laws, that the question of total or partial dependency is one of fact and not of law; that there is no presumption of law as to the fact of dependency respecting any claimant. At one time the decisions left this question in doubt. 1 *Honnold on Workmen's Compensation*, p. 224, section 70, and notes; 1 *Bradbury's Workmen's Compensation*, 583; *Dawbarn's Workmen's Compensation Appeals, 1910-1912*, 88. The English cases of *Davies v. Main Colliery Co.* (1899) 1 W. C. C. 92; *Main Colliery Co. v. Davies* (1900) 2 W. C. C. 108; and *Hodgson v. Owners of West Stanley Colliery* (1910) 3 B. W. C. C. 260, decisions of the House of Lords on appeal, finally settled the question in England. But there, as here, when the evidence is all certified and there is no conflict it may be presented as a question of

law whether there was any evidence on which the findings of the commissioner or court could have been made. In *re Herrick*, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554, point 2 of the syllabus.

[4] While under our statute the findings of the Commissioner are not conclusive on the fact found, we think his finding should be treated substantially as the findings of a judge, or the verdict of a jury, and should not be set aside if there is evidence which will support it. It was so held in *Massachusetts*, not as to a question of dependency, but as to whether or not the person for whose death compensation was sought was in the employ of the insured at the time of the injury. *Pigeon v. Employers' Liability Assurance Corp., Ltd.*, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516; *Poccardi v. Pub. Ser. Com.*, 75 W. Va. 542, 84 S. E. 242, L. R. A. 1916A, 299.

[5] On the evidence in this case can it be said as a matter of law that at the time of his death claimants were dependents in whole or in part for their support upon the earnings of deceased? The Commissioner found the evidence insufficient to support this claim. Some decisions say the dependency does not necessarily mean absolute dependency for the necessities of life, but that it is sufficient that the contributions of the workman are looked to for support in the maintenance of the dependents' accustomed mode of living. *Glass on Workmen's Compensation Law*, 248, and decisions cited. In the leading case of *Simmons v. White Brothers*, 1 *Workmen's Compensation Cases*, 89, it was decided that "dependent," in the British act, "means dependent for the ordinary necessities of life for a person of that class and position in life, taking into account the financial and social position of the recipient," and that "deriving benefit from earnings is not necessarily being dependent upon them." The same rule was announced in *Main Colliery Co., Limited, v. Davies*, *supra*, where it was said:

"The extent to which such dependency existed was not a matter for their Lordships to consider. The learned County Court Judge might have been right or wrong as to the exact degree to which that state of things existed; but if it existed at all the appeal must be dismissed."

In that case the wages of the deceased, a boy, and a member of the family, was the matter in question, and it was shown that he contributed his wages to his father, the head of the family, and that the father actually depended in part on those wages to support the family.

[6] The question in these cases is not whether by skimping, the claimant could have maintained himself or his family with the bare necessities of life, or have maintained himself without the assistance of the earnings of the injured or deceased employé, but whether he was actually dependent on

such earnings at the time of the injuries for his reasonable support and maintenance. *Elliott on the Workmen's Compensation Act* (7th Ed.) 268, and cases cited; *Boyd on Workmen's Compensation*, p. 1077, section 496. And it was held in *Powers v. Hotel Bond Co.*, *supra*, that partial dependency may exist though the contributions made by the workman were at irregular intervals and in irregular amounts, and though the dependent have other means of support. But under the statute of Rhode Island it was decided that a father who was able out of his wages to support himself and wife, and save three or four dollars per week, is not a dependent upon the son. *Dazy v. Apponaug Company* (1914) 36 R. I. 81, 89 Atl. 160, 4 N. C. C. A. 594. The court in that case said:

"The test of dependency is not whether the petitioner, by reducing his expenses below a standard suitable to his condition in life, could secure a subsistence for his family without the contributions of the deceased son, but whether such contributions were needed to provide the family with the ordinary necessities of life suitable for persons in their class and position. * * * The expression 'dependent' must be held to mean dependent for the ordinary necessities of life for a person of his class and position, and does not cover the reception of benefits which might be devoted to the establishment or increase of some fund which he might desire to lay aside."

The fact that a son has sent money out of his earnings to his father is not conclusive of the question of dependency. *Mathew, L. J.*, in *Howells v. Vivian & Sons*, 4 W. C. C. 106, 109, says:

"I agree that it is not decisive of the question of dependency that the deceased workman did contribute to the family fund, or, on the other hand, that the father could support the family without that contribution."

For the foregoing reasons we are of opinion that the order of the State Compensation Commissioner was on a former day properly affirmed.

(146 Ga. 583)

DANIEL et al. v. JONES et al. (No. 295.)
(Supreme Court of Georgia. Feb. 28, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 170(2)—INSURANCE \S 691—FRATERNAL BENEFIT ASSOCIATION—RECEIVERSHIP—PRESENTATION OF QUESTIONS BELOW.

The superior court has jurisdiction of an equitable petition filed by a member and certificate holder of a fraternal benefit association chartered by the superior court, in behalf of himself and of all others similarly situated, against such association, for the purpose of having it placed in the hands of a receiver to conserve the property of the association, alleged to be going to waste on account of the illegal removal of two of the executive officers of the association by the parent society, and the refusal of the other three to act, and to keep it a going concern until other officers can be legally elected to transact the business of the association according to its charter and by-laws.

(a) The superior court was not deprived of such jurisdiction by the act of the General Assembly approved August 17, 1914 (Acts 1914,

p. 99 et seq.), which provides that no application for injunction against, or proceedings for the dissolution of, or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless the same is made by the Attorney General, inasmuch as the act of 1914, in section 29, expressly excepts from its operation grand or subordinate lodges of Odd Fellows.

(b) No objection having been raised in the court below to the constitutionality of the exception in the act above recited, such objection will not be considered by this court.

(c) Nor is the superior court without jurisdiction of the case for the alleged reason that the defendant is an insurance company or association, and must be chartered by the secretary of state; it appearing that the defendant is a fraternal benefit association.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1037, 1038; Insurance, Cent. Dig. §§ 1829-1831.]

2. INSURANCE — 691 — FRATERNAL BENEFIT ASSOCIATION — RECEIVERSHIP — SUFFICIENCY OF PETITION.

The allegations of the petition are sufficient to bring the case within the jurisdiction of a court of equity; and the trial judge on an interlocutory hearing did not err in making an order restraining the defendants from certain acts complained of, nor in appointing receivers for the purposes therein stated, subject to the further orders of the court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1829-1831.]

3. CORPORATIONS — 609 — INSURANCE — 691 — DISSOLUTION — RECEIVERSHIP — JURISDICTION OF SUPERIOR COURT.

A court of equity has no jurisdiction in this state to dissolve a corporation. Civil Code 1910, § 2238 et seq., and acts amendatory thereof, provide how public and private corporations may be dissolved.

(c) But where some of the officers of a corporation have been suspended by a "subcommittee of management" claiming to have authority to suspend, and other officers refuse to act in the management and control of the corporation, a court of equity has jurisdiction in a proper case to appoint a receiver to conserve the assets of the corporation alleged to be going to waste, and keep it a going concern, and to grant an injunction until other officers can be legally elected to conduct its affairs according to its charter and by-laws.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2420-2423; Insurance, Cent. Dig. §§ 1829-1831.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Suit by Alfred D. Jones and others against the District Grand Lodge No. 18 of Georgia, Grand United Order of Odd Fellows in America, Jurisdiction of Georgia, on his own and in representative behalf, wherein T. C. Strickland and others on motion were made parties, and B. W. S. Daniel and others moved to be made parties defendant, and Clifford Walker, as Attorney General, appeared and moved to dismiss the action, and to discharge the receivers appointed by the court, and James A. Branch was appointed receiver, and defendants were enjoined from interfering with the receiver's management of the lodge's property, etc., and B. W. S. Daniel

and others, and the Attorney General except and bring error. Judgment affirmed.

Alfred D. Jones brought an equitable petition against the District Grand Lodge No. 18 of Georgia, Grand United Order of Odd Fellows in America of the State of Georgia, the same having been incorporated by the superior court of Fulton County, and alleged substantially as follows: This petition is on behalf of the plaintiff and all others similarly situated, or who may be interested by reason of being Odd Fellows and members of the corporation, or who may have financial interest therein. Plaintiff is a member of a certain named lodge of the order, and holds a "death benefit certificate for \$500, and holds a death benefit certificate for \$200 in Atlanta Household of Ruth No. 1286, and is a member both of the order of Odd Fellows and an inmate of the Household of Ruth." The defendant was incorporated for social, educational, and charitable purposes. It has no capital stock, but its revenue arises from dues, initiation fees, and donations. It is provided by its charter that it shall be governed by an executive committee which shall constitute a board of directors authorized and empowered to manage and conduct the business of said corporation within the meaning of the object and constitution of the Grand United Order of Odd Fellows in America, and in accordance with the rules and by-laws and regulations enacted by the members of the corporation through their representatives in annual communication assembled. The board of directors are, by the provisions of the charter and the constitution and by-laws which have been adopted by the District Grand Lodge No. 18 of Georgia, the District Grand Master, the Deputy Grand Master, the District Grand Secretary, the District Grand Treasurer, and the District Grand Director. These officials, by virtue of their offices, to which they are elected by the representatives of the various subordinate lodges of Georgia duly assembled in biennial communications, became ipso facto the executive committee to manage the defendant corporation. Until January 15, 1916, the following were the officers of the defendant, having been duly elected at the biennial communication in August, 1915, and they were ex officio the executive committee in charge of the affairs of the defendant corporation, and were the only officers having any power to control the assets of the corporation, and without those officers the corporation would be entirely without management, to wit: B. S. Ingram, District Grand Master; J. M. Pitts, Deputy District Grand Master; B. J. Davis, District Grand Secretary; J. C. Styles, District Grand Treasurer; William Decker Johnson, District Grand Director. Under the laws of the Grand United Order of Odd Fellows in America there is a subcommittee of management, being a

corporation under the laws of the state of Pennsylvania, its corporate name being "Subcommittee of Management." The ones constituting the subcommittee of management are the ones (officials) occupying the position in the Grand United Order of Odd Fellows in America, as follows: Grand Master, Deputy Grand Master, Grand Secretary, Grand Treasurer, and five Grand Directors. The subcommittee of management, undertaking to act in accordance with the authority claimed by them under the laws and usages of the order, did, on January 15, 1918, suspend B. S. Ingram, the District Grand Master of the Georgia Lodge No. 18, and B. J. Davis, District Grand Secretary of the lodge, for the period of one year. The subcommittee also passed an order, reciting that "a state of anarchy" existed in the state of Georgia in the affairs of District Grand Lodge No. 18, and "revoked the charter, dispensation, and warrant of said District Grand Lodge No. 18." Under the laws and usages of the order of Odd Fellows herein referred to, the only right to maintain a district grand lodge is under the authority of the Grand United Order of Odd Fellows in America, which, through its authorized agencies, grants a dispensation or warrant for such district grand lodge in each state or territory having the requisite number of lodges, to wit, three or more. Under the laws and usages of the national order, which is composed entirely of colored men, the decisions, rulings, and opinions of the subcommittee of management in all matters coming before it are final, and there is no appeal therefrom within the order. By an endowment feature of the order each male Odd Fellow paid 25 cents per month, which entitled him to a graduated policy according to the number of years he had paid, until he reached a maximum of \$300; and later it was determined that each male Odd Fellow should pay 50 cents per month, which entitled him to a graduated policy, reaching after payment of ten years to \$500, payable to the beneficiary upon his death. The two classes of outstanding policies are outstanding obligations against the defendant. By and under the usages of the national order there is an affiliated branch called the Household of Ruth, which is under the subcommittee of management referred to above. The Household of Ruth was organized largely for such colored women as might desire to belong to it, although men were permitted to be members, provided they were members of the original order. The District Grand Lodge of Georgia undertook to provide an endowment feature for the members of the Household of Ruth who were in the jurisdiction of Georgia; and the members thereof were entitled, upon certain payments, to benefits ranging in amounts to a maximum of \$200. There are about 30,000 members of the District Grand Lodge No. 18 of Georgia, and about 20,000 members of the Household of Ruth, the latter not being members of the

District Grand Lodge No. 18. Every male member of the order of Odd Fellows is compelled to be a beneficiary of the Endowment Bureau, and no man can be a member of the Household of Ruth who is not also a member of a subordinate lodge under the jurisdiction of Georgia. All of the 50,000 members of this order in the respective branches thereof have paid money to the district Grand Lodge No. 18, for the purpose of being entitled to a death benefit certificate payable to the beneficiary designated, etc. When the endowment feature was organized, the officials constituting the executive committee were compelled to begin without resources whatever, "and, by the skillful management and strict observances of business rules, the District Grand Lodge No. 18 has accumulated from the sources referred to assets in excess of \$600,000, consisting of real estate, stocks, bonds, etc., which constitute a trust fund of which the 50,000 members in Georgia are beneficiaries."

Davis and Ingram claim that their suspension is illegal and without authority; and plaintiff claims that the withdrawal of the dispensation by which the District Grand Lodge No. 18 of Georgia operates is illegal, and is advised that the executive committee also claims that the withdrawal of the charter of the District Grand Lodge No. 18 of Georgia is illegal. Under the order of the subcommittee of management (provided it is effective and valid), there is no District Grand Lodge of Odd Fellows in Georgia, and there is no executive committee, and there are no officials of the chartered corporation, and no provision for the conservation of the large assets of the corporation, nor is there any method provided for the reception of the funds being received by the District Grand Lodge No. 18 from all over the state of Georgia. Profert is made of the charter, constitution, and by-laws of the District Grand Lodge No. 18. There is no method, under the present status, for the appointment of anybody by the Order of Odd Fellows to take charge of the assets; and the only possible way by which the assets can be conserved, and either officially distributed to the cestui que trusts, or utilized as a going concern, if the contention of the executive committee and the plaintiff be correct, is for the court, acting as a court of equity, to intervene. It would be highly beneficial to the members of this order in Georgia, as well as to the members of the colored race, that the District Grand Lodge be preserved as a going concern and be allowed to effectuate its beneficial purposes, which provides for the maintenance, after death, of those who are dependent upon its members. The intervention of this court will preserve and conserve the interests of everybody, etc. The five members of the executive committee have well and faithfully managed the affairs of this corporation, and they were chosen by the various subordinate lodges of Georgia,

representing every member in Georgia, to occupy this fiduciary relation to the corporation. They understand its affairs and are best acquainted with its management, and if the contentions of the members who oppose the dissolution of the organization, and oppose the order of the subcommittee of management are successful, their continuance in office would best serve all parties concerned. About one-fifth of all the members of this order in the United States live in the state of Georgia, and they have no representation on the subcommittee of management. The latter has no interest whatever in an official way, and the order outside of Georgia has no interest as an order in any of the assets described. The assets, which belong exclusively to the members in Georgia, are more than all of the assets of the order outside of Georgia combined. A failure to pay dues for a certain length of time causes a lapse of the death benefit certificate, with loss of all the payments which have been made thereon. The plaintiff, therefore, prays that the court pass such order as will allow a continuance of payments by the various members, of which appropriate account shall be kept, and until it be determined whether the action of this subcommittee of management is legal in withdrawing the charter. While the plaintiff contends that the action of the subcommittee of management is illegal, even as applied to the District Grand Lodge of Odd Fellows, at the same time he avers that it is impossible for the subcommittee of management of Pennsylvania to in any wise withdraw a charter granted by the superior court of Fulton county to the District Grand Lodge No. 18 of Georgia. The plaintiff was employed by the executive committee, at a salary of \$900 a year, as District Grand Medical Examiner, for a period of two years, and the employment was within the power of the executive committee, the term of employment expiring September 1, 1917; and the effect of the order of the subcommittee of management is to deprive him of this contract right to the extent of the damage he names. He prays that the members of the executive committee be appointed as temporary receivers, and be authorized to conduct the business of the corporation as heretofore conducted by them; that, until further ordered, those making payments shall not be deprived, by lapse or otherwise, of the benefits to which they are entitled under the certificates, but their rights be preserved in the assets until the court shall otherwise order; and that the court grant such other protective orders as will protect the various cestui que trusts, etc.

The plaintiff, with others who were made parties plaintiff and by intervention adopted the petition as their own, amended by alleging the correct name of the corporation to be "The District Grand Lodge No. 18, Grand United Order of Odd Fellows of America, Jurisdiction of Georgia." They also amend-

ed the prayers by asking that the court appoint a temporary receiver to take charge of all the assets of the defendant and hold them until further order; that the court appoint a permanent receiver to take charge of the assets of the defendant and hold and control them until final decree to distribute these assets as justice and equity may demand; and that the defendant, its agents and servants, be restrained and enjoined from interfering with the custody and control of the receivers to be appointed, and from interfering with the assets of the corporation, etc.

T. C. Strickland, A. W. Russell, members of Atlanta Lodge No. 5465, District Grand Lodge No. 18 of Georgia, G. U. O. O. F. in A., and others, filed a motion for themselves and as representatives "of all the members of said lodge in good standing," alleging as follows:

They are necessary and proper parties defendant, because they are beneficially interested and are representatives of a numerous class of persons so interested in the property and assets which are the subject-matter of this suit. The suit as it now stands is a collusive one and a fraud upon the court and upon the beneficiaries of the property. The plaintiff and the persons appointed by the court as temporary receivers, to wit, B. S. Ingram, J. W. Pitts, B. J. Davis, J. C. Styles, and William Decker Johnson, have a common interest in the proceedings, and that there is no real party defendant, and that the persons just named have fraudulently colluded to illegally perpetuate themselves in control of the property and assets of the corporation. That the District Grand Lodge accepted both its original and amended charter and acted under the same recognized authority of the laws and constitution of the Grand United Order of Odd Fellows in America. Article 3, section 2, of the last-named constitution reads as follows:

"The S. O. N., the executive branch of the order, shall have exclusive control of the management, government, and administration of the business affairs of the order, with the enforcement of its laws, and with the execution of its purposes generally."

Acting under its authority as set out in the constitution and laws of the National Order, the subcommittee of management did, on the 15th day of January, 1916, pass an order as set out in the petition, suspending from the order, for the space of 12 months, Ingram and Davis, after finding them guilty of contempt, etc. Movants show that they have a good legal defense to this suit, based upon the facts herein set out, and on other facts not pertinent to the motion; that they will present formal answers setting out the defense in formal manner on the day set for hearing the rule nisi, etc.; that when they become parties of record they will pray the court to vacate its orders inadvertently rendered, appointing temporary receivers, and will ask the appointment of a conservator or trustee to hold and care for the prop-

erty until the lodge can act; that in the meantime the receivers be required to execute a bond with good security, conditioned as the law requires, in the sum of \$50,000; that movants be made parties defendant with right to plead, answer and demur, etc.

The court made an order granting the movants leave to be and appear at the hearing to show why they should not be made parties, and to present their formal answer. At the hearing of the rules the movants were made parties to the case, the court reserving the right thereafter to assign them as parties plaintiff or defendant as the court might determine, with the right of demurrer and answer reserved to any other parties. The defendants filed an answer, admitting some of the allegations of the petition and denying others. The plaintiffs filed a response, alleging certain facts and reasons why the movants should not be made parties plaintiff, not necessary here to be set out. B. W. S. Daniel et al. also filed a motion to be made parties defendant in their own behalf and in the representative capacity stated. The Attorney General of the state of Georgia appeared and moved the court in writing to abate and dismiss the action and all proceedings thereunder, and to discharge the receivers appointed by the court. As grounds for dismissal he alleged as follows: The District Grand Lodge No. 18, G. U. O. O. F. of America, Jurisdiction of Georgia, is a fraternal benefit society, as declared by the laws of Georgia, and particularly by the act of the General Assembly for the regulation and control of all fraternal benefit societies, approved August 17, 1914. (Laws 1914, p. 99.) The insurance commissioner of Georgia, after examination has advised petitioner that the defendant has failed to comply with the provisions of the act, and has not obtained any license from the insurance department of Georgia to do business in Georgia, or filed any reports with the department. The insurance commissioner has referred to petitioner, for investigation and appropriate action, as authorized by the act, the petition of B. W. S. Daniel and others (which is attached), and has presented the facts relating to the examination, and the circumstances warranting the proceedings; and he is preparing to commence an action as provided by the act. Under the terms of the act, no such proceedings shall be commenced by the Attorney General against a fraternal benefit society until after notice has been duly served on its chief executive officers, and until reasonable opportunity is given to said fraternal benefit society to show cause, on a date to be named in the notice, why such proceedings should not be commenced; and notices are being prepared by the Attorney General to be served, in accordance with the requirements of the act, upon all parties claiming to be chief executive officers of the fraternal benefit society. Under section 25 of the act no application

for injunction against, or proceedings for the dissolution of, or the appointment of a receiver for any domestic society or branch thereof shall be entertained by any court in this state, unless the same is made by the Attorney General; and the Attorney General appears in the cause for the sole purpose of presenting to the court the facts herein alleged as cause for the abatement of the action and all proceedings thereunder; and he moves the court to dismiss the action and all proceedings thereunder, and to revoke the appointment of the temporary receivers heretofore appointed. This motion was amended by alleging, that the superior court was without authority to confer upon individuals or corporations the right and power to conduct any business of insurance, that the business being conducted by the defendants is without corporate authority, and that such rights and privileges can only be conferred by the state of Georgia, etc. Numerous answers and demurrers to this motion were filed. Upon interlocutory hearing, the court appointed James A. Branch, receiver, under the direction as set out in the judgment, to take charge of all the assets of the defendant corporation, etc.; and the defendant and all its agents, servants, and all other persons were restrained from interfering with the possession, management, and control of the receiver of the property of the defendant, or with the certificate holders in the payment of their dues and assessments to the District Grand Lodge.

To the above judgment of the court, B. W. S. Daniel, R. E. Pharrow, A. Graves, J. G. Elias, W. J. Scott, J. D. Atkisson, T. C. Strickland, A. W. Russell, Morgan Williams, Willie Williams, J. O. Hembree, F. L. Willis, C. M. Brinson, J. J. Parker, J. D. Powell, D. R. Green, J. H. Dent, George Wheeler, E. J. Terrentine, J. H. Pitts, R. L. Goodrum, and Clifford Walker, as Attorney General of the State of Georgia, excepted.

Clifford Walker, Atty. Gen., Dorsey, Brewster, Howell & Heyman, and Brown & Randolph, Parker & Scott, all of Atlanta, Anderson, Cann, Cann & Walsh, of Savannah, and Parham & Brookes, of Atlanta, for plaintiffs in error. Rosser, Slaton, Phillips & Hopkins, Brandon & Hynds, and C. P. Goree, all of Atlanta, for defendants in error.

HILL, J. (after stating the facts as above). While the record is extensive and intricate, and the arguments of counsel are equally so, happily the assignments of error are comparatively few, and the case, when stripped of surplusage, is confined to a few controlling issues. The facts of the case are liberally set forth in the foregoing statement.

[1] 1. The main question is one of jurisdiction. It is contended that under the allegations of the petition as amended, and under the evidence introduced on the trial, the defendant was a fraternal benefit society, and as such was and is subject to the laws of

Georgia regulating fraternal benefit societies, and that under the laws of the state the superior courts have no jurisdiction of a cause praying for the appointment of a receiver or an injunction, except on the petition of the Attorney General of Georgia. It is also insisted that under the allegations of the petition as amended, and under the evidence, the defendant was either an insurance company subject to the general insurance laws of Georgia, or it was a fraternal benefit society subject to the laws regulating such societies, and that in either event the superior court had no jurisdiction to entertain the subject-matter of the cause, or to appoint a receiver, or to grant an interlocutory injunction, because the jurisdiction to direct, manage, and control the defendant is by law vested in the insurance department of the state, and it appeared on the hearing that a petition had been filed, and was then pending in the insurance department to investigate the defendant company.

In *Fraternal Life, etc., Association v. Evans*, 140 Ga. 284, 78 S. E. 915, it was held that:

"Civil Code, § 2869, provides that fraternal beneficiary orders or associations shall be governed by the provisions of the Code relating to such orders or associations, and shall be exempt from the provisions of the insurance laws of this state."

But it is insisted that the act of 1914 (Acts 1914, p. 99 et seq.) was passed to meet the decision in the *Evans* Case, just cited. By section 25 of the act of 1914 (page 119) it is provided that:

"No application for injunction against or proceedings for the dissolution of or the appointment of a receiver for any such domestic society or branch thereof shall be entertained by any court in this state unless same is made by the Attorney General."

But it will be seen from reading section 29 of the act that it was declared that:

"Nothing contained in this act shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows," etc.

It was argued that this exception was unconstitutional; but no exception was taken to that effect, and that question will not be considered. Therefore the act of 1914 by its terms does not apply to the defendant the District Grand Lodge No. 18 of Georgia, Grand United Order of Odd Fellows, etc., which was chartered by the superior court of Fulton county. Being a fraternal benefit association, it could be so chartered, and did not have to be chartered by the secretary of state as an insurance company, as contended.

The withdrawal of the charter granted by the National Order at Philadelphia did not have the effect of severing all connection between the order of Odd Fellows of Georgia under its private charter; and the right of the private corporation chartered by the superior court of Fulton county was not abrogated or forfeited as to its control and man-

agement of the assets of the order which had been acquired by its endowment plan.

We reach the conclusion, therefore, that the superior court, and not the insurance commissioner of the state, has jurisdiction in the instant case, a proper case having been alleged showing such jurisdictional facts.

[2] 2. Did the petition as amended make a case which would come within the jurisdiction of a court of equity? We have already held that the insurance commissioner of the state had no jurisdiction of the case. It was alleged that the plaintiff and those joined with him were members of and held death benefit certificates in the order; that the domestic charter provided that the corporation should be governed by a board of directors who should manage and control its affairs; and that until January 15, 1916, when the "subcommittee of management," a corporation under the laws of Pennsylvania, suspended two of the officers of the domestic corporation and revoked the charter, dispensation, and warrant of the District Grand Lodge of Georgia, they were the officers having authority to control the affairs and assets of the corporation. This subcommittee also adopted an order, reciting that "a state of anarchy" existed in the state of Georgia in the affairs of the defendant; it was further alleged that under the order of the committee of management there was no executive committee or officials of the chartered corporation to conserve its assets, alleged to be worth \$600,000, two being suspended and three others refusing to act; and that there was no method provided for carrying on the affairs of the corporation; and that the only way the assets could be conserved and officially distributed or utilized, and thus keep the corporation a going concern, was for the superior court, acting as a court of equity, to assume jurisdiction, etc. Without reciting all the allegations, which can be seen by reference to the statement of facts, we conclude that under the allegations of the petition as amended, which is sworn to, the evidence in the case, and all the answers of the defendants, this case is one peculiarly for a court of equity, and that the trial judge did not err in granting a temporary restraining order, and in appointing receivers to take charge of the assets of the corporation under direction of the court until officers could be legally elected to take charge of its affairs in accordance with law, and until the further order of the court, and in refusing to dismiss the petition.

[3] 3. The amended petition prays for a dissolution of the corporation, and a distribution of its assets. Under the decisions in the cases of *Croft v. Lumpkin Chestatee Mining Co.*, 61 Ga. 465, 467, *Gibson v. Thornton*, 107 Ga. 545, 33 S. E. 895, and *White v. Davis*, 134 Ga. 274, 67 S. E. 716, a court of equity in this state cannot dissolve a corporation. The statute provides how corporations may

be dissolved. Civil Code 1910, § 2238 et seq., and acts amendatory thereof. But for the purposes of conserving the assets of the corporation, which were alleged to be going to waste, etc., and keep it a going concern until officers could be legally elected and qualified, and until the further order of the court, the case is one coming within the jurisdiction of a court of equity. Niblack on Accident Insurance and Benefit Societies, 226, §§ 110, 119; High on Receivers (4th Ed.) § 293; 1 Bacon, Mut. Ben. Soc. § 60; 2 Bacon, Mut. Ben. Soc. § 479(a).

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 570)

MORRISON et al. v. COOK, Secretary of State. (No. 290.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. STATUTES \Leftrightarrow 113(1)—SUBJECT AND TITLE—CONSTITUTIONAL PROVISIONS.

The act of August 11, 1915 (Acts 1915, p. 18), is not violative of article 3, § 7, par. 8, of the Constitution of this state (Civ. Code 1910, § 6437), which provides: "No law or ordinance shall pass which refers to more than one subject-matter, or contains matter different from what is expressed in the title thereof."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 141.]

2. RAILROADS \Leftrightarrow 48—PARALLEL RAILROAD—CONSTRUCTION OF STATUTE.

When the act of 1915, just mentioned, is considered in its entirety, in the light of the history of its passage as disclosed by the admissions in the pleadings in this case, it sufficiently appears that the act is applicable to the proposed application for charter which is the subject-matter of the suit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 106.]

3. STATUTES \Leftrightarrow 80(1)—GENERAL LAW—SPECIAL LAW—CONSTITUTIONAL PROVISIONS.

The act of December 17, 1892 (Acts of 1892, p. 37), the purpose of which was to carry into effect an amendment to the Constitution of this state (article 3, § 7, par. 18; Civ. Code 1910, § 6446), relating to the incorporation of railroad companies, is a general law within the meaning of article 1, § 4, par. 1, of the Constitution (Civ. Code 1910, § 6391), which declares, in part: "Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law." The act of 1915 (supra), purporting to amend the act of 1892, is a special enactment having reference to a matter for which the existing general law provided, and is void as violative of the provision of the constitution above quoted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 86.]

4. REFUSAL OF MANDAMUS ABSOLUTE.

It was erroneous to refuse the mandamus absolute.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Mandamus by W. J. Morrison and others against Phillip Cook, Secretary of State.

Judgment for defendant, and plaintiffs bring error. Reversed.

Application was duly made to the Secretary of State, under the Civil Code, §§ 2577-2597, for charter of a corporation to be called North Georgia Mineral Railroad Company. The proposed route of the railroad extended from Atlanta in a northwest direction, a distance of about 50 miles, to a place called Wafford's Cross Roads, near the town of Cartersville in Bartow county, Ga. The Western & Atlantic Railroad, owned by the state of Georgia, extends from Chattanooga, Tenn., via Cartersville, to Atlanta, Ga. This property was under lease, soon to expire, to the Louisville & Nashville Railroad Company, a foreign corporation. The latter company owned a railroad extending from Knoxville, Tenn., to Cartersville, Ga., where there was physical connection between its tracks and the tracks of the Western & Atlantic Railroad, and thence the Louisville & Nashville Railroad was accustomed to run its trains to Atlanta over the tracks of the Western & Atlantic Railroad. The application for charter of the North Georgia Mineral Railroad Company had caused all things to be done which were requisite, under the statute, to issuance of the certificate of incorporation. The Secretary of State, apprehending that the application for charter was in the interest of the Louisville & Nashville Railroad Company, preparatory to gaining an entrance into Atlanta without the use of the Western & Atlantic tracks, and becoming a competitor of the state road at the termination of its lease, called upon the Attorney General for an opinion as to whether he had a discretion, under the Constitution and laws of Georgia, to refuse the application, and was advised that he did not have any discretion in the matter. Conferences were then held between the Secretary of State, the Governor of Georgia, the Attorney General, and the attorneys for the applicants for the charter, which resulted in an agreement by which the Secretary of State should not act in the matter of issuing a certificate of charter until the meeting of the next session of the Legislature, in order that that body might take action on the subject as it should see fit. When the Legislature convened, a bill was passed and approved (Acts 1915, p. 18), as follows:

"An act to amend section 2577 of the Code of 1910, providing for the issuance of corporate powers to railroads, so as to prevent the issuance of any corporate power to any private company to parallel the tracks of the Western & Atlantic Railway, so long as the same is the property of the State, and for other purposes.

"Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same, that section 2577 of the Code of 1910 be and the same is hereby amended by adding the following words: 'No corporate power or privilege shall ever be granted by the Secretary of State to any private company to build a line of railway parallel with

the track of the Western & Atlantic Railway so long as the same remains the property of this State." So that said section when so amended will read as follows: "Sec. 2577. *Corporate Powers to Railroads Granted by Secretary of State.* All corporate powers and privileges to railroad companies in this state shall be issued and granted by the Secretary of State, upon the terms, liabilities, restrictions and subject to all the provisions of this article and the constitution of this state. If by reason of any interest in the proposed corporation the Secretary of State should be disqualified, the duties required to be performed by the Secretary of State shall be performed by the Comptroller General. No corporate power or privilege shall ever be granted by the Secretary of State, to any private company to build a line of railway parallel with the track of the Western & Atlantic Railway, or that will depreciate the value of said Western & Atlantic Railway, so long as the same remains the property of the State."

"Sec. 2. Be it further enacted by the authority aforesaid, that all laws and parts of laws in conflict with this act be and the same are hereby repealed."

While the bill was pending, the attorneys for the applicants for charter appeared before the Legislature and opposed its passage. After the bill was approved by the Governor, the Secretary of State notified the applicants for charter that he refused to issue a certificate of incorporation, basing his action on authority of the act. Mandamus proceedings were instituted to compel issuance of a certificate, and, upon the hearing, the judge refused a mandamus absolute. The exception is to this judgment. The other material facts appear in the opinion.

Dorsey, Brewster, Howell & Heyman and King & Spalding, all of Atlanta, for plaintiffs in error. Clifford Walker, Atty. Gen., Mark Bolding and Jno. C. Hart, both of Atlanta, and Horace M. Holden, of Athens, for defendant in error.

ATKINSON, J. [1] 1. It is contended that the words, "or that will depreciate the value of the said Western & Atlantic Railway," as embodied in the act of 1915, are not included in the caption, and that the inclusion of them in the body is violative of article 3, § 7, par. 8, of the Constitution of Georgia (Civil Code, § 6437), which inhibits the inclusion in the body of an act of matter that it not covered by the caption. The caption contemplates the enactment of a law for the protection of the Western & Atlantic Railroad as against competing lines to be constructed by private companies. The caption does not use the words which are quoted above from the body of the act, but the matter expressed by these words is germane to the object of the act as indicated by the caption. The caption concludes, "and for other purposes." When the caption is considered in its entirety, it is sufficient. Mayor, etc., of Macon v. Hughes, 110 Ga. 795, 36 S. E. 247.

[2] 2. It was also contended that it did not appear that the proposed railroad would be parallel to the tracks of the Western & Atlantic Railroad, or that it would de-

preciate the value of that road; and hence that the act has no application. The case was tried upon the pleadings, which set forth in detail the facts as outlined in the statement preceding this opinion. From these it sufficiently appears that the contemplated road would be parallel to and depreciative of the value of the Western & Atlantic Railroad, within the meaning of the act.

[3] 3. It was further contended that the act of August 11, 1915, was a special act for which there was provision by an existing general law as set forth in the Civil Code, § 2577 et seq., and that the special act was violative of article 1, § 4, par. 1, of the Constitution of the State of Georgia (Civil Code, § 6391), which, among other things, provides that:

"Laws of a general nature shall have uniform operation throughout the state, and no special law shall be enacted in any case for which provision has been made by an existing general law."

The attack thus made upon the act of 1915 involves the character of the law embodied in the Civil Code, § 2577 et seq., and likewise the character of the act of 1915, in respect to either or both being special laws or laws of a general nature, within the meaning of the above provision of the Constitution. If the former is a general law and the latter a special enactment on the same subject, the latter is unconstitutional; if both are special laws, the latter does not violate that provision of the Constitution. Mathis v. Jones, 84 Ga. 804, 11 S. E. 1018. We will first consider the character of the law embodied in the Civil Code, § 2577 et seq. Formerly the matter of incorporating railroad companies was a subject exclusively for special legislative enactment. This was changed by an amendment to the Constitution of the state (article 3, § 7, par. 18; Civil Code, § 6446), which took from the Legislature the power directly to grant charters to railroad companies, and conferred that power upon the Secretary of State, to be exercised under laws to be prescribed by the Legislature. In 1892 an act was passed by the Legislature (Acts 1892, p. 37), prescribing laws for the incorporation of railroad companies, which are now embodied in the Civil Code, § 2577 et seq. The legislative history on the subject is set forth in Hawkinsville, etc., R. Co. v. Waycross R. Co., 114 Ga. 239, 39 S. E. 844, in which case was involved the validity of an amendment by the Legislature to the charter of the Waycross Air-Line Railroad Company before the above-mentioned amendment to the Constitution (Civil Code, § 6446), but after an act of the Legislature passed in 1891 (Acts 1890-91, vol. 1, p. 416). In holding the amendment to the charter valid, the case was distinguished from any such case as the present, by pointing out that the amendment was prior to the amendment to the Constitution. The amendment to the

Constitution, so far as material to be stated, provides that:

"All corporate powers and privileges to * * * railroad" corporations "shall be issued and granted by the Secretary of State in such manner as shall be prescribed by law; and if in any event the Secretary of State should be disqualified to act in any case, then in that event the Legislature shall provide by general laws by what person such charter shall be granted."

When it was declared, as in the foregoing excerpt, that charters should be issued and granted by the Secretary of State "in such manner as shall be prescribed by law," the Constitution is to be construed as referring to laws to be adopted by the Legislature in a constitutional manner. It was not intended that that provision should abrogate the other provisions of the Constitution inhibiting the passage of a special act for which there was provision by an existing general law. After the adoption of the above amendment to the Constitution, the Legislature passed an act for the purpose of carrying its provisions into effect. Acts 1892, p. 37. The provisions of the act were subsequently embodied in the Civil Code 1910, § 2577 et seq. The provisions of the act, thus placed in the Code, established comprehensive laws for the grant of charters to railroad companies exclusively by the Secretary of State, applicable to all persons and operative throughout the state, so that persons complying with the law thus made could obtain a charter for a railroad company, authorizing them to construct a railroad to be located anywhere throughout the state. In *McElreath on the Constitution of Georgia*, § 1136, it is said, upon authority of decisions of this court:

"A law is general under the Constitution of Georgia when it operates uniformly throughout the whole state upon the subject with which it purposes to deal."

Under this authority, the act of 1892, supra, as embodied in the Civil Code, § 2577 et seq., was an existing general law for the incorporation of railroad companies. By that law the authority was conferred exclusively upon the Secretary of State, "except in cases of disqualification, when the power was conferred upon the Comptroller General to act for the state in granting charters to railroad companies." While such general law was in existence, the Legislature passed the act of 1915, which is fully set out in the foregoing statement of facts. This act purported to amend the general law in such manner as to prevent the Secretary of State from granting a charter to any private company whose line of railroad would parallel the Western & Atlantic Railroad, or would depreciate the value of the Western & Atlantic Railroad so long as it should remain the property of the state. As indicated above, if this were a special law, its constitutionality could not be sustained as amending the general law. We will now consider the character of this act.

If carried into effect, the act would be a limitation upon the power expressly conferred upon the Secretary of State by the pre-existing law, and render inoperative the general railroad law embodied in the Civil Code, § 2577 et seq., in that section or territory of the state where a railroad, if constructed, would be parallel to the Western & Atlantic Railroad. The Western & Atlantic Railroad having a fixed position and location, there would be excepted from the operation of the law a well-defined portion of the state along and through which no private railroad could be constructed, and the law would not be territorially general. Under these circumstances, the amending act would ordinarily be a special law inhibited by the Constitution, under the principles of the cases which will now be noticed. In the case of *Futrell v. George*, 135 Ga. 265, 69 S. E. 182, the question was whether the act of 1903 (Acts 1903, p. 26), purporting to amend the general road laws of the state, was a special law and violative of the provision of the Constitution prohibiting the passage of a special law upon a subject for which there was provision by an existing general law. The act in question was so expressed as definitely to describe otherwise than by name certain counties which it purported to except from the operation of the act. It was held that the act was a special law, because it was not territorially general, and for that reason was violative of the provision of the Constitution which is now being applied. In the course of the opinion, there was a quotation from the opinion in *Thomas v. Austin*, 103 Ga. 701, 30 S. E. 627, as follows:

"The words 'throughout the state,' as used in the Constitution, necessarily imply that, in order for a law to partake of the nature of generality, it should, by its terms, show that it is capable of being applied in any county in the state. It is not necessary that every county in the state, at the time of the passage of the law, should fall within its operation; but it is necessary that none should be excepted in such a way that it can never fall within its provisions. If therefore a statute should except from its operation even one county, either by name or by the use of such words as clearly indicate that the law can never apply to such county, the act is lacking in the feature of 'territorial generality,' and is therefore not a general law. We think this case is controlled by the decision * * * in *Lorentz & Rittler v. Alexander*, 87 Ga. 444, 13 S. E. 632. In that case Justice Simmons said: 'The act of 1872, which first provided for the establishment of county courts, was not a general law having uniform operation throughout the state, for the act itself excepted 46 counties from its operation. The act of 1879, which amended the prior act, was not a general law, for the same reason. It excepted Walton county by name, and all counties in which a city court had been established, and all counties in which county courts were then existing. A law to be general under this section of the Constitution must operate uniformly, throughout the whole state, upon the subject or class of subjects with which it proposes to deal. The act under consideration deals with the establishment of county courts. In order for it to be general and have uniform operation throughout the state, it must

affect each county in the state. * * * It follows therefore that the act in question is not a general law, under this clause of the Constitution."

In *City of Cochran v. Lanfair*, 139 Ga. 249, 77 S. E. 95, one question was whether the act of 1874 (Acts 1874, p. 109), now embodied in the Civil Code, § 864 et seq., in regard to the levy of taxes by a municipal corporation, was a general law applicable to all municipal corporations, thereby precluding the Legislature thereafter from conferring charter authority upon separate municipalities to levy a different tax rate. The act of 1874 excepted from its operation the city of Savannah; and it was held that this made the law a special law as distinguished from a general law within the meaning of the Constitution, and did not prohibit the Legislature from authorizing the city of Cochran to levy a different tax rate.

The foregoing decisions dealt with cases where the charter of the enactment depended upon its territorial generality. A law may assume a general nature, within the meaning of the Constitution, from its subject-matter, notwithstanding it may have only local application. *Mathis v. Jones*, supra. But the act of 1915 is not of that character. The act deals with the subject of incorporating railroad companies. There is nothing peculiar to this subject that would render local legislation with respect to it general law. It is urged that, because it prevents the incorporation of a railroad that would compete with the Western & Atlantic Railroad, the act was in the interest of the state as owner of such road, and that such interest would characterize the subject as one from which generality might be inferred. The state's ownership of the Western & Atlantic Railroad is a business venture, and in no sense an institution for exercise of governmental functions. In *Western & Atlantic R. Co. v. Carlton*, 28 Ga. 180, it was declared:

"When a state embarks in an enterprise which is usually carried on by individual persons or companies, it voluntarily waives its sovereign character and is subject to like regulations with persons engaged in the same calling."

Relatively to such a business, the pecuniary interest of the state could no more give public character to the subject of incorporating railroad companies than could the interest of private persons engaged in the same kind of business. If incidental interest resulting from the restrictions upon the power of the Secretary of State to grant charters could give character to the legislation, it would not be the state alone that would be affected. The proposed incorporators and constructors of railroads, as well as the inhabitants of the section of the state where the restriction is to be applied, would be affected. So long as the act remained of force, there could not be another railroad in that part of the state, and the population would be deprived of the convenience which such a road would afford, and local public

institutions would fail to receive substantial aid that would flow from taxation of railroad properties and increased values of property, due to the construction of the railroad. The existence and condition of public roads enter largely into taxable values from which the state derives its revenues. The case of *Futrelle v. George*, supra, affords an example where this court has held that enactments on that subject which are not territorially general are special enactments. The assessment of the value of property for taxation is also a question which affects the state's revenue.

An act was passed in 1885 (Acts 1884-85, p. 449), creating a board of tax assessors for the county of Richmond. In the case of *Bohler v. Verdery*, 92 Ga. 715, 19 S. E. 36, it was sought to apply the act. It was resisted on the ground that it was repugnant to that part of the Constitution which forbids special legislation in any case for which provision has been made by an existing general law. In the course of the opinion, it was said by Simmons, J.:

"The invalidity of the act was conceded, and may now be regarded as settled, under the decision of this court in the case of *Stewart, Tax Collector, v. Collier*, 91 Ga. 117 [17 S. E. 279]."

By the act of 1870 (Acts 1870, p. 423) the Governor of the State was authorized to lease the Western & Atlantic Railroad. By a section of the act it was declared that the lessees should be a body corporate under the name and style of the Western & Atlantic Railroad Company, and succeeding sections conferred specific powers and obligations and imposed duties upon the corporation to the state. The road was duly leased, and the corporation operated the road until the term specified in the act for duration of the charter was about to expire. Certain suits were pending in the courts, and for the purpose of continuing the prosecution and defense of such suits by the corporation an act was passed (Acts 1890-91, p. 280) continuing the term of the charter beyond the time expressed in the lease act above mentioned. It was attempted to apply this act in the case of *Logan v. Western & Atlantic R. Co.*, 87 Ga. 533, 13 S. E. 516, and it was held to be a special act for which there was a provision by an existing general law, and that the act was invalid. The pecuniary interest of the state was more remote in the cases mentioned than in the case under consideration, but the fact remains that the state's pecuniary interest was incidentally affected, and that fact did not cause this court to hold that the act involved was a general law. In other states, in which the language of Constitutions on the subject of general and special laws differs from that of our own state (see *Mathis v. Jones*, supra), the courts have ruled differently. But under our Constitution, as interpreted and applied by this court, we think the act of 1915 is a special law. It was upon a sub-

ject for which provision was made by the general law as contained in the Civil Code, § 2577 et seq., and was violative of that part of the Constitution which prohibits special laws on subjects on which provision has been made by an existing general law. The act was alleged to be violative of other provisions of the Constitution; but, as we hold that it is void for the reasons indicated, it becomes unnecessary to deal with other questions in the case.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(148 Ga. 490)

ROBERTS v. ATLANTA CEMETERY ASS'N
et al. (No. 261.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

1. HOMESTEAD §52—APPLICATION TO SET APART—NOTICE—STATUTE.

The time to be fixed by the notice prescribed in Civ. Code 1910, §§ 3381-3383, of when the ordinary will act on an application for setting apart a homestead, is not less than 20 nor more than 30 days from the date of the order of the ordinary to the surveyor. If more than 30 days intervene, the homestead is void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 70-72.]

2. EJECTMENT §90(1)—EVIDENCE—APPLICATION FOR SALE OF HOMESTEAD.

The homestead being invalid, the application for leave to sell it was irrelevant to any issue in the case.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 254.]

3. EVIDENCE §379—ADMISSIBILITY—PLAT.

Where a civil engineer who made a survey and plat testifies that the same are correct, the plat is admissible in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1656.]

4. BOUNDARIES §36(2)—LOCATION OF LINE—EVIDENCE—DEED.

Where it becomes material to locate the line between the land in controversy and that of an abutter, the deed of such abutter to one of the defendants, conveying the abutting land and so describing the line that its physical location is ascertainable, is admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 160, 161.]

5. EJECTMENT §109—DIRECTING VERDICT—SUFFICIENCY OF EVIDENCE.

The evidence examined, and held error to direct a verdict for the defendants.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 312.]

6. MORTGAGES §534, 596—FORECLOSURE—RIGHTS OF JUNIOR PURCHASER.

A foreclosure of a mortgage by the statutory method, to which proceeding a junior vendee of the land is not a party, while not conclusive on such vendee, is valid as between the holder of the mortgage and the mortgagor, and a purchaser at the foreclosure sale acquires the legal estate of the mortgagor; and, where no illegality in the foreclosure proceeding and the sheriff's sale thereunder is made to appear, the sheriff's deed is superior to the deed executed by the mortgagor after the date of the mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1555, 1684.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action by Mrs. Carrie Roberts against the Atlanta Cemetery Association and another. Verdict directed for defendants, and plaintiff brings error. Reversed.

E. M. & G. F. Mitchell, of Atlanta, for plaintiff in error. Smith, Hammond & Smith and Mayson & Johnson, all of Atlanta, for defendants in error.

EVANS, P. J. The action was brought by Mrs. Carrie Roberts against the Atlanta Cemetery Association and Mrs. M. Owens. Upon the conclusion of the evidence the court directed a verdict for the defendants.

[1] 1. One of the muniments of title relied upon by the plaintiff was a homestead alleged to have been set apart to J. A. Casey, and a sale thereunder by Casey and his wife by virtue of an order of the superior court authorizing the sale of the homestead property. Several objections were urged to the reception of the homestead in evidence, one of which was that the homestead was void because the date of the hearing was more than 30 days after the order of the ordinary setting the case for hearing. The court sustained this objection and excluded the homestead. It is provided by Civil Code 1910, § 3381 et seq., that when an application has been filed, the court shall publish a notice that the applicant has applied for the setting apart and valuation of a homestead, and fix the time when he shall pass upon the same, and that the time fixed in the notice shall not be less than 20 days nor more than 30 days from the date of the order of the ordinary to the surveyor. The record discloses that the application was filed on November 17, 1888, and on that day the ordinary passed an order, directed to the county surveyor, to enter upon the land of the applicant and lay off a homestead for him and his family of so much of the land as would not exceed in value a certain amount, and to make a plat thereof; and on the same day he passed an additional order, setting the hearing for action on the application for Wednesday, December 19, 1888. It thus appears that more than 30 days intervened between the date of the order of the ordinary to the surveyor and the time fixed by the notice as when the ordinary would take action on the application for homestead. As was pointed out in *West v. McWhorter*, 141 Ga. 590, 81 S. E. 859, the jurisdiction of the setting apart of a homestead is conferred by statute on the ordinary, and he must pursue the mode and order prescribed by law in the discharge of the duty thus imposed; and when he deviates from that order and undertakes to prescribe one to suit his own convenience, he is acting without authority of law, and his action is illegal and void. It was held in that case that where the date

for the hearing and approval occur within less than 20 days, the homestead is illegal and void. This rule was adhered to in *King v. King*, 143 Ga. 385, 85 S. E. 95. Inasmuch as the ordinary was without authority to fix a day for the hearing to occur more than 30 days after the filing of the application and the date of the order to the surveyor to lay off the homestead, he had no jurisdiction on the day so fixed to take any action on the application, and the homestead was void on this account.

[2] 2. Inasmuch as the homestead was invalid, the application addressed to the superior court for leave to sell the homestead was irrelevant to any issue in the case.

[3] 3. The plaintiff offered in evidence a map made by a civil engineer, explanatory of a survey which he had testified he had made. One of the contentions in the case was that the deed under which the defendants claimed title covered only a part of the land embraced in the muniments of title relied upon by the plaintiff; and that, even if the defendants' title as to that part was superior to the plaintiff's nevertheless she was entitled to recover the rest of the premises in controversy, if she showed title to the same. The civil engineer testified that the plat which he made was correct. The evidential value of the map was not to establish the contentions of the parties respecting their claim of title to the land, but to show their application to the premises. The testimony of the civil engineer was of such a character as to bring the case within the rule that where a surveyor makes a survey and plat and testifies that the same are correct, the plat is admissible in evidence. *Wooten v. Solomon*, 139 Ga. 433, 77 S. E. 375.

[4] 4. The southern boundary of the land in controversy, according to the calls of the deeds of both parties, is the J. D. Collins land. It is important to locate that boundary in order to give effect to the calls of these deeds. The plaintiff offered in evidence a deed from the widow of Collins to one of the defendants, the Atlanta Cemetery Association, from the description of which that line could be physically located. This deed was admissible for such purpose.

[5] 5. The petition described the premises as—

"all that tract or parcel of land situated, lying, and being in land lot number two hundred and twenty-two (222) in the Seventeenth (17th) district of originally Henry, now Fulton county, Georgia, commencing on the east side of the Marietta road (sometimes called the Atlanta and Marietta road and now generally known as the Old Marietta road) at the north line of the property formerly known as the J. D. Collins land, and running thence northerly along the east side of said road five hundred (500) feet; thence east and nearly east four hundred and fifty (450) feet; thence southeasterly along the run of the branch about fifty (50) feet; thence east about three hundred and ninety-five (395) feet to the line of the property formerly owned by H. Franklin; thence south along the line of said Franklin land six hundred and fifty (650)

feet to the line of the said property formerly known as the J. D. Collins land; thence in a westerly direction along the line of said Collins property eleven hundred (1100) feet to the point of beginning, containing a fraction over thirteen (13) acres."

The plaintiff submitted evidence tending to show that on April 12, 1895, John A. Casey and his wife conveyed to Mrs. Belle Simmons the tract of land described in the petition, and that he was in possession thereof at the time of his conveyance. On April 28, 1896, Mrs. Belle Simmons conveyed the land to Mrs. Carrie Oliver, who, on June 9, 1896, incumbered it with a security deed to W. F. Quillian. Quillian sued on his debt to judgment, and filed in the clerk's office, for the purpose of levy and sale, a deed of reconveyance to Mrs. Oliver. The land was levied upon under an execution issued upon the judgment of Quillian against Mrs. Oliver, and was sold by the sheriff on October 3, 1899, and purchased by the plaintiff, and on the same day the sheriff executed a deed to the plaintiff. In all these conveyances the land is described substantially as in the petition. The defendants submitted in evidence a mortgage from J. A. Casey to the Mutual Loan & Banking Company, dated May 22, 1894, a petition by the mortgagee to foreclose the mortgage agreeably to the statute, filed November 20, 1900, and a judgment of foreclosure rendered thereon September 26, 1901, and a deed by the sheriff to Mrs. M. Owens, dated November 5, 1901, in pursuance of the sheriff's sale under the foreclosure. The land as described in the mortgage and judgment of foreclosure, and in the sheriff's deed, is as follows:

"All that tract or parcel of land lying and being in land lot No. 222 in the 17th district of Fulton county, Georgia, commencing on the east side of the Atlanta and Marietta road at the north line of J. D. Collins' land, and at the south line of said J. A. Casey's land, and running thence in a southeasterly direction along the said Collins land 1115 feet to H. Franklin's line, thence north along H. Franklin's line 612 feet, thence east 950 feet to the Atlanta and Marietta Road, thence south along the east side of railroad 300 feet to the point of beginning; bounded on the north by lands of J. A. Casey, and being a part of land on which said J. A. Casey now resides."

The evidence did not disclose any actual occupancy of the land by Mrs. Simmons, or her grantees, including the plaintiff, nor any actual occupancy by Mrs. Owens, Mrs. Owens, on August 2, 1913, executed a bond for title to J. H. Wiggins, who transferred it to the Atlanta Cemetery Association on August 4, 1913. The entire land in dispute at the time of the institution of the suit was inclosed by a wire fence, but is is uncertain as to when the fence was built, there being testimony from which an inference could be drawn that the fence was erected by the Atlanta Cemetery Association after its purchase. From the foregoing it will be seen that both parties claim to derive their title from J. A. Casey. A comparison of the muniments of title of the two parties

will disclose that the land described in the muniments of the defendant is less in extent than that described in the muniments of the plaintiff. The deeds of both parties call for the Collins line as a southern boundary. The calls of the plaintiff's deed are for the Old Marietta road for a distance of 500 feet, measuring northward from the Collins land, as the western boundary; and H. Franklin's land for a distance of 650 feet, measuring northward from the Collins land, as the eastern boundary. In the deed of the defendants the calls are for the Old Marietta road for 300 feet, measuring northward from the Collins land, and for the Franklin land measuring 612 feet from the Collins land. If we accord to the defendants the land embraced in the sheriff's deed to Mrs. Owens, there would be left of the premises described in the petition and included in the description contained in the plaintiff's deeds a portion of land having a boundary of 200 feet on the Old Marietta road on the west, and 38 feet on the Franklin line on the east, with a northern boundary as described in the plaintiff's deeds. As to so much of the land embraced in the sheriff's deed executed by virtue of the foreclosure of the Mutual Loan & Banking Company's mortgage, the defendants showed the better title, for the reason that the mortgage is anterior in date to the deed from the mortgagor to Mrs. Simmons, under whom the plaintiff claims; and as to such land the court very properly could have directed a verdict.

It is contended by the defendants in error that the evidence as to the description of any land claimed to be included in the plaintiff's muniments of title, and not embraced in their own, is so indefinite that the jury was unable by their verdict to locate it. We think the evidence sufficient to define the area of land covered by the plaintiff's deed which is not embraced in the defendants' muniments of title.

It is also argued that the plaintiff failed to show any title to the area of land covered by her muniments of title, which may not be embraced in the defendants' deed. The husband of Mrs. Owens testified, in substance, that he represented his wife in the purchase of the land at sheriff's sale; that after the sale, accompanied by the sheriff, he went on the land and exhibited the sheriff's deed to J. A. Casey, who pointed out the lines to him, and that the sheriff's deed under which the defendants claim title covers the locus of the suit. Both parties claiming that Casey had title to the locus of the suit, and that their respective claims of title derived from Casey cover the premises in controversy, the rule applies that where both parties claim under a common grantor or propositus, that common grantor or propositus will, for the purposes of the case, be treated as a

true and original source of title, and the plaintiff may recover by showing legal title and right of entry as derived from that source. Powell on Actions for Land, § 361.

[6] 6. The plaintiff insists that the sheriff's deed to Mrs. Owens, made pursuant to the proceedings by the Mutual Loan & Banking Company in foreclosure of its mortgage against J. A. Casey, is void as a conveyance of title, because she was not made a party to the foreclosure proceedings. It will be remembered that J. A. Casey sold the land to Mrs. Belle Simmons, and that Mrs. Roberts acquired Mrs. Simmons' title before the foreclosure proceedings were instituted. In this state a mortgage does not convey title to the mortgaged premises, but only creates a lien thereon for the security of the debt. The statutory foreclosure of a mortgage on realty does not contemplate that a third person may defend (Civil Code, § 3280), and a junior incumbrancer or subsequent purchaser is not a necessary party to a foreclosure suit. Brooke v. Lowry National Bank, 141 Ga. 493, 81 S. E. 223. The foreclosure of the mortgage, to which the subsequent purchaser is not a party, does not affect the rights of such purchaser. Howard v. Gresham, 27 Ga. 347; Williams v. Terrell, 54 Ga. 462; Osborne v. Rice 107 Ga. 285, 33 S. E. 54; Swift v. Dederick, 106 Ga. 35, 31 S. E. 788; Hinesley v. Stewart, 139 Ga. 7, 76 S. E. 385. Nevertheless such a foreclosure is valid as between the holder of the mortgage and the mortgagor, and the purchaser at the foreclosure sale acquires the legal estate of the mortgagor. Carpentier v. Brenham, 40 Cal. 221. Any equitable right of a subsequent purchaser to redeem within a reasonable time is not involved in this action. The action is at law; and, as the sheriff's sale seems to be regular in all respects, the purchaser at that sale acquired the title of Casey as of the date of his mortgage to the Mutual Loan & Banking Company, and superior to his subsequent deed under which the plaintiff claims title. None of the other assignments of error are such as to require special mention.

Judgment reversed. All the Justices concur.

(146 Ga. 498)

MEGAHEE v. HATCHER. (No. 266.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

DEEDS ~~§~~ 129(4) — CONSTRUCTION — LIFE ESTATE — REMAINDER.

In a deed executed in 1859 the granting clause was to "Stewart Beggs for the use, benefit, and advantage, in trust for said children [the children of the grantor whose names were given in the stating clause] and the lawful issues of their bodies, free from the control or disposition of any and all persons, husbands and wives included." The habendum and tenendum clause was as follows: "To have and to hold the above-described property unto him, the said Stewart

Beggs, in trust for my aforesaid children, and, on the demise of either of my aforesaid children, to such child or children he or she may leave. Each child to receive an equal share of the above-mentioned property at such time as shall hereinafter be mentioned, to wit, on the arrival at the age of twenty-one years of the living child. To have and to hold the above-described property unto him, the said Stewart Beggs, in trust for my children aforesaid, in fee simple, free from the debts, liabilities, and control of their present or future husbands, to their only benefit or behoof." Held, that the land was to be divided equally among the grantor's children, and a life estate vested in each child as to the portion assigned to him or her, with remainder over, on the death of that child, to his surviving child or children.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 423.]

Error from Superior Court, McDuffie County, H. C. Hammond, Judge.

Action by C. L. Megahee against Reese Hatcher. Petition dismissed on demurrer, and plaintiff brings error. Reversed.

The action is to recover land, and the petition was dismissed on demurrer. Counsel for plaintiff and defendant concur that the correctness of the judgment on demurrer is dependent on the construction of the deed from John Megahee to Stewart Beggs, trustee. The plaintiff contends that under this deed his father, David Megahee, one of the beneficiaries, became vested with an estate for life in the portion of the land granted to him, with remainder over to his surviving child or children, and that the plaintiff is his surviving child and entitled to the possession of the land on the death of his father. On the other hand, the defendant contends that by a proper construction of the deed the grant was to the first taker in fee, and that no remainder estate was created. The deed is as follows:

"This indenture made this first day of March, eighteen hundred and fifty-nine, between John Megahee, Sr., of the one part, Stewart Beggs of the other part, both of the County and State aforesaid, witnesseth that the said John Megahee, Sr., for and in consideration of the natural love and affection which he, the said John Megahee, Sr., has and bears to his children, to wit, James, Michall, John, Elizabeth, David, Mary Ann, Nancy, Robert, Jasper, and Jenny Megahee, and for and in consideration of the sum of five dollars cash in hand paid by said Stewart Beggs at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath bargained, sold, granted and conveyed, and by these presents doth bargain, sell, grant and convey unto the said Stewart Beggs, for the use, benefit, and advantage in trust for said children, and the lawful issues of their bodies, free from the control or disposition of any and all persons, husbands and wives included, all that tract or parcel of land, situate, lying, and being in said county and bounded as follows [describing land], containing one thousand acres, be the same more or less, with all the rights, members, privileges, and appurtenances to said tract of land in any wise appertaining or belonging, and also the following negroes to wit: Joe about twenty-five years of age, Pomp eighteen years old, Bob sixteen years old, Gilroy aged two years old. Also my interest in the steam mill books, known as the Dearing Steam Mill Company, to wit: in accounts, notes, together with all debts, dues, demands and claims I as copartner have or may have in and

to the books of the late Harris, Megahee & Co., and of the firm of Megahee & Beggs. Also all the individual claim as copartner in said firms in notes, accounts, or claims or demands whatsoever. Also my notes, debts, claims, and demands which may be due or owing to me in any manner at this date. To have and to hold the above-described property unto him, the said Stewart Beggs, in trust for my aforesaid children, and, on the demise of either of my aforesaid children, to such child or children he or she may leave. Each child to receive an equal share of the above-mentioned property at such time as shall hereinafter be mentioned, to wit, on the arrival at the age of twenty-one years of the living child. To have and to hold the above-described property unto him, the said Stewart Beggs, in trust for my children aforesaid, in fee simple, free from the debts, liabilities, and control of their present or future husbands, to their only benefit or behoof."

It is unnecessary to set out the other facts, because counsel for plaintiff and defendant argue only the question of the nature of the estate in this conveyance.

J. B. Burnside, of Thomson, and Wm. H. Fleming, of Augusta, for plaintiff in error. John T. West, of Thomson, for defendant in error.

EVANS, P. J. (after stating the facts as above). We will first undertake to determine the nature of the estate conveyed by this deed according to the accepted rules of construction at common law, as modified by the statutes of this state. In the case of a conditional fee at common law, whereby an estate was given to A. and his issue or to A. and the heirs of his body, in exclusion of collateral heirs, A. took the fee as soon as any issue was born, or it reverted to the donor's estate if no issue was born. The effect of the statute *de donis conditionalibus* was to convert a fee conditional into an estate tail. By the act of 1821 (Acts 1821, p. 92) fee tails, whether express or implied, were converted into an absolute estate in the first taker. *Craig v. Ambrose*, 80 Ga. 134, 4 S. E. 1. Code 1863, § 2230 (Code 1910, § 3661), left express estates tail just as under the act of 1821, but changed an estate tail by implication into a life estate with remainder over. *Ewing v. Shropshire*, 80 Ga. 374, 382, 7 S. E. 554, 555. That Code section is as follows:

"Estates tail are prohibited and abolished in this state. Gifts or grants to one, and the heirs of his body, or his heirs male or heirs female, or his heirs by a particular person, or his children, or his issue, convey an absolute fee. Estates tail being illegal, the law will never presume or imply such an estate. Limitations, which, by the English rules of construction, would create an estate tail by implication in this state, shall give a life estate to the first taker with remainder over in fee to his children and their descendants as above provided; and if none are living at the time of his death, remainder over in fee to the beneficiaries intended by the maker of the instrument."

The precise question for decision is whether the children of the grantor in the deed under consideration took an express fee tail in the premises, converted into a fee simple by the

act of 1821, or whether they took a life estate, either because the words "and on the demise of either of my aforesaid children, to such child or children as he or she may leave," create a limitation over to the grantor's grandchildren who take as purchasers, or because of an implication of an estate tail from these words. It is argued that these words are words of limitation and equivalent to "heirs of the body" of the first grantees. The case of *Childers v. Childers*, 21 Ga. 377, is relied on as sustaining this conclusion. That case involved the construction of a will executed in 1843. The bequest was expressed in these words:

"To my daughter, Nancy Childers, I give and bequeath my negro girl Clarissa, which property I give to Nancy Childers, the wife of John Childers, of this county, and at her death to the heirs of her body, with her increase."

The court held that there was no limitation over, and that an absolute estate vested in the first taker. The reasoning of the court was that the words "at her death" did not vary the technical meaning of the words "heirs of her body," and the bequest was legally the same as if it had been to "Nancy Childers and the heirs of her body"; that the bequest did not create a limitation over, but did create an estate tail, which was converted into a fee simple. There is a clear differentiation between the bequest in that will and the deed under consideration. The bequest as construed by the court created an express fee tail; the grant in the deed is not to the grantor's children and the heirs of their bodies, but to them, and on the demise of either to "such child or children as he or she may leave," that is, to surviving children; and thus prevents the grant from being an express fee tail. Furthermore, under the English rules of construction a devise or grant limited upon words importing an indefinite failure of issue was uniformly held to be void for remoteness; and this rule was in force in this state when the will in the *Childers* Case was made. Since then it has been abrogated by the act of 1854, codified in Civil Code 1910, § 3662. We think that the grant over to the surviving children of the first takers is to them as purchasers, and such words should not be construed as words of limitation. *Miller v. Hurt*, 12 Ga. 357. In the case just cited *Lumpkin, C. J.*, quoted approvingly and applied the following from 2 *Jarman on Wills*, 315:

"That it is now admitted on all hands that a devise to A. and his wife, and after their death to their children, gives an estate for life to the parents, with remainder to their children; and that the notion that such a bequest creates an estate tail is wholly untenable."

The words "on the demise," in this deed, can have no different import than the words "after the death" had the latter been used.

Conveyances similar to that under review have been before this court for construction. In *Ford v. Cook*, 73 Ga. 215:

"A testator made a will in 1856 and died in 1859. The thirteenth item contained the following provisions: 'I will and bequeath to Caroline C. Cook, my daughter, twenty-five hundred dollars, with the following reductions, viz.: One lot of land [describing it] valued at five hundred dollars; also a negro girl named Nancy, valued at four hundred dollars; also reduction of notes and accounts that I hold against John H. Cook, her husband; said property and money to be free from the disposition of her husband, John H. Cook, and to be for her own separate benefit, and at her death to go to her children.' By another item the testator appointed his executors trustees, 'to hold in trust for me and in my name the property herein bequeathed to my daughters [naming them], and to hold the same in trust for them and their bodily heirs': Held, that the will created an estate for life in the daughter of the testator, with remainder to her children living at her death."

In *Bush v. Williams*, 141 Ga. 62, 80 S. E. 286, the grant was to Josephine Henrietta Williams, and after the description of the property conveyed these words were employed:

"These lands after her death, [the] said party of the second part, to belong to the heirs of her body; and if no heirs, then to revert to and become the property of Peter C. Roberts and Clarissa C. Roberts. To have and to hold the said above granted and described property, with all and singular the rights, members, and appurtenances thereunto appertaining, to the only proper use, benefit, and behoof of the said party of the second part, her heirs, administrators, executors, and assigns, in fee simple."

It was held that the first taker took a life estate, and upon her death her sons took a vested fee. In *King v. McDuffie*, 144 Ga. 318, 87 S. E. 22, it was held that under Civil Code 1910, § 3661, a deed to a woman "and the heirs of her body after her death" conveys a life estate to the first taker, with a remainder over to her children.

We think that the clause, "Each child to receive an equal share of the above-mentioned property at such time as shall hereinafter be mentioned, to wit, on the arrival at the age of twenty-one years of the living child," referred to the time each of the immediate grantees was to have possession of his or her respective share of the land, and does not militate with our interpretation of the deed as to the estate granted in the land.

Looking at the deed as a whole, the intention of the maker seems to have been to give the land to his ten children, to be equally divided between them at the time indicated, and the portion assigned to each child to vest in him for life, with remainder over to his surviving child or children. Giving the deed this construction, it was error to dismiss the petition on demurrer.

Judgment reversed. All the Justices concur.

(146 Ga. 503)

MEGAHEE v. HAMILTON. (No. 265.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

This case is controlled by the decision in the case of *Megahee v. Hatcher*, 91 S. E. 677, this day rendered.

Error from Superior Court, McDuffie County; H. C. Hammond, Judge.

Action by C. L. Megahee against Herbert Hamilton. Judgment for defendant, and plaintiff brings error. Reversed.

J. B. Burnside, of Thomson, and Wm. H. Fleming, of Augusta, for plaintiff in error. John T. West, of Thomson, for defendant in error.

FISH, C. J. Judgment reversed. All the Justices concur.

(146 Ga. 503)

MILES et al. v. GRUBBS et al. (No. 267.)

(Supreme Court of Georgia. Feb. 15, 1917.)

(Syllabus by the Court.)

This case is controlled by the decision in the case of *Megahee v. Hatcher*, 91 S. E. 677, this day rendered.

Error from Superior Court, Columbia County; H. C. Hammond, Judge.

Action between J. T. Miles and others and Robert Grubbs and others. Judgment for the latter, and the former bring error. Reversed.

J. S. Watkins and Wm. H. Fleming, both of Augusta, for plaintiffs in error. John T. West, of Thomson, for defendants in error.

GILBERT, J. Judgment reversed. All the Justices concur.

(146 Ga. 489)

UNION TANK LINE CO. v. WRIGHT, Comptroller General. (No. 260.)

(Supreme Court of Georgia. Feb. 15, 1917.)

*(Syllabus by the Court.)***APPEAL AND ERROR 1195(1)—LAW OF CASE—SUBSEQUENT APPEAL—JUDGMENT.**

This case was before the Supreme Court on a former occasion, 143 Ga. 765, 85 S. E. 994. It was there ruled:

"(1) This was a suit by an equipment company against the comptroller general of the state, to enjoin the levy (under Civ. Code 1910, § 990) of an ad valorem tax on cars of the company which were allowed to be moved, in the regular course of business, on the lines of railroad track in this state. It was alleged that the method proposed by the comptroller general, if carried into effect, would impose a tax on property outside the state. The case was tried upon an agreed statement of facts. Held that, while some of the expressions used in the agreed statement of facts, if taken alone and disassociated from the context, might have the appearance of conceding that the comptroller general was seeking to tax property outside of the state, yet, when taken as a whole and in connection with the allegations of the petition,

it is evident that the parties did not intend any such concession.

"(2) Civ. Code 1910, § 990, is to be construed in connection with Civ. Code 1910, §§ 1031 and 989, which, by reference, are made parts thereof. So construed, provision is made for a method of taxing cars of equipment companies moved on the lines of railroads in this state on the track mileage basis of apportionment. The method so employed does not contemplate taxation of property outside of the state, and is not violative of the due process clause of the federal or the state Constitution.

"(3) The agreed statement of facts in this case shows the following: The Union Tank Line company is incorporated in the state of New Jersey. It has offices in New York. It rents tank cars to the Standard Oil Company, a Kentucky corporation. The agreements and settlements are made outside of this state. The cars are furnished for use by the Standard Oil Company. The railroad companies, in lieu of providing tank cars, pay to the Union Tank Line Company three-fourths of a cent per mile for each mile the car is moved over its tracks. The Standard Oil Company transports a large amount of oil to Jacksonville, Fla., and Savannah, Ga., mainly by marine transportation. From these points oil is sent out, mainly by means of tank cars, to different points in the interior. A number of these cars come into Georgia and are used there and elsewhere. Held, that this does not authorize the imposition upon the Union Tank Line Company of a franchise tax in addition to the tax upon its tangible property in this state, the value of which is arrived at by the rule indicated in the preceding headnote."

After the remittitur was returned to the trial court, the case was again submitted to the judge, who, by consent of the parties, decided the case at the first term, based upon the identical pleadings and evidence that were before the court on the first trial; and upon consideration he rendered a decree in conformity with the rulings of this court as announced above, and held that the Union Tank Line Company was not subject to the franchise tax in this state, but was subject to a property tax, and that the basis of valuation of the property of the company was valid, and not violative of the Constitution of this state or of the Fourteenth Amendment to the Constitution of the United States, and refused to enjoin the levy and collection of the taxes on the ground that the assessment was unconstitutional. The Union Tank Line Company excepted to so much of the decree as refused to enjoin the assessment of the property and the collection of taxes on such property upon the basis of such assessment. In the bill of exceptions certain grounds were specified upon which it was contended that the decree was erroneous, but they present no point which was not involved in the case on the former hearing and ruled upon by this court. Held, that the rulings of the court when the case was formerly here decided the law of the case; and the judge did not err on the second trial, based on the same pleadings and evidence, in rendering a decree in accordance with such rulings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4661.]

Hill, J., dissenting.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action for injunction by the Union Tank Line Company against William A. Wright, Comptroller General. Judgment for plaintiff in part, and it brings error. Affirmed.

King & Spalding, of Atlanta, for plaintiff in error. Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for defendant in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except HILL, J., dissenting.

HILL, J., adheres to his views as expressed in the dissenting opinion when the case was here on the former occasion:

(146 Ga. 535)

LOVETT v. BERRIEN COUNTY BANK.
(No. 283.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

REFUSAL OF INTERLOCUTORY INJUNCTION.

The court did not abuse his discretion in refusing an interlocutory injunction.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between L. B. Lovett and the Berrien County Bank. Interlocutory injunction refused, and Lovett brings error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. E. K. Wilcox, of Valdosta, and J. P. Knight, of Nashville, for defendant in error.

PER CURIAM. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 531)

WRIGHT, Comptroller General, v. SOUTHERN RY. CO. (No. 294.)

(Supreme Court of Georgia. Feb. 28, 1917.)

(Syllabus by the Court.)

1. COUNTIES \Leftrightarrow 152—EXPENSES—TAXATION.

Where a county is without funds to carry on its affairs, a liability for a legitimate current item of expense may be incurred, provided that at the time of incurring the liability a sufficient sum to discharge the same can be lawfully raised by taxation during the current year. *Butts County v. Jackson Banking Co.*, 129 Ga. 801, 809, 60 S. E. 149, 15 L. R. A. (N. S.) 567, 21 Am. St. Rep. 244.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 215-217.]

2. COUNTIES \Leftrightarrow 150(2), 192 — CREATING "DEBTS"—MATERIAL FOR PUBLIC ROADS—TAX.

A county may, without being said to create a debt, contract for equipping its chain gang, and for the purchase of machinery and materials for the prosecution of work on the public roads of the county, to be paid for out of available funds in the hands of the treasurer, or out of the proceeds of taxes that have been or may be levied during the year in which such contracts are made. Where the county has allowed the payment of such demands to go by default, and there is no other available fund in the treasury with which to pay the same, the authorities may during the next year levy a tax

for the discharge of liabilities. *Wilson v. Gaston*, 141 Ga. 770, 82 S. E. 136.

[Ed. Note.—For other cases, see Counties Cent. Dig. §§ 165, 166, 216, 300-302.

For other definitions, see Words and Phrases, First and Second Series, Debt.]

3. COUNTIES \Leftrightarrow 153—LIABILITIES—BORROWING MONEY—"CASUAL DEFICIENCIES."

Where during the course of a fiscal year a county is without funds to pay liabilities not due to "casual deficiencies," the authorities cannot legally borrow money, without a vote of the people, to anticipate its revenues under the guise of a temporary loan. The framers of the Constitution meant by the term "casual deficiency" unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen or necessary expense (Const. art. 7, § 3, par. 1 [Civ. Code 1910, § 6558]). *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57; *Hall v. County of Greene*, 119 Ga. 254, 46 S. E. 69, and cases cited.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 214.

For other definitions, see Words and Phrases, First and Second Series, Casual Deficiencies.]

4. TAX LEVY—COUNTY.

The item in the tax levy to pay a promissory note for borrowed money, under the ruling above stated, was illegally included therein.

(a) Whether a tax levy may be made to discharge any legitimate items of liability for money actually received and used by the county as a fruit of the unauthorized contract is not before us for decision; as the levy in this case was specifically assessed to pay the note which we hold to be illegal.

5. COUNTIES \Leftrightarrow 190(2) — TAXATION — PURPOSES.

County authorities may legally levy a tax not exceeding 100 per cent. of the state tax to pay accumulated debts and current expenses of the county, without any reference to a recommendation of the grand jury. Civ. Code 1910, § 507.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 303.]

6. COUNTIES \Leftrightarrow 190(2) — TAXATION — COUNTY PURPOSES—RATE.

If 100 per cent. of the state tax be not sufficient to pay the accumulated debts and current expenses of the county, the authorities have power to raise a tax for county purposes over and above the tax of 100 per cent. of the state tax, and not to exceed 50 per cent. of the state tax for the year it is levied, "provided two-thirds of the grand jury, at the first or spring term of their respective counties, recommend such tax." Civ. Code 1910, § 508; *Sheffield v. Chancy*, 138 Ga. 686, 75 S. E. 1112. And see Civ. Code 1910, § 513, for enumeration of purposes for which county taxes may be assessed.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 303.]

7. COUNTIES \Leftrightarrow 196(7)—EVIDENCE \Leftrightarrow 83(4)—PRESUMPTIONS — OFFICIAL ACTS — TAXATION—AFFIDAVIT OF ILLEGALITY.

As against the special demurrer, the affidavit of illegality failed to negative compliance with section 508 of Civ. Code 1910, in regard to action or nonaction by the grand jury. All presumptions are in favor of the legality of the tax. It will be presumed, therefore, that the law was complied with in reference to the grand jury. This being the only infirmity alleged in the attack on items 4, 5, 6, and 8 of the assessment as levied, the ground of illegality in respect to these items was insufficient to withstand the general demurrer. As to item 1 of the tax levy, the ground of illegality was sufficient, since a recommendation of the grand

jury would not have given validity to an indebtedness which was not due to a "casual deficiency" and which had not the sanction of a vote of the people.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Evidence, Cent. Dig. § 105.]

8. AFFIDAVIT OF ILLEGALITY—COUNTY TAX.

Under the foregoing rulings, the court did not err in overruling the demurrer to the affidavit of illegality as to item 1 of the tax levy, and, on the agreed facts, in sustaining the affidavit in this respect, but did err in overruling the demurrers to the affidavit of illegality in so far as it attacked other items of the tax levy.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Proceeding between W. A. Wright, Comptroller General, and the Southern Railway Company. Demurrer to affidavit of illegality overruled, and the Comptroller brings error. Affirmed in part, and reversed in part.

Jos. H. Hall and W. J. Wallace, both of Macon, for plaintiff in error. McDaniel & Black and E. A. Neely, all of Atlanta, for defendant in error.

PER CURIAM. Judgment affirmed in part, and reversed in part. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 600)

MOYE v. BEDINGFIELD. (No. 299.)

(Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

1. TRIAL §259(1)—INSTRUCTIONS—WRITTEN REQUESTS.

To an action of ejectment instituted on July 8, 1913, in which several demises were laid, the defendant pleaded "not guilty," and on the trial introduced evidence, without objection, tending to show continuous adverse possession in good faith by himself and those under whom he claimed, under color of title, beginning in 1899. The judge charged on the law of prescription, and in doing so instructed the jury, among other things, "The question that you are called upon to decide is whether or not the defendant has shown to you a prescriptive title, that is, possession as required by law, under color of title, by himself and those under whom he claims, for seven years or more," and then read to the jury the sections of the Code defining prescriptive title and adverse possession. In view of the charge, if further instructions were desired on the subject of the burden of proof being on the defendant to establish prescriptive title, or as to the character of possession required to support a prescriptive title, as to the contention of the plaintiff that the possession of one of the prescribers originated in fraud, appropriate written request therefor should have been made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648, 650.]

2. JUDGMENT §707 — EVIDENCE — ADMISSIBILITY.

When the case was here on a former occasion (Bedingfield v. Moye, 143 Ga. 563, 85 S. E. 856), it was held that "the court erred in admitting in evidence a certain decree affecting adversely the title of the defendant, where the pleadings themselves upon which the decree was based were not introduced in evidence, and there was no other competent evidence to show that the defendant in this case or any of his prede-

cessors in title were parties to the case wherein the decree was rendered." At the trial under review the plaintiff, after introducing testimony of the clerk of the superior court to the effect that the petition in the case in which the decree was rendered could not be found in his office, tendered in evidence the decree and the demurrer and answer filed in that case, neither of which showed that the defendant or any of his predecessors in title were parties to the suit; and they were excluded by the court. Held, that this ruling was proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230.]

3. TRIAL §252(1) — REQUESTED INSTRUCTIONS—REFUSAL.

Certain requests to charge, the refusal of which is assigned as error in the motion for new trial, did not state correct principles of law applicable to the evidence, and were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596, 612.]

4. REFUSAL OF NEW TRIAL.

There was evidence to support the verdict in favor of the defendant, and there was no error for any reason assigned, in refusing a new trial.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action by W. L. Moye against W. E. Bedingfield. Judgment for defendant, and plaintiff brings error. Affirmed.

Ira S. Chappell, of Dublin, for plaintiff in error. Davis & Sturgis and J. S. Adams, all of Dublin, for defendant in error.

PER CURIAM. Judgment affirmed. FISH, C. J., absent.

(146 Ga. 546)

BYRD v. HENDRIX. (No. 287.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

LOGS AND LOGGING §3(10)—TIMBER LEASE—CONSTRUCTION.

A timber lease conveying to the grantee "all the pine timber standing and fallen, measurement to be 14 inches through diameter in box, for sawmill purposes and such other purposes as the party of the second part may desire, which will measure not less than 12 inches from the ground on the [land described]. The said party of the second part * * * shall have the right of ingress and egress to and from said land necessary for cutting and hauling and milling said timber, and * * * as long as said party of the second part * * * may carry on said land as may be necessary for the mill business"—includes in the grant all pine timber on the land, standing or fallen, which will measure 14 inches in diameter at a height on the tree of 12 inches from the ground, and the grantee is not restricted in using such timber "for sawmill purposes" only.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9.]

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Action between Mrs. G. A. Byrd and J. M. Hendrix. Judgment for the latter, and the former brings error. Affirmed.

Cowart & Norman, of Millen, for plaintiff in error. Deal & Renfro, of Statesboro, for defendant in error.

PER CURIAM. Judgment affirmed. FISH, C. J., absent.

(146 Ga. 530)

HARDIN v. DOUGLAS et al. (No. 293.)

(Supreme Court of Georgia. Feb. 28, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 726—ASSIGNMENTS OF ERROR—INDEFINITENESS.

The jury having rendered a verdict, the defendants made a motion for a new trial, which was granted. The plaintiff did not file a direct bill of exceptions complaining of the judgment granting a new trial, but presented exceptions pendente lite to the judgment, which were duly certified and filed as a part of the record in the case. Subsequently when the case was called for trial the defendants submitted a written demurrer to the petition as amended, and at the same time made an oral motion to dismiss the petition. The oral motion was sustained, with leave to the plaintiff to amend within ten days. Without offering to amend, the plaintiff came by direct bill of exceptions, assigning error on the judgment dismissing the case; also assigning error upon her exceptions pendente lite to the former judgment granting a new trial. The assignment of error upon the motion to dismiss the petition does not disclose the ground upon which the motion was based, without resort to recitals in the judgment, which were not made a part of the assignment of error. *Held:*

The assignment of error in the bill of exceptions upon the motion to dismiss the petition was too indefinite to present any question for decision by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3006-3009.]

2. APPEAL AND ERROR \S 549(5)—GRANTING OF MOTION FOR NEW TRIAL—REMEDY.

When the judge granted the motion for new trial, the remedy of the respondent was by direct bill of exceptions to this court, and assignments of error in that judgment, based solely upon the exceptions pendente lite, will not be entertained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2450.]

Error from Superior Court, Fulton County; W. D. Ellis, Judge.

Action by K. G. Hardin, administratrix, against E. L. Douglas and others. Verdict for plaintiff, motion for new trial granted, and plaintiff excepted pendente lite, and motion to dismiss petition granted, and plaintiff brings error. Writ of error dismissed.

T. B. Higdon, Lowndes Calhoun, and D. T. MacKinnon, all of Atlanta, for plaintiff in error. Rosser & Brandon, A. C. Broom, Geo. Westmoreland, and E. L. Douglas, all of Atlanta, for defendants in error.

HILL, J. Writ of error dismissed. All the Justices concur, except FISH, C. J., absent.

HILL v. STATE. (No. 304.)

(Supreme Court of Georgia. March 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 822(17) — INSTRUCTIONS — VOLUNTARY MANSLAUGHTER.

The judge in his general charge correctly instructed the jury on the law of voluntary manslaughter. The portion of the charge excepted to, when considered in connection with the entire charge, was not erroneous on the ground that it unduly restricted the jury and excluded from their consideration the phase of the case involving voluntary manslaughter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1990, 1994, 3158.]

2. SUFFICIENCY OF EVIDENCE.

The evidence was sufficient to support the verdict, and there was no error in refusing a new trial.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Walter Hill was convicted, and he brings error. Affirmed.

Edmund W. Martin, of Atlanta, for plaintiff in error. Eb. T. Williams, Sol. Gen., and A. L. Ivey, both of Atlanta, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 616)

WILLS VALLEY COAL & IRON CO. v.

LUMPKIN et al. (No. 308.)

(Supreme Court of Georgia. March 13, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1084(1) — REVISAL — INACCURATE INSTRUCTIONS — CORRECT VERDICT.

In several of the extracts from the charge to the jury which were criticized in the motion for a new trial there are palpable inaccuracies; but the instructions which the court gave upon the controlling issues in the case were substantially correct; and, there being evidence to support the verdict, this court will not interfere with the judgment of the court below refusing a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219.]

Error from Superior Court, Dade County; A. W. Flite, Judge.

Action between the Wills Valley Coal & Iron Company and T. J. Lumpkin and others. There was a judgment for the latter, and the former brings error. Affirmed.

Payne & Hale, of Chattanooga, Tenn., for plaintiff in error. T. J. Lumpkin, of Trenton, for defendants in error.

BECK, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 546)

ADAMSON v. ADAMSON. (No. 286.)
(Supreme Court of Georgia. Feb. 24, 1917.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR §977(4) — GROUNDS OF NEW TRIAL—REVERSAL.

This case falls within the rule that the first grant of a new trial, whether based upon general or special grounds, will not be disturbed by this court, unless the verdict was required by the evidence. *Watson v. Equitable Mortgage Co.*, 112 Ga. 253, 37 S. E. 363.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3863.]

2. NEW TRIAL §165—JUDGMENT—VACATION—NECESSITY OF MOTION IN WRITING.

The superior court is a court of record, and a motion to set aside a judgment must be in writing. The court did not err in refusing, on an oral motion, to vacate the judgment granting a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 334, 335.]

Error from Superior Court, Clayton County; C. W. Smith, Judge.

Action between M. E. Adamson and J. T. Adamson. Judgment for the latter, and the former brings error. Affirmed.

G. A. K. Stevens and J. W. & J. D. Humphries, all of Atlanta, for plaintiff in error. J. W. Culpepper, of Fayetteville, and O. J. Coogler, of Jonesboro, for defendant in error.

PER CURIAM. Judgment affirmed.
FISH, O. J., absent.

(146 Ga. 524)

NEWTON v. BOWEN et al. (No. 276.)
(Supreme Court of Georgia. Feb. 16, 1917.)

(*Syllabus by the Court.*)

1. VENDOR AND PURCHASER §107—PURCHASER'S RESCISSION OF CONTRACT—GROUNDS.

"The maker of promissory notes given for the purchase of land, of which such maker holds undisturbed possession under a bond from the vendor, conditioned to make to the former a good and sufficient title to the land upon payment of the notes, can neither voluntarily rescind the contract of purchase nor defeat the collection of the notes, upon the ground that the vendor has not in fact a good title to the land in question, without showing clearly that there is a paramount outstanding title against the vendor, and also proving fraud upon his part, or that he is insolvent, or a nonresident, or else proving other facts which would authorize equitable interference with the carrying out of the contract as made." *Black v. Walker*, 98 Ga. 31, 26 S. E. 477. This ruling has been frequently followed by this court, including, among others, the late case of *Henderson v. Fields*, 143 Ga. 547, 85 S. E. 741.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 188-192.]

2. PETITION—DEMURRER.

Applying the principle announced in the preceding note, the petition as originally drafted failed to set out a cause of action; and the proffered amendment, if allowed, would not have cured its fatal defects. Accordingly, it was not error to reject the offered amendment and to dismiss the case on general demurrer.

Error from Superior Court, Effingham County; W. W. Sheppard, Judge.

Action by Mrs. A. E. Newton against W. O. Bowen and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Paul E. Seabrook, of Savannah, for plaintiff in error. H. B. Strange, of Statesboro, for defendants in error.

FISH, O. J. Judgment affirmed. All the Justices concur.

(146 Ga. 619)

MALLORY v. STATE. (No. 806.)
(Supreme Court of Georgia. March 13, 1917.)

(*Syllabus by the Court.*)

VERDICT—EVIDENCE—SUFFICIENCY.

The evidence as to venue and upon all other issues involved in the case was sufficient to support the verdict. The exception to the omission to charge as complained of was without merit.

Error from Superior Court, Greene County; J. B. Park, Judge.

Jesse Mallory was convicted of crime, and he brings error. Affirmed.

Noel P. Park, of Greensboro, for plaintiff in error. Doyle Campbell, Sol. Gen., of Monticello, Clifford Walker, Atty. Gen., and M. C. Bennet, of Atlanta, for the State.

ATKINSON, J. Judgment affirmed. All the Justices concur, except **FISH, O. J.,** absent.

(146 Ga. 617)

KERCE v. KERCE. (No. 809.)
(Supreme Court of Georgia. March 13, 1917.)

(*Syllabus by the Court.*)

TEMPORARY ALIMONY AND ATTORNEY'S FEES—ALLOWANCE—PROPERTY.

Under all the evidence in the case, there was no abuse of discretion on the part of the trial judge in allowing the applicant temporary alimony and attorney's fees.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between J. W. Kerce and Sarah Kerce. There was a judgment for the latter, and the former brings error. Affirmed.

F. W. Copeland and W. B. Mebane, both of Rome, for plaintiff in error. John W. Bale and J. W. Ewing, both of Rome, for defendant in error.

BECK, J. Judgment affirmed. All the Justices concur, except **FISH, O. J.,** absent on account of sickness.

(146 Ga. 614)

PEOPLE'S BANK OF MANSFIELD v. INSURANCE CO. OF NORTH AMERICA. (No. 273.)
(Supreme Court of Georgia. Feb. 16, 1917.)

(*Syllabus by the Court.*)

1. INSURANCE §606(2)—PAYMENT TO CREDITOR—SUBROGATION.

Where one borrows money, and secures the payment thereof by deed, and insures the house

on the land conveyed by the deed, with loss payable to the creditor, and the insurance policy provides for subrogation pro tanto, and the house is burned, after which the insurance company pays the creditor the amount of the debt, taking a transfer of the debt and the security, the insurance company is subrogated to the rights of the grantee in the security deed to the extent of the debt paid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1509, 1515, 1516.]

2. INSURANCE — 383—WAIVER OF CONDITION OF POLICY—PAROL EVIDENCE.

Where, in violation of the terms of a fire insurance policy, the insured afterwards procured additional insurance, parol evidence is inadmissible to show that the company assented to the additional insurance and waived the provision in the policy prescribing the conditions thereof.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1018.]

3. DIRECTED VERDICT.

There was no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demanded a verdict for the claimant, and the court did not err in so directing.

Error from Superior Court, Newton County; C. W. Smith, Judge.

Proceeding on mortgage *fi. fas.* by the People's Bank of Mansfield against L. R. Sams, in which the Insurance Company of North America filed a claim to the property. Directed verdict for claimant, and the People's Bank of Mansfield excepts and brings error. Affirmed.

Two mortgage *fi. fas.* in favor of the People's Bank of Mansfield, Ga., and against L. R. Sams, were levied upon certain described real estate as the property of Sams. The Insurance Company of North America filed a claim to the property. Upon issue joined the case was tried, and at the conclusion of the evidence each party moved that the court direct a verdict in its favor. The court overruled the motion of the plaintiff, and sustained that of the claimant, whereupon the plaintiff excepted. It appeared from the evidence that on October 16, 1912, the Insurance Company of North America issued to Sams a policy of insurance upon his dwelling house for a term of five years. On November 14, 1912, Sams executed to the Calvert Mortgage & Deposit Company a loan deed to the property in dispute, upon which the dwelling was located, and received from that company a bond for title. On January 17, 1914, the dwelling was destroyed by fire. The insurance company paid the debt of the assured to the mortgage company. On the back of the security deed was the following transfer, dated December 12, 1914, and signed by the Calvert Mortgage Company:

"For value received, we hereby transfer, assign, and convey unto the Insurance Company of North America, of Philadelphia, Pa., its successors and assigns, all of our right, title, and interest, power and option in, to, and under the within deed to secure debt, as well as the land described therein, and the indebtedness secured thereby."

The provisions of the policy pertinent to this case are as follows:

"This policy is made and accepted subject to the following stipulation and condition printed on the back hereof, together with such other provision, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be subject of agreement endorsed hereon or added hereto, and as to such provision and condition no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured under so written or attached. This insurance is effected subject to the following conditions, which are hereby made warranties by the assured and are accepted as parts of this contract: No additional insurance permitted, unless the amount are inserted by agent of this company in the blank spaces following, viz.: \$ — on dwelling. This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

Attached to the insurance policy was what is known as the New York standard mortgage clause, which contained, among other provisions, the following:

"Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owners, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage with interest, and shall thereupon receive a full assignment and transfer of the mortgage and all such other securities; but no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of their claim."

The date of the mortgage clause attached to the policy was November 20, 1912.

Rogers & Knox, of Covington, for plaintiff in error. Smith, Hammond & Smith, of Atlanta, and C. C. King, of Covington, for defendant in error.

GILBERT, J. (after stating the facts as above). The assignments of error raise three issues: (1) Did the payment to the Calvert Mortgage Company by the Insurance Company of North America of the amount of the debt due the mortgage company by the assured subrogate the insurance company to the rights of the mortgage company; or was such payment simply an extinguishment of the debt due the mortgage company by the assured? (2) Was the plaintiff *fi. fa.*, under the terms of the policy, estopped from showing by parol evidence that the insurance company had assented to the procurement of additional insurance by the assured, and had

thus waived the provision making the policy void in such event? (3) The plaintiff in *fi. fa.* and the claimant each moved the court to direct a verdict in accord with their respective contentions. The court overruled the motion of the former, and directed a verdict for the latter. Was this erroneous?

[1] 1. The plaintiff in error contends, because the mortgagor, Sams, paid the insurance premium, that the policy was for the benefit of the assured, and therefore, when the insurance company paid to the mortgagee the amount due by Sams, his debt was extinguished; that, the debt being paid, the title to the property reverted to the assured, who was the defendant in *fi. fa.*, and therefore the property was subject to the debt of the People's Bank of Mansfield, Ga., the plaintiff in *fi. fa.* The case in this respect is one of first impression in this state, as is stated by counsel. In support of the above contention quite a number of authorities were cited as upholding the principle, because of their similarity in some respects. The leading case thus cited is *King v. State Mutual Fire Insurance Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 685, where a large number of cases are collated and discussed in the learned opinion of Chief Justice Shaw, and in the notes appended. Among these are all of the other cases cited by the plaintiff in error, and hence it would serve no useful purpose to enter upon a separate discussion of them here. In the opinion above mentioned the court said: "Nothing is so likely to mislead as a simile." Thus we find that the leading case and others cited by plaintiff in error, while similar, are not identical in the controlling feature of the insurance contract, and would be misleading unless distinguished.

The policy in the instant case contains a clause known as the New York standard mortgage clause. This clause in express terms provides for subrogation *pro tanto*, and states the conditions therefor. It also provides that no subrogation shall impair the rights of the lien creditor to whom loss may be payable to recover the full amount of this claim. The last-named provision simply leaves the matter of liability on the policy between the insurer and the insured in case of loss. The creditor is paid, and, according to the insurance contract is eliminated from the matter about which he has no further concern. All legal rights of the insurer and the insured remain unimpaired.

The cases cited by the plaintiff in error have reference to insurance policies containing no provision for subrogation, and hence the similarity falls on the vital point. In *May on Insurance* (4th Ed.) § 4576, the author states broadly:

"If an insurance company pay a mortgagee the loss, it is subrogated to the rights of the mortgagee, and may proceed against the mortgagor on the mortgage."

And further:

"An agreement in the policy that the insurance as to the interest of a mortgagee shall not be avoided by any act of the mortgagor, but that in case a loss occurs after action of the mortgagor which causes forfeiture as to himself the company shall, on paying the loss to the mortgagee, be subrogated to his rights under the mortgage, to the extent of such payment, and may pay the whole debt and require an assignment of the mortgage, is valid and will be sustained by the courts."

The clause in the policy involved in the present case seems to have been drawn expressly to meet by contract the decisions in some of the earlier cases. *Allen v. Watertown Fire Insurance Co.*, 132 Mass. 480. The trial court was correct in holding that the insurance company was subrogated to the rights of the Calvert Mortgage Company.

[2] 2. The policy of insurance being valid when issued, and the insured afterwards, in violation of the terms of the policy, having procured additional insurance without complying with the terms of the policy, the plaintiff in *fi. fa.* was estopped from showing by parol evidence that an unauthorized agent of the company had assented to the procurement of additional insurance, and had waived the provision in the policy, unless it was shown that the assured had complied with the terms of the policy in that respect. *Beasley v. Phoenix Insurance Co.*, 140 Ga. 128, 78 S. E. 722. Where a policy of fire insurance contained a stipulation that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance," and the insured at the time of the issuance of this policy had additional insurance in violation of the terms of the new policy, which fact was known to the agent issuing the new policy, the rule would be otherwise than as above stated. Limitations in an insurance policy upon the authority of the agent of the company to waive the conditions of the contract of insurance are to be treated as referring to waivers made subsequently to the issuance of the policy. *Mechanics', etc., Ins. Co. v. Mutual Real Estate, etc., Association*, 98 Ga. 262, 25 S. E. 457; *Johnson v. Aetna Ins. Co.*, 123 Ga. 404, 51 S. E. 339, 107 Am. St. Rep. 92. The court did not err in rejecting parol evidence offered for the purpose of showing that the agent of the company had waived the terms of the policy in respect to additional insurance.

[3] 3. There was no conflict in the evidence, and that introduced, with all reasonable deductions or inferences therefrom, demanded a verdict for the claimant. *Civil Code* (1910) § 5926. The court, therefore, did not err in so directing.

Judgment affirmed. All the Justices concur.

(146 Ga. 521)

MAY v. MAY. (No. 275.)

(Supreme Court of Georgia. Feb. 16, 1917.)

(Syllabus by the Court.)

NE EXEAT § 1, 14 — NATURE OF REMEDY — BOND.

The writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state; and where the principal in a ne exeat bond appears and defends the suit against him for divorce and alimony, and is within the jurisdiction of the court when the final judgment is rendered against him, subject to the processes of the court, such writ becomes functus officio, and upon motion the court should declare the bond canceled and the sureties therein discharged.

[Ed. Note.—For other cases, see *Ne Exeat*, Cent. Dig. §§ 1, 18.

For other definitions, see *Words and Phrases*, First and Second Series, *Ne Exeat*.]

Error from Superior Court, Chatham County: W. G. Charlton, Judge.

Petition by Mrs. Laura May against C. H. May, her husband, for alimony, custody of child, and for writ of ne exeat. Motion to dissolve and discharge bond given by defendant overruled, and defendant excepts and brings error. Reversed.

Mrs. Laura May filed a petition against her husband, C. H. May, for alimony for herself, for the custody of their child, and for the writ of ne exeat. A rule nisi was granted for a hearing as to temporary alimony, and the writ of ne exeat was ordered. In the order the amount of the bond was fixed:

"Conditioned to pay and abide by such judgment as may be rendered in favor of the plaintiff herein; and, in default of such bond, to be kept in your custody until said order is complied with, and by you be confined in the common jail of said county, without bail or mainprize, until the further order of the court."

The writ of ne exeat duly issued, and the defendant was arrested thereunder and confined in jail. To escape confinement a bond was executed, the condition of which was:

"If the said C. H. May, the defendant, shall be forthcoming to answer to the complainant's claim, or shall abide by the order and decree of the court, then this bond to be void; else, of full force and virtue."

The petitioner alleged that she prayed no restraint upon the defendant's leaving the jurisdiction of the court, but did pray that the court grant the state's writ of ne exeat and require a bond "conditioned to pay such judgment as may be rendered by the court in favor of the plaintiff." The prayer of the petition was in accord with the allegation just stated, and for a bond to "abide the judgment of this court, and in default thereof to be imprisoned." The defendant duly appeared and answered the petitioner's complaint, and defended the suit; and after a verdict and judgment awarding permanent alimony to the wife, the defendant made an oral motion before the judge to dissolve and discharge the bond as functus officio. The court overruled this motion, and the defendant excepted.

Hewlett, Dennis & Whitman, of Atlanta, for plaintiff in error. Twiggs & Gazan, of Savannah, for defendant in error.

GILBERT, J. (after stating the facts as above). This case is brought on a writ of error to the judgment of the trial court in overruling a motion to "dissolve and discharge the bond as functus officio" in a writ of ne exeat republica. This is the sole issue presented. As a remedy the writ of ne exeat regno is exceedingly old. It was first used in England some time between the reign of John and that of Edward I, as a high prerogative writ founded upon the duty of a subject to defend the king and his realm. In this country it has always been treated, not as a prerogative writ, but as an ordinary process which issues as of right in cases in which it is properly grantable; and it is called ne exeat republica. 29 Cyc. 383; 29 Harvard Law Review, 206. Lord Eldon said:

"How it happened that this great prerogative writ, intended by the laws for great political purposes and the safety of the country, came to be applied between subject and subject, I cannot conjecture." 1 J. & W. 405, 414; 29 Harvard Law Review, 207, note.

In both the English and the American courts, however, the uses of the writ are extended for the enforcement of equitable, pecuniary demands, within certain limitations. The writ of ne exeat in Georgia, though originating in England, is regulated by statute. It is in its nature a proceeding for equitable bail, and is an extraordinary remedy. While the path of its progress through the centuries has been well marked as to its applicability, the exact time when the bond becomes functus officio has not been so plainly marked. There have been cases where the discharge of bail was in issue, but these cases depended upon statutes and the facts of the particular case. Just when in this state bail are entitled, as a matter of law, to a discharge, is to be determined from the history of the remedy as applied in Georgia. Our statute has undergone some changes, as will be seen by an examination of the cases of *McGee v. McGee*, 8 Ga. 295, 52 Am. Dec. 407, and *Lamar v. Lamar*, 123 Ga. 827, 51 S. E. 763, 107 Am. St. Rep. 169, 3 Ann. Cas. 294. These two cases trace the development of the writ in Georgia, and leave nothing necessary for a clear understanding of its purposes, as far as they have gone. Our Civil Code, § 5459, provides:

"The writ of ne exeat issues to restrain a person from leaving the jurisdiction of the state."

It also provides when the writ may be granted. Since the right to grant the writ is not questioned in the case at bar, we will omit a discussion of that subject. In the case of *Freeman v. Freeman*, 143 Ga. 788, 85 S. E. 1038, the terms of the bond pursuant to the writ of ne exeat were, in the essential particulars, the same as in the present case. In the *Freeman Case* the bond was held to

be an appearance bond. When such is the case, it is not necessary that an exoneretur be entered upon the minutes of the court. The conditions of an appearance bond are fulfilled when the principal is present, or within the jurisdiction of the court, so that he may be subjected to the decree and judgments of the court. When the conditions are fulfilled by the principal, his bondsmen cannot be made to pay any part of the bond, since the liability does not attach until a breach occurs.

In *Pounds v. Pounds*, 136 Ga. 196, 71 S. E. 137, the condition of a similar bond was to "faithfully abide by, execute, and perform the judgment and decree of the court." The court held that it was not error to refuse to "enter judgment against the principal and sureties on the bond and to issue execution against them for the amount due on a judgment for alimony"; it not appearing that the principal breached the bond by leaving the jurisdiction. An inspection of the record in the office of the clerk of the Supreme Court shows that the principal in the bond was present in the court upon all the trials of said case and when all judgments were rendered. Afterwards it appeared that he was in arrears in his payments on account of temporary and permanent alimony, and had departed beyond the jurisdiction of the court. A motion was made to enter up judgment against the defendant and his sureties on the ne exeat. The court rendered a judgment denying the motion.

In the instant case the defendant appeared and answered the complaint, and also when a judgment was rendered against him. He thus placed himself in a position where other and final process could be served upon him, and the court could deal with him in any manner that the law authorized. This was what he was obligated to do in his bond; and, the bond having discharged all the offices for which it was intended, it should have been canceled as functus officio, and the sureties discharged. It was error, therefore, to overrule the motion made by the plaintiff in error.

We have reached the conclusion just stated upon broader grounds; but it should not be overlooked that the petition on which the writ was founded, in express terms, alleged that the petitioner prayed no restraint upon the defendant's leaving the jurisdiction of the court, but prayed that the court grant the state's writ of ne exeat, and require a bond "conditioned to pay such judgment as may be rendered by the court in favor of the plaintiff." The court on an ex parte hearing ordered the writ, and fixed the amount of the bond, "conditioned to pay and abide by such judgment as may be rendered in favor of the plaintiff herein," and in default thereof for the defendant to be imprisoned. The bond, however, actually made was in conformity

with the requirements of the statute. We think the order of the court, construed in the light of the petition, exceeded the authority conferred by the statute. The petition and the order of the court, construed as a whole, indicate that it was not the purpose of the court to confine the defendant to the jurisdiction of the court, but to provide by means process a means of enforcing the payment of the final judgment in favor of the plaintiff in her suit for alimony, should she prevail. Judgment reversed. All the Justices concur.

(146 Ga. 606)

LANDIS v. SANNER. (No. 302.)

(Supreme Court of Georgia. March 1, 1917.)

*(Syllabus by the Court.)*1. EXECUTION \Leftrightarrow 144 — DORMANT EXECUTION — STATUTE — DISMISSAL OF LEVY.

Under the evidence in this case, the execution which the plaintiff was attempting to enforce was dormant, not having been kept in life under the provisions of section 4355 of the Code of 1910; and the court did not err in dismissing the levy upon motion of the claimant.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 363-375.]

*(Additional Syllabus by Editorial Staff.)*2. DIVORCE \Leftrightarrow 256 — JUDGMENT — LIEN — HOMESTEAD — INTEREST.

Where a fi. fa. was based on a judgment rendered in a suit for divorce and alimony, defendant in fi. fa. whose father, owning a homestead property, had died prior to the judgment, did not have such an interest in the homestead property that it could be made the subject of a general or special lien at the time of filing of libel for divorce, or such interest as made it a proper subject for schedule in the libel, as defendant's reversionary interest was subject to disposition which his father might make by deed or will.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 725, 726.]

3. DIVORCE \Leftrightarrow 256 — JUDGMENT FOR ALIMONY — LIEN.

A money judgment for alimony based on a final verdict of a jury in a divorce suit would give plaintiff a judgment lien against any property which defendant owned at date of the judgment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 725, 726.]

4. DIVORCE \Leftrightarrow 253 — ALIMONY — SCHEDULED PROPERTY — DISPOSITION.

Where property belonging to defendant at the commencement of a divorce suit against him was scheduled then, or pending the trial, the jury under the express provisions of Code 1910, § 2956, in passing on the question of alimony could in their final verdict specify the disposition to be made of the property.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 716, 717.]

5. DIVORCE \Leftrightarrow 253 — PROPERTY OF PARTIES — "SCHEDULED PROPERTY."

The expression "scheduled property," as used in Code 1910, § 2956, providing that verdicts of jury shall specify the disposition to be made of scheduled property, refers to property scheduled in a divorce suit in accordance with section 2954, which refers only to property owned by

the defendant at the time of the filing of the libel for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 716, 717.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Execution proceeding by A. C. Landis against Mrs. M. A. Sanner, in which claim was interposed. Motion by claimant to dismiss levy sustained, and plaintiff brings error. Affirmed.

W. H. Terrell and Anderson & Rountree, all of Atlanta, for plaintiff in error. Candler, Thomson & Hirsch, of Atlanta, for defendant in error.

BECK, J. This case grows out of an issue made by levy upon land and the interposition of a claim thereto. Motion was made by the claimant to dismiss the levy on the ground that the execution was dormant, and the judge sustained this motion. To this judgment the plaintiff excepted.

[1] The court properly held the *fi. fa.* to be dormant, and therefore ruled correctly in dismissing the levy. The *fi. fa.* was based upon a judgment rendered on the 19th day of October, 1897, in a suit for divorce and alimony. The decree rendered in that case, after awarding the custody of the minor child of the marriage to the libellant, a certain sum of money as permanent alimony, another sum for the support of the child during minority, and another sum as attorney's fees, provides that:

"The sums here found shall be a special lien on the property described in the petition as the property of said defendant, and on the interest of the defendant in the estate of Solomon Landis, deceased, both being subject to the homestead estate."

[2] The *fi. fa.* follows the decree. The property levied upon formerly belonged to the father of the defendant in *fi. fa.*, Solomon Landis, and in 1869 it was set apart as a homestead to Solomon Landis as the head of a family consisting of his wife, Mary A. Landis, and his minor children, Martha, Mary, and Thomas M. The last-named beneficiary is the defendant in *fi. fa.* The homestead property was not scheduled in the divorce suit when it was first filed, but was scheduled in an amendment to the libel for divorce. Solomon Landis died prior to October 19, 1897. The homestead expired in 1915; the last beneficiary died at that time, and shortly thereafter the *fi. fa.* was levied upon the property in controversy.

[3-5] The defendant in *fi. fa.* did not have such an interest in the property covered by the homestead that it could be made the subject of a general judgment lien or a special lien at the time of the filing of the libel for divorce; he did not have such interest in that property as made it a proper subject for schedule. So far as any reversionary in-

terest in the property was concerned, that was subject to any disposition which the head of the family, Solomon Landis, might make of it by deed or by will. Inasmuch as the property could not have been scheduled at the time of filing the libel for divorce, we do not think the court could render a judgment or decree in the divorce suit that would be a special lien upon this property, or that the verdict and the decree could make any disposition of the property under the provisions of section 2956 of the Civil Code. Of course, a money judgment for alimony, like the one in the present case, based upon a final verdict of a jury in a divorce suit, would give the plaintiff a judgment lien against any property which the defendant might own at the date of the judgment. And where property belonging to the defendant at the time of the commencement of the divorce suit was scheduled then, or, under the judgment of the court, was scheduled pending the trial, in passing upon the question of alimony the jury in their final verdict could specify the "disposition to be made of the scheduled property." But this expression, "scheduled property," as used in section 2956, has reference, as is indicated above, to property scheduled in accordance with the provisions of section 2954, and that has reference only to property owned by the defendant at the time of the filing of the libel for divorce. This construction of section 2954 and the two succeeding sections may be a very strict one, but it is proper to give them a strict construction; and the effect of these sections should not be extended beyond their terms by construction. *Singleton v. Close*, 130 Ga. 716, 61 S. E. 722. The creation of a special lien in the judgment above referred to was beyond the jurisdiction of the court, and such judgment did not have the effect of creating a special lien according to the purport of the terms used in the verdict and decree. Consequently, the verdict and judgment in the case was only a common-law judgment; this is certainly true as to strangers to the suit. The *fi. fa.* based upon this judgment was dated October 21, 1897, and was entered on Fulton superior court execution docket and general execution docket, on October 21, 1897. It had on it an entry of levy on the land described in the decree, the levy being dated November 12, 1897; also, a levy on the same property dated September 11, 1915. Both levies recited notification to tenant in possession. The judgment in this case amounting to nothing more than an ordinary common-law judgment, the *fi. fa.* based upon it, not having been kept in life in accordance with the provisions of section 4355 of the Code of 1910, was dormant, and the court did not err in so ruling.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 600)

WADE, Sheriff, v. TURNER et al. (No. 298.)
(Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

CONSTITUTIONAL LAW §284(1) — DUE PROCESS OF LAW—TAX EQUALIZATION ACT.

The sixth section of the tax equalization act (Acts 1913, p. 123), requires an examination of the returns of the taxpayers of the county by the board of county tax assessors, and it is made their duty to assess and fix the just and fair valuation to be placed upon the property to be returned. When any change is made in the valuation of the property of a taxpayer as fixed by him in his return, such taxpayer must be given notice of such change. If the taxpayer is dissatisfied, he may demand an arbitration and have a hearing before arbitrators as provided in the act. These arbitrators are required to render their decision in ten days, or else the valuation as fixed by the county board shall stand affirmed and shall be binding in the premises. In *Vestel v. Edwards*, 143 Ga. 368, 85 S. E. 187, section 6 of the act mentioned above was attacked as violative of the due process clause of the Constitution, for the reason, among others: "That the act requires the arbitration to be made within ten days from the time of the selection of the arbitrator of the tax-assessors, without making any allowance for inability to agree upon a third assessor or arbitrator, or adequate time for the examination of properties and the ascertainment of their values, or for any other cause that might interfere to render such arbitration impossible within the time specified in the act." It was held that this part of the act was not obnoxious to the due process clause of the Constitution of this state or of the United States. The principle of the decision announced in that case is controlling, and it was erroneous to grant the injunction.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 896.]

Error from Superior Court, Brooks County; W. E. Thomas, Judge.

Action for injunction by H. Turner and others, executors, against J. P. Wade, Sheriff. Judgment for plaintiffs, and defendant brings error. Reversed.

Bennet & Harrell, of Quitman, for plaintiff in error. Little, Powell, Smith & Goldstein, of Atlanta, for defendants in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 619)

VINCENT v. STATE. (No. 305.)
(Supreme Court of Georgia. March 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §814(17) — TRIAL — INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

Where the state offers direct and circumstantial evidence that the defendant committed the crime, and where one of the contentions of the defendant was that another person committed the crime, and he offers circumstantial evidence tending to support such contention, it is not error to omit to charge on the rule respecting circumstantial evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1883, 1979.]

2. SUFFICIENCY OF EVIDENCE.

The evidence supports the verdict.

Error from Superior Court, Oconee County; C. H. Brand, Judge.

Falvin Vincent was convicted of crime, and he brings error. Affirmed.

See, also, 145 Ga. 293, 89 S. E. 203.

Wolver M. Smith and Thomas & Thomas, all of Athens, and R. R. Burger, of Watkinsville, for plaintiff in error. John B. Gamble, Sol. Gen., of Athens, Clifford Walker, Atty. Gen., and Mark Bolding, of Atlanta, for the State.

HILL, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 569)

McKINNEY v. POWELL. (No. 289.)
(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS §438(5) — SUIT—NECESSARY PARTIES—LEGATEE.

A testator devised to his executors his estate charged with the payment of an annuity and special legacies, with remainder to certain legatees. His widow was an annuitant under the will. She also claimed a large amount from the estate by reason of the testator having used her property in the accumulation of his estate, and brought suit against the executors of her husband to recover that amount. This court held her petition set out a cause of action. *Rucker v. Maddox*, 114 Ga. 890, 41 S. E. 68. In that litigation a settlement was effected, by the terms of which she accepted certain property in settlement of her claim and her annuity, and this settlement was duly approved and made the decree of the court. Pursuant to the decree the executors conveyed by deed to the widow of the testator certain property which by the terms of the decree was to be taken by the widow in full settlement of all her claims, as annuitant or otherwise, in the estate of her husband. Afterwards, upon the death of the widow, a legatee under the will of her husband brought suit against the administrator cum testamento annexo on the estate of the widow, to recover one-twentieth of the property conveyed to her in virtue of the decree, because of the devise to him of one-twentieth interest in the estate of the widow's husband, subject to the charges and annuities placed thereon in his will. *Held*:

That the decree in the case between the widow and the executor of her deceased husband was not void because the legatee who had an equitable interest in the property of the widow's husband was not a party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1772.]

2. EXECUTORS AND ADMINISTRATORS §438 (11), 453(4)—ACTION—DECREE—PARTIES.

That such decree transferred the property therein decreed to the widow, unless set aside for fraud; and in such a case the personal representative of the estate is a necessary party.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1784, 1897-1908.]

3. DEMURRER.

The demurrer should have been sustained.

4. OTHER QUESTIONS.

Under this view it is unnecessary to decide other questions in the record.

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Suit by J. J. Powell against C. D. McKinney, administrator cum testamento an-

nexo. Judgment for plaintiff, and defendant brings error. Reversed.

W. M. Johnson, of Gainesville, and Green, Tilson & McKinney, of Atlanta, for plaintiff in error. H. H. Dean, of Gainesville, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 535)

FLYNT v. COLLEY et al. (No. 284.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

CANCELLATION OF INSTRUMENTS \Leftrightarrow 50—CONSPIRACY TO DEFRAUD—EVIDENCE.

The evidence in this case, taken as a whole, including the signing of the will as well as the deeds, was sufficient to carry the case to the jury to determine whether or not there was a conspiracy, as alleged, on the part of the defendants to defraud the plaintiff of her property. The court erred in granting a nonsuit.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 105, 106.]

Exceptions from Superior Court, Laurens County; J. L. Kent, Judge.

Suit in equity by Mary M. Colley, continued after her death by R. D. Flynt, her administrator, against W. F. Colley and wife and Frank J. Colley and wife. Settled as to W. F. Colley and wife, and judgment of nonsuit granted on motion of the other defendants, and plaintiff excepts. Reversed.

Ira S. Chappell and Davis & New, all of Dublin, for plaintiff. W. C. Davis, of Dublin, for defendants.

PER CURIAM. Mary M. Colley filed her equitable petition against W. F. Colley, his wife, Elizabeth H. Colley, and Frank J. Colley and his wife, Minnie L. Colley, seeking injunction and cancellation of certain deeds. Subsequently to the filing of the suit the plaintiff died, and her administrator, R. D. Flynt, was made a party plaintiff in her stead. Before the trial the case as to W. F. Colley and his wife was settled. Upon the trial, after the plaintiff had introduced evidence and closed, the defendants moved for a nonsuit, which was granted, and the plaintiff excepted.

The evidence was in substance as follows: The plaintiff was a feeble and illiterate woman of 70-odd years of age, and unable to sign her name. She was possessed in her own right of two city lots, with houses thereon, in one of which she resided. The other she rented, and lived upon that income as her only support. Her husband died, leaving three children by a former marriage. The plaintiff has no children. Soon after the death of her husband, one of her stepsons, without any knowledge on the part of the plaintiff, had a will prepared for her to sign,

and brought witnesses, and, after some changes, induced her to sign it, leaving her property involved in this suit to her stepsons, one of whom is a defendant in this case. However, it appears that there is no claim made under this will. Shortly afterwards, the other stepson called her into his office and requested her to sign a paper, having secured the necessary subscribing witnesses, one being a notary public. The son stated in the presence of the plaintiff that the paper she was to sign was a power of attorney for the purpose of authorizing him to transact her business on account of her age and feeble condition. She signed two deeds conveying one house and lot to the wife of one of the stepsons, and the other house and lot to the wife of the other stepson. One stepson moved into the house occupied by the plaintiff, and the other stepson demanded rent of the tenant occupying the other house. The plaintiff had no knowledge of having signed deeds to her property until she was notified by the tenant that he had been requested to pay the rent by the grantee in the deed covering the premises. The plaintiff said, "If I had known they were deeds, I would not have signed them." The plaintiff then filed an equitable petition to have these deeds set aside, on account of fraud. On cross-examination the plaintiff said, among other things:

"Frank Colley nor his wife ever did anything to induce me to sign any will or any deed. They never used any fraud to get me to do it. I know of no conspiracy entered into to get me to do it. It was an advantage over me. I think they had something to do with it."

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(173 N. C. 100)

LEWIS et al. v. MAY et al. (No. 177.)

(Supreme Court of North Carolina. March 7, 1917.)

1. CONTRACTS \Leftrightarrow 147(3)—CONSTRUCTION—INTENTION OF PARTIES—CONSTRUING ENTIRE INSTRUMENT.

The intent of the parties to a written contract should be gathered from the entire instrument, giving each part its legitimate effect.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743.]

2. DRAINS \Leftrightarrow 49—CONTRACTS—COMPENSATION—DRAINAGE ENGINEERING SERVICES.

Where engineers contracted to perform drainage services for a sum payable from drainage bonds, but for a smaller amount, for services including their preliminary report, payable from the drainage petitioners' bond if the proceedings were dismissed, the larger sum cannot be recovered, although services additional to the preliminary report were performed before dismissal.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 59.]

3. APPEAL AND ERROR \Leftrightarrow 878(1)—NECESSITY OF DECISION.

Where drainage engineers secured a judgment, including the reasonable value for serv-

ices performed after a preliminary report, and the opposing parties did not appeal, the correctness of including such item need not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573, 3574.]

4. APPEAL AND ERROR \S 1022(2)—REFEREE'S FINDINGS — CONCLUSIVENESS AFTER APPROVAL.

A referee's findings of fact, confirmed by the court below upon some evidence, will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015.]

Appeal from Superior Court, Pitt County; Whedbee, Judge.

Special drainage proceedings by B. M. Lewis and others against Ida May and others. From a judgment against the plaintiffs and their sureties, the Brett Engineering & Contracting Company appeals. Affirmed.

The proceeding was brought for the purpose of establishing a drainage district, and on April 7, 1914, a petition was filed before the clerk for the establishment of such a district along Little Contentnea creek. On July 13, 1914, a petition was filed by certain landowners, asking that additional territory along Middle Swamp be added, and on July 2, 1914, a petition was filed, asking that additional territory along Sandy run be included. Process has been duly served on all the defendants. At the hearing of the original petition, May 12, 1914, an order was entered appointing viewers, among whom was A. S. Goss, a civil engineer and drainage engineer. A like order was entered upon the filing of the petitions for the inclusion of additional territory. From time to time the viewers filed requests for extensions of time under the statute, and finally the preliminary report was filed, as to the whole territory described in the various petitions, on the 22d day of August, 1914, and proper orders were made for a hearing thereon, proper notices given, and affidavits made as to the giving of the notices; protests of various parties were heard, and on the 12th day of September, 1914, the date fixed therefor, the preliminary report was heard and passed on by the clerk, and, after finding the facts as required by the statute, Pitt County drainage district No. 1, was established, and under another order, entered on the same date, the preliminary report was referred back to the board of viewers to make to the court a complete report, maps or surveys, plans, specifications, etc., on or before the 12th day of October, 1914. The record will disclose that the proceedings were correctly and properly conducted, and in accordance with the statute. On the 12th day of October, 1914, the final report of the board of viewers was filed in accordance with the statute, and attached thereto were a schedule of the landowners, acreage, classifications, etc., and maps and profiles, as required by the statute.

Objections were filed by persons included

in the district, and heard, as appears from the record, none of which however has anything to do with this controversy. The hearing of the final report was continued from time to time by regular orders entered in the cause, all of which appear in the record, until the 26th day of January, 1915, when a final judgment was entered in the case, dismissing the same. Thereafter the Brett Engineering & Contracting Company, as assignee of A. S. Goss, filed its claim before the clerk of the court for the sum of \$3,350 for services, and moved that the petitioners and their bondsmen be taxed with said amount. To this motion the petitioners filed an answer, and the clerk of the court, on April 30, 1915, signed a judgment denying the motion and dismissing same, to which the Brett Engineering & Contracting Company excepted and appealed. At the August term, 1915, of the superior court, Judge Bond presiding, upon motion of the Brett Engineering & Contracting Company, the judgment of the clerk upon the motion of the Engineering Company, was reversed, and all matters in controversy referred to J. D. Grimes; this reference being ordered on motion of said company. Mr. Grimes heard the matter and rendered his report, stating his findings of fact and conclusions of law, which was confirmed by Judge Whedbee, at May term, 1916, of the superior court, after overruling exceptions to said report filed by the Brett Engineering & Contracting Company.

As the decision of the case turns upon the construction of the contract between the Brett Engineering Company and B. M. Lewis and McD. Horton, and a similar contract between that company and R. L. Davis, it will be necessary to a proper understanding of the matter that one of those contracts, with identical terms, be set forth, as follows:

"For that portion of the Pitt County drainage district lying along Little Contentnea creek and extending from about Beaver Dam hole to about Adam's Bridge, we propose to act as engineer, make all necessary surveys, prepare plans, estimates, etc., for the sum of fifteen hundred (\$1,500) dollars; this \$1,500 to be paid out of the first proceeds from the sale. In case the action to establish the drainage district is dismissed by the clerk of the court, our fee for the services rendered, up to and including the preliminary report, will be \$400, to be paid in cash out of the bond of the petitioners, within 30 days after dismissal by the court."

The proposal of the Engineering Company was accepted by the parties, B. M. Lewis and McD. Horton, and constitutes their contract, and the other proposal was likewise accepted by R. L. Davis, and this forms his contract. The reference was ordered at the request of the Brett Engineering Company, with the consent of the other parties, and provides that the findings of fact shall be conclusive. The court entered judgment, upon the referee's report, against the plaintiffs and their sureties for the sums set forth therein, and the Brett Engineering Company, claiming

that it is entitled to a larger amount under its contracts, appealed to this court.

H. G. Connor, Jr., of Wilson, and Skinner & Cooper, of Greenville, for appellant. F. G. James & Son, of Greenville, for appellees.

WALKER, J. (after stating the facts as above). [1-3] The decisive question in this case is: What is the meaning of the contract? The object of all rules of interpretation is to arrive at the intention of the parties, and where the terms of the agreement have been reduced to writing, so that there is no dispute as to what they are, and they are so framed as to admit of construction, the intent must be gathered from a consideration of the entire instrument; the problem being, not what any part of the contract, taken separately, may mean, but what is the meaning of the contract when every part is given its legitimate effect? *Railroad Co. v. Railroad Co.*, 147 N. C. 382, 61 S. E. 185, 23 L. R. A. (N. S.) 223, 125 Am. St. Rep. 550, 15 Ann. Cas. 363; *Simmons v. Groom*, 167 N. C. 271, 83 S. E. 471; *Spencer v. Jones*, 168 N. C. 291, 84 S. E. 261. We do not think that there is other than one meaning to be deduced from the words of this contract, which is that it was intended to provide for two contingencies. The first was that the proceeding should be conducted to its end, as contemplated by the statute, so that the drainage district would be fully established and the proceeding terminated in a final adjudication, or decree of confirmation, upon which depended the issuance of the bonds. If this event occurred, the Engineering Company should receive \$1,500 for its services, under the Lewis and Horton contract and \$900 under the R. L. Davis contract. The second contingency was that the proceeding might stop short of a final decree, by a dismissal, in which event it was provided that petitioners and their sureties would be bound to pay the sum of \$400 (or \$250 by the other contract) within the time specified, for services rendered up to and including the preliminary report. The Engineering Company assumed the risk of the proceeding being stopped before reaching its final stage, when the bonds would be issued. It seems evidently to have been the purpose that the \$1,500 and \$900 should be paid out of "the first proceeds from the sale of drainage bonds," and not by the petitioners.

The learned counsel, who argued the case so well in this court for the Engineering Company, suggested that the requirement that the first payment should come out of the bonds is not conclusive as to the intent, and this may be so, and we are so treating it; but it is the strongest kind of evidence as to what was the true meaning of the parties. The proposal was that the company, or its assignor, would do the whole work for the specified amount and rely for compensation on the proceeds of the sale of

bonds, and this offer was accepted by the petitioners. This part of the contract was clearly intended to exclude the idea of any personal responsibility of the petitioners for so large an amount, and there was no good reason why they should assume it. If the event—upon the happening of which it was provided that the money should be paid, and in a particular way—had taken place, the money would have been paid out of the fund designated for that purpose. But it failed to occur, because the proceedings were dismissed, and the other event had happened, which fixed the liability of the petitioners at the smaller sums, or \$400 and \$250. If the enterprise succeeded throughout as designed at the beginning of it, the district would take the burden of paying for the work out of its bonds; but if it failed, by reason of a dismissal and before the final conclusion of the matter, the petitioners thought it fair, as there was no other way of payment, that they should undertake to pay for the preliminary work, and this is all of their obligation, in this view of the case. Whether the petitioners were liable for the reasonable value of the services performed after the preliminary report was filed we need not decide, as the company has received a judgment upon the theory that it was so entitled to recover, and the petitioners have not appealed.

The terms of the contract are broadly stated, viz. "In case the action to establish the drainage district is dismissed by the clerk of the court," the \$400 (and \$250 in the second contract) should be paid "out of the bond of the petitioners," while in the other or first event named the \$1,500 (and \$900 in the other contract) should be paid "out of the first proceeds from the sale of drainage bonds." When we compare, or contrast, the two clauses, it appears clearly, we think, that the method of payment was intended to indicate who should be liable for the different amounts. The use of the word "dismissed," without qualification and in a general sense, shows that dismissal of any kind was intended. In other words, if the proceedings failed of their purpose, and were dismissed for any cause, the petitioners should pay \$400 (and \$250) and their bondsmen should be liable with them. The proceedings were dismissed, and there has been no reversal of that judgment. If it was erroneous in law, it could be attacked only by an appeal; and, if irregularly entered, by a motion to set it aside. It is not contended that it was void, so that it can be assailed collaterally. When the clerk denied the motion of the Engineering Company to tax petitioners and their sureties with the amount of their claim (\$3,350), his judgment was reversed, and the order of reference made. This had nothing to do with the prior dismissal of the proceedings, but supervened, and was based upon the judgment of dismissal.

[4] The appellant has excepted to the ref.

eree's findings of fact, but they have been approved and confirmed by the judge upon evidence, and we do not, in such case, review the finding. *Cooper v. Middleton*, 94 N. C. 86; *Harris v. Smith*, 144 N. C. 440. 57 S. E. 122; *McCullers v. Cheatham*, 163 N. C. 63, 79 S. E. 306. Besides, the order of reference was by consent and at appellant's request, and it was stated therein that the findings of fact should be conclusive.

In discussing the case, we have not referred specifically to the contract for the drainage of District No. 1 along Middle Swamp; but the contracts are all alike in substance, and we selected the two contracts first mentioned in the case. The same reasoning extends to all of them, and our conclusion as to each is therefore the same.

There are numerous exceptions, and assignments of error; but we need not refer to any but those already considered. The main question in the case involves the construction of the contract, and a decision as to this sufficiently covers the case. We have kept within the limits of the appellant's brief, as we are required to do by the rule of this court. The statutes relating to the subject of drainage have been kept held constantly in view, but we do not think that any of their provisions should induce us to give a different meaning to the contract.

Affirmed.

(173 N. C. 93)

ALLEN v. GOODING. (No. 171.)

(Supreme Court of North Carolina. March 7, 1917.)

1. LIMITATION OF ACTIONS §103(1)—COMPUTATION OF TIME.

Action upon contract of partners to acquire land, under which the land was taken in the name of one partner, who refused to convey to the other, held not barred by the statute of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506, 509.]

2. TRUSTS §92½ — PAROL TRUSTS — ENFORCEABILITY—TRUST IN LANDS.

A parol trust to convey lands, created under a partnership agreement by which one partner secured title in the other's name and the other agreed to give him a half interest, is enforceable.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141.]

3. TRUSTS §92½ — PAROL TRUSTS — ENFORCEABILITY—TRUST IN LANDS.

While, after delivery of deed, the grantor cannot allege an oral trust against the grantee, the rule does not apply as against one member of a partnership, who under agreement with the other secured deeds to land in the latter's name.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 141.]

Appeal from Superior Court, Carteret County; Lyon, Judge.

Suit by W. D. Allen against T. T. Gooding. Decree for plaintiff, and defendant appeals. No error.

Moore & Dunn, of Newbern, for appellant. D. L. Ward, of Newbern, Abernethy & Davis, of Beaufort, and R. E. Whitehurst, of Newbern, for appellee.

CLARK, C. J. The plaintiff and defendant had been engaged for some time in business, trading as partners, when in 1910 or 1911 the plaintiff informed the defendant that he had discovered some property owned by non-residents. Defendant said to the plaintiff that he had already tried to buy it, but had been unable to do so. Finally they agreed, after discussion, to buy it jointly, and the plaintiff was to have one-half interest in the land if he would procure the title thereto, and pursuant to this agreement the plaintiff at his own cost went to Alabama in May, 1911, and located the heirs for the two tracts of land. He ascertained at what price the land could be bought, but, not having sufficient money, he returned to this state and reported to the defendant, giving him the family history, showing the heirs to whom the property belonged. It was then agreed that they would buy the Abner Neal tract and the Jones or Borden tract, and in pursuance of such agreement the plaintiff returned to Alabama in June, 1911. Just before going he received from the defendant two deeds, to be executed by the Borden heirs, in which the defendant alone was named as grantee, but with them was a note from the defendant saying: "You take the deeds in my name, and I will deed you your half when you come back home." With these deeds and letter there was a check for \$200, in part payment of expenses, and the purchase price. Pursuant to the agreement the plaintiff went to Alabama and had these deeds executed, and further in pursuance of the understanding and agreement that the defendant would convey plaintiff's one-half interest secured options on the other tract of land, as he alleges.

On his return the plaintiff delivered to the defendant the deeds and the options. Later, finding that the deeds executed upon these options had been taken in the defendant's name alone, he spoke to the defendant of the matter, who stated to him that he would make him a deed for his one-half interest as soon as the pending lawsuit between the Defiance Box Company and himself had been determined, and to all subsequent requests that the defendant should execute a conveyance of one-half the land the defendant had always replied: "Wait until the suit with the Defiance Box Company is settled." That suit was settled in January, 1915, and the defendant then said that he would make the conveyance as soon as the controversy with the Roper Lumber Company and himself was settled.

After this and other controversies were settled, the defendant still delaying to make

the agreed conveyance, the plaintiff brought this action to enforce the trust, and to compel defendant to execute conveyance for one-half interest in the land, as per the written agreement as to the Borden land above referred to and the oral agreement as to the other tract. It is in evidence that the consideration agreed upon had been paid, and that the plaintiff had spent time and trouble in procuring the deeds and options under the agreement. The defendant disputed the allegations of fact to some extent, but the jury have found that:

"The defendant agreed with the plaintiff to join with him in buying the lands described in the complaint for their joint benefit and to take the title to the same, one-half interest therein each for the plaintiff and defendant, as alleged in the complaint, but that the defendant thereafter caused the title to said land to be made to himself, and refused to convey any part thereof to the plaintiff."

This was a matter of fact upon the evidence.

[1] The jury also found, under the instructions of the court, that the plaintiff's cause of action was not barred by the statute of limitations, which was correct.

[2] There is scarcely need for any discussion as to the Borden land, as to which the written agreement was in testimony; but the defendant earnestly insists that he cannot be forced to execute the trust as to the Abner Neal tract. It is well settled in this state that such trust is enforceable, even though there was no writing concerning such agreement, and there are facts and circumstances here which justified the jury in finding with the plaintiff as to the oral agreement in regard to the Neal tract. *Owens v. Williams*, 130 N. C. 168, 41 S. E. 93; *Cobb v. Edwards*, 117 N. C. 252, 23 S. E. 241; *Shields v. Whitaker*, 82 N. C. 522.

In *Avery v. Stewart*, 138 N. C. 435, 48 S. E. 778, 68 L. R. A. 776, Walker, J., says:

"More accurately considered, constructive trusts have no element of fraud in them; but the court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and of working out the equity of the complainant. The party guilty of the fraud is said in such cases to be a trustee *ex maleficio*, and will be decreed to hold the legal title for the use and benefit of the injured party, and to convey the same when necessary for his protection, as when one has acquired the legal title to property by unfair means. The jurisdiction is exercised distinctly upon the ground of the fraud practiced by the party against whom relief is prayed"—citing *Bispham, Equity*, 125, 126, 143; *Wood v. Cherry*, 73 N. O. 110.

Such trusts are, of course, not affected by the statute of frauds. *Gorrell v. Alsbaugh*, 120 N. C. 362, 27 S. E. 85.

"Where one party has by his promise to buy, hold, or dispose of real property for the benefit of another induced action or forbearance by reliance upon such promise, it would be a fraud that the promise should not be enforced." *Bispham on Equity*, § 218.

In *Glass v. Hulbert*, 102 Mass. 39, 3 Am. Rep. 413, it is said:

"Where a party acquires property by conveyance or devise, secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another, a trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself."

[3] The whole subject has, however, been too fully discussed by Mr. Justice Walker in *Avery v. Stewart*, *supra*, and the principles are too well settled, to need any further consideration by us. But the defendant insists, however, strenuously that as to the Neal tract of land he cannot be decreed to execute title to the plaintiff for one-half under his oral trust, as found by the jury, because it was held in *Gaylord v. Gaylord*, 150 N. C. 222, 63 S. E. 1028, that when a deed has been executed the grantor cannot allege that there was an oral trust which he could enforce against the trustee, because this would be to contradict the deed. This principle is well settled, and has been repeatedly cited and approved. *Trust Co. v. Sterchie*, 169 N. C. 21, 85 S. E. 40, and cases there cited; *Campbell v. Sigmon*, 170 N. C. 351, 87 S. E. 116. It has no application, however, in this case. Here the title was not in the plaintiff, but in pursuance of the agreement between himself and the defendant, and by his efforts in procuring the owners to give options and deeds, and upon payment of the money and rendition of services, the deeds and options were executed to the defendant upon an agreement that he would execute conveyance for one-half thereof to the plaintiff. This is not annexing a trust to a conveyance by the plaintiff to the defendant, but the procuring of a title from the owners of the land to the defendant upon an agreement that he would hold the same jointly in trust for himself and the plaintiff. There was testimony of this agreement, and of the repeated promises of the defendant from time to time to execute the trust by making the conveyance as soon as pending litigation was terminated.

It is true that the "options" (for the Neal land) were taken in the name of the plaintiff, and were assigned by him to the defendant; but the deeds therefor were executed direct to the defendant by the owners, and, as the jury find, in pursuance of the oral agreement between the plaintiff and the defendant. The defendant well says in his brief: "The plaintiff never had title to the land in controversy." The doctrine in *Gaylord v. Gaylord*, *supra*, could therefore have no application.

The jury have found the facts in accordance with the plaintiff's contention, and in accordance with the well-settled principles of law the court decreed that the defendant should execute the trust by conveying one-half interest in both tracts to the plaintiff.

It is not necessary to discuss all the exceptions in detail.

After considering all the exceptions, we find no error.

(173 N. C. 85)

GINN et al. v. EDMUNDSON. (No. 112.)
(Supreme Court of North Carolina. March 7, 1917.)

1. HUSBAND AND WIFE \S 14(10)—ENTIRETY ESTATE—CONVEYANCE BY SURVIVOR.

Where a husband and wife owned land by the entireties, the wife can, after death of husband, make a valid and binding agreement for the sale of all of the same, and convey good title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. \S 82-84.]

2. WILLS \S 100—"JOINT"—"CONJOINT"—"MUTUAL WILL" OR "RECIPROCAL WILL."

A joint or conjoint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 238.]

For other definitions, see Words and Phrases, First and Second Series, Conjoint; Joint Will; Mutual Will; Reciprocal Will.]

3. WILLS \S 208—JOINT OR MUTUAL WILLS—VALIDITY.

Joint or mutual wills are valid, and may be admitted to probate like any other will, unless revoked.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 516.]

4. WILLS \S 188—JOINT OR CONJOINT WILLS—REVOCATION.

A joint or conjoint will, made by husband and wife devising land owned by them by the entireties, may, in the absence of contract based on consideration, be revoked by wife after death of husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 449.]

Appeal from Superior Court, Wayne County; Cox, Judge.

Action by Mary J. Ginn and others against B. G. Edmundson. Judgment for plaintiffs, and defendant excepts and appeals. Affirmed.

This is an action to recover the purchase price of a tract of land which the plaintiff, Mary J. Ginn, has contracted to sell to the defendant. The defendant refused to pay the purchase money, and to accept the deed upon the ground that the plaintiff has not a good title to the land. On the 30th day of September, 1909, John B. Exum and wife conveyed the land in controversy by deed to J. Hiram Ginn and his wife, the plaintiff, Mary J. Ginn. In April, 1910, the said J. Hiram Ginn died, leaving the plaintiff Mary J. Ginn, surviving him, but prior to his death he and his wife executed jointly a will in which the land in controversy was devised to several children of the said Hiram Ginn and wife, and in which nothing was devised

to the said Mary J. Ginn, or to the said J. Hiram Ginn. After the death of the said J. Hiram Ginn the said Mary J. Ginn refused to abide by said will, repudiated the same, and contracted to sell the land devised therein to the defendant, and has tendered him a deed, which he has refused to accept, because, as he alleges, the plaintiff has no title.

Dickinson & Land, of Goldsboro, for appellant. W. T. Dortch, of Goldsboro, for appellees.

ALLEN, J. [1] The deed to J. Hiram Ginn and his wife, Mary, conveyed an estate by the entireties with the right of survivorship (Motly v. Whitmore, 19 N. C. 537; Bruce v. Nicholson, 109 N. C. 204, 13 S. E. 790, 26 Am. St. Rep. 562), and the plaintiff, Mary J. Ginn, being the survivor, is the owner of the land in controversy and can convey a good title to the defendant, unless prevented from doing so by the signing of the joint will with her husband.

[2] A joint or conjoint will is a testamentary instrument executed by two or more persons, in pursuance of a common intention, for the purpose of disposing of their several interests in property owned by them in common, or of their separate property treated as a common fund, to a third person or persons, and a mutual or reciprocal will is one in which two or more persons make mutual or reciprocal provisions in favor of each other.

[3] In many of the early cases it was held that there could not be a valid joint or mutual will, but—

"it is now well settled by the overwhelming weight of authority both in England and the United States that such wills may be valid and may be admitted to probate like any other will unless revoked." 40 Cyc. 2110 et seq.

In Clayton v. Liverman, 19 N. C. 553, our court adhered to the earlier authorities, but this case was overruled in the Davis Will Case, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771, which was approved at the last term in the Cole Will Case, 171 N. C. 74, 87 S. E. 962, and joint and mutual wills are now recognized in this state as valid testamentary dispositions of property.

[4] It is also now the general doctrine of the text-books and of the decided cases that in the absence of contract based upon consideration that such wills may be revoked at pleasure. In re Davis, 120 N. C. 9, 26 S. E. 636, 38 L. R. A. 289, 58 Am. St. Rep. 771; In re Cole, 171 N. C. 74, 87 S. E. 962; Gardner on Wills, pp. 88, 89; Theobald on Wills, p. 12; 40 Cyc. 2115; 30 A. & E. 621; note, 38 L. R. A. 291.

The author says in the citation from Theobald on Wills:

"Persons may make joint wills, which are, however, revocable at any time by either of them or by the survivor."

And in the note to the Davis Case, which is reported in 38 L. R. A. 291, the editor says:

"The cases generally agree that either of the comakers can at any time revoke his part of the will."

The will before us belongs to the class of joint or conjoint wills, as it is a disposition of the property owned by the husband and wife by the entireties to third persons, and there is no reason why the wife could not, after the death of her husband, revoke the will and dispose of the property as if it had not been signed by her.

As was said in the Davis Case:

"There is nothing from which it can be implied even that there was any agreement that, if one should devise to these devisees, the other would do so, or that, if one should afterwards revoke, the other would do so. Either had the right to do so, and without notice to the other."

We are therefore of opinion that the plaintiff had the power to repudiate the paper writing as her will, and that the contract of sale is binding upon her and the defendant, and that her deed will convey to him a good title to the land in controversy, and he must accept it and pay the purchase price.

Affirmed.

(173 N. C. 704)

LEE v. MELTON. (No. 110.)

(Supreme Court of North Carolina. March 7, 1917.)

1. TRIAL \S 280(1)—INSTRUCTIONS—REQUEST COVERED BY CHARGE.

Refusal to give a request substantially covered by the court's charge was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 651.]

2. LANDLORD AND TENANT \S 332—SALE OF CROPS BY TENANT — ACTION BY BUYER — INSTRUCTIONS.

Where evidence showed that landlord consented to sale of peanut crop by tenant, an instruction in action by purchaser for failure to deliver that ordinarily a tenant has no right to sell crops until his rent is paid, and that a purchaser with knowledge that rents are not paid cannot enforce his contract, and that, if jury are satisfied that tenant had landlord's consent to sell, their relation might be disregarded, was proper.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 1363, 1400.]

Appeal from Superior Court, Hertford County; Daniels, Judge.

Action in justice court by J. H. Lee against A. J. Melton. Judgment for plaintiff for \$30.22, and defendant appeals to superior court, where judgment of \$6.95 was awarded plaintiff, and defendant appeals. No error.

The action is to recover \$30.22 damages for failure to deliver certain peanuts according to contract. The action was heard in the superior court on appeal from a justice of the peace, and the plaintiff was there awarded \$6.95 damages. It was in evidence that the defendant was a tenant of one Weaver at the time the contract of sale was

made, and that the peanuts were raised on the land of Weaver.

Roswell G. Bridger, of Winton, for appellant.

PER CURIAM. [1,2] The principal exception relied on by the defendant is to the refusal of his honor to charge the jury that the plaintiff could not recover because of the illegality of the contract, in that the defendant was a tenant, and had not settled with his landlord, and had no right to sell or remove the peanuts. We find, however, that his honor gave the defendant the full benefit of the principle for which he contends. He charged the jury, among other things, as follows:

"Ordinarily a tenant has no right to sell any part of the crop until he has paid his rents and advances; and a person making a contract with him to buy, knowing that he is a tenant, and knowing that rents and advances had not been paid, could not enforce such a contract. The contention of the plaintiff is that the landlord consented that the tenant should deal with those peanuts. The plaintiff contends that the landlord consented, that he had been his tenant for some years, and had been in the habit of selling the peanut crop, and this year he was selling the peanuts just as he had been doing before, and the landlord says he made no objection, and the reason the landlord took charge was because the tenant asked him. If you are satisfied from the testimony and by its greater weight that the tenant had the consent of the landlord to sell the peanuts, then you are to disregard their relations as landlord and tenant."

There was evidence tending to prove that the landlord had given his consent to the sale by the defendant, and it was only upon this view of the case that his honor permitted the recovery by the plaintiff.

There is no error.

No error.

(173 N. C. 705)

WHITE v. NORFOLK SOUTHERN RY. CO. (No. 9.)

(Supreme Court of North Carolina. March 14, 1917.)

Appeal from Superior Court, Pasquotank County; Bond, Judge.

On petition for rehearing. Petition denied, and former opinion affirmed.

For former opinion, see 89 S. E. 788.

C. M. Bain, of Norfolk, Va., J. Kenyon Wilson, of Elizabeth City, and W. B. Rodman, of Norfolk, Va., for appellant. I. M. Meekins, of Elizabeth City, for appellee.

PER CURIAM. In the petition to rehear this case it is said:

"The amount of money involved in this appeal is very little, and if that was all that was involved, this company would not have appealed the case to this court. The real question is one that is vital to the proper operation of trains in the real interest of the traveling public. That question is this: May any and all local agents of railroads abolish or change the published schedules of its trains?"

We think the learned counsel for defendant have misconstrued our opinion. We have not decided that local agents of railroads may abolish or change the published schedules of trains. The decision in this case is made to rest exclusively upon the unwarranted negligence of the defendant's agent in misdirecting plaintiff in respect to the schedules of its trains. A cursory reading of the opinion, we think, makes that manifest.

Petition dismissed.

(173 N. C. 83)

LESTER et al. v. HARWARD et al.
(No. 108.)

(Supreme Court of North Carolina. March 7, 1917.)

1. PARTITION \S 62—PLEADINGS, ISSUES, AND VARIANCE.

Where pleadings in partition suit raised issue of whether plaintiff and defendants were tenants in common, while the issue submitted to the jury was as to plaintiff's sole seisin, there was a variance which will not support a verdict for plaintiff, since in the absence of admissions, it would not follow from defendant's sole seisin that the parties were not tenants in common.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 178-181.]

2. PARTITION \S 63(1)—BURDEN OF PROOF.

Plaintiff in partition has the burden of proving his allegations of a tenancy in common where defendant pleads sole seisin, although, having made a prima facie case, it devolves upon defendant to prove his alleged adverse possession.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 183.]

3. TRIAL \S 159—NONSUIT FOR PLAINTIFF.

There is no precedent for rendering judgment as of nonsuit for plaintiff upon evidence introduced by defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 341, 359-367.]

4. PARTITION \S 63(1)—TENANCY IN COMMON—SUFFICIENCY OF EVIDENCE.

Where plaintiff in partition claimed a tenancy in common with defendant and evidence showed that plaintiff's father, the common source of title, died about 1865, and that his son, defendant's father, was in possession until his death about 4 years ago, and that defendant's sister, aged 28, had resided there until her father's death, and with other defendants had since collected rents, from which plaintiff had never received anything held to show adverse possession of defendants and their predecessors for 20 years, raising a presumption of ouster of plaintiff.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 183.]

5. TENANCY IN COMMON \S 15(4) — ADVERSE POSSESSION—PRESUMPTION.

The possession of one tenant in common is the possession of all cotenants, but where his exclusive possession has continued for 20 years without claim from the others who are under no disability, it raises a presumption of ouster of the other tenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. \S 45.]

Appeal from Superior Court, Chatham County; Stacy, Judge.

Proceedings for sale of land for partition by Bina Harward Lester and others against

J. H. Harward and others, who filed a plea of sole seisin. Judgment for plaintiffs, and defendants except and appeal. New trial granted.

It was admitted in this court that W. B. Harward, the father of the feme plaintiff, and the grandfather of the defendants, was originally the owner of the land in controversy, and that the plaintiff and the defendants are his heirs at law. The defendants claimed that they were the owners of the land by adverse possession, held by their father, Needham B. Harward, and themselves. At the conclusion of the evidence, his honor ruled that there was no evidence of adverse possession to be submitted to the jury, and the defendants excepted.

L. L. Tilley, of Durham, for appellants. Fred W. Bynum, of Pittsboro, and Hayes & Gibbs, for appellees.

ALLEN, J. The case on appeal, which was not settled by the judge, and the record show several irregularities.

[1] The complaint and answer raise the issue as to whether the plaintiff and defendants are tenants in common of the land described in the complaint, while the issue submitted to the jury was as to the sole seisin of the defendants, which, in the absence of admissions by the parties, would not be determinative, nor sufficient to support the verdict. It does not follow that the plaintiff and defendants are tenants in common because the defendants are not sole seised, unless there is an admission to this effect.

[2, 3] Again the burden of proof was placed on the defendants, and at the close of the evidence a motion for judgment as of nonsuit on the defendants' evidence was allowed.

The burden of proof is on the plaintiff when sole seisin is pleaded (*Huneycutt v. Brooks*, 116 N. C. 793, 21 S. E. 558), although it will devolve on the defendant to establish adverse possession after a prima facie case of a tenancy in common is made out, and there is no precedent for a judgment of nonsuit of a defense.

It is probable the case on appeal does not state accurately the action of the court (and our knowledge of the learned judge before whom the trial was had leads to this conclusion), and that his ruling was that the defendants had not offered sufficient evidence of adverse possession to justify submitting it to a jury, and we will so treat it.

[4] The plaintiff testified that she had never received any rents from the land, that her father, the common source of title, died between 1861 and 1865, and that the father of the defendants, N. B. Harward, was in possession of the land until his death, 3 or 4 years ago.

[5] One of the defendants also testified that she was a daughter of N. B. Harward and was 28 years of age; that she was born

and reared on the land, and lived on it until her father died, and that she and the other defendants had been in possession and had collected the rents since the death of her father. This furnishes evidence of an exclusive possession for 20 years in the defendants and those under whom they claim, and under our decisions such possession by one tenant in common raises a presumption of an ouster and, unexplained, will bar the other tenants.

"The possession of one tenant in common is in law, the possession of all his cotenants, because they claim by one common right. When, however, that possession has been continued for a great number of years, without any claim from another who has a right, and is under no disability to assert it, it will be considered evidence of title to such sole possession; and, where it has so continued for 20 years, the law raises a presumption that it is rightful, and will protect it. This it will do, as well from public policy, to prevent stale demands, as to protect possessors from the loss of evidence from lapse of time. Possession, then, for 20 years under the above circumstances will amount to a disseisin or ouster of the cotenant, and furnishes a legal presumption of the fact necessary to uphold an exclusive possession—as that the possession was adverse in its commencement, and tolls the entry of the tenant not in possession." *Black v. Lindsay*, 44 N. C. 467.

This authority was approved in *Dobbins v. Dobbins*, 141 N. C. 216, 53 S. E. 870, 10 L. R. A. (N. S.) 185, 115 Am. St. Rep. 682, where the principle is fully discussed and the cases collected.

It was therefore error to refuse to submit the evidence of adverse possession to the jury.

We have not considered the effect of the coverture of the plaintiff, as it does not appear when she was married.

New trial.

(173 N. C. 75)

ARCHER et al. v. JOYNER et al. (No. 104.)
(Supreme Court of North Carolina. March 7, 1917.)

1. ANIMALS §50(1) — STOCK LAWS — CONSTITUTIONALITY.

The Stock Law (Pub. Loc. Laws 1915, c. 448), declaring certain townships to be under its provisions, providing for the impounding of stock trespassing on lands situated in the townships, and providing that one or more citizens in such township, or in adjacent townships, may at their own expense construct a line fence when necessary for their protection, with authority to condemn land, etc., is constitutional, and residents of the stock law territory were acting within their rights in proceeding to fence against the stock of residents of adjacent townships.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148, 156.]

2. ANIMALS §50(1) — STOCK LAWS — ENFORCEMENT—"NECESSARY EXPENSES."

The provision of the Stock Law (Pub. Loc. Laws 1915, c. 448), for the imposition of a 10 cents on the \$100 assessment for erection of such fences as the board of county commissioners shall deem sufficient between township lines named therein and adjacent townships cannot be upheld as a tax, because the fences, not be-

ing a "necessary expense," must first receive the approval of a popular vote.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148, 156.]

For other definitions, see *Words and Phrases*, First and Second Series, *Necessary Expenses*.]

3. ANIMALS §50(1) — STOCK LAWS — TAXATION—VALIDITY OF STATUTE.

The provision of the Stock Law (Pub. Loc. Laws 1915, c. 448) for assessment of 10 cents on the \$100 valuation of property returned for taxation in the county, to erect sufficient fences between township lines named and adjacent townships, cannot be upheld as an assessment, because imposed upon both real and personal property, and, as to a part of it, in free range territory to receive no benefits from the erection of the fence.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148, 156.]

4. STATUTES §64(1)—PARTIAL INVALIDITY—EFFECT.

When a part of a statute is unconstitutional, and the valid and invalid provisions are so interdependent that it cannot be supposed that the General Assembly would have enacted the law with the invalid features eliminated, the entire law will be avoided.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58, 195.]

5. STATUTES §64(5)—PARTIAL INVALIDITY—STOCK LAW.

The invalidity of the provision of the Stock Law (Pub. Loc. Laws 1915, c. 448) authorizing the county commissioners to levy and collect an assessment not to exceed 10 cents on the \$100 valuation of the property returned for taxation in the county, to erect such fences as it may deem sufficient between township lines named in the law and adjacent townships, did not render the whole law invalid, where it was to go into effect in certain townships on and after a certain date, and did not make the building of fences mandatory on the commissioners, and, where a separate and distinct provision permitted citizens of the townships included, or of adjacent townships, to build fences at their own expense if necessary for their protection.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 62, 195.]

Appeal from Superior Court, Northampton County; Cooke, Judge.

Action by J. M. Archer and others against W. H. Joyner and others. Judgment dissolving the restraining order and dismissing the plaintiffs' action as to plaintiffs' right to recover, and plaintiffs except and appeal. Affirmed.

Peebles & Harris, of Jackson, for appellants. W. E. Daniel, of Weldon, and Gay & Midyette, of Jackson, for appellees.

HOKE, J. On the hearing it appeared, among other things, that the state Legislature of 1915 passed an act putting seven townships in Northampton county under the stock law, the same being chapter 448, Public Local Laws 1915, and designated by common consent as the "Mason Law," after the distinguished author of the bill, then a representative of said county. By a subsequent act (chapter 768, Public Local Laws 1915) the township of Roanoke was withdrawn

from the provisions of the first statute. The act declares that the townships included shall be under the provisions of the stock law as therein contained on and after January 1, 1916, makes minute provision for the impounding of stock that trespasses on lands situate in the townships, etc.; further, that the county commissioners are authorized and empowered, whenever they shall deem it necessary to do so, to erect such fences as the board may deem sufficient between the township lines named and adjacent townships and to defray the expense of same; shall levy and collect an assessment, not to exceed 10 cents on the \$100 valuation of the property returned for taxation in said county. Provision is also made that any one or more citizens in said townships named or in those adjacent thereto, may construct, at their own expense, a line fence, erect gates, etc., when it may be considered necessary for their proper protection, and authority is conferred to condemn land 20 feet in width on which to place the fence, the damages therefor to be assessed by a justice of the peace and two disinterested freeholders, etc. The present action is prosecuted by citizens and residents of the adjacent townships against the defendants, certain citizens and residents of the stock law territory, to restrain the latter from putting in force and carrying out the provisions of the Mason Act and of impounding plaintiff's stock thereunder, on the ground, chiefly, that the Mason Act should be declared unconstitutional for the reason that the tax provided for, not being for a necessary expense, cannot be imposed without a vote of the people, pursuant to article 7, § 7, of the Constitution.

[1] The county commissioners are not made parties defendant, and it appears, further, that there is no present purpose to build the fence or lay the tax referred to in the statute, and it may be that this action could in no event be maintained, because the probability of injury is too uncertain and remote to warrant the exercise of the injunctive powers of the court, but, if it be conceded that the action lies as one in the nature of a bill of peace to prevent multiplicity of suits, a course sometimes permissible when the action is in the assertion of rights common to all the parties and dependent upon exactly similar facts and the same principles of law (10 R. C. L. pp. 282, 283), we are of opinion that the present action must fail because the statute in question, in establishing the stock law and in the features which threaten the apprehended injury, is a valid statute, and defendants are in the exercise of their lawful rights in acting under it in the matters complained of.

[2, 3] It is true that the provision in the statute for an imposition of a 10-cent assess-

ment cannot be upheld, not as a tax, because, the fence not being a necessary expense, it must first receive the approval of the popular vote, which it has not had (*Keith v. Lockhart*, 171 N. C. 451, 88 S. E. 640; *Faison v. Commissioners*, 171 N. C. 410, 88 S. E. 761), not as an assessment, because it is imposed on both real and personal property, and, as to a portion of it, in territory to receive no benefits from the erection of the fence (*Harper v. Commissioners*, 133 N. C. 106, 45 S. E. 526).

[4] It is true also that, when a part of a statute is unconstitutional and the valid and invalid provisions of the law are "so interdependent one upon the other that it cannot be supposed that the General Assembly would have enacted the law with the invalid features eliminated," in such case the entire law will be avoided. *Keith v. Lockhart*, supra; *Harper v. Commissioners*, 133 N. C. 113, 45 S. E. 526.

[5] But we are of opinion that these recognized principles do not uphold plaintiff's position in the present case, where it appears that the two portions of the law are separate and distinct, and it is perfectly clear, from a perusal of the statute, that the Legislature intended the valid portion to be effective "whether the other was upheld or not." Recurring to the statute, as heretofore stated, there is definite, positive provision that in the six townships named the stock law shall prevail on and after January 1, 1916. The question of whether such a statute or policy should be put in force, with or without a fence, is entirely for the Legislature. *Jones v. Duncan*, 127 N. C. 118, 37 S. E. 135; *Aydlett v. Elizabeth City*, 121 N. C. 4, 27 S. E. 1002; *State v. Tweedy*, 115 N. C. 704, 20 S. E. 183. That body has not made the existence of the legislation dependent, in express terms, on the building of the fence, the case presented in *Keith v. Lockhart*. They have not made the building of the fence mandatory on the commissioners, in which case the invalid provision might be held to affect the entire statute, as in *Harper v. Commissioners*, but the enactment is that the law shall be in force on and after the specified date, with power in the commissioners entirely discretionary to build the fence or not, and with permission also that the adjacent landowners may build at their own expense if they see proper, and it is the evident purpose of the General Assembly that, as to the establishment of the stock law, the statute shall, in any event, prevail, and, this being within its power, the will of the Legislature must be enforced.

There is no error, and the judgment of the court is affirmed.

Affirmed.

(173 N. C. 30)

McAULEY v. SLOAN. (No. 107.)

(Supreme Court of North Carolina. March 7, 1917.)

1. TRIAL ~~§~~4—SEVERING ISSUES.

Where a plea in bar is a matter totally distinct from and unconnected with the issues on the merits, the issues may be reserved until plea has been passed on by jury under Revisal 1906, § 859.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 8-10.]

2. APPEAL AND ERROR ~~§~~969—SEVERING ISSUES—DISCRETION—REVIEW.

Failure to try together a plea in bar and other issues in a case is not a ground for reversal on appeal in the absence of an abuse of discretion on the part of the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3845-3848.]

3. COMPROMISE AND SETTLEMENT ~~§~~19(2) — COMPLIANCE WITH CONDITIONS—TENDER.

Where defendant paid into court under a compromise, \$55 and costs of a suit, the plaintiff cannot have compromise set aside for failure of clerk of court to include in bill of costs what was due plaintiff for a witness ticket where he refused to accept the same.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 71-73.]

Appeal from Superior Court, Lee County; Bond, Judge.

Action by W. R. McAuley against E. G. Sloan. From an order setting aside the verdict, plaintiff appeals. Affirmed.

Williams & Williams, of Sanford, for appellant. Edwin L. Gavin, of Sanford, for appellee.

CLARK, C. J. While the motion was pending to set aside the verdict (it having been agreed that the court should take the papers and render his decision out of the county), the plaintiff and defendant compromised the case, as is found by the jury, the defendant to pay \$55 and costs. The judge thereafter set aside the verdict. The defendant paid the \$55 and bill of costs, as taxed by the clerk, into court. The plaintiff declined to accept.

[1] The only question presented is as to the action of the court in submitting an issue upon the plea in bar of accord and satisfaction under Revisal, § 859, and reserving the other issues until such plea in bar was passed upon by the jury. In so doing, we think the judge acted within his powers. In *Jones v. Beaman*, 117 N. C. 261, 23 S. E. 248, the court held that where there is a plea in bar such as a release, accord and satisfaction, and the like, the plea in bar should be passed upon first to avoid what might prove an expensive and useless trial on the merits with loss of time to witnesses.

There are cases where the judge in the exercise of a wise discretion should try a plea in bar as the statute of limitations, or other pleas in bar, along with the issues on the merits of the controversy, so as to avoid two trials going over essentially the same ground. But when, as in this case, the plea in bar is

of a settlement in full, under the circumstances of this case it is a matter totally distinct from, and unconnected with, the issues on the merits, and it is a saving of time and expense to have such plea disposed of before a trial on the merits, since in the case of an affirmative finding in regard to the settlement, it will become unnecessary to try the controversy upon the issues presented in the original pleadings. Indeed the general rule is to dispose of the plea in bar whether it is an issue of law, or of fact, before proceeding further. *Commissioner v. White*, 123 N. C. 534, 31 S. E. 670.

[2] This is a matter which will depend very much upon the circumstances of each particular case, and in the absence of an abuse of such discretion this court will not disturb the action of the judge. In this case, in view of the finding of the jury that the full settlement was made, it is very clear that it would have been a needless consumption of time to have tried the issues upon the merits of the cause, for such matters became irrelevant and unnecessary for decision after the settlement between parties.

The defendant testified that he had paid into court the entire amount, \$55, and the cost of the action, as agreed upon, and had been ready, willing, and able at all times to pay the same, and that the plaintiff had wrongfully refused to accept the same. Judge Bond told the jury that the defendant Sloan "introduced a letter of certain date and a receipt, which they contend the evidence shows was signed by Miss Campbell, the office deputy or clerk of Mr. Campbell." (Printed Record, p. 41.) The clerk of the court testified also that the money had been paid in, and the jury so found.

[3] On examination of the exceptions we are unable to find any error. The controversy was one of fact, and the jury has found the same upon competent testimony in favor of the defendant. There seems to have been a small amount due for witness ticket to plaintiff of \$1.16, which was not taxed in the bill of costs when the defendant paid into the clerk's office the amount due by the compromise and the costs. The plaintiff refused to receive his witness ticket for that amount, and this is not a sufficient basis for a claim that the compromise was not effected by a compliance with its terms. Having refused, he cannot take advantage of a lack of tender. *Smith v. B. & L. A.*, 119 N. C. 257, 26 S. E. 40.

Judgment was properly entered on the verdict that the \$55 in the clerk's office, without interest, should be paid to plaintiff, that the cost up to the compromise should be paid by the defendant, and the cost of the last trial should be paid by the plaintiff.

No error.

ALLEN, J., concurs in opinion.

ALLEN, J. (concurring). I concur in the opinion of the court, except in the statement

of fact that Miss Campbell signed the letter and receipt, and this is not material to the decision, and is referred to in order that it may not hereafter be cited as a precedent upon the right of a woman to hold the office of deputy clerk. Miss Campbell did not sign the letter or the receipt, nor does it appear that she was deputy clerk, as is manifest from the evidence of K. R. Hoyle, who testified as follows:

"The signature to the paper shown me—a letter—is the handwriting of T. N. Campbell, clerk of the court. The other paper, a receipt for \$5, part of this is in the handwriting of Miss Tannie Campbell, who is Mr. Campbell's office deputy. It is signed T. N. Campbell, but it is in her handwriting. The other paper is a receipt for \$63, in the handwriting of the same lady."

She was simply an employé in the office, who wrote the letter and receipt for the clerk to sign.

(173 N. C. 88)

UPCHURCH et al. v. UPCHURCH et al.
(No. 115.)

(Supreme Court of North Carolina. March 7, 1917.)

1. JUDICIAL SALES \S 31(1)—CONFIRMATION.
Under Revisal 1905, \S 2513, as to judicial sales of property, confirmation of a sale is within the legal discretion of the court even if no exceptions are filed, where an increase of bid is made.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. \S 59, 60, 65.]

2. JUDICIAL SALES \S 31(2)—SALES OF LAND—CONFIRMATION.

Where property was ordered sold and the highest bid was \$26,000, and an advanced bid by responsible parties of \$1,500, was made one day after expiration of the time limit but before the bidder appeared to insist on his rights, it was proper to refuse to confirm the sale.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. \S 61-64, 67.]

Appeal from Superior Court, Chatham County; Cox, Judge.

Proceedings for the sale of land of the estate of Isham S. Upchurch, deceased, brought by M. R. Upchurch and J. M. Broadwell, executors, against G. W. Upchurch and others. From an order refusing to confirm the sale of the land to them, Nevins and Flournoy appeal. Affirmed.

The judgment of the clerk was one refusing to confirm a sale of lands had pursuant to a decree by him duly entered, and the facts pertinent to the present appeal are very well epitomized in the judgment of Judge Cox, as follows:

"It appearing to the court and the court finding as a fact that the sale of the lands and timber described in the complaint filed in the cause, made by the commissioners herein on the 5th day of January, 1917, was in all respects regular; that there were numerous bidders at the sale and the bidding was spirited; that W. T. Hunt, of W. T. Hunt & Bro., was present and bidding; that W. L. Nevins and L. B. Flournoy, trading as Nevins & Flournoy, became the last and highest bidders at said sale for

the land and timber at the price of \$26,000; that said bid was a fair and reasonable price for said land and timber; that the commissioners made report of the sale without recommendation, on the 6th day of January, 1917; that an advanced bid of \$1,500 was filed by W. T. Hunt and S. L. Hunt, trading as W. T. Hunt & Bro., with Hon. James L. Griffin, clerk of the superior court of Chatham county, on the 27th day of January, 1917; that before the filing of the advanced bid no exception had been made to the report of the commissioners and no confirmation of the sale had been made by the court; that on the 29th day of January, 1917, W. L. Nevins, of Nevins & Flournoy, appeared in person and with counsel, before said clerk of the superior court of Chatham county, and moved the court for judgment confirming said sale to Nevins & Flournoy, and for an order requiring the commissioners to make and deliver to said Nevins & Flournoy a good and sufficient deed to said land and timber on payment of the purchase price; that said clerk of the superior court of Chatham county, in the exercise of his sound discretion, refused to confirm said sale; that from such refusal to confirm the said Nevins & Flournoy excepted and appealed to this court."

Upon these facts, his honor, being of opinion that the clerk was acting within his authority in refusing to confirm the sale, entered a decree confirming the judgment, and Nevins & Flournoy, the bidders at the sale, having duly excepted, appealed.

Percy J. Olive, of Apex, and J. C. Little, of Raleigh, for appellants. Fred W. Bynum, of Pittsboro, for appellees.

HOKE, J. The statute bearing more particularly on the question presented (Revisal \S 2513) is as follows:

"The court may authorize any officer thereof, or any other competent person, to be designated in the decree of sale, to sell the real estate under this proceeding; but no clerk of any court shall appoint himself or his deputy to make sale of real property or other property in any proceeding before him. Such officer or person shall file his report of sale giving full particulars thereof, within ten days after the sale, in the office of the clerk of the superior court, and if no exception thereto is filed within twenty days, the same shall be confirmed: Provided, that any party, after the confirmation, shall be allowed to impeach the proceedings and decrees for mistake, fraud or collusion, by petition in the cause: Provided further, that innocent purchasers for full value and without notice shall not be affected thereby."

And it is contended for defendants that, by virtue of the clause in the section, "and if no exception thereto is filed within twenty days, the same shall be confirmed," they are entitled to have the sale confirmed as of right and notwithstanding the increased bid of \$1,500.

[1] Prior to the enactment of this clause and so far as the rights of a bidder at a judicial sale was concerned, the court, before confirmation, had well-nigh unlimited discretion as to the acceptance of the bid. Such a bidder acquired thereby no independent right in the property or in the suit. His offer was considered only as a proposition to buy at the price named, the court reserving the right to accept or reject the bid as it might decree

best. *Harrell v. Blythe*, 140 N. C. p. 415, 53 S. E. 232; *Rorer on Judicial Sales* (2d Ed.) § 108. In *Harrell's Case*, Walker, Judge, delivering the opinion, said:

"Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and, until it is obtained, the bargain is not complete."

And in *Rorer*, § 108, it is said:

"The court is clothed with an unlimited discretion to confirm a judicial sale or not, as it may seem wise or just. Confirmation is final consent, and, the court being the vendor, it may consent or not in its discretion."

True, this author, in a subsequent section, says that the matter of confirmation rests in the sound legal discretion of the court, and the same may be reviewed on appeal; but this, except on motion to relieve a bidder from a proposal superinduced by fraud or excusable mistake, must be understood to refer rather to the question as it affects the rights or interests of the parties which are already involved in the suit, and not to the bidder who as yet has acquired no standing or interest therein. *Harrell v. Blythe*, supra; *Joyner v. Futrell*, 136 N. C. p. 302, 48 S. E. 649; *Hall v. Taylor*, 133 Ga. 606, 66 S. E. 478; *Rorer*, *Judicial Sales*, § 110. On the matter of confirmation, in that aspect of the case, it has not been in accord with the practice in this state to refuse to confirm a sale for inadequacy of price unless there has been an advanced bid, and by a responsible bidder and on average or lesser values, an increased bid of 10 per cent. has usually been regarded as sufficient to justify the court in reopening the biddings. Where amounts are large, the advance per cent. need not be so much. A distinction recognized by statute as to sales under decree of foreclosure, etc., by chapter 146, Laws 1915, making 5 per cent. sufficient when the amount of bid is over \$500. But, while these rules are usually observed, they are not absolutely imperative, and the question of confirming a sale is referred, as stated, to the sound legal discretion of the court, and, in the proper exercise of such discretion, the court, under certain conditions, may reject an increased bid and confirm a sale when it appears from the relevant facts and circumstances that such a course is wise and just and for the best interests of all parties whose rights are being dealt with in the suit. *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113; *Uzzle v. Well*, 151 N. C. 132, 65 S. E. 755; *Dula v. Seagle*, 98 N. C. 458, 4 S. E. 549; *Wood, Adm'r. v. Parker*, 63 N. C. 379. After confirmation, the power of the court is much more restricted. The purchaser is then regarded as the equitable owner, and the sale as it affects him or his interests can only be set aside for "mistake, fraud or collusion" established on petitions regularly filed in the cause. *Revisal*, § 2513; *Ashbee v. Cowell*, 45 N. C. 158;

Kampman v. Nicewaner, 60 Neb. 208, 82 N. W. 623; *Va. Ins. Co., etc., v. Cottrell*, 85 Va. p. 857, 9 S. E. 132, 17 Am. St. Rep. 108.

Considering this legislation in view of these recognized powers of the court in the case of judicial sales, we are of opinion that, on the facts as embodied in his honor's judgment, appellant's position cannot be maintained. So far as we are aware, the clause relied upon appears for the first time in the Code of 1883 (section 1906). Prior to that, these sales were confirmed on motion and after notice (Laws 1868-69, c. 122, §§ 5, 15), and the primary purpose of the amendment was to relieve the parties and the proposed purchaser of the delays and uncertainties incident to this requirement for further notice, etc. In causes having numerous parties, in many instances widely scattered and at times nonresident, this requirement for further notice might, and frequently did, present a real obstacle in the successful conduct of such sales, both in the matter of time and cost, and the law was enacted to enable the court to proceed to judgment on the record as it stood, after 20 days, and to shut off all right of exceptions for irregularities, lack of notice, or even inequalities as between the parties to the record, and it was never intended to deprive the court of the power to regulate and control a sale by reason of advanced bids made and entered before the purchaser appeared and move that his bid be accepted and sale confirmed. This right the statute confers upon him, and, under its provisions, he can appear at the end of the 20 days or after, and, if an increased bid has not been made at the time of motion entered, he is entitled to have the same allowed and on the record as it then appears. Until such move is made on his part, the powers of the court in reference to confirming the sale for inadequacy of price may be determined in its legal discretion. This increase of bid is not in strictness an exception by the parties, the objection more directly contemplated by the statute, but a recognized method of affording information to the court that the property has not brought a fair price, and, as stated, these facts may be considered and acted on if presented before the purchaser has appeared and moved for confirmation of sale.

[2] This, in our opinion, being the proper construction of the law, his honor has made correct ruling on the matter presented. In a sale, to an amount greatly in excess of the average, \$26,000, there has been an advanced bid by responsible parties of \$1,500. True, this was made one day after the expiration of the time limit, but it was made before the bidder had appeared to insist on his rights, and, under the facts of the record, the clerk was right and certainly acting within his powers in refusing to confirm the sale. We have been referred by counsel to the case of *Floyd*

v. Rook, 128 N. C. p. 10, 38 S. E. 33, as an authority against our disposition of the appeal. That was a case of actual partition and in which exceptions from some of the parties of record, filed after 20 days, were disallowed for that reason. It does not distinctly appear in that appeal what was the nature of these exceptions. Doubtless they were for some irregularities in the proceedings or because of some inequitable adjustment. In either case, they were known to the parties at the time the partition was made or when the report was filed, and such objections come more nearly within the express terms and purpose of the statute. In our view, the case is not in necessary conflict with our present decision, to the effect that the statute does not and was not intended to impair the power of the court as to confirmation of judicial sales for inadequacy of price evidenced by an increased and sufficient bid made before the proposed purchaser has appeared and moved for an acceptance of his bid as he can now do under the law after 20 days.

There is no error, and the judgment of the court is affirmed.

Affirmed.

(173 N. C. 706)

FORBES et al. v. SAVAGE. (No. 183.)

(Supreme Court of North Carolina. March 14, 1917.)

DESCENT AND DISTRIBUTION \S 35—COLLATERAL RELATIVES—HALF BLOOD.

Where a daughter taking by inheritance from her father died without lineal descendants, a sister of the half blood, but not of the blood of the father, being the issue of a subsequent marriage of the common mother, was not the heir at law.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 102-107.]

Appeal from Superior Court, Pitt County; Stacy, Judge.

Proceeding by Mrs. Lena Forbes and others against W. A. Savage, guardian of Jaunita Savage. Judgment for plaintiffs, and defendant excepts and appeals. Affirmed.

This is an action to determine the rights of the parties to certain money derived from the sale of land. The facts are stated in full in the judgment, which is as follows:

This cause coming on to be heard, before W. P. Stacy, judge presiding, at the January term, 1917, of Pitt superior court, and being heard on the following agreed facts: (1) That W. L. Anderson married Laura Smith, and as the result of said marriage four children were born, to wit, Louis Anderson, Ella Anderson, Georgia Anderson, and Lena Anderson. (2) That after the birth of said children, the said W. L. Anderson died, and at the time of his death owned a tract of land, known as the "285-acre tract," leaving surviving him the above-named four children and the widow, Laura Anderson. (3) That after the death of W. L. Anderson, his widow, Laura Anderson, married W. A. Savage, and to them was born Jaunita Savage, the petitioner in this case. (4) That after the birth of the said Jaunita Savage, as above named, the

said Ella Anderson, one of the survivors of W. L. Anderson, married one Tucker, and died intestate leaving no children or child or issue of such. (5) That the children now surviving W. L. Anderson, to wit, Louis Anderson, Lena Anderson Forbes, and Georgia Anderson Gilbert, have in this special proceeding (Louis Anderson being a non compos mentis, acting through his next friend, C. C. Pierce) effected a sale of the said land, described in the petition. That W. A. Savage in behalf of his ward, Jaunita Savage, did not oppose the sale of the same, but asks that one-sixteenth of the funds arising from the sale of the said land be held for her, to be paid to her, if the court shall decide that she is entitled to the same; but, if the court should decide that she is not entitled to it, as heir at law of Ella Anderson Tucker, then that it shall be turned over to the original petitioners herein.

It is now, therefore, ordered, adjudged, and decreed that Jaunita Savage is not an heir at law of Ella Anderson Tucker; that she has no interest in the tract of land described in the pleadings, or fund arising from the sale thereof; that said one-sixteenth being held to abide the claim of Jaunita Savage be delivered to the said Louis Anderson, Georgia Anderson Gilbert, Lena Anderson Forbes, heirs at law of Ella Anderson Tucker; that Jaunita Savage take nothing by this action; and that original petitioners recover their costs of the said guardian, to be taxed by the clerk of this court.

W. P. Stacy,
Judge Superior Court, Presiding.

The defendant excepted and appealed.

S. J. Everett, of Greenville, for appellant.
F. M. Wooten, of Greenville, for appellees.

PER CURIAM. The judgment is affirmed on the authority of Noble v. Williams, 167 N. C. 112, 83 S. E. 180.

Affirmed.

(173 N. C. 70)

MEEDER & CO. v. SEABOARD AIR LINE
RY. (No. 99.)

(Supreme Court of North Carolina. March 7, 1917.)

1. CARRIERS \S 230(7) — CARRIAGE OF LIVE STOCK—INSTRUCTION.

In an action against a railroad for injuries to live stock in unloading, the court charged that, when freight is shipped in carload lots, the duty is imposed upon the consignee to take it out of the car; that, had nothing been said by plaintiff to defendant in respect to the shipment, defendant would have been justified in carrying the carload to destination without making preparation for its unloading, but that, if plaintiff notified defendant he expected the shipment and requested defendant to provide facilities for unloading, and defendant received such notice, it was defendant's duty to provide proper facilities; and that if defendant did not have sufficient facilities at destination for unloading live stock, and it was notified by plaintiff that he was to receive the stock, and a sufficient time elapsed, and defendant failed to provide facilities, it was negligence on the part of defendant. Held, that such charge was favorable to defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 961.]

2. CARRIERS \S 228(3) — CARRIAGE OF LIVE STOCK—EVIDENCE.

In such action, evidence of a witness that kids and lambs were born dead the next morning

as result of the failure to provide proper facilities for unloading was competent.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 960.]

8. APPEAL AND ERROR —1050(1)—HARMLESS ERROR—EVIDENCE.

In such action, the opinion of a witness that it would be harmful for goats and sheep carrying young to jump 10 feet from a car was harmless, as it could not have affected the result, since any one of sufficient intelligence to act as juror would know the matter.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153, 4157.]

Appeal from Superior Court, Warren County; Stacy, Judge.

Action by Meeder & Co., against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. No error.

This is an action to recover damages to a carload of sheep and goats shipped over the road of the defendant from Artesia, N. C., to Ridgeway, N. C. The action was commenced in the recorder's court of Warren county, and was tried in the superior court on appeal. The allegation of negligence relied on by the plaintiff was that the defendant failed to provide proper and adequate facilities for unloading.

The plaintiff's evidence tended to show that the carload of sheep and goats, containing 230 animals, was gathered together at Artesia for Meeder & Co., at Ridgeway, N. C. J. A. Meeder, manager of Meeder & Co., testified that he went to the agent of the defendant at Ridgeway and told him that he expected a carload of sheep and goats and wanted him to take the matter up with the company of building a cattle chute for unloading these animals. The agent informed him that he had written the defendant about the matter, and had been advised that it would be too expensive and take too long to get the material for the construction of the chute. Plaintiff then told the agent of the defendant that he would do the work and furnish the material for \$7.50. This was two weeks before the shipment arrived. On the arrival of the car, Meeder refused to accept shipment because there were no facilities for unloading the animals. The defendant's agent then attempted to unload the sheep by putting a plank up so that they could get out. As soon as the door of the car was opened all of the animals attempted to come out at the same time, and a number of them fell from the plank to the ground and were injured. Four sheep were found dead in the car, and numbers of goats and sheep died after they were taken to the plaintiff's farm.

His honor charged the jury, among other things, as follows:

"When freight is shipped in carload lots, the duty is imposed upon the consignee to unload; that is, take it out of the car. * * * Had nothing been said by plaintiff to defendant in respect to this expected shipment, then defendant would have been justified in carrying the

carload of sheep and goats or animals to Ridgeway without making any preparation for its unloading. But if you should find from the evidence, and by its greater weight, that plaintiff notified defendant that he expected a shipment of live stock consigned to him at Ridgeway; that he requested the defendant to provide facilities for unloading that stock, and defendant having received such notice, and if you find that defendant received such notice from the plaintiff, then it was the duty of the defendant to make such facilities, and it was the duty of the railroad to provide the proper facilities. * * * (If you find from the evidence that defendant company did not have sufficient facilities at Ridgeway for unloading live stock, and you should further find that it was notified by plaintiff that he was to receive it over that line, and you should find that sufficient time elapsed and defendant failed to provide such facilities, it is negligence on the part of the company, and the plaintiff should have the second issue answered in his favor. If you do not so find, you are to answer the second issue 'No.')

The defendant excepted to part in parenthesis. The defendant also excepted to the evidence of one of the witnesses for the plaintiff that some of the goats and sheep were born dead the next morning after they were taken from the car. This same witness testified, without objection, that in his opinion the treatment received by falling out of the car was the cause of being born dead. The defendant also excepted to the evidence of another witness for the plaintiff, who testified that the result of allowing animals to jump 10 feet from a car while with kids and lambs would be harmful.

There was a verdict and judgment for the plaintiff, and the defendant excepted and appealed.

Murray Allen, of Raleigh, for appellant. Thos. M. Pittman, of Henderson, and B. B. Williams, of Warrenton, for appellee.

ALLEN, J. [1] The charge of his honor to the jury was favorable to the defendant. The only authority cited in the brief (*Covington's Stockyard Co. v. Keith*, 139 U. S. 133, 11 Sup. Ct. 462, 35 L. Ed. 73) states the rule to be that:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its roads and connections, as well as for discharging such stock after it reaches the place to which it is consigned."

And this is in accord with the decision of this Court in *Cogdell v. Railroad*, 124 N. C. 306, 32 S. E. 706, and in other cases.

[2, 3] The evidence of the witness that kids and lambs were born dead the next morning as a result of the failure to provide proper facilities for unloading was clearly competent, and the opinion of the other witness that it would be harmful for goats and sheep, carrying young, to jump 10 feet from a car, could not have affected the result, as any one of sufficient intelligence to

act as a juror would know this without the testimony of a witness.

No error.

CLARK, C. J. (concurring). I concur in all that is so well said in the opinion of the court, but it would seem there was negligence, not only in the manner of discharging the stock at the place of destination, but also in carrying sheep and goats promiscuously, without putting any division between them. The difference between the two classes of stock required this, and the failure to do this doubtless caused some of the loss.

We know on the best authority that a shepherd "divideth his sheep from the goats." Matthew xxv, 32.

(173 N. C. 753)

STATE v. SOUTHERN EXPRESS CO.
(No. 465.)

(Supreme Court of North Carolina. March 14, 1917.)

1. COURTS \Leftrightarrow 97(5)—PRECEDENTS—CONTROLLING DECISIONS.

The latest utterance of the United States Supreme Court construing a federal statute is binding on the state courts as to such statute's construction, regardless of prior decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 332.]

2. INTOXICATING LIQUORS \Leftrightarrow 138—OFFENSES —"BEVERAGE."

Pub. Loc. Laws Ex. Sess. 1913, c. 267, declares that the manufacture, sale, delivery, or transportation for the purpose of delivery of any intoxicating beverage in the corporate limits of the town of Trinity, Randolph county, shall be unlawful. Webb-Kenyon Act March 1, 1913, c. 90, 37 Stat. 699, prohibits the transportation in interstate commerce of all liquor intended to be received, possessed, sold, or in any manner used, either in the original package or otherwise in violation of any state law. Defendant, an interstate carrier, transported from without into the state of North Carolina and town of Trinity, a quart of whiskey. Held that, notwithstanding the interstate character of the transaction, defendant was, in view of the Webb-Kenyon Act, guilty of a violation of Laws 1913; whiskey being a beverage within the terms of the act, for a "beverage" is defined as a liquid for drinking, usually artificially prepared and of an agreeable flavor, as an intoxicating beverage.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148.

For other definitions, see Words and Phrases, First and Second Series, Beverage.]

Appeal from Superior Court, Randolph County; Ferguson, Judge.

The Southern Express Company was indicted for violating Pub. Loc. Laws Ex. Sess. 1913, c. 267, by making a delivery of intoxicating liquors in violation of its provisions, and from a judgment on a special verdict whereby defendant was pronounced not guilty, the State appeals. Reversed, with directions to proceed to judgment.

The Attorney General and Assistant Attorney General, for the State. Roberson, Barnhart & Smith, of High Point, for appellee.

BROWN, J. The substance of the special verdict is that the defendant delivered to Matthew Hargrove one quart of whisky on November 25, 1915, shipped from Lynchburg, Va., and intended for the personal consumption of said Hargrove, and that the delivery was made within the corporate limits of the town of Trinity.

The prosecution is based on a local statute (chapter 267 of the Public Local Laws of the Extra Session of 1913), the first section of which declares:

"That the manufacture, sale, delivery, or transportation for the purpose of delivery of any intoxicating beverage, in the corporate limits of the town of Trinity, Randolph county, shall be unlawful except as herein provided."

It is admitted that the delivery is not within the proviso of the statute. This statute, operating as it does upon a carrier engaged in interstate commerce, is a direct burden upon such commerce and conflicted with the power of Congress. The statute, therefore, could not be used to prevent interstate shipments from Virginia into North Carolina. This proposition has not been open to question since the decision in *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

[1, 2] But since that decision the Webb-Kenyon Law has been enacted and its constitutionality sustained by the Supreme Court in *Clark Distilling Co. v. West Virginia et al.*, 242 U. S. 311, 37 Sup. Ct. 180, 61 L. Ed. —, January 8, 1917. In that case the court says:

"As the state law forbade the shipment into or transportation of liquor in the state, whether from inside or out, and all receipt and possession of liquor so transported, without regard to the use to which the liquor was to be put, and as the Webb-Kenyon Act prohibited the transportation in interstate commerce of all liquor 'intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state,' there would seem to be no room for doubt that the prohibitions of the state law were made applicable by the Webb-Kenyon Law. If that law was valid, therefore, the state law was not repugnant to the commerce clause."

It is contended that the decision of the Supreme Court in *Adams Ex. Co. v. Kentucky*, 238 U. S. 190, 35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167, conflicts with the *West Virginia Case*. As the latter is the latest utterance of the court, we must follow it, and are not concerned with a supposed conflict in its decisions. But, referring to such contention, the court says in the *West Virginia Case*:

"The case in this court relied upon to establish the contrary (*Adams Express Company v. Kentucky*, 238 U. S. 190 [35 Sup. Ct. 824, 59 L. Ed. 1267, L. R. A. 1916C, 273, Ann. Cas. 1915D, 1167]) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited."

The statute under which this indictment is brought differs very materially from the High Point statute construed in *So. Express Company v. High Point*, 167 N. C. 103, 83 S. E. 254. In that case we said:

"The General Assembly of North Carolina has not up to this time undertaken to prohibit the introduction of liquor into this state for individual consumption. * * * It is not contended, so far as we know, by any one, where the state permits the importation of liquor for the individual consumption of its citizens, or for any other lawful purpose, that the Webb-Kenyon Law has any effect."

We were referring to the High Point act and the general law of this state, and not to any merely local act. As we construed the High Point act, it did not forbid the delivery of liquor for personal consumption. That the Trinity act forbids the delivery of liquor for personal consumption is manifest. It is not confined to deliveries for purposes of sale. The delivery "of any intoxicating beverage" is prohibited, whether for sale or personal use.

The word "beverage" means:

"Liquid for drink; drink; usually applied to drink artificially prepared and of an agreeable flavor; as, an intoxicating beverage. Specifically, a name applied to various kinds of drink." Webster's International Dictionary.

"Drink of any kind; liquor for drink; as, water is the common beverage; intoxicating beverages." The Century Dictionary.

The words in the above statute "Intoxicating beverage," should be understood as a general term including all the different kinds of liquors named in the general prohibition law, namely, "spirituuous, vinous, fermented or malt liquors or intoxicating bitters." Public Laws, Extra Session 1908, c. 71, § 1.

The word "beverage" is to be understood as indicating the use of such liquors as distinguished from their use as a medicine. See *People v. Hichman*, 75 Mich. 587, 42 N. W. 1006, 4 L. R. A. 707.

We are of opinion that the defendant is guilty under the facts found in the special verdict.

The cause is remanded, with direction to proceed to judgment.

Reversed.

(173 N. C. 147)

**BOARD OF COM'RS FOR CALDWELL
COUNTY v. SIDNEY SPITZER
& CO. (No. 477.)**

(Supreme Court of North Carolina. March 14, 1917.)

**COUNTIES § 151 — FISCAL MANAGEMENT —
"NECESSARY EXPENSE" — COUNTY HOME —
"SUPPORT."**

Procuring a site for building a new county home is a "necessary expense," within the meaning of Const. art. 7, § 7, providing that no county shall contract debt, or levy or collect taxes, without sanction by vote of electors, except for necessary expenses, in view of article 11, § 7, providing that beneficent provision for the poor is one of the first duties of a Christian state, and the board of county commissioners has the power to issue bonds for the construc-

tion of a county home without sanction of a taxpayer's vote, under an act of the General Assembly; the word "support," as used in Revisal 1906, § 1327, including the building of a home.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 166, 218.

For other definitions, see Words and Phrases, First and Second Series, Necessary Expenses; Support.]

Appeal from Superior Court, Caldwell County; Webb, Judge.

Proceeding by the Board of Commissioners for the County of Caldwell against Sidney Spitzer & Co. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a controversy without action between the board of commissioners for the county of Caldwell and the defendant, Sidney Spitzer & Co., to determine the validity of bonds issued by authority of an act of the General Assembly, ratified January 9, 1917. By that act the said commissioners were empowered to issue bonds, among other things, for the purpose "of securing site for and building a new county home for said county." These bonds were directed to be issued without a vote of the people. The defendant made a proposition for the purchase of the said bonds, which the plaintiff board accepted. This proposition was made dependent upon the legality of the issue. Defendant, under the advice of its attorney, declined to complete the purchase, upon the ground that the said bonds to be issued under said act, \$12,000 in amount, were not for a necessary expense of the said county, and that, therefore, a majority of the qualified voters of Caldwell county were required to sanction the issue to make said bonds legal under the provisions of article 7, § 7, of the Constitution of North Carolina. The only question presented is the one as to whether procuring a site for and building a new county home is a necessary expense of the county of Caldwell.

Judgment was rendered in favor of the plaintiff, declaring said bonds valid, and adjudging the recovery of the purchase price thereof, and the defendant excepted and appealed.

B. F. Williams, of Lenoir, for appellant.
Squires & Whisnant, of Lenoir, for appellee.

ALLEN, J. It is declared in article 11, § 7, of the Constitution that "beneficent provision for the poor, the unfortunate and orphan" is "one of the first duties of a civilized and Christian state," and in accordance with this spirit, which pervades the Constitution, it was held in *Jones v. Commissioners*, 137 N. C. 579, 50 S. E. 291, and affirmed in *Keith v. Lockhart*, 171 N. C. 451, 83 S. E. 640, that the "support of the aged and infirm," which is the designation given by statute to the poor of the county (Rev. §

1327; *Copple v. Com'rs*, 138 N. C. 132, 50 S. E. 574), is a necessary expense.

The word "support" has a variety of meanings, and does not necessarily include the building of a home; but, when considered in connection with the class to be benefited, many of whom are without a place of residence, and the policy of the state to maintain the poor at some permanent and established place, support includes shelter, a place to live, and this makes it necessary to build a county home, without which the duty enjoined upon the commissioners could not be performed.

It follows that the bonds in controversy are valid, and that the defendant must accept and pay for them.

Affirmed.

(173 N. C. 137)

BRINSON et al. v. DUPLIN COUNTY et al.
(No. 222.)

(Supreme Court of North Carolina. March 14, 1917.)

MANDAMUS \Leftrightarrow 187(10)—APPEAL—REPEAL OF STATUTE.

Where, after judgment of mandamus against county to require it to build fences under Laws 1915, c. 512, the county appealed, and pending the appeal the General Assembly passed a bill to authorize the county to issue bonds to build fences on vote of the people, and repealed chapter 512, the proceeding must be abated.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 437.]

Appeal from Superior Court, Duplin County; Lyon, Judge.

Mandamus by A. J. Brinson and others against Duplin County and W. G. Kornegay and others, as Commissioners of such County. Judgment for plaintiffs, and defendants appeal. Proceeding abated.

L. A. Beasley, of Kenansville, for appellants. R. D. Johnson, of Warsaw, for appellees.

CLARK, C. J. This is a mandamus against Duplin County (Revisal, § 1310 [1]; *Fountain v. Pitt County*, 171 N. C. 114, 87 S. E. 990) and its commissioners to compel the building of fences around the county, and around certain territories therein, and to borrow necessary funds to pay for the same, under the authority of chapter 512, Laws 1915. The court gave judgment in favor of the plaintiffs.

Pending the appeal by the defendants the General Assembly of 1917 has passed House Bill 919, Senate Bill 1305, to authorize Duplin county to issue bonds to build fences around said county and said territories therein, provided that a bond issue for \$100,000 for said purpose shall be ratified by a vote of the people, and repealing chapter 512, Laws 1915, under which this proceeding was instituted.

The defendants' counsel present the certified copy of said act and move that this

proceeding be abated. The motion must be allowed (*Wikel v. Commissioners*, 120 N. C. 451, 27 S. E. 117), and in accordance with the ruling therein "the judgment for costs below is affirmed, and each party will pay his own costs in this court, as the repealing statute was enacted before judgment here." To same effect, *Herring v. Pugh*, 125 N. C. 437, 34 S. E. 538.

Abated.

(173 N. C. 707)

McGEORGE v. NICOLA et al.

(Supreme Court of North Carolina. March 14, 1917.)

1. APPEAL AND ERROR \Leftrightarrow 1022(2)—REVIEW—FINDINGS OF REFEREE—APPROVAL BY COURT.

Where a case is heard on exceptions to a referee's report, and his findings of fact are accepted and approved by the judge upon evidence that tends to support them, the Supreme Court will not review the judge's findings on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4015.]

2. APPEAL AND ERROR \Leftrightarrow 1022(4)—REVIEW—FINDINGS OF TRIAL COURT.

When a case is heard on exceptions to a referee's report, the Supreme Court will not review the trial judge's independent findings of fact on evidence tending to support them, or such as he made when overruling findings of the referee.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4017.]

3. APPEAL AND ERROR \Leftrightarrow 831(4)—PRESUMPTIONS—FINDINGS—FAVORING JUDGMENT.

In an action to recover land, referred to a referee, although the trial court, overruling the referee's findings, failed to set out findings in his judgment that plaintiff's grants had been located by the greater weight of the evidence, the Supreme Court must presume that the trial court found such to be the facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764.]

Appeal from Superior Court, McDowell County; Justice, Judge.

Action by Percy McGeorge against F. F. Nicola and others. From a judgment for plaintiff, defendants appeal. No error.

W. B. Council, of Hickory, and Avery & Ervin, of Morganton, for appellants. Pless & Winborne, of Marion, and S. J. Ervin, of Morganton, for appellee.

PER CURIAM. Plaintiff sued for the recovery of a large body of land, containing about 10,000 acres, claimed under several grants from the state. The defendants denied the plaintiff's title, which involves the question of the location of the several state grants and mesne conveyances which cover the locus in quo. After the pleadings were filed and the issues were raised, the case was, by consent, referred to Hon. W. D. Turner, of Statesville, N. C., and, after taking evidence and hearing counsel for both plaintiff and defendants, the referee, on November 25, 1915, filed his report, which is set out in the record. The plaintiff filed exceptions to the report of the referee, both as to the findings

of fact made by him and to his conclusions of law. Defendants also filed exceptions to the report of the referee, both as to the facts found by the referee and as to his conclusions of law. Upon the exceptions filed by plaintiff and defendants the case was heard by Judge Justice with the consent of the parties at chambers in Rutherfordton, N. C., on the 23d day of March, 1916, and, upon the hearing, the exceptions filed by the plaintiff were sustained, and those filed by the defendants were overruled and judgment rendered in favor of the plaintiff, as appears in the record, the material part of which is as follows:

"It is considered, ordered, and adjudged that the plaintiff's exceptions to the findings of fact set out in said report numbered from 1 to 14, both inclusive, and plaintiff's exceptions to the conclusions of law set out in said report numbered from 1 to 3, both inclusive, be and the same are hereby sustained, and that said report be and the same is amended in accordance with said exceptions. It is further considered, ordered, and adjudged that the defendants' exceptions to said report be and the same are hereby overruled, except in so far as the same are sustained by the foregoing order sustaining the plaintiff's exceptions. It is further considered, ordered, and adjudged that the report of the said W. D. Turner, referee, be and the same is in all respects approved and confirmed, except in so far as the same is modified by the order sustaining the plaintiff's exceptions thereto and by this judgment. It is further considered, ordered, and adjudged that Percy McGeorge, plaintiff, is the owner of and entitled to the possession of the land described in the complaint, and that the defendants have no title to any of the lands described therein, and that the claim asserted thereto by the defendants is not sustained and constitutes a cloud thereon, and that said defendants be and they are hereby enjoined and restrained from asserting any claim thereto. It is further considered, ordered, and adjudged that the plaintiff recover of the defendants and the surety on their defense bond the cost of this action, to be taxed by the clerk."

The defendants filed numerous assignments of error based upon exceptions previously entered by them to the referee's report, and also upon the rulings of the judge upon the exceptions of both parties thereto. Many of these assignments are framed substantially alike, and it will be necessary to state only three of them; the first being correct types of all the others except the last of them now set forth.

The defendants assign as errors, and as ground of exception to the judgment, the following:

"(1) Error in sustaining No. — of plaintiff's exceptions to the report of the referee, and the attempted amendment to the report in accordance therewith, on the ground that said exception is not warranted or sustained by the evidence or the law applicable thereto.

"(2) Error in overruling No. — of defendants' exceptions to the report of the referee on the ground that the said exception was warranted by the evidence and the law applicable thereto as set out in said exception.

"(3) Defendants further assign error in said judgment, in that, while the rulings of the court on plaintiff's exceptions are tantamount to holding that there was some evidence to be considered by the referee tending to establish the contentions of the plaintiff, the court fails to find

that the grants of the plaintiff have been located by the greater weight of the evidence so as to vest title in the plaintiff to the lands described in said grants, and fails to find any facts to warrant said judgment."

There are a few exceptions to conclusions of law, but we think they are really involved in the other exceptions and raise the question whether there was any evidence to sustain the location of the land as claimed by the plaintiff.

[1] We have often held that, when a case is heard upon exceptions to a referee's report and his findings of fact are accepted and approved by the judge upon evidence that tends to support them, we will not review the judge's findings in this court. As said in *McCullers v. Cheatham*, 163 N. C. 63, 79 S. E. 306:

"The misfortune of the defendants in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. * * * We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them."

[2] This was approved in *Spruce Co. v. Hayes*, 169 N. C. 254, 85 S. E. 382, and applies to those rulings in which the judge has approved the referee's findings. It also applies to the judge's independent findings and to such as he made when overruling those of the referee. We adopt the facts as stated in the final judgment, if there is any evidence to support them. *Adickes v. Drewry*, 171 N. C. 667, 89 S. E. 23; *Sturtevant v. Cotton Mills*, 171 N. C. 119, 87 S. E. 992; *Usry v. Suit*, 91 N. C. 406; *Bule v. Kennedy*, 164 N. C. 290, 80 S. E. 445; *Lumber Co. v. Lumber Co.*, 169 N. C. 80, 85 S. E. 438; *Henderson v. McLain*, 146 N. C. 329, 59 S. E. 873; *Baggett v. Wilson*, 152 N. C. 182, 67 S. E. 479; *Bailey v. Hopkins*, 152 N. C. 750, 67 S. E. 569. This disposes of nearly all of the exceptions, as we think there is evidence upon which the findings of the judge can well be based.

It is conceded in the third of the assignments above set out (No. 44 in the record, it being the last one of all) that:

"The rulings of the court are tantamount to a holding that there was some evidence to be considered by the referee tending to establish the plaintiff's contentions."

We have said that this "holding" of the court was correct. The defendants further except, in that assignment, upon the ground that:

"The court fails to find that the grants of the plaintiff have been located by the greater weight of the evidence."

[3] It would, perhaps, have been more formal and regular to have set out the specific findings of the court in its judgment, but as the judge was passing upon the plaintiff's exceptions and the facts were therein stated

—that is, those which he evidently thought the evidence warranted—we must, of course, presume that he found those to be the facts without setting them out fully in the judgment. His general conclusion, as embodied in the judgment, clearly implies that he found:

"That the grants of the plaintiff had been located by the greater weight of the evidence, so as to vest the title in the plaintiff to the lands described in them."

The fact that the judge set aside the referee's decision as to the location of the grants, to which the plaintiff filed exceptions, shows that he found there were facts sufficient to support the plaintiff's contention as to the proper location of the land described in the grants.

We have carefully examined the record and find that there is ample evidence of the location of the lands claimed by the plaintiff under the grants, and further that there is nothing unusual, in the legal aspects of the case, to require any detailed discussion of the matters in controversy in addition to what we already have said about it, as in the view we take of the record the principles of law are well settled.

No error.

(173 N. C. 110)

HARRIS v. NORFOLK SOUTHERN R. CO.
(No. 172.)

(Supreme Court of North Carolina. March 14, 1917.)

1. CARRIERS ⇨119—CARRIAGE OF GOODS—
"ACT OF GOD."

A wind and rainstorm of such unusual extent and violence as to be out of the ordinary range of human experience is an "act of God" within the meaning of the principle which ordinarily relieves a common carrier of liability for loss or destruction of goods in such cases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 523-530.

For other definitions, see Words and Phrases, First and Second Series, Act of God.]

2. CARRIERS ⇨123—CARRIAGE OF GOODS—
ACT OF GOD.

Where a common carrier of goods was negligent in constructing its warehouse, and negligently failed to remove goods therefrom, though able to do so before an unusual wind and rainstorm blew down the warehouse, the negligence of the carrier renders it liable, even though the storm be considered an act of God.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 506, 507, 539-543.]

3. TRIAL ⇨351(5)—SPECIAL ISSUES—SUBMISSION.

Where the issues submitted were fully sufficient to enable the parties to present adequately every matter involved in the controversy, the denial of additional special issues requested by defendant was not error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 834.]

Brown, J., dissenting.

Appeal from Superior Court, Pitt County; Lyon, Judge.

Action by R. E. Harris against the Norfolk Southern Railroad Company. From a

judgment for plaintiff, defendant appeals. Affirmed.

Civil action to recover value or damage for the loss of two shipments of goods over defendant railroad, consigned to plaintiff, the owner, at Washington, N. C. There was evidence on part of plaintiff tending to show that the goods, to the value of about \$1,000, on 2d and 3d of September, 1913, were held by defendants as common carriers and were, at the time, in a warehouse of the company, situate on and over the river at Washington, N. C., awaiting reshipment to plaintiff who was doing business at Falkland, and that the same had never been delivered to plaintiff or to any one for him. Defendants resisted recovery on the ground, chiefly, that on September 3, 1913, the goods and the warehouse, in which the same were held, were destroyed by a storm of wind and rain of such unexpected and unusual extent and violence that defendant company was relieved of liability for the loss, and offered much evidence tending to support its position. Plaintiff replied, and there was some evidence tending to show that the warehouse on the river was improperly and unsafely built, and that its destruction was due to this fact rather than to the storm, as defendant contended, and, further, that after defendant had warning of the storm and its nature and with facilities at hand for removing the goods from the exposed position, it did not make proper efforts to do so. On issues submitted, the jury rendered the following verdict:

"(1) Were the goods damaged and destroyed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"(2) If so, what damage is plaintiff entitled to recover? Answer: \$946.15."

Judgment, and defendant excepted and appealed.

L. I. Moore, of Newbern, for appellant. Skinner & Cooper, of Greenville, for appellee.

HOKE, J. [1, 2] The position is fully recognized here and elsewhere that a wind and rain storm of unusual extent and violence, one "so far outside of the ordinary range of human experience that the duty of exercising ordinary care does not require that it be anticipated or provided against," is an act of God, within the meaning of the principle which ordinarily relieves a common carrier of liability in such cases. 29 Cyc. 441. And it is further held that, in order to its proper application, the negligence of the carrier must not have concurred as a proximate cause of the loss complained of. Under a charge of the court below, in full recognition of these principles, the jury have answered the issues for the plaintiff, and we find no error in the case on appeal and exceptions noted which justify us in disturbing the results of the trial.

In *Shearman & Redfield on Negligence* (6th Ed.) 1613, it is said:

"The rule is the same when the act of God or accident combines or concurs with the negligence of the defendant to produce the injury, as when any other efficient cause combines or concurs. The defendant is liable if the injury would not have resulted but for his own wrongful act or omission."

In *Barrows on Negligence*, p. 23, the position is stated thus:

"When a negligent or wrongful act is followed by an extraordinary natural occurrence which connects the act with consequent injury, the wrongdoer is still liable, and this is true even if the original negligent act without the occurrence of the natural phenomenon would not in itself have produced harm."

And *Moore on Carriers* (2d Ed.) p. 308, is to the same effect.

The principle, as stated in these authorities, has been approved by decisions in our own court. *Ridge v. Railway*, 167 N. C. 510-527, 83 S. E. 762; *Ferebee v. Railway*, 163 N. C. 351-354, 79 S. E. 685, 52 L. R. A. (N. S.) 1114, and are in accord with doctrine very generally prevailing on the subject.

[3] The refusal to submit certain issues tendered by defendant, directed more specifically to the character and effects of the storm, cannot be sustained, those submitted being fully sufficient to enable the parties to present adequately and properly every "matter involved in the controversy." *Zollicoffer v. Zollicoffer*, 168 N. C. 326, 84 S. E. 349; *Barefoot v. Lee*, 168 N. C. 89, 83 S. E. 247.

The objections to the rulings of the court on questions of evidence are without merit, and could have had no appreciable effect on the result. We find no reversible error in the record, and the judgment for plaintiff is affirmed.

Affirmed.

BROWN, J., dissents.

(173 N. C. 129)

BOWEN v. W. A. POLLARD & CO. et al.
(No. 188.)

(Supreme Court of North Carolina. March 14, 1917.)

1. MALICIOUS PROSECUTION §56 — BURDEN OF PROOF—ELEMENTS.

In action for damages for malicious prosecution, plaintiff has the burden of proving the institution and termination of a criminal charge against him; that the prosecution was without probable cause; that it was instituted with malice; and that the defendants participated therein.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 112-116.]

2. MALICIOUS PROSECUTION §71(2)—PROBABLE CAUSE—QUESTION FOR COURT.

What is probable cause is a question of law to be decided by the court on the facts as found by the jury.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 161, 162.]

3. MALICIOUS PROSECUTION §18(1)—"PROBABLE CAUSE."

"Probable cause" is the existence of circumstances sufficient to excite in a reasonable mind suspicion that the person charged was guilty, and is a case of apparent guilt contradistinguished from real guilt; it not being essential that there should be positive evidence of guilt when the action is commenced.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 23, 24, 38.

For other definitions, see *Words and Phrases*, First and Second Series, *Probable Cause*.]

4. MALICIOUS PROSECUTION §24(1)—PROBABLE CAUSE—EFFECT OF INDICTMENT.

The fact that the committing magistrate before whom the plaintiff was charged with an offense required him to enter into bond for his appearance and that a grand jury returned a true bill against him established probable cause *prima facie*, but not conclusively.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 49.]

5. MALICIOUS PROSECUTION §64(1)—PROBABLE CAUSE—EVIDENCE.

Evidence held to show want of probable cause in instituting prosecution against plaintiff in action for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 151, 153.]

6. MALICIOUS PROSECUTION §32—WANT OF PROBABLE CAUSE—INFERENCE OF MALICE.

Malice may be inferred from a want of probable cause for instituting criminal proceedings.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 67, 68.]

7. MALICIOUS PROSECUTION §64(1)—PARTICIPATION OF DEFENDANTS—EVIDENCE.

Evidence held to show that certain defendants participated in the bringing of a criminal prosecution for which plaintiff sought damages as for malicious prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 151, 153.]

8. MALICIOUS PROSECUTION §42—LIABILITY—PARTICIPATION OF PARTNER.

The mere fact that one defendant, in action for malicious prosecution, was a partner of another who participated in the criminal prosecution, without evidence at least of his knowledge, approval, or consent, would not be sufficient to connect him with the prosecution and charge him with damages therefor.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 83-86.]

Appeal from Superior Court, Pitt County; Stacy, Judge.

Action by Thomas H. Bowen against W. A. Pollard & Co. and others. Judgment of nonsuit, and plaintiff appeals. Reversed in part, and affirmed in part.

This is an action to recover damages for malicious prosecution, the evidence tending to prove the following facts: The plaintiff was living on his wife's land in Pitt county, and went to Pollard & Co. to obtain advancements for the year 1910 to the amount of \$400. In accordance with the agreement made Bowen executed a crop lien to Pollard & Co. on January 25, 1910. About five weeks thereafter the defendant Pollard approached the plaintiff and requested, as the title to the land had been found to be in plaintiff's wife, that plaintiff and his wife sign the

crop lien. This the plaintiff agreed to do, and, in accordance with the desire of Pollard & Co. plaintiff and wife executed a new crop lien to the said defendants. At the time this was done Mrs. Bowen, wife of the plaintiff, refused at first to sign unless one-third of the crop was excepted, as she was in debt for the land. Finally it was agreed that five acres should be excepted, and the exception of "five acres in tobacco" was written in the mortgage. Mrs. Bowen planted peas in the tobacco when it was laid by. There is no definite evidence in the record as to how much the account of the Bowens amounted to for the year, but it was about \$800. The plaintiff introduced in evidence receipts to the amount of \$590, which were admitted to be correct. When the harvesting season came on Pollard & Co. received all of the plaintiff's crop and certain personal property.

This cause of action grew out of the efforts of Pollard & Co. to obtain the hay raised on Mrs. Bowen's five acres of tobacco excepted in the crop lien. They began an action against the plaintiff and his wife for the hay before a magistrate of Farmville township, in which action papers in claim and delivery were issued.

When the claim and delivery papers were served upon the Bowens, the hay was not actually seized, but remained in the yard of plaintiff Bowen with a statement of the officer not to move it before trial. An examination of the officer's return upon the fiat, in the record, shows that the officer states:

"The defendant having executed a good and sufficient undertaking as required by law, the said property was delivered back to the defendant."

After the trial the hay in question remained in the stack in the yard for several weeks, exposed to the weather and the depredations of stock, until finally Mrs. Bowen had her boys remove it and place it under shelter. She then used up about 300 pounds of the hay in feeding the team, but plaintiff testifies he had nothing whatever to do with this or the removal of the hay.

Some time after this the defendant Flanagan went to the home of the plaintiff and asked for the hay. He was the constable of Farmville township, and the one who served the claim and delivery papers. According to his statement, there was as much as 1,000 pounds of the hay used, and he demanded pay for it, and says that Bowen promised to pay \$5 for what was used, and that Bowen did not do what was promised; that he told Pollard about this, and Pollard said that \$5 would be all right. Flanagan further states that he informed Pollard that the \$5 was not paid. Immediately afterwards, Flanagan swore out the criminal warrant. Before the arrest Flanagan resigned, and Bowling took his place, and made the arrest.

The new constable arrested Bowen and car-

ried him under custody to Farmville. Upon arriving there, Bowen was taken to the store of Pollard & Co. and Pollard offered, upon the payment of \$10 for the hay, to let Bowen go. Bowen did not have the money, and he was put in the town guardhouse for the night. The next morning he was taken out and tried before R. E. Belcher, a brother-in-law of the defendant Flanagan. At this trial Bowen was bound over to the superior court under a \$200 bond. Bowen endeavored to get the constable to carry him by the home of one Bill Elks, who lives on one of the roads running from Farmville to Greenville, where Bowen could have given bond, but the constable would not do this. The plaintiff was put back in the guardhouse and kept all that day and night, and was carried to Greenville next day.

After the trial of the case before the magistrate, Bowen was again carried to Pollard, and he asked Pollard to stand his bond. This Pollard refused to do, with a statement that he would not stand his bond after prosecuting him for the hay. When the case was brought to trial in the superior court, the grand jury found a true bill, but upon the trial the presiding judge directed a verdict of not guilty.

It is in evidence that the defendants Pollard & Co. never advertised and sold the produce and chattels taken from the plaintiff, as required by law, but credited them at the price fixed by themselves. There was other evidence referred to in the opinion. At the conclusion of the evidence his honor entered judgment of nonsuit, and the plaintiff excepted and appealed.

S. J. Everett and W. F. Evans, both of Greenville, for appellant. F. G. James & Son and Skinner & Cooper, all of Greenville, for appellees.

ALLEN, J. [1] The action is to recover damages for a malicious prosecution, and the burden is on the plaintiff to prove: (1) The institution and termination of a criminal charge against him; (2) that the prosecution was without probable cause; (3) that it was with malice; (4) that the defendants participated in the prosecution. If, however, he has furnished evidence of these facts, giving to the evidence the most favorable construction for the plaintiff, as we are required to do on appeals from judgments of nonsuit, there is error.

It is not denied that a criminal prosecution was instituted against the plaintiff, and that it terminated by a verdict of not guilty before this action was commenced, but the defendants contend that probable cause is shown by the evidence of the plaintiff, and that there is no evidence of malice or that the defendants took part in the prosecution.

[2, 3] "What is probable cause is a question of law, to be decided by the court upon the facts, as they may be found by the jury." Beale v. Roberson, 29 N. C. 280; Vickers v.

Logan, 44 N. C. 393. As a guide to the court, it is defined to be:

"The existence of circumstances and facts sufficiently strong to excite, in a reasonable mind, suspicion that the person charged with having been guilty, was guilty. It is a case of apparent guilt as contradistinguished from real guilt. It is not essential that there should be positive evidence at the time the action is commenced, but the guilt should be so apparent at the time as would be sufficient ground to induce a rational and prudent man, who duly regards the rights of others, as well as his own, to institute a prosecution, not that he knows the facts necessary to ensure a conviction, but that there are known to him sufficient grounds to suspect that the person he charges was guilty of the offence." *Smith v. Deaver*, 49 N. C. 515, approved in *Wilkinson v. Wilkinson*, 159 N. C. 265, 74 S. E. 740, 39 L. R. A. (N. S.) 1215.

[4] The fact that the committing magistrate required the plaintiff to enter into bond for his appearance at court, and that a grand jury returned a true bill against him, establish probable cause *prima facie*, but not conclusively, and it was still open to the plaintiff to prove there was no probable cause. *Stanford v. Gro. Co.*, 143 N. C. 426, 55 S. E. 815. Let us apply these principles to the evidence.

The charge in the warrant is that the plaintiff did "move and make way with hay after being attached," and it appears that the hay was not attached, but that it was seized in proceedings in claim and delivery. The defendant Flanagan, who served the papers in the claim and delivery proceedings, and who made the affidavit for the warrant, does not testify that after the seizure of the hay he left it in charge of the plaintiff as his agent, if this could be done legally, nor does it appear that he made any effort to remove it. He left it where it was on the land of the plaintiff's wife, and made return:

"The defendant [the plaintiff in this action] having executed a good and sufficient undertaking, as required by law, the said property was delivered back to the defendant."

The plaintiff testified that the hay remained in the field more than a month after the papers in claim and delivery were served, when it was removed to a shelter by his wife and children in his absence, to protect it from stock, and that, although about 300 pounds of the hay was used in feeding horses, on which the defendants Pollard and Joyner held a mortgage, and which were afterwards delivered to them, he had nothing to do with it, and so told Flanagan before the warrant was issued. He also offered evidence tending to prove that the supplies furnished by Pollard & Co. amounted to about \$600, and he produced receipts showing payments of \$590, and in addition that he had delivered 15 bushels of cotton seed, and that the stock turned over to Pollard & Co. was not advertised and sold and was credited at less than its value. The wife of the plaintiff also testified "that, instead of them owing Pollard [meaning Pollard & Co.], Pollard was owing them."

[5, 6] If this evidence is true, and the jury alone had the right to pass on its credibility, the warrant was issued on the affidavit of the defendant Flanagan for unlawfully removing the hay, when there was nothing due Pollard & Co., which Pollard & Co. knew or ought to have known, and when the hay had been left with the plaintiff after he had given his bond for the return of the property, and when the plaintiff had told Flanagan he had nothing to do with the use or removal of the hay, and this is evidence of a want of probable cause, and malice may be inferred from a want of probable cause. *Humphries v. Edwards*, 164 N. C. 156, 80 S. E. 165.

The distinction between malice which is necessary to sustain the action and proof of malice which will justify awarding punitive damages is clearly stated and discussed by Justice Hoke in *Stanford v. Gro. Co.*, 143 N. C. 422, 55 S. E. 815. There is, however, some evidence of actual malice in the evidence of the plaintiff, in addition to the malice which may be inferred from the want of probable cause, and which alone is sufficient to sustain this element in the cause of action, which we will not discuss as the action is to be tried again. We have, then, evidence of malice and of a want of probable cause, and the remaining question is whether there is any evidence that the defendants or either of them participated in the prosecution.

[7] Flanagan made the affidavit upon which the warrant issued, and the plaintiff testified that after his arrest he was carried to the store of Pollard & Co., and that the defendant Pollard told him before the trial that if he would pay him \$10 he would let him go back, and again after the trial that he would release him if he would pay him \$10 for the hay, and when asked to stand his bond for his appearance at court, Pollard said, "You know I would not stand your bond after prosecuting you for the hay," and this is evidence that these two defendants took part in the prosecution.

[8] We find no evidence against the defendant Joyner. He was absent from home when the prosecution was begun and knew nothing about it, so far as the evidence discloses, until after its termination, and the mere fact that he was a partner of Pollard, without evidence, direct or circumstantial, of at least his knowledge, approval, or consent, would not be sufficient to connect him with the prosecution. *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412; *Rosankrans v. Barker*, 115 Ill. 331, 3 N. E. 93, 56 Am. Rep. 169; *Noblett v. Bartsch*, 31 Wash. 24, 71 Pac. 551, 96 Am. St. Rep. 886.

The judgment of nonsuit must therefore be set aside as to the defendants Flanagan and Pollard, and sustained as to Joyner.

Reversed as to Pollard and Flanagan. Affirmed as to Joyner.

(173 N. C. 117)

DOVER LUMBER CO. v. BOARD OF COM'RS OF MOSLEY CREEK DRAINAGE DIST. et al. (No. 175.)

(Supreme Court of North Carolina. March 14, 1917.)

1. DRAINS §91—ASSESSMENTS—INJUNCTION.

Where judgment in a drainage proceeding was absolutely void as to a lumber company which was not served with summons or other notice in the proceedings, and was not an apparent party, but merely the owner of a timber contract, injunction to enjoin an annual assessment made by the commissioners of the drainage district against the lumber company's timber was a proper remedy.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 53, 82, 102, 103.]

2. DRAINS §14(2)—FORMATION OF DISTRICT —NOTICE.

Under the drainage statute (Laws 1909, c. 442, amended by Laws 1911, c. 67), requiring summons to be served on all the defendant landowners who have not joined in the petition, and whose lands are included in the proposed drainage district, it is essential that notice in all proceedings for the formation of a drainage district be given to all parties who will be affected.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 5.]

3. DRAINS §76 — FORMATION OF DISTRICT — PROCEEDING IN REM.

One of the essentials of a proceeding in rem, as a drainage district proceeding to charge property with an assessment, is that the property sought to be charged shall be identified by description in the proceedings.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 76-81.]

4. DRAINS §70 — DISTRICT — PROPERTY ASSESSABLE — TIMBER LEASE — "LAND" — STATUTE.

Under the drainage statute, requiring only landowners to be made parties in proceedings for the formation of a district, and that such proceeding shall be initiated only by a majority of the resident landowners, and that, for purposes of assessment, the lands shall be divided into five classes, and the degree of wetness and proximity to the ditch or natural outlet and the fertility of the soil shall be considered in determining the amount of benefit, a timber lease, entitling the holder to cut and remove timber from lands within a specified period, is not assessable for drainage purposes, since, when standing timber is severed by conveyance from the land, it is no longer a part of the land.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 74.

For other definitions, see Words and Phrases, First and Second Series, Land.]

Clark, C. J., dissenting in part.

Appeal from Superior Court, Craven County; C. G. Lyon, Judge.

Action by the Dover Lumber Company against the Board of Commissioners of Mosley Creek Drainage District and others. From a judgment dissolving an injunction, plaintiff appeals. Judgment reversed, and cause remanded, with direction to enter judgment for plaintiff in accordance with the opinion.

This action is brought to enjoin an annual assessment of \$1,992.50 each year for five years made against plaintiff's timber by de-

fendants. The cause was heard by Lyons, Judge, at November term, 1916, of the superior court of Craven county, upon an agreed state of facts. His honor held that the assessment was valid, and came within the terms of the drainage laws, and dissolved the injunction. Plaintiff appealed.

D. L. Ward and Moore & Dunn, all of Newbern, for appellant. Gulon & Gulon, of Newbern, for appellees.

BROWN, J. The case agreed substantially sets forth these facts: The Dover Lumber Company, a corporation, owned certain rights to cut standing timber upon the lands of the West estate, situated within the Mosley Creek drainage district. The timber was conveyed to plaintiff, with the privilege of removing it within a stipulated period, prior to the formation of the drainage district. When the district was formed, the plaintiff was not made a party nor served with summons, neither was the particular timber of the plaintiff referred to anywhere in the proceedings. No summons was issued against the plaintiff, and there was no apparent service upon it.

The owner of the land known as the West estate was a party, and an assessment was levied against the land. The grounds upon which plaintiff asks injunctive relief are: (1) That plaintiff has had no notice of and is no party to the drainage proceeding; (2) That standing timber, the title to which has been severed from the land by conveyance, is not the subject of assessment under the statute. It is contended that injunction is not the proper remedy.

[1] The plaintiff was not only not served with summons or other notice in the drainage proceeding, but was not an apparent party. The judgment was therefore absolutely void as to it and could be attacked collaterally. Had plaintiff been an apparent party and had there been apparent service on it, then the remedy would be by motion in the cause. Where it appears on the face of a legal proceeding that a party against whom execution is issued has not been made a party, and that there has been no service of summons, the judgment is void as to him, and its enforcement will be restrained. *Bowman v. Ward*, 152 N. C. 602, 68 S. E. 2.

[2] Our drainage statute (Laws 1909, c. 442, amended by Laws 1911, c. 67) is mandatory in requiring a "summons to be served on all the defendant landowners who have not joined in the petition and whose lands are included in the proposed drainage district." The drainage laws of North Carolina have been largely copied from the acts in Indiana and Illinois, and following the construction of these acts in these and other states for the long period of time the acts have been in force, it is essential that notice of summons in all such proceedings be given to all

parties who will be affected thereby. *Sites v. Miller*, 120 Ind. 19, 22 N. E. 82, citing numerous authorities; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 872; *Curran v. Sibley County*, 47 Minn. 313, 50 N. W. 237; *Baltimore, etc., R. R. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91. In those states it is held that where the mandate of the statute is that notice shall be given in the manner and for the time therein prescribed, before the time fixed for the hearing of the petition, failure in respect to give this notice as required will render invalid any assessment against a person who is not so notified. *Yolo Co. Reclamation District v. Burger*, 122 Cal. 442, 55 Pac. 156; *Craig v. People*, 188 Ill. 416, 58 N. E. 1000; *McMullen v. State*, 105 Ind. 334, 4 N. E. 903.

In the Supreme Court of the United States it has been held, in the enforcement of a drainage assessment, the question of due process of law does arise where the defense goes to the validity of the service. *Hager v. Reclamation District*, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The case of *Banks v. Lane*, 170 N. C. 14, 36 S. E. 713, differs materially from this. In that case it was held that where the landowner had been made a party and the land duly assessed, a mortgagee need not be made a party, as the proceeding is one in rem and the draining of the land inured to his benefit as well as to that of the mortgagor; hence the mortgagee could not restrain the collection of the assessment.

Upon rehearing (171 N. C. 505, 38 S. E. 754) there were two concurring opinions, with one justice dissenting in toto. Mr. Justice Walker concurred in the decision that the remedy was by motion in the original proceedings upon the ground that it did not appear affirmatively on the face of the Craven judgment that there was no service of the summons. The writer concurred upon the same ground, and further that it did appear that the lands belonging to Mrs. Spivey were set out and embraced in the drainage proceedings and were duly assessed in her name as one of the landowners within the drainage district.

[3] One of the essentials of a proceeding in rem is that the property sought to be charged shall be identified by description in the proceedings. Nothing of the sort appears in this drainage proceeding. The owner of the timber lease had no right to assume that his timber would be separately assessed because the owner of the land upon which it grew had been made a party. The assessment of the timber lease appears to have been an afterthought of the viewers, and does not appear to have been contemplated when the proceeding was first initiated.

[4] The second position of plaintiff is that a timber lease does not come within the letter or spirit of the statute, and is not assessable for drainage purposes. It appears to us that this proposition is undoubtedly correct. When standing timber is severed by

conveyance from the land, with the right to cut and remove within a given period all timber of a certain size, it is no longer a part of the land. The owner of the timber is not a freeholder or landowner from the mere fact of owning a timber lease. It is true we have held that timber is to be considered as land for purposes of conveyancing, but it does not follow the land after it has been so conveyed, and is no longer a part and parcel of it.

The statute provides for issuing drainage bonds to be paid in annual installments by assessments on the lands. These assessments "shall constitute the first and paramount lien, second only to county and state taxes."

If the standing timber is assessable separate from the land, and if the assessment is a lien on the timber, the owner of the bond can restrain the cutting of the timber until the bonds are paid, and if the term for cutting is less than ten years, the owner of the timber would lose all of it as he could not cut within the ten years, and the timber not cut within that time would belong to the owner of the land.

The statute requires only landowners to be made parties in such drainage proceedings, and that the proceeding shall be initiated only by a majority of the "resident landowners." It provides that for purposes of assessment the lands shall be divided into five classes, and that "the degree of wetness on the land, its proximity to the ditch or a natural outlet and the fertility of the soil shall be considered in determining the amount of benefit it will receive by the construction of the ditch." It is useless to quote further from the act. It is sufficient to say that its entire context plainly indicates that timber leases, such as the one held by plaintiff, do not come within its purview, and that its purpose is to facilitate the drainage of lands for agriculture.

It was well known to the General Assembly that much of the standing timber upon the lands of this state has been sold, with the right to cut and remove it limited, as in this case, to a few years. Had it been intended by the statute to embrace such leases within its terms, the Legislature would have said so and doubtless have provided a method of assessment measured by the benefit, if any, accruing to the timber exclusively during the actual existence of the lease and not, as in this case, amounting to practical confiscation. The judgment is reversed, and the cause remanded to the superior court of Craven county, with direction to enter judgment for plaintiff in accordance with this opinion.

Reversed.

ALLEN, J., concurs. See 91 S. E. 845.

CLARK, C. J., concurs on the first ground that the plaintiff, owner of the timber interest in the land, was not made a party in the

drainage proceeding, and has had no day in court. In *Banks v. Lane*, 170 N. C. 14, 86 S. E. 713, s. c., 171 N. C. 505, 88 S. E. 754, the landowner had been made a party, and was duly assessed. The court held that such proceeding was in rem, and that the notice to the owner was sufficient, for the mortgage was only an incumbrance, and it was also to be presumed that the mortgagee was benefited by the enhancement of the value of the land, which was security for the debt.

I dissent, however, as to the second point, which besides is merely an obiter dictum, since the proposition cannot arise after holding that the plaintiff has not been made a party, and that the whole proceeding was void as to it. If the plaintiff had been made a party, of course, it would be bound by any judgment or assessment from which it did not appeal. Moreover, the conveyance of the timber right has been often held by this court to be a conveyance of the realty. *Timber Co. v. Wells*, 171 N. C. 264, 88 S. E. 327, and cases cited. If the timber had not been conveyed at the time of the judgment in this drainage proceeding the land with the timber on it would have been assessed its due share for the payment of the bonds and the expenses of the proceeding. The owner, having parted with the valuable timber interests, would not be assessed for the same valuation on the land as he would have been before such conveyance. If the valuation assessed against his land was reduced by the value of the conveyance of the timber, of course the owner of such timber right would be assessed for the value of such timber as was standing and uncut at the time the assessment and valuation were made. It is true the conveyance may be called a lease, but it is not a lease in the ordinary sense of a lease of a house or farm which takes nothing from the value of the realty, but it is a conveyance of an interest for years in the land. Till the timber is cut the land cannot be used for any other purpose, and the gradual cutting of the timber will impair the value of the tract.

Whatever the value of this conveyance for years is at any given time, it is liable for taxation. Revisal, § 5225; Laws 1915, c. 286, § 32—which provide that when any "mineral, quarry or timber right" is owned by other than the owner of the fee, such right shall be listed and taxed in the name of its owner, such right and the fee being assessed separately. Of course, therefore, it is liable for an assessment of its value in forming a drainage district. There are thousands of acres of timber held by lumber companies which are very valuable, and to hold that such timber rights are not liable to taxation, or for an assessment in the drainage district which may embrace them, would be to exempt a very great property, many millions of dollars, from liability either to taxation or

assessment for any local purpose. If liable to taxation as realty, they must be equally subject to local assessments.

In laying a local assessment, whether it is for paving or for fencing or for a drainage district or other purpose the question is not whether the particular property is benefited, but what is its valuation. There is some modification under the terms of the statute in proceedings for drainage, having regard to the benefit to each tract; but when the tract is assessed and the timber interest is sold off, whether before or after the assessment, such timber interest should be assessed in the proportion that the timber right bears to the value of the whole tract.

(178 N. C. 134)

ODOM v. CANFIELD LUMBER CO.
(No. 221.)

(Supreme Court of North Carolina. March 14, 1917.)

1. MASTER AND SERVANT §137(5)—INJURY TO SERVANT—DUTY TO WARN.

That an employé knew of dangers incident to operating a skidder did not relieve the master, when about to remove a locomotive attached to a train on which the skidder was being loaded, of the duty to give the usual notice by blowing the whistle.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278.]

2. MASTER AND SERVANT §137(5)—INJURY TO SERVANT—DUTY TO WARN—VOLUNTEER.

Even if a servant had volunteered to get on a locomotive and hand a chisel to his foreman, such fact would not give the employer right to injure him negligently.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 269, 270, 274, 277, 278.]

Allen and Walker, JJ., dissenting.

Appeal from Superior Court, Onslow County; Devin, Judge.

Action by John E. Odom against the Canfield Lumber Company. Judgment for plaintiff, and defendant appeals. No error.

The fifth exception referred to is as follows:

The court also charged the jury as follows: "It was the duty of the Canfield Lumber Company to exercise reasonable care in its business to avoid injury to its employes while working about their premises which, in the exercise of reasonable care, could have been foreseen." The defendant excepts to this portion of his honor's charge, and this is the defendant's fifth exception.

The twelfth exception is as follows:

The defendant requested the court to charge the jury as follows, which the court did:

"(1) That if the plaintiff received his injury while attempting to get on the car while in motion, he is not entitled to recover, and you should answer the first issue 'No'—which was given.

"(2) That if the plaintiff was not employed by the defendant in such work as required his presence on or around the skidder, and he was there waiting to get a ride to his place of work, where he was working under a contract for the cutting of wood by the cord, and received his injury while attempting to get on the car while

in motion, he is not entitled to recover against the defendant, and you find that he received his injury while attempting to board the cars to go to his work in this way, you should answer the first issue 'No'—which was given.

"(3) That if the plaintiff was sitting at the fire near the skidder waiting for the skidder to be removed, the defendant owed him no duty of giving warning that the engine was going to move up to the skidder."

The defendant requested the court to charge the jury as follows, which was given:

"(4) That if the plaintiff, while on his way to work which was unconnected with the loading logs, stopped where the skidder was stationed and gratuitously handed a chisel to the operator of the skidder and received his injury while performing such gratuitous service, he is not entitled to recover against the defendant, and if you find that he was doing this work gratuitously, you will answer the first issue 'No.'"

The court refused to charge the same except as contained in general charge. The defendant excepts, and this is the defendant's twelfth exception.

Frank Thompson and E. M. Koonce, both of Jacksonville, Langston, Allen & Taylor, of Goldsboro, and Charles L. Abernethy, of Newbern, for appellant. Duffy & Day, of Jacksonville, and G. V. Cowper, of Kinston, for appellee.

CLARK, C. J. The plaintiff was an employé of the defendant, cutting wood, rafting logs, driving the loading horse and working on the railroad. It was the custom, known to the company and employes, that the men rode to and from their work on defendant's log train, and a whistle always sounded a short time before the engine started to give them notice that the engine was ready to move.

On this occasion the skidder was being jacked up on the car, by the usual method of jacking it up, letting the car go under it and then lowering the skidder down upon the car. The plaintiff was assisting in this work, when Fred Garner, in charge of the skidder, told him to jump up on the engine and hand him down a cold chisel, and as he turned around to get off, the train started and made a hitch, and as plaintiff grasped the bracket block it gave way, throwing the plaintiff off, and the engine ran over his left foot. Joe Lockie testified that he was foreman, but Garner was in charge of the skidder; that he "was in charge of the whole business, but Garner was particularly in charge of the skidder." The plaintiff testified that no whistle was sounded or other warning given after he was sent up on the engine to get the chisel. He also said:

"The morning I was hurt I did not have that warning of the train starting. It had never failed to give warning. That was the first time it failed to blow at that time that I know of."

He was corroborated by the witness Ed Jones, and his father and mother, Mr. and Mrs. Odom, testified that the foreman, Lockie, admitted to them soon after the injury that the whistle did not blow. Lockie himself says that it was current among the employes at the time that if the whistle had

been blown the plaintiff would not have been hurt.

The defendant demurred in this court for the first time that the complaint did not state a cause of action, but we cannot sustain the demurrer. The exceptions to the evidence and the charge have been considered, but we do not think they can be sustained, or that they need discussion. The case was almost entirely one of fact, and the jury have found the facts against the defendant. The definitions of negligence and of proximate cause were given practically as set out in *Pritchett v. Railroad*, 157 N. C. 102, 72 S. E. 828; *Mule Co. v. Railroad*, 160 N. C. 221, 76 S. E. 513. The charge as to proximate cause is in accordance with what was said in *Ward v. Railroad*, 161 N. C. 184, 76 S. E. 717; *Alexander v. Statesville*, 165 N. C. 532, 81 S. E. 763. The defendant contends that such charge conflicts with *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. But we do not see any conflict between these cases.

[1] Exceptions 3, 4, 6, 7, 8, and 9 require no discussion. As to the fifth exception the fact that the plaintiff was an employé and knew the dangers incident to operating the skidder did not relieve the defendant of giving usual notice by blowing the whistle. *Noble v. Lumber Co.*, 151 N. C. 78, 65 S. E. 622, 134 Am. St. Rep. 974; and cases there cited. Exceptions 10 and 11 were to the statement of plaintiff's contentions, and the defendant made no exception at the time. The court told the jury that the mortuary tables in the Revisal were not conclusive, but merely evidential. *Sledge v. Lumber Co.*, 140 N. C. 461, 53 S. E. 295.

[2] Exception 12 cannot be sustained; for there is no evidence that the plaintiff volunteered to hand the chisel to Garner. The plaintiff testified that he was directed by Garner to jump up on the engine and get the chisel; while the defendant's contention was that there was no chisel, and that plaintiff was not sent for it. Moreover, if he had volunteered to help Garner, being a workman under him, this would not have given defendant the right to negligently injure him.

There was also a motion in this court to set aside the judgment and verdict on the ground of newly discovered testimony. This court in *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702, 11 Am. St. Rep. 748, stated:

"This court will, as a rule, in future, grant or refuse such motions without discussing the facts embodied in the petitions or affidavits, * * * as we cannot see that any good will be accomplished by contributing another to the volumes that have been written upon the exercise of legal discretion" in such cases.

This has been cited and approved in many cases, especially in *Herndon v. Railroad*, 121 N. C. 499, 28 S. E. 144, where the court prescribed the practice in such cases and held that we would not hear oral argument on such motions. This has been followed ever since in *Crenshaw v. Railroad*, 140 N. C. 193,

52 S. E. 731; *Murdock v. Railroad*, 159 N. C. 132, 74 S. E. 887; and other cases. It may be well, however, to call attention to the summary of the rules as to the grounds of a valid motion as given by Mr. Justice Walker in *Johnson v. Railroad*, 163 N. C. 453, 79 S. E. 690, Ann. Cas. 1915B, 598. It does not appear in this case that the testimony of two witnesses which is now chiefly desired could not have been had if subpoenaed promptly; for they were both in the employ of the defendant company, and, moreover, their testimony would only have been cumulative.

No error.

ALLEN, J. (dissenting). I am of opinion there ought to be a new trial on the issue of damages on account of the failure of his honor to restrict the recovery of prospective damages to their present value. He nowhere told the jury that this was the rule for their guidance, and does not refer to present value, except in one place, when stating the contention of a party, and in this, I think, there is error. *Fry v. Railroad*, 159 N. C. 362, 74 S. E. 971.

WALKER, J., concurs in this opinion.

(173 N. C. 126)

LUPTON et al. v. SPENCER et al. (No. 187.)
(Supreme Court of North Carolina. March 14, 1917.)

1. JURY ⇐72(2, 3)—DRAWING JURY—POWERS OF COURT.

Under Revisal 1905, § 1967, the court has power to summons talesmen, and, although the primary meaning of the term implies that they are to be selected from bystanders, it is within the powers of the court to go outside for talesmen and notify them in advance.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 339-342, 347.]

2. JURY ⇐72(3)—DRAWING JURY—POWERS OF COURT.

While executive duty to select talesmen is with the sheriff or deputies, the court supervises the selection, and, if the sheriff is interested in the cause or related to the parties, the court may, under Revisal 1905, § 1968, name another to select the jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 340-342, 347.]

3. NEW TRIAL ⇐20—GROUNDS—DRAWING JURY.

Where the sheriff was related to one party by marriage and his summoning of talesmen was objected to, whereupon his deputy read from a list calling the talesmen, and when asked, stated that he had prepared the list, when in fact it had been prepared by the sheriff, the other party was entitled to new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 72, 73.]

Appeal from Superior Court, Pamlico County; Lyon, Judge.

Proceedings by R. D. Lupton and others against Nathan Spencer and others. Judgment for plaintiffs, and defendants appeal. Verdict set aside, and new trial ordered.

Ward & Ward and H. L. Gibbs, of Oriental, for appellants. Moore & Dunn, of Newbern, for appellees.

HOKE, J. Defendants, among many other exceptions, object to the validity of the trial by reason of the manner in which the jury was selected, a number of them being talesmen, and the ground of his objection is very correctly set forth in his assignment of error, taken from the record, as follows:

"When the jury was being selected, the defendants objected to the sheriff's summoning the talesmen, there being a deficiency of several of the regular jury, on the ground that the plaintiffs were first cousins of the sheriff. His honor ordered the deputy sheriff to summons the talesmen. In summoning the talesmen the deputy sheriff began reading from a list which he had in a book. Counsel for the defendants made inquiry as to the origin of this list, and the deputy sheriff said he had gotten them up himself. Nothing further was said about the matter at this stage.

"During introduction of the evidence, it appeared that F. A. Lupton, together with his wife, Rena Lupton, had warranted the title to the plaintiffs to the land in controversy, and that said F. A. Lupton was the brother of the sheriff. After the verdict, the sheriff stated in the presence of his honor and counsel for defendants that he had selected the talesmen constituting the list that his deputy read from in naming the talesmen selected on the jury to try this cause two or three days before the trial of the cause. It appeared, also, that this cause had been set regularly on the calendar for trial at this term."

[1] Under our law, a litigant has the legal right to have his cause tried before an impartial jury, selected according to the forms of law, and, if he has not waived his objection nor been guilty of laches in insisting upon it, it is the duty of the court to see that this right is awarded him. To this end, the power to summons talesmen is given the court inherent and approved with us by statute (Revisal, § 1967), and, although the primary meaning of the term would imply that they are to be selected from the bystanders, it is the practice and within the powers of the court and of the executive officers, acting under its orders, to go outside for the purpose or to notify them in advance when such a course is best promotive of the ends of justice. *State v. McDowell & Hartness*, 123 N. C. 764, 31 S. E. 839.

[2] Under our system of procedure, the executive duty of selecting these talesmen is primarily with the sheriff or his deputies acting for him, but this matter is under the control and supervision of the court, and, whenever it is made to appear that the sheriff has such an interest in the cause, direct or indirect, or bears such a relation to the parties thereto as to render him an improper or unsuitable person to perform this duty, the court may designate some other for the purpose. This power, too, has been expressly confirmed with us by statute (Revisal, § 1968), in terms as follows:

"In the trial of any action before a jury where the sheriff of the county in which the cause is to be tried is a party to or has any interest in the action, or when the presiding judge shall find upon investigation that the sheriff of the county is not a suitable person, on account of indirect interest in or relative to the cause of action, to be intrusted with the summoning of the tales jurors in any particular case pending, such judge shall appoint some suitable person to summon the jurors in place of the sheriff."

[3] Recurring to the record, it appears that the rights of defendants, in the respects suggested, have not been sufficiently regarded in the present case, and we are of opinion that his objection to the validity of the trial, on that ground, must be sustained. Knowing that the sheriff was closely related to the parties plaintiff, defendants, in apt time, objected to his selection of the talesmen, and the court, after investigating the matter, decided that the sheriff was not a suitable person to act, and directed the deputy to select them. When the latter proceeded to do this from a list, counsel at once made inquiry and was informed that the deputy had made out the list. In the further development of the case, it appeared that, in addition to the sheriff being a first cousin of the parties, his own brother had conveyed the land in question to plaintiffs by deed with covenants of warranty, etc.; that he had made out this jury list at the beginning of the term, and with this cause on the calendar for trial. On these facts, not controverted in the record, we are of opinion that defendants, as of right, are entitled to have the verdict set aside and the cause tried before another jury.

We are not inadvertent to decisions of our court holding that a verdict will not be set aside as a matter of right by reason of the partiality or natural bias of a juror when the objection is made for the first time after the verdict is rendered. *State v. Maultsby*, 130 N. C. 664, 41 S. E. 97; *Baxter v. Wilson*, 95 N. C. 187; *Spicer v. Fulghum*, 87 N. C. 18. These were instances of individual jurors whose positions might or might not have affected the result, and an examination of the cases will disclose, too, that much stress is laid on the fact that the objection was made for the first time after verdict rendered and with an intimation that the litigant had not been sufficiently alert in ascertaining the conditions complained of. To our minds these authorities do not apply to the facts of this record, where it appears that the defendants moved in apt time, insisted on their objection throughout, and this objection is made, not to the individual juror, but to the action of the executive officer in selecting a large number of the panel and by whose representations both the parties and the court were imposed upon.

Under the principles approved and applied in the well-considered case of *Boyer v. Teague*, 106 N. C. 582, 11 S. E. 665, 19 Am. St.

Rep. 547, we are of opinion, as stated, that the verdict should be set aside, and a new trial had.

Venire de novo.

(173 N. C. 112)

TAYLOR v. NEUSE LUMBER CO.

(No. 174.)

(Supreme Court of North Carolina. March 14, 1917.)

1. NEGLIGENCE ⇐2—DEFINITION.

"Negligence" is the breach of a legal duty.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 3, 4.

For other definitions, see Words and Phrases, First and Second Series, Negligence.]

2. MASTER AND SERVANT ⇐105(2)—INJURIES TO SERVANT—NEGLIGENCE—APPLIANCES IN GENERAL USE.

Merely by furnishing machinery and appliances approved and in general use an employer did not meet its obligation to provide its servant with a reasonably safe place to work and reasonably safe machinery and appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 186, 187.]

3. MASTER AND SERVANT ⇐278(5, 14)—INJURIES TO SERVANT—NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

In action for injuries from slipping into boiling water by an employé of a lumber company, evidence held to show that the lumber company furnished unsafe machinery and that it had knowledge of the danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 961, 966.]

4. MASTER AND SERVANT ⇐285(5)—INJURIES TO SERVANT—QUESTION FOR JURY.

The question of proximate cause held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1016.]

5. TRIAL ⇐165—MOTION FOR NONSUIT—EVIDENCE.

Plaintiff's evidence must be accepted on defendant's motion for judgment of nonsuit.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374.]

6. MASTER AND SERVANT ⇐129(1)—INJURIES TO SERVANT—ACCIDENT—PROXIMATE CAUSE.

The mere fact that the foot of an employé of a lumber company slipped, throwing him into boiling water caused to accumulate by the negligence of the lumber company, was not legally an intervening cause, rendering the company's negligence not the proximate cause of the servant's injuries, and was relevant only on the question of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 257.]

Appeal from Superior Court, Craven County; C. C. Lyon, Judge.

Action by J. B. Taylor against the Neuse Lumber Company. From a judgment for plaintiff, defendant appeals. No error.

This is an action to recover damages for personal injury caused by falling in boiling water, which had escaped from a steam pipe which burst in a mill of the defendant, and at the close of the testimony the defendant moved for a judgment of nonsuit, which was refused, and the defendant excepted.

The plaintiff was employed to look after

and keep in repair the piping, boilers, and engines, and his duty required him to be in the boiler and engine room. At the time of the explosion he was in back of the boiler engaged in rolling tubes, and when he came out of the boiler the explosion occurred. He then went around in front of the boiler and the fire room and went forward to look at the inspirator to see if that was all right, and stepped or slipped in the pit in front of the boiler where boiling water had accumulated from the pipe, which exploded. The allegation of negligence is that the elbow was defective in that it was made of cast iron when it ought to have been malleable iron or brass.

The jury returned the following verdict: "First. Was plaintiff injured by the negligence of the defendant as alleged in the complaint? Yes.

"Second. If so, did plaintiff by his own negligence contribute to his injury? No.

"Third. What damage, if any, is plaintiff entitled to recover? \$2,000.

Judgment was entered upon the verdict in favor of the plaintiff, and the defendant appealed.

Moore & Dunn and Gulon & Gulon, all of Newbern, for appellant. D. L. Ward and E. M. Green, both of Newbern, for appellee.

ALLEN, J. The appeal presents two questions for decision: (1) Is there evidence of negligence? (2) If so, is there evidence that this negligence was the proximate cause of the injury to the plaintiff?

[1] In considering the evidence of negligence we must keep in mind the duty imposed upon the defendant, because negligence is the breach of a legal duty, and it is only when we have a clear conception of the duty that we can properly appreciate the evidence bearing upon its breach.

[2] It is conceded by the defendant that it was under a legal obligation to provide the plaintiff a reasonably safe place to work, and reasonably safe machinery and appliances, but it contends that it has shown that it furnished machinery and appliances approved and in general use, and that this is a full performance of its duty. This is not, however, a final test, and, if it was, defective and unsafe machinery could be used by all doing a like business, and the larger the number using such machinery the stronger would be the evidence of its being approved and in general use and the greater the freedom from liability.

The rule, as applicable to the facts in this record, is correctly stated by Justice Hoke in *Ainsley v. L. Co.*, 165 N. C. 122, 81 S. E. 4:

"An employer owes it as a duty to his employé working at machines driven by mechanical power and more or less dangerous and intricate to supply him with appliances, etc., which are reasonably safe and suitable, and to exercise the care of a prudent man in looking after his safety; and this duty may not always be fully discharged by furnishing him such im-

plements and appliances as are 'known, approved, and in general use.'"

And by Justice Walker in *Dunn v. John L. Roper Lumber Co.*, 172 N. C. —, 90 S. E. 18:

"It is not always a full performance of the master's duty to provide merely for his servant implements and appliances which are known, approved, and in general use. He will still be liable for any injury proximately resulting from a failure to perform that duty in any other respect. He is not permitted to put defective machines or appliances in the hands of his servant with which to do the work, even though they may be of the requisite model, or type, and if he is negligent in so doing, and thereby causes injury to the servant, he must answer in damages for the wrong. *Ainsley v. Lumber Co.*, 165 N. C. 122, 81 S. E. 4; *Kiger v. Scales Co.*, 162 N. C. 133, 78 S. E. 78. This rule has frequently been recognized by us in negligence cases. It is a part of his obligation to furnish appliances 'which are known, approved, and in general use,' but not necessarily all of it; and, if he complies with that part of it, and is otherwise negligent in not supplying a reasonably safe place for the work to be done, or reasonably safe machinery, tools, and appliances with which to do it, he falls short of the legal measure of his duty."

Is there evidence of a breach of this duty in that the defendant furnished unsafe machinery? The plaintiff was employed by the defendant to look after and keep in repair the piping, engines, boilers, and other machinery, and there is no evidence that he was not competent. He was therefore recognized by the defendant as a skillful, experienced mechanic, whose opinion could be accepted as to the safety of machinery, and he testified that the elbow called an L, in which the explosion occurred and from which the boiling water came, was made of cast iron, and that:

"Before that L was put in there that blew out I had a conversation with Mr. Walker about its being safe to put it in there. I told him it wasn't safe to put a cast iron in the fire like that; it ought to be malleable iron or brass."

This evidence, while in the form of a conversation with the superintendent of the defendant, is in effect a statement that the elbow was unsafe, and the fact that it was not objected to gives indication that the witness was known to be an expert.

Gabe Whitfield, another witness for the plaintiff, testified:

"I remember the occasion when this elbow was put in. I don't know who brought it there. Mr. Walker furnished it to Mr. Taylor, and Mr. Taylor told him it would be best to put in malleable iron because that boiler had high pressure and it would not stand the pressure, and Mr. Walker told him to put it in, and he put it in. I was engineer at that time."

The explosion, occurring as it did at the precise point of danger indicated by the plaintiff, is also strong corroboration of his opinion.

[3] There is therefore evidence that the defendant furnished unsafe machinery and that it had knowledge of the danger, and this would be a breach of duty and negligence.

Is there evidence that this negligence of

the defendant was the proximate cause of the injury to the plaintiff?

As was said in *Paul v. Railroad*, 170 N. C. 232, 87 S. E. 66, L. R. A. 1916B, 1079:

"Much of the difficulty in the application of the doctrine of proximate cause arises from the effort on the part of the courts to give legal definition to what is essentially a fact, and in most cases for the determination of a jury."

The rule generally adopted and approved is as stated by Mr. Justice Strong in *Railroad v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. He says:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of the jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

Again, the same judge says in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395:

"The proximate cause * * * is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in time and place. * * * The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

In *Harvell v. Lumber Co.*, 154 N. C. 261, 70 S. E. 391, this statement of the law was approved, the court saying:

"Proximate cause means the dominant efficient cause, the cause without which the injury would not have occurred; and if the negligence of the defendant continues up to the time of the injury, and the injury would not have occurred but for such negligence, it is not made remote because some act not within the control of the defendant, and not amounting to contributory negligence on the part of the plaintiff, concurs in causing the injury."

[4] Applying these principles to the evidence, the question of proximate cause was for the jury.

[5] The plaintiff, according to his evidence, which must be accepted on a motion for judgment of nonsuit, was where he had a right to be in the performance of a duty; the steam, as he says, prevented him from seeing the boiling water, and he has been absolved from the charge of contributory negligence by the jury.

The motion for nonsuit does not rest on the ground of contributory negligence, and there is no exception directed to the second issue, and the jury might well say that there was "a continuous succession of events so linked together as to make a natural whole" from the defective elbow to the plaintiff's injury.

[6] The fact that the foot of the plaintiff slipped, throwing him into the water, is not an intervening cause, and is only relevant on the question of contributory negligence, as is held in *Aiken v. Mfg. Co.*, 146 N. C. 324, 59 S. E. 696, *West v. Tanning Co.*, 154 N. C. 48, 69 S. E. 687, and *Lynch v. Veneer Co.*, 169 N. C. 170, 85 S. E. 289, in all of which cases recoveries were sustained because of the negligence of the defendant, although the plaintiff in each would not have been injured if his foot had not slipped.

The case of *Nelson v. Railroad*, 170 N. C. 170, 86 S. E. 1036, is not in point. There was in that case no evidence of negligence, and it was correctly stated that the immediate cause of the accident was the slipping of the foot.

We are therefore of opinion that the motion for judgment of nonsuit was properly denied.

No error.

(173 N. C. 124)

SMITH v. SMITH et al. (No. 178.)

(Supreme Court of North Carolina. March 14, 1917.)

1. QUIETING TITLE ~~§~~46 — JURISDICTION — CONSTRUCTION OF WILL.

Under Revisal 1905, § 1589, authorizing actions to quiet title, the superior court had jurisdiction in an action by a father against his minor children to remove a cloud from plaintiff's title to real estate derived under a will, to determine by construction of the will whether the plaintiff took a life estate with a remainder over in his heirs or a fee title to the property.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. § 94.]

2. WILLS ~~§~~608(3)—CONSTRUCTION—RULE IN SHELLEY'S CASE.

Under the rule in *Shelley's Case*, where real estate was devised to the testator's son for life, at his death to his bodily heirs, and to his wife for her lifetime or widowhood, etc., the son took a fee-simple interest in the property subject to the life estate to his wife; since the interposition of the life estate in another does not interfere with the operation of the rule so far as the heirs are concerned.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1374, 1378.]

3. WILLS \Rightarrow 614(13)—CONSTRUCTION—ESTATE DURING LIFETIME OR WIDOWHOOD.

A remainder to the wife of a devisee during her lifetime or widowhood is a life estate in her unless sooner terminated by her marriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1406.]

4. WILLS \Rightarrow 466—CONSTRUCTION—"LOAN."

In the absence of a manifest intention on the part of the testator to the contrary, the word "loan," in a will, passed real property to which it applied in the same manner as "give" or "devise."

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 985.

For other definitions, see Words and Phrases, First and Second Series, Loan.]

Appeal from Superior Court, Pitt County; Lyon, Judge.

Action to remove a cloud from title by Doremus L. Smith against Susan E. Smith and others. Judgment for plaintiff, and defendants except and appeal. Affirmed.

F. M. Wooten, of Greenville, for appellants. Harding & Pierce, of Greenville, for appellee.

HOKE, J. [1] Plaintiff's title to the land, the subject-matter of this litigation, is dependent on the will of his father, Joshua W. Smith, deceased; the devise to plaintiff being in terms as follows:

"I loan to my son, D. L. Smith, two tracts of land (describing same) to have during his life, at his death to his bodily heirs and to his wife for her lifetime or widowhood, etc."—and charging the devisee with payment of certain small amounts in money to persons designated.

The plaintiff, contending that he owns the land in fee under the rule in Shelley's Case subject to a life estate in his widow, brings this action against his minor children, alleging that they contend and claim that plaintiff has, under the will, only a life estate in the property, and, by reason of such claim, he is unable to sell or incumber his interests or otherwise enjoy the rights of ownership to which his estate entitles him. Defendants, summoned and duly represented by guardian ad litem, answer, admitting the allegations in the complaint except as to nature and extent of plaintiff's estate, and aver that under the will plaintiff had only an estate for life.

[2, 3] Under our statute (Revisal, § 1589), by which the powers formerly exercised in cases of this character have been much enlarged, the court had undoubted and full jurisdiction to determine the question presented. *Little v. Efrd*, 170 N. C. 187, 86 S. E. 1040; *Christman v. Hilliard*, 167 N. C. 4-8, 82 S. E. 949; *Campbell v. Cronly*, 150 N. C. 457, 64 S. E. 213. And we concur in his honor's judgment that the will of Joshua Smith conveys and devises to plaintiff a fee-simple interest in the property, subject to the estate to his wife during her lifetime or widowhood, this, by correct interpretation, being

a life estate in her unless sooner terminated by her marriage (*Kratz v. Kratz*, 189 Ill. 276, 59 N. E. 519), and in remainder after the interest for life first devised to the husband, the plaintiff.

[4] We have held in several of the more recent cases that the words "lend or loan," in a will, will be taken to pass the property to which it applies in the same manner as "give or devise," unless it is manifest that the testator otherwise intended. *Robeson v. Moore*, 168 N. C. 388, 84 S. E. 351, L. R. A. 1915D, 496; *Sessoms v. Sessoms*, 144 N. C. 121-124, 56 S. E. 687. And, under this instrument, by correct construction, the estate was devised to the son, the plaintiff, for life, remainder to his wife for her lifetime or widowhood, remainder to the bodily heirs of the son. In *Nichols v. Gladden*, 117 N. C. 497-500, 23 S. E. 459, 460, the rule in Shelley's Case, as it appears in *First Coke*, 104, is given as follows:

"That when an ancestor, by any gift or conveyance, taketh an estate of freehold, and, in the same gift or conveyance, an estate is limited either mediately or immediately to his heirs in fee or in tail, the word 'heirs' is a word of limitation of the estate and not a word of purchase."

The rule as given in *Preston on Estates*, appearing in *Robeson v. Moore*, supra, and other cases, will serve to throw light on the words "mediately or immediately," if explanation were at all needed. Thus:

"When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is limitation by way of remainder, either with or without the interposition of another estate of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation," etc.

Thus, by the very terms of the rule, and as explained and applied in numerous and well-considered opinions, the interposition of a life estate in another does not interfere with the operation of the rule so far as the heirs are concerned. When the estate comes to them, if it ever does, they take by descent and not by purchase, and the ancestor or first taker, in this and like cases, has full power of control over the property and may sell or incumber as a full owner may, subject only to estate in remainder to the wife during her life or widowhood and the rights incident to it. *Cotten v. Moseley*, 159 N. C. 1, 74 S. E. 454, 40 L. R. A. (N. S.) 768; *Edgerton v. Aycock*, 123 N. C. 134, 31 S. E. 382; *Kiser v. Kiser*, 55 N. C. 28; *Quick v. Quick*, 21 N. J. Eq. 13.

On the facts admitted, the plaintiff is entitled to the relief awarded him and the judgment below is affirmed.

Affirmed.

(173 N. C. 149)

EVANS v. BRENDLE (No. 577.)

(Supreme Court of North Carolina. March 14, 1917.)

1. JUDGMENT §403—CORRECTION—FORM OF REMEDY—LEGAL ACTION.

Where the decree on which plaintiff's predecessor based her title made a mistake in the initial of plaintiff's predecessor, plaintiff may, in an action to recover the land, have the decree corrected without bringing a separate action for that purpose; the distinction between legal and equitable remedies having been abolished.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764.]

2. JUDGMENT §244—DESIGNATION OF PARTIES—"NAMES"—GIVEN NAME—MIDDLE INITIAL—MISTAKE.

The common law recognizes but one Christian name, and the surname, and the middle initial may be dropped or changed at pleasure; therefore a mistake in the middle initial in the decree vesting title to land in plaintiff's grantor will not invalidate plaintiff's title (quoting Words and Phrases, Second Series, Name).

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 430, 439, 440.]

3. EJECTMENT §13—ACTIONS—TITLE.

Plaintiff may maintain an action to recover the land itself on an equitable title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 56-58.]

4. MORTGAGES §608½ — ADJUDICATION AS TO CHARACTER—EFFECT—TRANSFER OF TITLE.

Revisal 1905, §§ 566, 567, respectively, declare that in any action wherein the court shall declare that a party is entitled to possession of land, the legal title to which may be in others, and the court shall order a conveyance of such legal title to him so declared to be entitled, the court, after declaring the right and ordering the conveyance, shall have the power to declare in the order then made, or any made in the progress of the cause, that the effect shall be to transfer to the party to whom the conveyance is directed to be made the legal title of the property to be held in the same right as though the conveyance ordered was in fact ordered, and that every judgment in which the transfer of title shall be so declared shall be regarded as a deed of conveyance executed in due form and by capable persons. A husband being successful in a suit to compel his grantee under deed in terms absolute to hold the same as security for a debt, tendered a decree directing that the debt having been paid, that the grantee should make conveyance to the husband's wife. *Held*, that the equitable title passed to the wife, even though the decree did not carry the legal title for failure to declare that it should be regarded as a deed of conveyance.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1815.]

5. HUSBAND AND WIFE §15(1) — CONVEYANCE—TITLE.

In such case, a conveyance of the land in which both the husband and wife joined at least conveyed the equitable title, regardless of whether the decree vested the wife with the equitable title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 13, 37, 90.]

6. EXECUTION §38—SUBJECT OF EXECUTION—EQUITABLE RIGHT—SALE—EFFECT.

The right to have a deed absolute on its face set aside and held a mortgage is not subject to execution sale, as is an equitable estate in land, and hence a purchaser at such a sale did not acquire priority over a subsequent grantee of the execution debtor, the deed absolute having in the meantime been set aside and declared a mortgage.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 51, 98-102.]

Clark, C. J., and Brown, J., dissenting.

Appeal from Superior Court, Swain County; E. B. Cline, Judge.

Action by Margaret Evans against Mark Brendle. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover land, both parties claiming title under Lee Fuller. On January 28, 1896, Lee Fuller executed a deed to H. T. Jenkins purporting to convey said land to him in fee. In the spring of 1898 he commenced an action, to which his wife, S. J. Fuller, was not a party, alleging that the deed of January 28th was intended as a security for a debt, and that certain clauses had been omitted by mistake, and at July term, 1902, of Swain superior court, the following judgment was rendered in said action:

Lee Fuller v. Henry T. Jenkins.

This cause coming on to be heard on motion of the plaintiff for judgment in accordance with the judgment and opinion of the Supreme Court in this action: It is ordered, adjudged and decreed by the court that it appearing, and having been made to appear, that the plaintiff paid into the office of the clerk of the superior court of Swain county the sum of \$9.95, the amount which was required to be paid by the opinion of the Supreme Court; that the defendant, H. T. Jenkins, shall execute and deliver to S. H. Fuller, her heirs, a deed conveying the title to the land, which is described as follows: "Beginning on a stone in the ford of the branch, it being the Jones corner and runs south 49½ west 22 poles to a stake with pointers; thence south 32 east 12 poles to a small black oak; thence south 32 east with Charles Jenkins' line 26 poles to a stake on the north side of a large gully; thence north 83 east * * * poles to a stake in the branch; thence north 15 west 23 poles to a stake in the branch; thence down the branch as it meanders to the beginning, containing 11½ acres, situated in Swain county, Charleston township." It is further ordered, adjudged and decreed by the court that the title to the said tract of land be and the same is hereby divested out of the defendant, H. T. Jenkins, and that the title to the same is hereby vested by this decree in said S. H. Fuller, and her heirs. It is further ordered and adjudged by the court that the plaintiff have and recover of the defendant, H. T. Jenkins, and his surety of his defense bond, Charles Jenkins, the cost incurred in this action to be taxed by the clerk. [Signed] M. H. Justice.

On January 15, 1903, Lee Fuller and wife, S. J. Fuller, executed a deed to the plaintiff purporting to convey said land in fee. The judge finds as a fact that Lee Fuller directed his counsel who drew the decree at July term, 1902, to convey this land to Fuller's wife, S. J. Fuller, but by mistake he named S. H. Fuller in the decree. The judge also finds that the person intended was Josephine Fuller, the wife of Lee Fuller, who had by name of Josephine Fuller joined in the conveyance to Henry T. Jenkins on January

28, 1896, and that the intention was to convey the land to her by this decree, and that S. J. Fuller and Josephine Fuller are one and the same person, and that she is the person who by mistake was named as S. H. Fuller in said decree, and that she has never been known as S. H. Fuller, but by mistake in drawing the decree she was designated S. H. Fuller, instead of S. J. Fuller. In the meantime judgment had been obtained January 9, 1900, in the federal court against Lee Fuller on a distiller's bond, which judgment was docketed in Swain, February 21, 1900. This tract of land was sold under execution on said judgment on May 7, 1900, at which sale the United States became the last and highest bidder, and the deed was made accordingly, May 23, 1900, and duly registered. On March 11, 1900, under proceedings in accordance with law, the Commissioner of Internal Revenue conveyed said tract to the defendant M. F. Brendle.

On these facts judgment was rendered in favor of the plaintiff, and the defendant excepted and appealed.

Bryson & Black, of Bryson City, for appellant. Frye & Frye, of Bryson City, for appellee.

ALLEN, J. [1, 2] It was contended before us that the decree in the action of Lee Fuller v. Jenkins, did not carry the title to S. J. Fuller because of the mistake in the second initial, and that it would first be necessary to bring an action to correct the decree. This is unnecessary under our system of procedure combining legal and equitable remedies. As it is found as a fact that S. J. Fuller was intended when by mistake S. H. Fuller was named, and that S. J. Fuller, the party named, is Josephine Fuller, the wife of Lee Fuller, who joined in the conveyance to Jenkins in 1896, and who, with her husband, made the subsequent deed to the plaintiff in January, 1903, this is sufficient if the grantee (by whatever name) obtained the title under such decree. The name used is merely a designation to identify the party, and when that identity is established a variation in name and especially a difference in the middle letter, as S. H. Fuller, instead of S. J. Fuller, is immaterial.

In Words and Phrases (Second Series), under the title "Name," it is said: "The common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure." It is further said, "In law the name of a person consists of one given name and one surname."

The plaintiff in her amended complaint sets out the decree of 1902 as a part of her title, and alleges that it had the effect of passing to the wife of Lee Fuller a perfect equitable title, if not a legal title, and to these allegations the defendant makes no answer, nor does he allege that the direction in the decree to make the title to the wife was fraud-

ulent. There is also no evidence of an adverse possession by the defendant and those under whom he claims prior to 1909, about five years before suit brought, so that there is no evidence of seven years' adverse possession under color. There are therefore two questions, which are determinative of the appeal: (1) Did the wife of Lee Fuller acquire a legal or equitable title to the land in controversy under the decree of 1902? (2) Did the sale by the marshal of the United States, under which the defendant claims, pass a legal or equitable title to the purchaser?

[3] The plaintiff may maintain her action against the defendant upon an equitable title (Watkins v. Manf. Co., 131 N. C. 537, 42 S. E. 983, 60 L. R. A. 617, and cases cited), and if the decree vested such a title in her grantor, and it was not divested by the sale by the marshal, which has the legal effect of a sale under execution, she is entitled to recover, and on the other hand, if the grantor of the plaintiff acquired no title, legal or equitable, under the decree, or if there was such title and it was divested by the sale, she cannot recover.

[4] It is doubtful if the decree had the effect of vesting the legal title in the wife of Lee Fuller under the Statute (Revisal, §§ 566, 567), because of the failure to declare that it "shall be regarded as a deed of conveyance" (Morris v. White, 96 N. C. 93, 2 S. E. 254), although the authority cited appears to give a narrow construction to the statute, and to attach more importance to the section declaring the effect of the decree than to the one prescribing its form; but however this may be, it appears from the record in the action of Fuller v. Jenkins that Jenkins, by force of the decree, held the legal title in trust to secure an amount due him, and then in trust for Lee Fuller, and that the amount due was paid, and this left the bare legal title in Jenkins and the beneficial interest and equitable estate in Lee Fuller, which he had the right to direct should be vested in his wife, although she was not a party. Testerman v. Poe, 19 N. C. 103; Campbell v. Baker, 51 N. C. 256; Ward v. Lowndes, 96 N. C. 381, 2 S. E. 591.

The last case cited was that of a purchase at a judicial sale by the husband, and a direction by him to make title to his wife, who was not a party, and the court says:

"The purchaser of the land, Lowndes, directed the deed for it to be made to his wife, and the administrator did so make it. This is made a ground of objection by the plaintiffs. It seems to us to be wholly without merit. The purchase money was paid as required by the order of the court, and the administrator was directed to make title to the purchaser. Why might he not make it to such person as the purchaser directed—to his wife? His power to convey to the purchaser was complete; the purchaser was entitled to have the deed made to him. Why not to have it made to such person as he might indicate? We can see no legal reason why he was not."

The fact that the deed was not executed only affects the legal and not the equitable title.

[5] We are therefore of opinion that the decree vested the equitable title in the wife of Lee Fuller, but if this was not so the equitable title was in Lee Fuller, and passed to the plaintiff under the deed of Lee Fuller and wife.

[6] Did the purchaser at the sale by the marshal acquire a legal or equitable title? And this depends on whether Lee Fuller had at that time, two years before the decree in *Fuller v. Jenkins*, an estate in the land subject to sale under execution or a mere right. The distinction between a right to have an equity established and enforced, which is not the subject of sale under execution, and an equitable estate which may be sold, if "simple and unmixed," that is, one which entitles the owner to call for the legal title, is well established. *Thompson v. Thompson*, 46 N. C. 430; *Bond v. Hilton*, 51 N. C. 181; *Nelson v. Hughes*, 55 N. C. 36; *Taylor v. Dawson*, 56 N. C. 91; *Hinsdale v. Thornton*, 75 N. C. 383; *Henley v. Wilson*, 77 N. C. 218; *Cedar Works v. L. Co.*, 168 N. C. 396, 84 S. E. 521.

The court says in the first of these cases:

"The ground of the distinction consists in the difference between a trust created by the act of the parties, where he who has the legal estate, consents to hold it in trust for the other, and there is no adverse possession or conflict of claims, and a trust created by the act of a court of equity, where there is a conflict of claims, and the party having the legal estate holds adversely, and does not become a trustee until he is converted into one by a decree founded on fraud, or the like. In the former, the cestui que trust has an estate; in the latter, there is a mere right."

In the second:

"In Equity, where the trust is by agreement of the parties, we say the cestui qui trust has the estate, but where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere right."

In the third:

"A right to property, is not subject to execution at common law; the debtor must have an 'estate'; consequently 'a right' to have one declared a trustee, is not subject to execution, under the statute; the debtor must have a subsisting trust—an 'estate' as distinguished from a mere 'right in Equity.'"

In the fourth:

"All trusts are either by agreement of the parties, as where there is a declaration to that effect, or where a trust is implied or presumed, as a resulting trust, or where one buys land and has the title made to a third person; or against the assent of the party who has the legal title. * * * In the former there is no adverse holding or conflict of claim between the trustee and cestui que trust; the one holds by agreement the legal title for the other, who has the estate in equity. In the latter there is an adverse holding and conflict of claim; the one holds the legal title for himself or some third person, who has a privy, or is in collusion with him (as in our case) and the other has but a right in equity or chose in action."

In the fifth:

"Where one has only a right in equity to convert the holder of the legal estate into a trustee, and call for a conveyance the idea that this is a trust estate, subject to sale under *fi. fa.*, is

new to us. True, his right to call for the legal estate is not subject to any further consideration than proof of the facts alleged in support of his right, but there is no trust estate until the decree declares the facts and the court declares its opinion to be that the one party shall be converted into a trustee for the other. It follows that the party has no estate subject to execution sale until the decree has vested an equitable estate in him."

And the other cases cited are to the same effect.

The principle clearly deducible from these authorities is that if it appears on the face of the writings that the legal title is in one, but that it is held in whole or in part for the benefit of or in trust for another, the latter has an estate, although he may have to go into a court of equity to enforce his claim; but if there is no declaration of the trust, and the holder of the legal title denies the right, and the one claiming a beneficial interest is compelled to invoke the aid of a court of equity to establish the facts upon which his right depends, he has no estate until the decree is entered in his favor.

We repeat here the language of Pearson, C. J., in *Bond v. Hilton*, 51 N. C. 180, that:

"Where a decree is necessary, in order to convert one into a trustee against his consent, the party has a mere right."

And in *Hinsdale v. Thornton*:

"There is no trust estate until the decree declares the facts and the court declares its opinion to be that the one party shall be converted into a trustee for the other. It follows that the party has no estate subject to execution sale until the decree has vested an equitable estate in him."

At the time of the sale by the marshal the title was in Jenkins, who held under a deed, in which there was no declaration of a trust or other evidence of an equity, and who denied that he held the title as a security; a decree was necessary to establish the facts upon which the right of Lee Fuller rested; the sale was two years before the entry of the decree, and it follows that Fuller had at that time a mere right, which was not subject to sale, not an estate, and that the purchaser acquired no title, and this is in line with the policy of our law which discourages the sale of uncertain and speculative interests.

The title was in Jenkins under a deed absolute, and there was nothing on the record to suggest that Fuller had either right, title, interest, or equity in the land. An action was pending in which Fuller alleged that the clause of defeasance had been omitted from the deed to Jenkins by mistake, and that it was intended as a security for debt, and this was denied by Jenkins. It was under these conditions the sale was made, when Fuller had nothing for sale except a lawsuit, and it is not surprising that the purchase price was \$1, which is less than nine cents per acre for the land in controversy. We therefore hold that the plaintiff has at least an equitable estate, and that as the defendant acquired no title under the

sale by the marshal she is entitled to recover.

There is much authority in support of the position that if Fuller had an equitable estate, it was not one subject to sale under execution because not a simple equity (*Gillis v. McKay*, 15 N. C. 174; *McGee v. Hussey*, 27 N. C. 258; *Battle v. Petway*, 27 N. C. 578, 44 Am. Dec. 59; *Williams v. Council*, 49 N. C. 214; *Tally v. Reed*, 72 N. C. 337; *Love v. Smathers*, 82 N. C. 373; *Mayo v. Staton*, 137 N. C. 685, 50 S. E. 331), and there is also authority that the act of 1812 includes all equities of redemption (*Thorpe v. Ricks*, 21 N. C. 618; *Davis v. Evans*, 27 N. C. 534; *Doak v. Bank*, 28 N. C. 330; *Frost v. Reynolds*, 39 N. C. 498), although these cases are based on *Thorpe v. Ricks*, in which the right to redeem was in writing; but it is not necessary to discuss this question, as there was no estate in Fuller at the time of the sale.

Affirmed.

CLARK, C. J. (dissenting). This was an action of ejectment. The parties waived a jury trial, and agreed that the judge should find the facts, and apply the law thereto, and render judgment. It was conceded that both parties claimed title under Lee Fuller as the common source. The defendant admitted that he was in possession holding adversely to the plaintiff.

In 1896 Lee Fuller was the owner in fee of the locus in quo (11½ acres of land). On January 28, 1896, he executed to H. T. Jenkins a deed which upon its face purported to be in fee conveying to him the said tract, which deed was duly registered. To spring term, 1898, of Swain he brought an action against Jenkins to have the said deed declared a mortgage. Judgment was rendered in favor of defendant at July term, 1901, of Swain, but on appeal this court held in *Fuller v. Jenkins*, 130 N. C. 554, 41 S. E. 706, opinion filed May 27, 1902, that said deed upon the facts found was a mortgage. When the opinion went down, by arrangement between the parties, the debt was settled, and a judgment was entered at July term, 1902, of Swain, conveying the title to the wife of Lee Fuller, who was not a party to the action and so far as it appears without any consideration. The decree did not direct that it should be recorded as a conveyance, and besides, Revisal, §§ 566, 567, authorizes such decree only as to a party or cestui que trust, and Lee Fuller's wife was neither.

In the meantime judgment had been obtained January 9, 1900, in the federal court against Lee Fuller on a distiller's bond, which judgment was docketed in Swain, February 21, 1900, and was a lien from that date. Revisal, § 576. This tract of land was also levied upon March 27th under execution from the federal court on that judgment, and after due advertisement was sold on May 7, 1900, at which sale the United States became the last and highest bidder, and the deed was

made accordingly May 23, 1900, and duly registered June 11, 1900. On March 11, 1906, under proceedings in accordance with law, the Commissioner of Internal Revenue conveyed said tract to the defendant M. F. Brendle, which deed was duly recorded in Swain April 2, 1906. The levy and return of sale merely mentions the "11½ acres of land, the property of Lee Fuller." But docketing the judgment gave the lien without describing any property, and the conveyance by the United States marshal to the United States and the later conveyance to the defendant sufficiently described the property which is admitted to be the locus in quo, and both these deeds were duly registered.

The judge finds as a fact that Lee Fuller directed his counsel who drew the decree at July term, 1902, to convey this land to Fuller's wife, S. J. Fuller, but by mistake he named S. H. Fuller as the grantee. The judge finds as a fact that the person intended was Josephine Fuller, the wife of Lee Fuller, who had by name of Josephine Fuller joined in the conveyance to Henry T. Jenkins on January 28, 1896, to release her dower, and that the intention was to convey it to her by this decree, and that S. J. Fuller and Josephine Fuller are one and the same person, and that she is the person who by mistake was named as S. H. Fuller in said decree, and that she has never been known as S. H. Fuller, but by mistake in drawing the deed she was designated S. H. Fuller, instead of S. J. Fuller. On January 15, 1903, Lee Fuller and wife, S. J. Fuller, conveyed said tract of land to plaintiff Margaret Evans, which was duly recorded in Swain.

It was earnestly contended before us that the decree conveying the property to S. H. Fuller, even though S. J. Fuller was intended, did not carry the title, and that it would first be necessary to bring an action to correct the deed. This is unnecessary under our system of procedure combining legal and equitable remedies. As it is found as a fact that S. J. Fuller was intended, when by mistake S. H. Fuller was named, and that S. J. Fuller, the party named, is Josephine Fuller, the wife of Lee Fuller, who joined in the conveyance to Jenkins in 1896, and who made the subsequent deed, her husband being joined, to the plaintiff in January, 1903, this is sufficient if the grantee (by whatever name) obtained the title under such decree. The name used is merely a designation to identify the party, and when that identity is established a variation in name and especially a difference in the middle letter, as S. H. Fuller instead of S. J. Fuller, is immaterial.

In Words and Phrases (Second Series), under the title "Name," it is said: "The common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure." It is further said, "In law the name of a person consists of one given name and one surname." In this state our statutes have indicated the comparative

unimportance of an exact identity in name when the identity of the person is shown. For instance, it is provided that if the name of a payee is wrong, yet he may indorse the bill in that name or in his own (Revisal, § 2192), or if a defendant in a civil action is erroneously named, this may be corrected by amendment (Revisal, § 510), and in criminal actions if the defendant is wrongly named, upon his making a plea to that effect instead of quashing the indictment the court will change the name to accord with the defendant's plea. There are many other instances showing that the question depends upon the identity of the person, and not the accuracy in naming the person. When a woman marries she changes her surname in this and many other countries (though not in Spain, and other Spanish speaking countries), and usually substitutes the initial of her maiden name for the former middle initial. In England, when a man is raised to the peerage, his name is changed, as when John Churchill became Duke of Marlborough, or John Scott became Lord Eldon. A Pope on his election always changes his name.

A young man who obtained his license to practice law, and was elected to the Legislature as Thomas Carter Ruffin, became Chief Justice of this court as Thomas Ruffin. In the same way, Stephen G. Cleveland became Governor of New York and President as Grover Cleveland. He who graduated at college as Thomas W. Wilson became Governor of New Jersey and President of the United States as Woodrow Wilson, and Hiram U. Grant having been accidentally misnamed in his appointment to West Point as Ulysses S. Grant bore that name as Commander in Chief of the armies and President of the United States. Under his *nom de plume*, Mark Twain became famous, but was comparatively unknown as Jere L. Clemens, so Voltaire's real name was Arouet, and Mollere's true name was Poquelin. Among numerous other instances was the private soldier Victor Perrin, who became Marshal Victor, and another of Napoleon's marshals, Jean Baptiste Jules Bernadotte, ascended the throne of Sweden and Norway as Charles XIV, John. These and numerous other cases instance the correctness of the common-law rule that it is the identity of the person, and not the identity of the name, which governs. The finding of the judge settles that it was Josephine Fuller who was intended as grantee, instead of S. H. Fuller in the decree of the court at July term, 1902.

The decree, however, attempting to convey title to the wife of Lee Fuller, did not have any effect, for it is not authorized by the statute (Revisal, §§ 566, 567), because of the failure to declare that it "shall be regarded as a deed of conveyance." *Morris v. White*, 96 N. C. 93, 2 S. E. 254, which holds that a decree does not operate as a conveyance unless it expressly declares that it shall be so regarded. In that case it is said:

"It is essential that it shall so declare, to give it the full effect of a proper conveyance of the land. It seems probable that the court intended that it should have such effect, but it is not sufficient for that purpose. Such statutory provisions must always be strictly observed as to their essential provision."

The plaintiff must recover upon the strength of her own title, and this alleged conveyance by virtue of the decree of the court is invalid for the further reason that it has not been registered in the manner required by Revisal, § 568, which provides:

"The party desiring registration of such judgment shall produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate."

The attempted certificate of the clerk upon which his attempted registration was had shows that there was no compliance with the language of the statute (Revisal, § 568), and it was error to admit it in evidence. There is no seal of the court attached, and the certificate does not certify that it is made "under the seal of the court," but only "Witness my hand and official signature." The judgment, not having been properly recorded, would not avail the plaintiff, even if color of title (*Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863), and the plaintiff cannot allege color of title, for she has shown no possession at any time in herself or in S. J. Fuller, even if the court had been authorized to render such judgment, which it had no authority to do for two distinct reasons.

There were only two parties to the action in which this judgment was rendered, Lee Fuller and H. T. Jenkins, and the purpose of that action was to have a certain deed which was upon its face a conveyance in fee declared a mortgage and a reconveyance to plaintiff ordered. On reference to the decision of this court in that case (130 N. C. 554, 41 S. E. 706), it will be seen that judgment was rendered for the defendant in the court below, which was reversed here with a direction that:

"The defendant [Jenkins] should reconvey, and in default of payment by plaintiff [Lee Fuller] of balance due by a day named, there should be a foreclosure."

Upon the certificate of this judgment of this court nothing remained to be done by the superior court but to enter judgment in accordance with this opinion. Instead of complying, the lower court attempted to adjudicate and vest the title in one S. H. Fuller, who was not a party to the action, nor had, in so far as it is shown, any right or interest therein. Such action was not authorized, and was not color of title, even if the plaintiff had shown possession. Moreover, such judgment, decreeing title to be conveyed to one not a party to the action, is unwarranted by the statute (Revisal, § 566), which provides that the court may enter such judgment only as to "parties to the action unless the property is to be held in trust for an-

other." This method of ordering a decree of court to operate as a conveyance of the legal title as if by deed is purely statutory, and, as said in *Morris v. White*, supra, there is no validity except in cases provided by the statute (Revisal, § 566), and when its terms are strictly complied with, which was not done here, for the decree does not provide that it "shall be regarded as a deed of conveyance," nor was it certified and registered as required by the statute, nor was it made in favor of a party to the action.

The wife of Lee Fuller was not a party to the action, nor was the title directed to be conveyed to her in trust for another. This statute was passed in consequence of an instance in Hertford county, where the court having ordered a defendant to execute a deed, he refused to obey, and lay in jail under an attachment for contempt until this statute was passed. It was enacted to provide for such cases and for cases in which the parties directed to pass the title are out of the jurisdiction of the court, or are minors or non compos. The party to whom such title could be made under such decree of the court was specified to be "parties to the suit," or one who is named as trustee for such person. The wife of Lee Fuller therefore was not one in whose favor such decree could direct the title to be conveyed. Besides the absolute invalidity for the reasons given of the decree to put the title in S. H. Fuller, the judgment of this court, which held that a conveyance by Lee Fuller to H. T. Jenkins January 28, 1896, was a mortgage, necessarily decreed that it was a mortgage on the date of its execution, for it was not based on anything occurring thereafter, and therefore when the judgment of the federal court was docketed in Swain county, and this tract of land was sold thereunder May 7, 1900, Lee Fuller held the land subject to the mortgage of \$30 by virtue of the agreement made at the time the deed was executed, as held by this court. The interest of Lee Fuller was therefore not a mere right in equity, but an equity of redemption, which this court held entitled him to a reconveyance upon payment of the \$30, with interest from the date of the deed. Such equity of redemption was subject to sale, and was conveyed by the deed to the United States for such property. Revisal, § 629(3); *Davis v. Evans*, 27 N. C. 525; *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331. The only legal effect of the judgment entered at July term, 1902, of the court below upon the certificate from this court was an acknowledgment by Fuller and Jenkins that the incumbrance had been paid off. The equity of redemption which passed by the execution sale against him thereupon became the unincumbered title which later passed to the defendant by the deed from the Commissioner of Internal Revenue under the authority of the United States when the

defendant took possession, which he still holds. By the decision of this court Fuller had the right to call upon Jenkins, at the very time the sale was made under execution, to reconvey this property upon payment of the \$30 and interest.

The whole subject is fully discussed in *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331, which holds that while a mixed trust cannot be sold under execution "an equity of redemption, * * * whether created by mortgage deed made to the creditor or to a third person with or without power of sale, may be sold under execution." This court in *Fuller v. Jenkins*, 180 N. C. 555, 41 S. E. 706, held that though the mortgage clause had been omitted this was a mortgage ab initio, and this made the interest of Fuller subject to sale, for the court did not create the relation of mortgagor and mortgagee by its decree, but held that it was a mortgage by virtue of the agreement of the parties at the time of the execution of the conveyance of Fuller to Jenkins January 28, 1896.

The defective decree at July term, 1902, which attempted to convey the property to Lee Fuller's wife, was evidently procured and arranged with the intent by that unauthorized and irregular proceeding, to head off the title which the United States government had obtained by the purchase of Lee Fuller's interest at the execution sale in May, 1900, for Josephine Fuller was not a party to the action in which the decree was rendered, and is not shown to have paid the \$30 and interest, or any other consideration, if indeed she could have purchased the property from her husband against the superior title already acquired by the United States as purchaser at such sale.

For the above reasons, the judgment ought to be reversed.

BROWN, J., concurs in the dissenting opinion.

(106 S. C. 461)

SOUTH CAROLINA INS. CO. v. COOK et al.
MOORMAN v. BLACK & COULTER CO.
et al.

(No. 9632.)

(Supreme Court of South Carolina. March 8, 1917.)

MORTGAGES ~~§~~ 263—ASSIGNMENT TO MORTGAGOR—MERGER.

Where one while having legal ownership of land took bare legal title by assignment of an incumbrance on the land, evidenced by bond, mortgage, and note, for the sole purpose of reassigning, and without delivery or right to possession of the papers except by paying the obligation due the bank to whom he assigned, there was no merger, and the obligation of the mortgage was not extinguished.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 696.]

Appeal from Court of Common Pleas of Richland County; Mendel L. Smith, Judge.

Consolidated actions by Robert Moorman, junior mortgagee, against the Black & Coulter Company and others, and by the South Carolina Insurance Company against Henry K. Cook, Robert Moorman, and others. From a decree adjudging the liens of the various parties, defendant Union National Bank appeals. Exceptions sustained, and judgment reversed.

Barron, McKay, Frierson & Moffatt, of Columbia, for appellant. Elliott & Herbert, E. W. Mullins, and Melton & Belser, all of Columbia, for respondents.

WATTS, J. The case is stated thus: This action was originally commenced by Robert Moorman July 12, 1915, for the foreclosure of a junior mortgage on certain property located on Hampton street, in the city of Columbia. The South Carolina Insurance Company subsequently (July, 1915) commenced an action to foreclose the first mortgage on the same premises, and the two actions were consolidated under an order of court. Several subsequent and prior mortgagees were made parties to these actions, and they all answered, setting up their respective mortgages. The defendant the Union National Bank of Columbia was made a party defendant, being the alleged owner and holder of a bond executed by Robert Moorman, Henry W. Fair, R. B. Herbert, and T. Hugh Meighan (the latter being represented in said action by his executrices) to Henry T. Bouchier in the sum of \$1,000, and secured by a mortgage executed by Robert Moorman to Henry T. Bouchier, the said Robert Moorman holding the legal title to said premises for the benefit of himself and the said Henry W. Fair, R. B. Herbert, and T. Hugh Meighan. The said bank filed its answer setting up said mortgage indebtedness, and setting up further that it became the owner of it by purchase under a power of sale contained in a certain collateral note of Henry K. Cook to the said bank, which said answer is hereinafter set out. The defendants R. B. Herbert, Robert Moorman, Henry W. Fair, the executrices of the estate of T. Hugh Meighan, and W. J. Conway, by their attorneys, filed their answers, setting up that the mortgage indebtedness represented by the said bond and mortgage held by the Union National Bank of Columbia had been paid and the lien thereof extinguished. The case was referred to A. D. McFadden, master, who made his report, setting up the amount and the priorities of the various liens on said premises. By this report, under agreement of counsel, the question of the payment and the extinguishment of the said mortgage indebtedness was reserved for future determination by the court of common pleas. On this report of the master a decree for foreclosure and a sale was signed by the presiding judge. The court in this decree determined the amount due the various parties upon the several bonds and mortgages set out in the

master's report, with the exception of the bond and mortgage of Robert Moorman to Henry T. Bouchier, ordered the land in question sold, and directed that the net proceeds of the sale be applied to the payment of the bond and mortgage of the South Carolina Insurance Company and that of August Kohn, and that the surplus, if any remains after such application, be held subject to the further order of this court. In that decree the court reserved for a later decision the question as to whether the said bond and mortgage owned by the Union National Bank of Columbia have, under the facts of the case, been paid and the lien of the same discharged as to the defendants Robert Moorman, R. B. Herbert, Henry W. Fair, the estate of T. Hugh Meighan, and Washington J. Conway, who set up these defenses. Thereafter the question of the payment and extinguishment of the mortgage indebtedness was argued in open court before Judge Mendel L. Smith, who decided that the defense set up by the defendants Robert Moorman, R. B. Herbert, Henry W. Fair, the executrices of the estate of T. Hugh Meighan, and Washington J. Conway as to said mortgage should be sustained, and adjudged that as to the said defendants the said mortgage indebtedness had been extinguished and discharged. Decree dated September 20, 1916.

From the decree of Judge Smith, appellants duly appeal, and by seven exceptions impute error on the part of his honor in his findings and decree, and ask reversal.

It is not necessary to take the exceptions separately. They challenge the correctness of Judge Smith's holding that the arrangement made between Lillard, Cook, and Norwood, Norwood being the president of the defendant-appellant, the Union National Bank, constituted a payment of the mortgage indebtedness and an extinguishment of the lien of the mortgage as to Moorman, Herbert, Fair, and the estate of Meighan, that there was of necessity a loan by the bank to Cook for the purpose of paying the indebtedness of Cook to Lillard represented by the bond and mortgage the payment of which Cook had assumed, an assignment from the bank to Lillard and from Lillard to Cook and from Cook back to the bank, and that under the arrangement as shown by the evidence such of necessity merits legal effect, and consequently a merger took place.

There is not and cannot be any dispute as to the testimony, as the only testimony on this point is that of the witnesses introduced by the defendant-appellant, the Union National Bank, Lillard, Cook, and Norwood. So we have undisputed facts, and the only question then is the construction of the testimony and what was the legal effect of this arrangement. Was Cook at any time the owner of the bond and mortgage to such an extent as to become absolutely entitled to have had the same extinguished and satisfied? Was he at any time in possession of

the same so he could have gone to the clerk's office and had it marked satisfied on the record? Or was he at any time in possession of the bond and mortgage so that he could have treated it absolutely as his own and done as he pleased with it by destroying it, assigning it to another, or exercising full, absolute ownership over it as his own property in his own right? Was he ever in possession actually of the property at any time? Was he in a position to dispose of it without the consent of the bank and Lillard? All of the facts and circumstances in the case negative the idea that he ever was in possession of the same other than constructively in his possession. The distinct understanding between Cook, Lillard, and the bank was it was to be retained by the bank as a security. It never was understood or contemplated by the parties that the mortgage was to be extinguished. Cook never acquired title to the bond and mortgage to such an extent that the legal effect was such that a merger took place. All of the facts and circumstances of the case rebut and overcome the presumption that a merger took place. If Cook had unquestionably become the owner in fee of the bond and mortgage and been absolutely entitled to it in his own right to do as he pleased with it, then under these conditions it would have been a merger, and the lien would have ceased to exist. If there had been no understanding between Cook, Lillard, and the bank of an intention to prevent a merger, the merger would have followed as a matter of law, but the intention and understanding of the parties and their intention was there was to be no merger. No other inference can be drawn from what took place between Cook, Lillard and the bank than an intention was expressed and implied that there was to be no merger, and the presumption of merger that arises in such cases is completely overcome and rebutted by a proper construction of the evidence in the case.

The evidence rebuts the idea that Cook, while having the legal ownership of the land, ever became the absolute owner of the incumbrance to such an extent as vested in him both title to land and ownership of the incumbrance so as to bring about the intention which governs merger in equity. The intention of the parties as expressed by them and their acts controls, and they intended

the bond and mortgage to remain open for the purpose of protecting the bank's claim. This was the arrangement and intention of the parties testified to by them and contradicted. Cook at no time was in possession of the papers or in control of them in such a sense as made him absolute owner. He had only a transitory, naked, temporary interest for a moment for the purpose of passing the title to the bank. He was the owner for the moment simply for the specific purpose of transferring them to the bank. He never was in possession of them as absolute owner. He never acquired any right of possession to them except for the one specific purpose of assigning them to the bank. He never acquired absolute dominion over it with full power and authority to dispose of it or use it according to his pleasure. There is nothing in the case that warrants the court in holding that payment by Cook could be assumed or that the doctrine of merger could apply. The holding of title in Cook for an instant only for the sole purpose of reassigning to the bank was not of such a nature under the facts of the case as warrants the application of the doctrine of merger. The bank neither surrendered the papers or parted with the possession of the same and at no time lost its title to them. There never was a delivery to Cook. They were simply passed to him to have him indorse his signature thereon without delivery to him of the papers by the bank, and he could at no time have gotten possession of them except by settling with the bank what was due thereon. The papers never were in his possession, except constructively for the sole and only purpose of assigning them to the bank. The bank at all times retained the actual possession. The conclusion is that under no view of the case did Cook ever acquire anything more than a bare legal title to the bond and mortgage and in no sense ever became the owner of them, and that the circuit court was in error in holding that the indebtedness represented by the bond and mortgage had been merged and extinguished.

The exceptions are sustained, and judgment reversed.

Reversed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 455)

JENNINGS v. BOWMAN. (No. 9631.)

(Supreme Court of South Carolina. March 8, 1917.)

1. APPEAL AND ERROR §264—EXCEPTIONS—NECESSITY OF.

Where, in an action on a contract, plaintiff relied on defendant's waiver of his strict performance, a verdict for defendant without exception thereto carried the issue of waiver out of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1533-1535.]

2. CONTRACTS §211—PARTITION AGREEMENT—CONSTRUCTION—TIME.

A contract for the partition of lands owned by the parties as tenants in common provided that each party should have the right to survey the lands, and any excess or shortage in acreage over the acreage stated in the deeds should be paid for or deducted at the rates therein; the surveys to be made within 90 days from the date of the contract, or otherwise the acreage stated in the deeds should stand. Plaintiff did not complete the survey within 90 days, and defendant denied his request for an extension of time. *Held*, that the contract made time of its essence, and plaintiff could not recover for an excess shown by a survey subsequently made.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938-943.]

Appeal from Common Pleas Circuit Court of Sumter County; S. W. G. Shipp, Judge.

Action by L. D. Jennings against W. A. Bowman. From a judgment for defendant, plaintiff appeals. Affirmed.

The agreement mentioned is as follows:

This agreement made and entered into by and between W. A. Bowman and L. D. Jennings, witnesses:

That the parties hereto, now the owners as tenants in common of the lands herein referred to, have agreed to a division of the same, and that in and by said division, W. A. Bowman is to take the parcel of ninety-seven (97) acres of land, originally purchased from Neill O'Donnell by deed recorded in the office of the C. C. C. P. for Sumter county in Book P. P. P. at page 321; a parcel of one hundred and five acres, being the part of the Knox place lying southwest of the public road from Sumter to Dalzell; a parcel of land of seventy-nine (79) acres, more or less, originally purchased by Bowman and Segars from J. J. Britton, Jr., and the half interest of L. D. Jennings is to be conveyed to W. A. Bowman by deed dated this day, based upon a valuation of fifty-five dollars (\$55.00) per acre. W. A. Bowman is also to take and there is to be conveyed to him, two-thirds interest in and to the land known as the Yeadon and Haynsworth land, containing five hundred thirty-eight (538) acres, more or less, which is to be conveyed to him at a valuation of forty dollars (\$40.00) per acre. At these figures, W. A. Bowman is to pay L. D. Jennings twenty-two thousand and seventy-four dollars (\$22,074.00).

As part payment of the same, W. A. Bowman agrees to pay off and discharge one-half of the indebtedness, due by L. D. Jennings, on the mortgage held by Yeadon and Haynsworth on the five hundred thirty-eight acre tract of land, and he is to assume and pay off the mortgage of three thousand dollars held by J. J. Britton, Jr., on the seventy-nine acre tract of land, leaving the amount of fifteen thousand, one hundred ninety four dollars to be paid by W. A. Bowman to L. D. Jennings.

L. D. Jennings is to take all the remainder

of the Knox land, estimated at eight hundred forty-one (841) acres, at fifty-five dollars (\$55.00) per acre, and the half interest of W. A. Bowman in said land is to be conveyed to him by deed dated this day. The total purchase price of the said interest in said land is the sum of twenty-three thousand, one hundred twenty-seven dollars (\$23,127.00) and to this is to be added five hundred fifty dollars (\$550.00), the value of the one-half interest in twenty acres of land, to be conveyed by M. E. Bowman to L. D. Jennings this day, making a total due by L. D. Jennings to W. A. Bowman of twenty-three thousand, six hundred seventy-seven (\$23,677.00) dollars.

L. D. Jennings assumes and agrees to pay off and discharge one-half of a certain mortgage executed by Bowman and Segars to R. I. Manning, recorded in Book 57, page 684, amounting to twenty-five hundred dollars, and one-half the mortgage of Bowman and Segars to Security Life and Annuity company, amounting to Seven thousand five hundred dollars, leaving a net amount due by L. D. Jennings to W. A. Bowman of the sum of thirteen thousand, six hundred and seventy-seven dollars (\$13,677.00).

That L. D. Jennings is to pay the full amount of the mortgages held by Security Life & Annuity Company for \$15,000.00, and by R. I. Manning for five thousand dollars, above referred to, and W. A. Bowman is to pay the full amount of the mortgages held by Britton for three thousand dollars and by Yeadon and Haynsworth for ten thousand, seven hundred sixty (\$10,760.00) dollars. Interest is to be paid up to January 1st, 1914, and the assumption of said mortgages is with interest from January 1, 1914.

The parties hereto agree hereby to forthwith, and as speedily as possible, remove from said lands other encumbrances than those herein mentioned, so as to leave said lands free and clear of encumbrance except for the mortgages herein mentioned as assumed by the parties hereto respectively.

The prices and considerations herein named are based upon actual acreage, and each of said parties shall have the right to survey the lands above referred to, and any excess or shortage in acreage over or under the acreage stated in the deeds to be paid for, or deducted, at the rates herein. Surveys under this contract are to be made within ninety days from the date hereof; otherwise the acreage stated is to stand.

L. D. Jennings and W. A. Bowman having agreed to sell a part of the land above referred to to H. T. Edens, and the lands so bargained to be sold to H. T. Edens being allotted to W. A. Bowman, L. D. Jennings herein assigns all his right and interest in the contract with the said H. T. Edens to the said W. A. Bowman.

Any difference between the parties is to be paid immediately in cash. The difference due L. D. Jennings based on acreage herein stated is \$1,517 which may be paid by offset against R. N. Segars mortgage assumed by L. D. Jennings under his contract with B. W. Segars.

A. S. Harby, of Sumter, for appellant. Lee & Molse, of Sumter, for respondent.

GAGE, J. The appeal involves the construction of a written agreement between the parties litigant and especially of the following clause, to wit:

"The prices and considerations herein named are based upon actual acreage, and each of said parties shall have the right to survey the lands above referred to, and any excess or shortage in acreage over or under the acreage stated in the deeds to be paid for, or deducted, at the rates

herein. Surveys under this contract are to be made within ninety days from the date hereof; otherwise the acreage stated is to stand."

Let the entire agreement be reported.

The agreement was made concurrently with the partition by cross-deeds of many parcels of land betwixt the parties, and which they held as tenants in common. It compassed other differences betwixt the parties than that suggested in the mooted clause. The surveys referred to and the basis of this action were not made within 90 days from the date of the agreement. On the ninetieth day the plaintiff requested an extension of the time to survey until May 1st, and the defendant dissented. The survey was begun in the field on the ninetieth day, and was completed some weeks thereafter. The plaintiff alleges that it turned out there were errors in the estimated actual acreage, against the plaintiff, one way and another, which amounted to nearly \$2,000, and the plaintiff sued the defendant for that sum, and for what the complaint terms equality of partition.

[1] The court held that time was the essence of the contract, and the plaintiff was bound to have made the surveys within 90 days from the date of the contract, unless the defendant had waived a strict performance of it. The issue of waiver has been dissipated by a verdict for the defendant, and no exception thereabout.

[2] And while there are three exceptions to the charge of the court, there is admittedly but one question, and that is: Shall the parties be held to abide the letter of the agreement?

It is a very old question whether time is of the essence of a contract, and the reason is, the application of the doctrine depends upon innumerable circumstances. The facts determine the application, and seem therefore to determine the law.

The question arises out of many classes of cases; in building contracts which provide for forfeitures, in contracts for the purchase and sale of lands, in insurance contracts, and others; and decisions in one class do not much help to elucidate causes arising in another class. Generally, in a court of law the time in which a thing is to be done is as much a part of the contract as any other feature of it. But in equity a different rule prevails; time is held to be of the essence or not, according to all the circumstances of the case. Yet even there, time will be regarded as of the essence, if the contractors have made it so by the use of words so plain as to leave no room for a consideration of the justice of the case.

The appellant suggests in the argument that this is a cause in equity, but the record does not show that such a question was made below; the parties treated the case as one at law. But as we view the case that

consideration is immaterial here. Suppose the instant agreement had provided that if the survey was not had in 90 days it should not be had thereafter, except by the consent of the parties indorsed on the agreement? There will be no two opinions about the effect of such a clause. The parties, having made so plain an agreement, would be held to it, without reference to the moralities of the case.

The case at bar is not altered. The parties agreed that "surveys under this contract are to be made within 90 days from the date thereof; otherwise the acreage stated is to stand." The seven words last quoted are those used by the contractors; they are susceptible of only one meaning; they closed the door to every negotiation after 90 days. The plaintiff feared that. He, on the ninetieth day, asked for an extension, and it was denied to him. The defendant has used the sword, as he had the legal right to do. The plaintiff is a man of affairs, a trained lawyer, accustomed to the use of words in written instruments. There is no way of escape for him—in a court.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 497)

CAMDEN WHOLESALE GROCERY v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN., et al. (No. 9635.)

(Supreme Court of South Carolina. March 12, 1917.)

1. INSURANCE — 685(1)—ACTION ON POLICY—INTEREST OF PLAINTIFF—EVIDENCE—SUFFICIENCY.

In an action on a fire policy, evidence that the insured conveyed the property and assigned the policy to plaintiff, but reserved the right to repurchase the property within one year and did not deliver the assigned policy to plaintiff, held to justify the inference that the insurance would only be operative during the time the vendor had the right to exercise his option, and that after that plaintiff had no interest in the policy.

2. INSURANCE — 152(3) — CONSTRUCTION OF POLICY—EXISTING STATUTE.

Where Civ. Code 1912, § 2719, providing that statements in application for insurance shall not prevent recovery before jury in case of loss and "provided" after the expiration of 60 days an insurer shall be estopped to deny the truth of a statement in an application for fire insurance which was accepted, except for fraud in making the application, was in existence when policy of insurance was issued, the provisions of the policy must be construed as if the section had been incorporated therein.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 312.]

3. INSURANCE — 288(1) — FIRE INSURANCE — FORFEITURE—OTHER EXISTING INSURANCE.

Under Civ. Code 1912, § 2719, where a fire policy, providing that it would be void if the insured then had or should thereafter procure other insurance, whether valid or not, on property covered in whole or in part by the policy was issued upon property already insured, and it

is not alleged that there was fraud in making application, or that the statement in the application upon which the policy was issued was denied within 60 days, the policy was valid, and the court erred in granting nonsuit based upon that fact.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 660-669.]

4. INSURANCE — 283(2)—FIRE INSURANCE—FORFEITURE—STATUTE.

Under Civ. Code 1912, § 2719, where a fire policy, providing that if the subject of insurance be personal property the policy would be void if the property be or become incumbered by a chattel mortgage, was issued on personal property incumbered by a chattel mortgage, but it is not alleged that the application was fraudulent or that there was a denial of the truth of the statement in the application upon which the policy was issued within 60 days, the policy was valid.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 639-645.]

5. INSURANCE — 336(1)—FIRE INSURANCE—FORFEITURE — OTHER SUBSEQUENT INSURANCE.

Where fire policy provided that it would be void if the insured thereafter procured any other contract of insurance whether valid or not, the action of the insured in thereafter procuring another policy of insurance on the same property worked a forfeiture of the first policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 856.]

6. INSURANCE — 646(5)—WAIVER OF FORFEITURE—EVIDENCE—BURDEN OF PROOF.

Where the acts of an insured under a policy worked a forfeiture of the policy under its terms, it was incumbent upon the insured to show a waiver of the forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1658.]

Appeal from Common Pleas Circuit Court of Kershaw County; John S. Wilson, Judge.

Actions by the Camden Wholesale Grocery Company against the National Fire Insurance Company of Hartford, Connecticut, and the Home Insurance Company of New York. From a judgment of nonsuit, the plaintiff appeals. Judgment affirmed as to the action against the National Fire Insurance Company, and reversed and new trial granted as to the Home Insurance Company.

L. A. Wittkowsky, of Camden, for appellant. Osborne, Cocke & Robinson, of Charlotte, and L. T. Mills, of Camden, for respondents.

GARY, C. J. This is an action on two policies of insurance, and the causes of action are separately stated. The appeal is from an order of nonsuit, granted at the close of the plaintiff's testimony.

The facts are not in dispute, and are, in substance, as follows: On the 20th of May, 1912, the defendant National Fire Insurance Company of Hartford, Conn., issued a policy of insurance to J. E. Creed, in the sum of \$1,500, covering the house which was afterwards destroyed by fire, and certain personal property, for the term of three years. The amount of insurance on the house was fixed at \$800. On the 17th of December,

1912, J. E. Creed conveyed to the plaintiff the lot on which said house stood, but reserved the right to repurchase the lot within a year, and agreed to keep the house insured. On the same day, to wit, the 17th of December, 1912, J. E. Creed, with the consent of said insurance company, assigned the policy to the plaintiff, which, however, was not then delivered to him, and was not delivered prior to the destruction of the house by fire, on the 8th of March, 1914, but was kept in the possession of J. E. Creed for the plaintiff. J. E. Creed failed to repurchase the lot, and on the 17th of December the defendant Home Insurance Company of New York issued to the plaintiff a policy in the sum of \$600 on said house, which was valued by the insurer and insured at \$1,000. When the first-mentioned policy was assigned by Creed, on the 17th of December, 1912, the plaintiff had notice of the assignment, but thought that it had lapsed when the second policy was issued.

F. M. Wooten, the president of the plaintiff company, thus testified:

"Q. At the time the policy was issued to you, by the Home Insurance Company, did you know as a matter of fact that the policy of the National Insurance Company was in force? A. Did not. Q. Had you ever seen it, at that time? A. Never had. We knew a policy had been in force prior to this; thought it had expired. We never had seen this policy at all. We were under the impression this policy had expired, and took out a new policy with the Home Insurance people. Q. At that time, time the assignment was made, did you know anything about it? A. Yes, sir."

[1] The only reasonable inference from the testimony is that, when J. E. Creed agreed to keep the house insured, the parties contemplated that the insurance would only be operative during the time he had the right to exercise his option to repurchase the property, to wit, one year. After the expiration of that time, the plaintiff no longer had any interest in the policy.

The personal property described in the policy issued by the National Fire Insurance Company was incumbered by a mortgage at the time said policy was issued. Each of said policies contained this provision:

"This entire policy, unless otherwise provided by agreement indorsed thereon, or added hereto, shall be void, if the insured now has or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage."

The defendants contend that, under the admitted facts, and the said provision, the policies were void.

Section 2719 of the Code of Laws 1912 is as follows:

"No statement in the application for insurance shall be held to prevent a recovery before a jury on said policy in case of partial or total loss: Provided, after the expiration of sixty days, the insurer shall be estopped to deny the

truth of the statement in the application for insurance which was accepted except for fraud in making the application for insurance."

This has reference to facts in existence at the time the policy is issued; for, otherwise, they could not appear in the application, which necessarily precedes the issuance of the policy.

[2] The provisions of the policies must be construed as if the said section had been therein incorporated. In *Adler v. Cloud*, 42 S. C. 291, 20 S. E. 400, the court said:

"It has been repeatedly held by this court and the United States Supreme Court that every contract made embodies the law governing such contracts as much as if so stipulated in the contract in express terms."

See, also, *Owen v. Insurance Co.*, 84 S. C. 253, 66 S. E. 290, 137 Am. St. Rep. 845.

Section 2719 of the Code of Laws 1912 was construed in the case of *McCarty v. Insurance Co.*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729, and it was held that, in the absence of fraud, the insurer is estopped from denying the truth of the statement in the application for insurance, after the expiration of 60 days from the time the policy was issued. See, also, *Owen v. Insurance Co.*, 84 S. C. 253, 66 S. E. 290, 137 Am. St. Rep. 845.

[3, 4] It is not alleged that the statement in the application for insurance, as to either policy, was fraudulent; nor that there was a denial of the truth of the statement in the application, upon which either policy was issued, within 60 days thereafter, as contemplated by said section. Therefore his honor the presiding judge erred in granting the nonsuit, as to the cause of action based upon the policy issued by the defendant Home Insurance Company of New York. He also erred in granting the nonsuit, as to the cause of action founded upon the policy issued by the defendant National Fire Insurance Company of Hartford, Conn., in so far as it was based upon the fact that the personal property was incumbered by a mortgage when the policy was issued.

[5] The other ground, however, upon which he granted a nonsuit as to this (the first) cause of action, must be sustained. When the plaintiff procured the policy of insurance from the defendant Home Insurance Company of New York, it violated that provision of the policy that it would be void if the insured thereafter made or procured any other contract of insurance whether valid or not, and thereby worked a forfeiture of the policy issued by the National Fire Insurance Company of Hartford, Conn. *Spann v. Insurance Co.*, 83 S. C. 262, 65 S. E. 232; *Wynn v. Insurance Co.*, 100 S. C. 47, 84 S. E. 306.

[6] It was then incumbent on the insured to show a waiver of the forfeiture, but there was no testimony whatever tending to show such fact. *Spann v. Insurance Co.*, supra.

Judgment affirmed as to first cause of ac-

tion, and reversed as to second cause of action, and new trial granted as to that cause of action.

WATTS, FRASER, and GAGE, JJ., concur. HYDRICK, J., concurs in the result.

(106 S. C. 447)

JOHNSON v. CAROLINA GAS & ELECTRIC CO. (No. 9591.)

(Supreme Court of South Carolina. Feb. 8, 1917.)

WATERS AND WATER COURSES — 203(13) — PUBLIC WATER SUPPLY—RIGHT TO CUT OFF WATER FOR NONPAYMENT.

A public service water company, though authorized by its franchise to discontinue service for nonpayment, had no right to cut off a consumer's water supply on account of a debt due for water supplied at a previous time and by another company, assigned to the present company.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 295, 296.]

Appeal from Common Pleas Circuit Court of Marion County; S. W. G. Shipp, Judge.

Application for mandamus by James W. Johnson against the Carolina Gas & Electric Company. From an order granting the writ, respondent appeals. Order affirmed.

Willcox & Willcox, of Florence, Geo. E. Dargan, of Darlington, and A. F. Woods, of Marion, for appellant. L. D. Lide and H. S. McCandlish, both of Marion, for respondent.

FRASER, J. On the 15th day of June, 1916, the respondent cut off the relator's light and water from his residence and office building, on account of arrears of water rent, for the office building, for the months February, March, and April, 1916. During those months the plant was operated by the Carolina Central Electric Company. The relator applied to his honor, Judge Shipp, for a writ of mandamus to require the restoration of the service. The writ was granted, and from this order this appeal was taken.

There are nine exceptions, but the appellant does not argue them separately, and we will not consider them separately.

In the view this court takes of this case, there is only one question, to wit: Can the respondent discontinue the service, even if there was a debt due for water, supplied at a previous time, and that supplied by another company?

The case of *Benson v. Water Co.*, 88 S. C. on page 354, 70 S. E. on page 897, answers the question. Quoting from *Poole v. Water Co.*, 81 S. C. 438, 62 S. E. 874, 128 Am. St. Rep. 923, we find:

"While a public service water company has the right to cut off a consumer's water supply for nonpayment of recent and just bills for water rent, etc. * * * We agree with the circuit judge that the water company cannot be allowed to refuse to furnish water under the contract of December 1, 1906, even if there was a

debt due for water supplied at a previous time and a different place."

The appellant cites from the franchise as its authority:

"Upon the failure or refusal of any consumer to comply with the foregoing provisions, or any reasonable rule or regulation of the said A. N. Walker, his heirs and assigns, and upon the failure of any customer to settle any bill when due, service may be discontinued and the amount of deposit returned to such customer after deducting all his bills due."

The service was discontinued here for past-due bills, under a contract made with another concern, and assigned to the appellant.

These companies should have a short and inexpensive method of collecting just bills, but we have been cited to no authority, and we know of none, that allows the short method for the collection of assigned accounts for past-due bills. Mr. Johnson denies that he is due anything for arrears of water rent.

The order is affirmed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

Petition for Rehearing.

PER CURIAM. The real controversy here is alleged arrears of water rent.

The petition is dismissed.

(156 S. C. 449)

BARRETT & CO. v. STILL et al.
(No. 9626.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. REFERENCE ~~to~~ 47—SPECIAL MASTER—POWER—STATUTE.

In view of Civ. Code 1912, § 1379, authorizing appointment of special master in case of vacancy, and section 1380, prescribing the duties of a master, in a proceeding by creditors of the estate of an intestate decedent to declare fraudulent deed executed by decedent to wife, the appointment of a special master clothed him with all the powers of a regular master, and the decree of another judge, who heard the argument on the report, that the master take further testimony and report amount of dower demandant was entitled to and make a sale, continued the special master in such capacity, and the fact that the sale did not occur at the time nominated in the decree did not deprive the special master of his jurisdiction to continue as such until the conclusion of the case.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 74, 76, 78.]

2. REFERENCE ~~to~~ 100(7)—FINDINGS—FAILURE TO OBJECT.

In an action by a creditor in behalf of itself and other creditors of the estate of an intestate decedent to set aside as fraudulent a deed executed by deceased to his wife, in which wife claims homestead and dower, where the decree did not direct the method to be used in determining homestead and dower, and the master adopted the usual course giving notice to the parties to select appraisers for that purpose, and plaintiff's attorney represented the creditor's class and selected an appraiser to determine

homestead and dower, any other creditor is estopped to object to the action of the master.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 163, 168.]

3. REFERENCE ~~to~~ 100(4)—FINDINGS—SUFFICIENCY OF EXCEPTIONS.

Exceptions to the homestead appraisement, which do not contain any evidence to establish the claim that the assessments were excessive and wrongful, beyond the bare statement of that fact, will be overruled.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 160, 161.]

4. REFERENCE ~~to~~ 89—FINDINGS—ATTORNEY'S FEES—PREMATURE ESTABLISHMENT.

The action of the master in establishing the fees for plaintiff's attorney in advance of the sale of the property, and the actual bringing into court of the net funds realized therefrom, was premature, and an exception thereto will be sustained on the ground that such services have not occurred.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 135-140.]

Appeal from Common Pleas Circuit Court of Barnwell County; J. W. De Vore, Judge.

Action to have a deed declared fraudulent by Barrett & Co. against H. D. Still and others. From the decree, the plaintiff and defendants F. S. Royster Guano Company and others appeal. Affirmed.

The following is the decree of the court below:

This matter comes before me on exceptions to proceedings had by the special master, J. Emile Harley, Esq., in re homestead and dower of Marian M. Still, and fees fixed for Mr. R. J. Southall, attorney for the plaintiffs herein.

The matter being on the calendar was, by consent, marked "heard" and was argued before me at my chambers in Columbia, on December 16th, the attorney for the excepting creditors, being Mr. Mitchell, of the firm of Mitchell & Smith; Mr. Nathans, of Nathans & Sinkler, representing the F. S. Royster Guano Company, Read Phosphate Company, and F. W. Wagener & Co., certain defendants; whilst the plaintiff was represented by R. J. Southall, Esq.; and Mr. Simms and Mr. Mayfield, representing Mrs. Marian M. Still, the claimant in homestead and demandant in dower.

The facts are as follows: The regular master for the county being disqualified, by consent, an order at chambers was signed by Judge Rice, on January 12, 1914, appointing J. Emile Harley, Esq., as special master, "to take all testimony in this cause and to report the same to the court with all convenient speed, and that said master is hereby clothed with authority and powers conferred upon masters," and he was also required to call in creditors to prove their claims before him, etc.

This was done, and the case was argued before Judge Sease on the testimony reported, and, among other things, Judge Sease provided in his decree that the said special master or referee (which terms are convertible) "to take the testimony herein and report to the court, the amount to which Mrs. Marian M. Still would be entitled for her right of dower in said lands; that he next pay to Mrs. Marian M. Still, H. D. Still, S. H. Still, and L. C. Still \$1,000 in full settlement and discharge of the homestead exemption to which they are entitled as the sole heirs at law of the said H. D. Still, deceased."

An appeal was taken to the Supreme Court from Judge Sease's decree, and the same was modified by the Supreme Court in certain particulars, among which was that Mrs. Still was

held to be entitled to both homestead and dower in kind, if practicable. Thereafter a reference was appointed by the special master, under the provisions of Judge Sease's order, as modified by the Supreme Court, to ascertain and report a reasonable compensation for R. J. Southall, Esq., plaintiffs' attorney, and also the selection and appointment, under the law, of appraisers to allot dower and homestead to Mrs. Still.

At this reference Messrs. Nathans & Sinkler, Mitchell & Smith, and James Simons, representing F. S. Royster Guano Company, Read Phosphate Company, and F. W. Wagener & Co., objected on the ground that they had not been sufficiently notified of the same, whereupon the special master continued the reference, and notified the said attorneys of the continuance, until the 11th of October, 1915. At this reference the said attorneys did not appear, but Mr. Boulware, an attorney at the Barnwell Bar, appeared, and on their behalf filed their objection to any action on the part of the special master, alleging that his jurisdiction had ceased with the expiration of the date fixed in the decree of Judge Sease, for making the said sale, and that he would be disqualified from taking any action until a new date had been fixed for the sale, and that the application to assess a fee for Mr. Southall, as plaintiff's attorney, was premature. This objection was overruled, and the special master proceeded with the reference, and testimony was offered as to the services rendered, and for the amount of fee for said plaintiffs' attorney.

The commissioners, who had been previously nominated and appointed, one on behalf of the plaintiff by plaintiffs' attorney, one by the defendant claimant, Mrs. Still, and the other by the special master, filed their report in homestead and dower, with the special master, together with their allotment and assessment, which in turn was filed with the clerk of court by the master on the 16th of October, 1915, and notice given to said defendants by the special master. To this exceptions were served by the defendants F. S. Royster Guano Company, Read Phosphate Company, and F. W. Wagener & Co., upon the special master and upon the attorneys for the various parties, alleging: (1) That there were no provisions in the decree of the circuit court or Supreme Court authorizing the special master or referee to appoint appraisers to set aside homestead or dower; (2) that the date for the sale, under Judge Sease's order, had expired, and no new order had been taken for another sales day, and that hence the special master had become functus officio and without authority to appoint appraisers; (3) that no authority was conferred by law on the present master or referee to appoint appraisers to admeasure dower. These exceptions were not filed with the clerk of court by the said creditors, but do appear in the report of the special master.

[1] After consideration of the matter, I am of the opinion, and so rule, that the appointment of the special master by Judge Rice, under the law, clothed him with all of the powers of a regular master, and that Judge Sease's decree continued him in that capacity to make the sale and to otherwise pass upon certain questions ordered by Judge Sease for his adjudication, and that the fact that the sale did not occur at the time nominated in the decree did not deprive this special master of his jurisdiction to continue as such until the conclusion of the case. Sections 1379, 1380, Civil Code.

There was no provision in the decree of the court directing the method to be pursued in the determination of the homestead and dower, and

this the practicability of the same being set off in kind. He followed, therefore, the usual course in matters of this character, giving notice to the interested parties to select appraisers for that purpose.

[2] All parties acquiesced in the appointment of the appraisers, except the defendants above mentioned. The plaintiffs' attorney selected, on behalf of the plaintiff, his appraiser. The defendant Marian M. Still, claimant in homestead and dower, selected hers, and the special master appointed the third. The other creditors, defendants, refused to co-operate with the plaintiffs' attorney in the selection of an appraiser, but relied entirely upon the objection that the master had become functus officio. I am of the opinion therefore that the objection to the action of the master should be, and is, overruled, because the plaintiffs' attorney in charge of the litigation having acted on behalf of the creditors' class, any individual creditor is estopped by conduct in the objection to the action of the master.

The further objection that the homestead and dower assessment are excessive in value appear to have been served upon the attorneys in the case, but do not appear on the original record as served by the said objecting attorneys upon the special master and by him filed with his report in the clerk's office.

[3] It was held, in *Chaffee v. Ransey*, 54 S. C. 517, 32 S. E. 522, that exceptions to the homestead appraisalment must be filed in the office of the clerk of court within the limited time, and that service on the judgment due will not suffice; but, waiving for the purposes of this decision this point, it does not appear in the exceptions any evidence going to establish the claim that the assessments were excessive and wrongful beyond the bare statement of that fact in the exceptions. It is therefore ordered that the exceptions to the appraisers' sworn report, accompanied by the plats, etc., be, and the same are hereby, overruled.

[4] As to the remaining question raised by the objecting creditors, as to the amount of fees fixed for the plaintiffs' attorney, and that the action of the master in establishing these fees at this time, in advance of the sale of the property and the actual bringing into the court the net funds realized therefrom, I am of the opinion that this question should be reserved, and that the action of the master in this particular was premature, and it is therefore ordered and adjudged that without expressing any opinion as found by the master as to the value of the services, but simply because the same had not yet occurred, it is therefore ordered that said exception be sustained.

James Simons, Mitchell & Smith, and Nathans & Sinkler, all of Charleston, for appellants. R. J. Southall, of Augusta, Ga., for respondents.

WATTS, J. This is an appeal from a decree of Hon. J. W. De Vore, circuit judge, made in this case. This is the second appeal in the case. The case is reported in 102 S. C. 19, 86 S. E. 204.

For the reasons stated by the circuit judge in his decree, it is the judgment of this court that the judgment of the circuit court be affirmed.

Judgment affirmed.

GARY, O. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(120 Va. 586)

SHEPHERD et al. v. DARLING et al.

(Supreme Court of Appeals of Virginia. March 15, 1917. Rehearing Denied March 28, 1917.)

1. EXECUTORS AND ADMINISTRATORS ⇨137—TRUSTS ⇨189—DUTY OF CARE OF EXECUTOR AND TRUSTEE.

An executor and trustee, in selling his testator's property, was required merely to exercise the care of a reasonably prudent man conducting his own affairs.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 701; Trusts, Cent. Dig. §§ 240, 241, 244.]

2. EXECUTORS AND ADMINISTRATORS ⇨127—SALE OF PROPERTY—POWER UNDER WILL.

Where testator bequeathed all his estate to his executors in trust to be sold as soon after his death as in their opinion it could be done with greatest profit, the surviving executor had power to sell testator's property without an order of the court.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 527–530.]

3. EXECUTORS AND ADMINISTRATORS ⇨82 — AUTHORIZATION OF SALE OF PROPERTY—PROTECTION OF EXECUTOR.

Testator's executor, authorized to sell the property without an order of court, had the right, notwithstanding the power given him by the will, to go into a court of equity for advice and instruction, and was fully protected by the court's order under which he acted in selling, when he sought the court's advice in good faith.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 335.]

4. PARTNERSHIP ⇨258(8)—SALE OF PROPERTY TO PARTNER—SUIT TO SET ASIDE—BURDEN OF PROOF.

In suit brought by the heirs of a deceased partner against his surviving executor and another partner, who purchased the partnership property from the executor, to set aside the purchase on the ground of undue influence and fraud, the burden of proof was not on the purchasing partner to show affirmatively that he made disclosure as to the business, with which he was the more familiar, and acted in good faith, even if he and the executor were partners in the business.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 580–582, 596.]

5. PARTNERSHIP ⇨258(8)—SALE OF PROPERTY TO PARTNER—BURDEN OF PURCHASES.

Where a partner purchased the business from the surviving executor of another partner only after the latter sought the independent advice of a court of equity, the fact satisfied any burden upon the purchasing partner to show his good faith and disclosure of the condition of the business, with which he was more familiar, in suit by the heirs of the deceased partner against him to set aside the sale.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 580–582, 596.]

Appeal from Circuit Court, Elizabeth City County.

Suit by Mary McMenamin Shepherd and another against Henry L. Schmelz, executor and trustee of James W. McMenamin, deceased, Frank W. Darling, and John McMenamin. From the decree, plaintiffs and the last-named defendant appeal. Affirmed.

The portion of James McMenamin's will authorizing his executors to sell his property read as follows:

"I give, devise, and bequeath unto my executors hereinafter named all my estate and effects that I may die possessed of, or am entitled to, in trust, to be (such of it as is not now advantageously invested) sold as soon after my death as in their opinion it can be done with the greatest profit, and the proceeds so invested as can give the best returns consistent with safety."

Allan D. Jones, of Newport News, for appellants. Jones & Woodward, R. M. Lett, and J. W. Read, all of Newport News, for appellees.

KELLY, J. The record in this cause embraces more than 800 printed pages. The case has been well argued, both orally and in the briefs. We have given it careful consideration, and it must now suffice to state briefly the essential facts as we find them and the principles of law governing the same.

In the year 1888 W. N. Armstrong, J. S. Darling, G. A. Schmelz, Geo. S. Schermerhorn, and James McMenamin obtained a charter of incorporation for the Powhatan Oyster Company, with the purpose of acquiring oyster grounds and buying, planting, and selling oysters. It appears that this company took charge of and planted certain oyster grounds theretofore assigned to some of the incorporators, and about the same time made a contract with Frank W. Darling to superintend its out-of-door work, subject to the direction and control of its officers. Shortly thereafter the incorporators decided to abandon the use of the charter and to divide the oyster grounds and oyster business of the company into five equal shares, one to be owned by each of the persons interested in the company. The grounds were accordingly laid off and assigned in five divisions to each of the parties, but, as it was not feasible to equally divide the oysters in this way, each party remained the owner of an undivided interest therein. The business itself was not affected by these changes, F. W. Darling continuing as the superintendent, and the interests of all the parties being held together under the company name and operated under one management. In the course of time, W. N. Armstrong assigned his interest to M. O. Armstrong, and James S. Darling assigned his interest to F. W. Darling. Still later M. C. Armstrong withdrew from the association, receiving an allotment of the oyster ground and a certain sum of money for his share in the oysters. Thus the joint business was reduced to four shares, held, respectively, by James McMenamin, Geo. S. Schermerhorn, Geo. A. Schmelz, and Frank W. Darling, the latter remaining also the superintendent or manager.

James McMenamin died in 1901, leaving a will whereby he appointed Henry L. Schmelz and Geo. A. Schmelz his executors. George Schermerhorn died in 1905, his widow succeeding to his rights in the oyster company. Geo. A. Schmelz died in 1911, and Henry L.

Schmelz and John Garland Pollard became his administrators.

F. W. Darling was thus left as the sole survivor of the parties originally connected with this enterprise. From the outset he had been, under varying contracts, the manager for all the parties, and was more familiar with the business than any of the others, and under his management it had been quite profitable to all concerned.

Some little time after the death of Geo. A. Schmelz, Darling called on Henry L. Schmelz for the purpose of discussing a settlement of the business; the latter asked him how a settlement could be made, and he replied as follows:

"I stated to him that I was perfectly willing to abide by our understanding among us in the first agreement, or the old agreement, which was that we divide up the oysters; sell the oysters and let me out. I told him I was perfectly willing to do that, sell the oysters, and let each man take his share of the ground. He asked me would I consider purchasing it. I told him 'Yes,' I would consider purchasing it. * * * I told him that I would consider the purchase of all the interests in the property. I did not mention any price or anything more at that time as to the purchase of it. He stated to me he would take the matter up with Mr. Pollard, and when they were in position to consider an offer would let me know."

After the lapse of more than a year, during which time there had been some further negotiations, Darling met Schmelz and Pollard at their request, and, upon being asked for his proposition, told them, in substance, that he would give \$20,000 in cash for each interest in the property as it stood, oysters, ground, and everything connected with it. They requested him to reduce the proposition to writing, which he accordingly did.

At the time this offer was made there was still pending in the circuit court of Elizabeth City county a chancery suit under the style of McMenamín's Ex'r v. McMenamín et al., which had been instituted by the executors shortly after the death of James McMenamín for the purpose of having a construction of the McMenamín will, and to obtain instructions by the executors as to certain of their duties.

H. L. Schmelz had the power, under the terms of the will, to make the sale, but he preferred to submit the matter to the court, and he accordingly filed his petition in the last-mentioned cause, reciting the proposition made by Darling and asking the instructions of the court. In this petition he recommended the proposition, but showed that he had not accepted it, and would not do so without the approval of the court. This petition named as defendants Mary McMenamín Shepherd and James and John McMenamín, the children and devisees of James McMenamín, who, under the residuary clause in his will, would be entitled to the property, or the proceeds thereof. Mary McM. Shepherd and James McMenamín were both of age, answered the petition, and prayed the court to approve the offer. John McMenamín was not

of age, and he filed a formal answer by his guardian ad litem. The circuit court referred the question to a commissioner, who took depositions and returned the same along with his report in favor of the acceptance of the offer, and the court thereupon confirmed the report and directed the sale.

The sale was accordingly made, being consummated in July, 1912.

In August, 1913, on the day on which John McMenamín attained his majority, and under circumstances not necessary here to detail, but which plainly show that the executor, Schmelz, acted openly and above criticism, the three residuary devisees, Mary McMenamín Shepherd and James and John McMenamín, made a final settlement with the executor, executing to him their release and receipt in full.

In October, 1913, the present suit was brought by Mrs. Shepherd and James McMenamín against H. L. Schmelz, surviving executor and trustee of James W. McMenamín, deceased, and Frank W. Darling, charging that the sale to Darling was procured by him by means of undue influence over the executor, and by fraud and misrepresentation on Darling's part, and by negligence or connivance on the part of Schmelz; and the bill charges that the latter is liable to the complainants and to their brother, John McMenamín, who was made a defendant in the suit, for the fair cash value of the property, subject to a credit of \$20,000, which was paid to the executor by Darling, and by him in turn paid to the complainants and John McMenamín. No specific relief is asked, however, against the executor in the prayer of the bill, except in so far as it is embraced in the prayer for general relief; and the special prayer and main purpose of the bill is to have the sale to Darling set aside and require him to account to the complainants and their brother for the value of the property, subject to a credit of \$20,000 theretofore paid by him; it being claimed by them that the fair cash value of the property was greatly in excess of the amount which he paid. John McMenamín answered the bill, admitting its allegations, and joining in its prayer.

So far as the case against the executor is concerned, it seems to be free from any sort of difficulty or question.

[1] We find nothing in the evidence to show either negligence or bad faith on his part. A careful consideration of the history of the business and the conduct of Henry L. Schmelz in connection therewith, and particularly in connection with the transaction under consideration, shows that he acted cautiously and prudently, and did nothing to indicate that the confidence reposed in him by James McMenamín, who evidently knew him well and trusted him fully, was violated; and in the negotiation with Darling he certainly acted with no less care than he or any other reasonably prudent man would have been

expected to act in his own affairs. This was all that was required of him as executor and trustee.

Prof. John B. Minor, in discussing the degree of care required of a trustee, says:

"But nothing more is in general required than that he should act in good faith, and with the same prudence and discretion that a prudent man exercises in his own affairs. If more than this were exacted, it would tend to the disadvantage of persons interested in trusts in general, because it would discourage competent persons from accepting the administration of trusts." 2 Minor's Inst. (4th Ed.) p. 255.

See, also, to the same effect, 2 Pom. Eq. Jur. § 1070; Elliott v. Carter, 9 Grat. (50 Va.) 541; Myers v. Zetelle, 21 Grat. (62 Va.) 733; Davis v. Harman, 21 Grat. (62 Va.) 199; Thomson v. Brooke, 76 Va. 166.

[2, 3] Although the contention is made by the appellants that Schmelz, as surviving executor, did not have the power to sell the property without an order of court, we are of opinion that, under the plain provisions of the will, he clearly did have this power, and that the same was not in any way affected or diminished by the previous proceedings in the above-mentioned suit of *McMenamin's Ex'r v. McMenamin et al.* But it is equally true that, as executor and trustee, he had the right, notwithstanding such power, to go into a court of equity for advice and instruction upon the proposition. Having taken that course in good faith, as we think the evidence shows he did, he is fully protected by the order of the court under which he acted. 2 Minor's Inst. (4th Ed.) p. 256; 2 Pom. Eq. Jur. § 1064; 21 Cyc. 88.

Coming now to the case as it affects Frank W. Darling, we are of opinion that it likewise must fail.

[4, 5] It is contended most earnestly by counsel for the appellants that, inasmuch as Darling occupied the relationship of a partner to the other parties, and especially in view of the fact that he was more intimately acquainted with the business of the company than any of the other partners, it was his duty to make a full disclosure, and that the burden was upon him to show affirmatively that he did make such disclosure, and that he acted in all respects with the utmost good faith. In the recent case of *Aronhime v. Levinson*, 89 S. E. 893, this court, while fully recognizing the rule requiring a purchasing partner to act openly and in good faith, expressly held that the burden of proof did not rest on the purchasing partner in a suit brought by the selling partner to set aside the purchase on the ground of fraud. Conceding, without discussion, that the appellants are right in contending that Darling occupied the relation of a partner to Schmelz, the decision in the *Aronhime* Case is absolutely controlling here so far as the question of the burden of proof is concerned. But, were the rule otherwise, the result would be the same in this case. Henry L. Schmelz, as executor and trustee under the will of James McMenamin,

had been representing the McMenamin interests in this business for 11 years, and, along with John Garland Pollard, his co-administrator, he had been representing another interest in it for about 6 years. It is true that Darling was more intimately acquainted with the details and doubtless with the accounts and financial condition of the business than his copartners, but his copartners did not rely upon his representations, and resorted to the safest method known to the law in obtaining independent advice. They invoked the aid and advice of a court of equity (Schmelz and Pollard, administrators, likewise participating informally in relying upon this application to the court). The case therefore, in our opinion, is brought clearly within the principle enunciated by Judge Riely in *Tennant v. Dunlop*, 97 Va. 236, 33 S. E. 624, as follows:

"There is no doubt that, where a beneficiary in dealing with the trustee has sought and obtained independent advice from a person competent to advise as to the particular transaction, this fact will go far to give assurance of its fairness, and to induce a court of equity to uphold it."

In the court proceeding above referred to the proposition from Darling to Schmelz was, as we have seen, referred to a commissioner, who made a thorough investigation of the proposition, taking the testimony of a number of widely known and experienced oyster men. Before his investigation was completed, John Garland Pollard, one of the co-administrators representing another interest, indicated that he would like to have some further proof taken, and thereupon the court directed certain additional evidence, and when this was in, the commissioner reported that the price offered was a good price, and that the sale would be an advantageous one for the James McMenamin estate. The court thereupon confirmed the report, and directed the sale, which was accordingly made.

In addition to the report of the commissioner and the approval of the circuit court, we think the proof in the present case shows that the sale was fairly made, and that the price, in view of all the contemporaneous circumstances, was adequate, or at least that it was very far short of the inadequacy which would have to appear under well-settled and familiar rules of law to justify an interference therewith in the present case. A most significant, if not a conclusive, circumstance appearing in the record is that the other interests, represented respectively by Pollard and Schmelz, administrators, and by Mrs. Schermerhorn, sold to Darling at or about the same time and at the same price, and are not seeking relief.

It is contended that Darling, during the negotiations leading up to the sale, acquired an undue influence over Schmelz by obtaining a controlling interest in two banks from each of which the latter was drawing a large salary. The evidence, we think, wholly fails to show any attempt on the part of Darling to

exercise, or that he in fact possessed, any such undue influence.

The decree complained of seems to us so clearly right, upon the grounds already discussed, that we deem it unnecessary to go into the question as to whether the sale was a private or a judicial sale. Of course, if it was the latter, and we have not perceived why it was not, the present suit would have to fail because it does not meet the requirements of a suit to set aside the decree under which the sale was consummated. See *Harrison v. Wallton*, 95 Va. 724, 726, 727, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830, and authorities there cited.

Upon the whole case, we are of opinion that the decree complained of is plainly right, and it must be affirmed:

Affirmed.

(120 Va. 563)

SHENANDOAH VALLEY LOAN & TRUST CO. v. MURRAY.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. HIGHWAYS § 160(2) — OBSTRUCTIONS — INJURIES—SUFFICIENCY OF EVIDENCE.

Where a telephone wire was taut before defendant's employes painted the house to which it was attached, but sagged immediately thereafter, the jury was warranted in finding defendant's employes caused such sagging.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 438.]

2. HIGHWAYS § 153—SAGGING WIRE—LANDOWNER'S LIABILITY.

A landowner must exercise reasonable care to prevent a telephone wire partly on his premises from sagging where it crosses a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 299, 417, 419.]

3. HIGHWAYS § 160(3)—LANDOWNER'S NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

Evidence that a sagging telephone wire was caused by defendant landowner's acts, and that such condition had existed three or four months before the accident, made defendant's negligence a jury question.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 440-442.]

4. HIGHWAYS § 160(3) — OBSTRUCTIONS — CONTRIBUTORY NEGLIGENCE — JURY QUESTION.

Plaintiff's contributory negligence was a jury question where the buggy in which she was riding was driven into a sagging telephone wire which she might have seen had she been looking.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 440-442.]

5. EVIDENCE § 128—ADMISSIBILITY—STATEMENTS TO PHYSICIAN.

Plaintiff's statements of physical suffering to her physician are admissible, although he was making an examination preparatory to testifying in her damage suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 383-387.]

6. TRIAL § 255(15) — REQUESTED INSTRUCTIONS—NECESSITY—PHYSICIAN'S DIAGNOSIS.

A physician's diagnosis of plaintiff's condition, made after her damage suit was decided upon, is admissible without a cautioning instruc-

tion, where no request for such instruction was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 641.]

7. EVIDENCE § 477(2)—OPINION EVIDENCE—PHYSICAL CONDITION.

A nonexpert witness' statement that plaintiff seemed to be suffering and nervous held admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2238.]

8. EVIDENCE § 470 — OPINION EVIDENCE — CONCLUSION OF WITNESS.

A nonexpert witness' conclusion of fact is admissible only when the jury cannot be fully informed regarding the facts upon which he bases it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2220.]

9. HIGHWAYS § 160(2) — OBSTRUCTIONS — INJURIES—EVIDENCE.

In an action for negligently allowing a telephone wire to sag across a public road, evidence that the wire could be used for installing a telephone on defendant's property is admissible upon the issue that the wire was of value to him.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 438.]

10. HIGHWAYS § 160(2) — OBSTRUCTIONS — INJURIES—EVIDENCE.

In an action for negligently allowing a telephone wire to sag across a public road, evidence regarding the condition of the wire two months previous to the accident held admissible.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 438.]

11. HIGHWAYS § 160(2) — OBSTRUCTIONS — INJURIES—EVIDENCE.

In an action against a landowner for negligently allowing a telephone wire to sag across a public road, evidence that, as against another landowner, the telephone company claimed to own the wiring is inadmissible, where the contracts in the two cases were not proven similar.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 438.]

12. HIGHWAYS § 160(3) — OBSTRUCTIONS — INJURIES—INSTRUCTIONS.

In an action for negligently allowing a telephone wire to sag across a public road, an instruction that defendant landowner owned the wiring, etc., if the telephone company made no claim to it and the previous landowner had relinquished her claim to it, held warranted by the evidence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 440-442.]

13. HIGHWAYS § 160(3) — OBSTRUCTIONS — INJURIES—INSTRUCTIONS.

In an action for negligently allowing a telephone wire to sag across a public road, an instruction that the wiring, etc., belonged to defendant landowner if conveyed by his predecessor in title, and the telephone company made no claim to it, held not erroneous as ambiguous or because not stating a proposition of law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 440-442.]

14. HIGHWAYS § 160(3) — OBSTRUCTIONS — INJURIES—INSTRUCTION.

An instruction that it was defendant landowner's duty to repair a sagging telephone wire if he knew of its condition or should have known of it, is warranted by evidence that the sagging was caused by defendant's employes some months before the accident.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 436, 440-442.]

15. DAMAGES ~~—~~131(4)—EXCESSIVE AMOUNT. \$1,000 damages is not excessive where plaintiff was confined to her bed about five weeks and was a nervous wreck for a year.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 365, 367, 370.]

Error to Circuit Court, Fairfax County.

Action by Mary A. Murray against the Shenandoah Valley Loan & Trust Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. L. Walton, of Woodstock, and John W. Rust, of Fairfax, for plaintiff in error. Moore, Keith, McCandlish & Hall, of Fairfax, for defendant in error.

SIMS, J. This is an action by defendant in error for personal injury caused by the sagging of a telephone wire extending from a pole on land belonging to plaintiff in error, beyond the boundary line of such land, across a public road. The former was plaintiff and the latter defendant in the court below, and they will be hereinafter referred to as plaintiff and defendant.

There was a demurrer to the declaration, upon seven grounds of demurrer. The demurrer was overruled by the trial court. This action of such court is made the basis of the first assignment of error.

Thereupon there was a trial by jury, resulting in a verdict for the plaintiff for \$1,000. The action of the court in overruling a motion of the defendant to set aside such verdict and grant a new trial, on the ground that it was contrary to the law and the evidence, is made the basis of the second assignment of error.

There are 11 other assignments of error.

The questions arising upon the second assignment of error include, in effect, all questions arising upon the demurrer to the declaration; hence, it is not necessary for us to discuss separately the first assignment of error. The questions arising upon all of said assignments of error will be considered in their order.

Preliminary to such consideration, the following facts of the case, material thereto, will be stated with such supplementary statements of them later as may be deemed necessary in connection with the several questions considered below. In ascertaining such facts the case is, of course, considered as if upon demurrer to the evidence by the defendant.

Facts of the Case.

The evidence is conflicting as to whether the sagging of the wire which caused the injury was due to its being taken and allowed to remain loose on the side of the road of defendant's land, or because of its insecure fastening on the opposite side of the road on the land of another. The testimony shows that the wire was not sagging, but was fastened up at a height of some 23 or 24 feet, in

good condition, at the time the land of defendant was conveyed to it, about 2 years and 5 months before the accident.

There were two telephone wires of a metallic circuit across the road. Only one of these later sagged. The boundary of defendant's land did not extend into, but stopped on the south side of, the public road. The wires were erected and owned by the former owner of the land, for use in connection with a telephone in the dwelling house. The telephone was rented of a telephone company, but the wires were not, being furnished by the said owner. The telephone had been removed before the conveyance of the land to the defendant, but the wires remained, and at the time of such conveyance were securely fastened to the porch of the house, extended thence about 35 feet to a tree in the yard, on which they were fastened to insulators on brackets, thence they passed to the top of a telephone pole set in the ground on the margin of defendant's land near the road, thence above and across the road to trees on the land of another named Huntington. There was therefore no sagging of the wire at the time defendant became the owner of the land. The sagging occurred afterwards.

[1] There was no eyewitness who testified as to who unfastened the wires from the porch, but there was testimony that the defendant, by its employes painted the house about a month after the conveyance of the land to it; that the wires were securely fastened as aforesaid immediately before, and that they were seen immediately after, such painting was done to be unfastened from the porch and the ends loosely wrapped around a tree near the porch. No other agency was shown in evidence to have caused this unfastening of the wires. The jury were, therefore, warranted in concluding that this was done by defendant through its employes, the painters.

There was the testimony of the agent of defendant who had charge of and looked after the property for it that he saw that the wires were detached from the porch three or four months after the defendant became the owner of the land. The condition of the wires then, as seen by this agent, was that the ends, which had been fastened to the porch, were hanging down loose from the tree. The defendant did not by this agent, or any other, fasten the loose ends of these wires.

There was testimony of witnesses for plaintiff to the effect that from four or five months before the accident one of the wires was sagging across the road, due to its having been loosened by a tree falling across the telephone line on the Huntington side of the road; that witness took the wire which was sagging, drew it up tight about 12 feet above the road, high enough to permit a buggy to pass under it without catching if the buggy was in

the middle of the road, but possibly not high enough to prevent a load of hay from catching on it; and wrapped the wire four or five times around a fence post on the Huntington side; that after the accident it was in the same position as he left it; that after he fixed it, it did slip from that side. This witness further testified that while the right of way for it might have been 30 feet, the road itself was narrow and just wide enough to drive in; and Mr. Jerman, who was driving the plaintiff in his buggy at the time of the accident, testified that he was driving in the middle of the road.

There was other evidence bearing on this question of fact, but it is deemed unnecessary to state it in more detail here, as this court cannot try the case upon a question of fact where the evidence is conflicting. It is sufficient to say that it was conflicting, and that there was sufficient evidence to warrant the jury in finding that the initial cause of the sagging of the wire across the road low enough to cause the accident resulting in injury to the plaintiff, was the act of the defendant, through its employes, in taking loose the wires from the porch; that is to say, there was sufficient evidence before the jury to warrant it in finding that the act of the defendant caused the nuisance of the sagging wire across the road from which the plaintiff received her injury.

At the time of the accident one of the wires had sagged down so low over the road as to catch on the top of the buggy in which plaintiff was seated, although the top was two-thirds turned back, and to come within 18 inches or 2 feet of her head. As to when the wire reached and how long it had remained in this condition before the accident, there was evidence before the jury which warranted them in finding that such condition existed for three or four months before the accident.

The road was straight as the plaintiff approached the place of accident for some distance, and the sagging telephone wire could have been seen by the plaintiff, if she had looked for it, from a sufficient distance away for her to have avoided the accident. But there was no evidence that the plaintiff, or the person driving her knew before the accident of the condition of the wire, or had their attention called to it, except by the presence of the wire itself hanging over the road.

The accident, the resulting injury to the plaintiff, etc., occurred as follows, in accordance with the testimony of the plaintiff and of Mr. Jerman, her employer, who were the only witnesses to the occurrence: Plaintiff, a typewriter, in the employment of Mr. Jerman, was in his top buggy, and was being driven by him, the horse in a slow trot, up a slight grade in the road. It was about 11 o'clock a. m., a bright, clear day. Plaintiff and Mr. Jerman were looking in the direc-

tion of defendant's property, discussing it as compared with a piece of property Mr. Jerman had bought. They had to look up the road to look at the property. Plaintiff was looking at stumps in the field before they got opposite the house, then at the house; the house was about opposite to her when the wire struck the buggy; her sight was all right; the road was level. If the plaintiff or Mr. Jerman had been looking for the wire, or looking up and not on the road, they could have seen the wire; but they were not looking up in the air, and it was hard to see a wire the size of that which caused the accident. The wire caught the top of the buggy and pulled the top off; plaintiff was thrown out, and her right foot must have caught under a little iron part of the running gear of the buggy, and she was dragged about 50 yards while the horse was running. The horse ran away as fast as it could, requiring all the energy of Mr. Jerman to stop it. As a result of the fall and dragging, plaintiff was bruised and injured on and about her back, hips and legs, and she continued to be sick at her stomach next day, but went to Fairfax to work. She had not been sick before for 10 years. After she got to Fairfax, the day after the accident, she felt so sick that she called Dr. Moncure in to Mr. Jerman's office; she then went to Dr. Moncure's office, and he examined her and gave her some medicine; she then returned to her home at Ballston, Va. She was confined in bed about five weeks as a result of the accident; and for the first year after the accident she was a nervous wreck; some days she would only be able to work part of the day. She suffered with her hips and head, and she continued to suffer up to the trial of the case with her hips, back, and side. Dr. Moncure saw her once at her home at Ballston, and Dr. Howard Fletcher right often. Mr. Jerman also testified that "she seemed to be suffering and nervous."

On the subject of the wires, brackets, insulators, and telephone pole on the land of defendant, and the wire extending from such land across the road, the deed to defendant was introduced in evidence, which was in the usual form of a deed of bargain and sale from a trustee who has sold land under a deed of trust, and contained no reservation or mention of pole, wires, or attachments. On this subject there was testimony for plaintiff that the former owner of the land, pole, wires, and attachments, did not claim or exercise any acts of ownership over the poles, wires, and attachments after the conveyance to the defendant. There was testimony also tending to show that the allowing of the poles, wires, and attachments to remain on the land of defendant was of value to the property, in that they were there ready for use in the event any occupant of the land wished to install a telephone, and in such case would save expense in having a phone installed.

We will now consider the several questions arising upon the assignments of error in their order as stated below.

[2] 1. Was there any duty resting upon the defendant to exercise due care to keep the telephone wire in question, where it extended beyond defendant's premises across the public road, in a reasonably safe condition for the public to pass under it?

We think that such duty did rest upon the defendant.

As noted above, the wire in question was originally constructed over the public road by and for the accommodation of the former owner of the land of defendant. The purpose for which it was there was obvious. While it is true that the defendant at no time itself made that use of it, the jury were warranted in concluding that defendant allowed it to remain there because it was of value to its property in view of its being there ready for such use. In this situation, the duty rested upon defendant to use due care to keep the wire in question in a reasonably safe condition for the public to pass under it—certainly to the extent that defendant's use of its land might affect the condition of the wire where it crossed the public road.

We think the principle underlying the following cases is applicable to the case before us.

As was said in *Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 41 L. R. A. 554, 66 Am. St. Rep. 575, which was a case in which a recovery was allowed of damages paid by the trustees of the village on account of personal injuries sustained through an accident caused by a defective grating in a sidewalk:

"It was his duty, however, as long as he owned and was in full possession of the premises, to use reasonable diligence to keep the grate in repair, so that it would be as safe as any other part of the sidewalk. *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *McGuire v. Spence*, 91 N. Y. 303, 43 Am. Rep. 668; 2 *Shearm. & Redf. Neg.* (5th Ed.) § 708. It was built for his accommodation and was a benefit to his property only, and the law placed upon him the obligation of using due care to keep it in a suitable and safe condition for the public to walk over it as a part of the sidewalk. Proper construction, in the first place, was not enough to relieve him from liability, but the duty of inspection and repair continued while he owned and was in the exclusive possession of the premises. The duty ran with the land as long as the grate was maintained for the benefit of the land. As was said as early as *Heacock v. Sherman*, 14 Wend. [N. Y.] 58, 60, the owner 'is bound to repair' * * * in consideration of private advantage.' The doctrine of implied duty, which is well established by the authorities, requires the person who, even with due permission, constructs a scuttle hole in the sidewalk in front of his premises to use reasonable care for the safety of the public, as long as it remains there and is subject to his control. *Babbage v. Powers*, 130 N. Y. 281 [29 N. E. 132] 14 L. R. A. 398; *Wolf v. Kilpatrick*, 101 N. Y. 146 [4 N. E. 188] 54 Am. Rep. 672; *Jennings v. Van Schaick*, 108 N. Y. 530 [15 N. E. 424, 2 Am. St. Rep. 459]; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Davenport v. Ruckman*, 37 N. Y. 568; *Swords v.*

Edgar, 59 N. Y. 28, 17 Am. Rep. 295; *Briggs v. New York C. & H. R. R. Co.*, 30 Hun [N. Y.] 291; *Heacock v. Sherman*, 14 Wend. [N. Y.] 58; *Seneca Falls v. Zalinski*, 8 Hun [N. Y.] 571; *Whalen v. Gloucester*, 4 Hun [N. Y.] 24; *Matthews v. De Groff*, 13 App. Div. 356 [43 N. Y. Supp. 237]; *Elliott, Roads and Streets*, p. 541; *Thomas*, Neg. 1145. * * *

"That duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks; and, as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. * * *

"If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession."

In the case of *Allen v. Linquist*, 43 App. D. C. 538, which was a case of personal injury received from a gate swinging over a sidewalk from a fence, not on, but in front of, the defendant's premises, which the latter had the right to use as appurtenant to his ownership of his lot, the court said:

"The right of Allen to use the parking was an appurtenance passing to him with the fee in the lot. Being such, so long as he permitted the fence to stand and inclose the parking, presumably for his private convenience, he was responsible for its condition. * * * The fence was built for the protection and accommodation of the abutting property. When Allen purchased the property, the fence and the right to use the inclosed parking passed as appurtenant thereto. He was not required to keep the fence there; but, so long as he permitted it to remain, he was responsible for its condition and proper repair."

The opinion proceeds:

"The rule here is not different from that applied where property owners construct for their own use openings under and through the sidewalk in front of their premises. In such cases, the property owner is held liable if the sidewalk, by reason of such use, becomes a nuisance, or in such repair as to cause injury to a person using the walk."

In this view of the case before us, it becomes unnecessary to consider the position of counsel for defendant that the telephone wire was not a fixture, and for that reason the ownership of it did not pass to defendant. If that position were conceded to be correct, yet, since we must regard as a fact in the case that the wire was left to remain over the public road for the benefit of or advantage to the property of defendant, it was its duty to exercise the due care in question, although the wire at the point at which it became a nuisance was not on the property of defendant.

[3] 2. Was there sufficient evidence to warrant the jury in finding that the defendant was guilty of negligence in not abating the nuisance?

As we have seen above, this is not the case of a nuisance existing at the time the defendant became the owner of its property, not

the case of a nuisance caused by an act of a former owner of the property. It is a case of a nuisance caused by an act of the defendant itself, and there was evidence before the jury that the nuisance had existed for three or four months prior to the accident. The jury might have well concluded from the evidence that the defendant either knew of such condition of the wire, resulting from its own act in unfastening it from the porch, in ample time to have abated the nuisance before the accident, or that by the exercise of reasonable care it would have so known, and hence that it was guilty of negligence in not abating the nuisance.

[4] 3. Was the plaintiff guilty of contributory negligence which should bar her recovery?

We think not.

This was a question of fact for the jury. We have referred above to the points in the testimony bearing upon this subject. We cannot say as a matter of law that the plaintiff was guilty of negligence per se so as to take this question from the jury. It is true it has been repeatedly held by this court that a traveler on a public street is held to the exercise of ordinary care (*Osborne v. Pulas-ki Light & W. Co.*, 95 Va. 16, 27 S. E. 812; *Moore v. City of Richmond*, 85 Va. 545, 8 S. E. 387); and this is equally true of a traveler on a public road. But what is ordinary care of course differs in different situations.

As was said by this court in *Watts v. Southern Bell T. & T. Co.*, 100 Va. 45, 40 S. E. 107:

"Every one has the right to presume that a public highway is in a reasonably safe condition. * * *

In *Weaver v. Dawson, etc., Telephone Co.*, 82 Neb. 696, 118 N. W. 650, 22 L. R. A. (N. S.) 1189, the plaintiff was seated on a hayrack, riding along a public road when injured by coming in contact with a telephone wire. With reference to the contention that he was guilty of contributory negligence, the court said:

"This contention is not well founded. Driving along a road under a telephone or telegraph wire, properly constructed, is not attended by any danger. It is unlike crossing a railroad, where a train is liable to pass at any time, and the rule which would require a person about to cross a railroad to stop and look before so doing has no application to a person driving along either a public or private road which is crossed by telephone or telegraph wires. The plaintiff did not observe that the wire was down, or that it was likely to strike his hayrack."

In *Penn. Telegraph Co. v. Varnau (Pa.)* 15 Atl. 624, the plaintiff's intestate was on top of a load of furniture, driving along a public road. He had passed the point opposite and was looking back at some persons working in an adjacent field, when he was struck by a wire across the road, was knocked off, and killed. On the claim of the defendant that there was contributory negligence, the

court held that it was a question of fact for the jury.

The case of *Jacks v. Rieves*, 78 Ark. 426, 95 S. W. 781, is a well-considered and instructive case. There the plaintiff was injured by the top of her surrey coming in contact with a telephone wire sagging across a public highway, which frightened her horse, and the plaintiff, in her fright, jumped out of the surrey and was injured. The court, among other things, said:

"It is not expected or required of a traveler driving easily along the middle of a much traveled highway to be looking up to see if perchance a stray wire is in reach of the top of the vehicle."

In *Lloyd v. Railway Company*, 110 Ga. 165, 35 S. E. 170, referring to the plaintiff and the driver of his carriage, the court said:

"They were upon the street where they had a right to be, and were driving in an ordinary manner and had no reason to apprehend that a wire would be across their pathway, and there was nothing to put them upon their guard against such an obstruction. When a person is in the habit of traveling the streets of a city day after day and these streets are clear of obstructions, whether ordinary care would require that he should look out for unusual obstructions we, as a court, do not know. Whether he ought to see a wire the size of the little finger, when he is looking straight ahead in the direction of the wire and could have seen it at a much greater distance if his attention had been called to it, is, it seems to us, a question for the jury and not for the court."

The question of whether the doctrine of imputable negligence, which was involved in the case of *Atlantic & Danville R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319, is applicable to the case before us, discussed by counsel for defendant, need not be considered by us, as we do not think there was anything in the conduct of Mr. Jerman, the driver of the buggy, which amounted to contributory negligence per se.

In connection with the question of contributory negligence in the case at bar, it should perhaps be noted that there was a conflict between the testimony of the plaintiff and her own witness, Mr. Jerman, on the matter of whether the sun was shining in her face so that she could not see the wire. She testified that such was the case. Mr. Jerman testified to the contrary, and stated that they were traveling in a direction which placed their backs to the sun. This was peculiarly for the consideration of the jury. It went only to the credibility of the witnesses, and as to which, if either, the jury believed stated the facts correctly. Besides, the plaintiff's case did not turn wholly upon the circumstance mentioned.

[5] 4. Were statements made by the plaintiff to Dr. Moncure, that "she was suffering with pain in her left hip and back and from the small of the back down her left side, and that she had a very bad headache, and other statements of the plaintiff to such doctor as to how she was suffering," admissible in the testimony of Dr. Moncure?

We think they were.

The testimony does not make it clear whether the plaintiff had determined to institute suit at the time she consulted Dr. Moncure, and that she employed him with the purpose of making him a witness in case of suit. Counsel for defendant contend that this was the fact. In such case, the authorities are in conflict as to the admissibility of such statements. A number of cases are cited to sustain the position that they are inadmissible. We think, however, that the weight of authority and of reason is in favor of their admissibility, even though made after the commencement of the suit and with the purpose of using the physician as a witness. The circumstance that they are then made goes only to the weight of the evidence. 8 R. C. L. p. 640, and note, 21 L. R. A. (N. S.) 827, and 16 Cyc. 166, where the authorities cited and relied on by counsel for defendant are referred to. The case of C. & O. Ry. Co. v. Parker, 116 Va. 370, 82 S. E. 183, cited by such counsel, does not appear to have involved statements of the plaintiff's intestate in regard to his physical condition in connection with a consultation of the ambulance surgeon with respect thereto, but statements with respect to occurrences at the time of the accident.

[8] 5. Was the testimony of Dr. Fletcher relating to his diagnosis of the plaintiff's condition, made after the suit had been decided on, admissible without an instruction from the court as to the weight to be given thereto by the jury?

We think it was, for reasons stated next above, as no instruction on the subject appears from the record to have been asked by the defendant.

[7, 8] 6. Was the statement of the plaintiff's witness, Mr. Jerman, that the plaintiff "seemed to be suffering and nervous," admissible in evidence?

We think it was.

This was a statement of fact. It is true it was to some extent a conclusion of fact, of inference from data observed by the witness; but not all conclusions of fact of a nonexpert witness are inadmissible in evidence. The test of admissibility of a conclusion of fact of a nonexpert witness is this: Is it clear that the jurors were or could have been as fully and as exactly furnished with the data which formed the basis for the conclusion of the witness as the latter was? If so, the conclusion is inadmissible in evidence; if not, it is admissible. Wigmore on Ev. §§ 1917-1921, 1924, 1926, and cases cited; Hot Springs, etc., Co. v. Revercomb, 110 Va. 240, 65 S. E. 557. The citations from Wigmore on Evidence require a reading of all of them to fully develop the subject. We regret that their length prevents quotation from them here on a question arising so frequently in practice.

Applying the test above stated, we think the testimony in question was admissible.

The cases of Atlantic Coast Line R. Co. v. Caple's Adm'r, 110 Va. 515, 66 S. E. 855, and Overdy v. C. & O. Ry. Co., 37 W. Va. 524, 16 S. E. 813, cited and relied on by counsel for defendant, are not in conflict with this conclusion.

[9] 7. Was the statement of one of plaintiff's witnesses "that if the company [defendant] had installed another phone in the Kidwell house, the same pole and wires could be used, if intact, and that in such event the company [the telephone company] would only charge for the work done in installing the phone," admissible in evidence?

We think it was.

This testimony had a direct bearing upon the question whether the telephone wire was allowed by defendant to remain across the public road because it was of value to its property. This was a material issue in the case. Therefore the authorities cited by counsel for defendant on this point to the effect that evidence bearing on no issue in the case, or very remotely bearing on an issue therein, should be excluded, are inapplicable.

[10] 8. Was the testimony admissible of one of the witnesses for plaintiff as to the condition of the wires about two months after the accident?

We think that it was within the discretion of the court to admit such testimony in evidence in a case such as that at bar, in the absence of evidence of any change in the condition. This is not a case where the lapse of time in question necessarily involved a change in condition.

In Washington, etc., R. Co. v. Vaughan, 111 Va. 785, 791, 69 S. E. 1035, 1037, this court said:

"Where the existence of a thing at a given time is in issue, its prior or subsequent existence is, according to human experience, some indication of its probable existence at a later or earlier period."

And again on the same page:

"The general principle that a prior or subsequent existence is evidential of a later or earlier one has been repeatedly laid down. But, says Prof. Wigmore, 'That no fixed rule can be prescribed as to the time or the conditions within which a prior or subsequent existence is evidential is sufficiently illustrated by the precedents, from which it is impossible (and rightly so) to draw a general rule.'"

And again:

"Since it is impossible to lay down any general rule as to the time or the conditions within which a prior or subsequent existence is evidential, the question of the admissibility of such evidence must be left largely to the discretion of the trial courts."

We do not think that the authorities Potomac, etc., R. Co. v. Chichester, 113 Va. 333, 74 S. E. 162, 1 Wigmore on Ev. § 437, Wash. Alex. & Mt. Vernon R. Co. v. Vaughan, supra; 10 R. C. L. 943, and 29 Cyc. 614, cited and relied on by counsel for defendant, are in conflict with this conclusion.

[11] 9. Was the ruling of the court below erroneous in refusing to permit a defend-

ant's witness to testify that the telephone company had taken the phone out of a house witness had in hand for sale as a real estate agent, that witness asked the telephone company's permission to remove the wires which were left on such property, and that the telephone company refused such permission, saying that the wires belonged to the company?

We think not.

In that case the telephone company claimed to own the wires. It is not shown in evidence in the case at bar that the same contract with the telephone company existed as in the case referred to by the witness. On the contrary, it is expressly shown in the case at bar that the telephone company did not own the wires.

10. The court below gave the following instruction (among others) at the request of the plaintiff:

"A. The court instructs the jury that every deed conveying land shall, unless an exception be made therein, be construed to include all buildings, privileges, and appurtenances of every kind belonging to the land, and if they believe from the evidence that the telephone loop, consisting of a pole, wires, and attachments was installed on the Kidwell property in 1907, for the convenience of the owner of the said property, and that the telephone company did not own or retain any interest or exercise any acts of ownership over said telephone pole, wires, and attachments, and that they remained on said property after the telephone was taken out in December, 1910, and were there when Maurice Kidwell and Ruth G. Kidwell executed the trust deed of April 28, 1910, and when said trust was foreclosed on May 18, 1911, and that the deed by which the property was conveyed to the defendant company contained no reservation of ownership of the pole, wires, and attachments, and that the owner of the said property during all the period between December, 1910, and the time of the accident to the plaintiff had the right and privilege to use said pole, wires, and attachments for the installation of another phone, then the court instructs the jury that said pole, wires, and attachments passed under the deed of May 18, 1911, to the defendant and became its property."

Counsel for defendant take the position that this instruction was erroneous on three grounds, which will now be considered in their order.

[12] (a) Because such instruction was without evidence to support it.

Counsel refer to the statements of several witnesses, among them to that of Follin, to the effect that the wires "were of no use to the owner of the property except to put in another telephone again," of Church, "that if another phone had been installed in the Kidwell house, the same pole and wire could be used if intact, and that in such case the [telephone] company would only charge for the work done in installing the phone." There was also testimony to the effect that the telephone company never owned these wires, and was not operating them at the time of the accident; that Mrs. Kidwell, the former owner of the farm, once owned them and had them installed for her use and benefit as occupant of the farm; that she

left them attached to the freehold and laid no claim to them after the sale of the farm to the defendant.

We, therefore, do not think this ground of objection to the instruction is well taken.

[13] (b) Because the instruction does not state a proposition of law, even if the facts as stated are true.

Counsel give no reasons for this position. We do not think it is tenable.

(c) Because the instruction is ambiguous.

We do not think the instruction open to this objection.

[14] 11. The court below gave also the following, among other instructions, at the request of the plaintiff:

"B. The court instructs the jury that if they believe from the evidence that the wire which injured the plaintiff sagged from the Kidwell side by virtue of the fact that it was detached from the house and insecurely wrapped around a tree near the house on that side after the Kidwell property passed to the defendant company, and that the sagging which caused the wire to injure the plaintiff did not come from the Huntington side, and that for three or four months before the injury the wire had been gradually sagging from the Kidwell side so that it was a danger and menace to the traveling public, and that during all this time the defendant company had full control and dominion over the said Kidwell property and wire, and knew of its sagging condition, or could have ascertained the same by ordinary diligence, it thereupon became the duty of defendant to use due care to either remove said wire from across the public road, or to so fasten and secure it that it would not be a danger or menace to the traveling public, and if they further believe the defendant company failed to perform this duty, and as a direct and proximate result of such failure plaintiff was injured without negligence on the part of herself or the driver of the buggy, their verdict should be for the plaintiff."

Counsel for defendant claim that there was no evidence to support this instruction.

As noted above, there was a conflict in the evidence with respect to which side of the road the wire slacked from in order to sag across the road. It did not break over the road or within the line of the poles and post to which it was fastened on each side of the road, and in that way fall down in the road. It sagged down over the road. The physical fact was that, in order to do so, of necessity it must have given way and slipped from one side or the other, or from both sides of the road, from defendant's property or from the land on the opposite side of the road, or from both. There was evidence of the loose ends of the wires left unfastened, or insecurely fastened, on the side of defendant's land, for a long time before the accident, to account for the sagging of the wire. In view of the testimony of defendant's own agent as to what he knew of the location and condition of the wires from a time over two years before the accident, there was also, as above noted, evidence to warrant the jury in finding that the defendant knew, or by the exercise of reasonable care ought to have known, of the dangerous condition of the wire over the road in more than sufficient time to have abated the nul-

sance before the accident, and that the defendant was therefore guilty of negligence in not so doing.

Therefore we do not think the objection made to this instruction is well grounded.

12. The court below refused to give the following instruction at the request of the defendant:

"(6) The court instructs the jury that if the plaintiff could have seen the wire in question if she had looked at it, and that if they believe from the evidence that she was not looking to the front, but that her face was turned away in the direction of the Kidwell house, then she was guilty of gross negligence and is not entitled to recover."

This involves the same question as to contributory negligence considered in our third heading above. For the reasons there given, we think the court committed no error in declining to give this instruction.

[16] 13. Was the verdict for \$1,000 so excessive as to constitute error in the ruling of the court below refusing to set the verdict aside?

We think not.

There is no evidence of any prejudice or passion on the part of the jury. We do not consider the amount of the verdict as such evidence, under the circumstances of this case, and hence we do not think this point well taken.

One objection to the ruling of the court below in allowing Mr. Browning, the agent of the defendant, to be asked as to his failure to fasten the wires after he saw them hanging loose, is not specifically noticed above, for the reason that such objection was made on the ground that the defendant owed no duty with respect to keeping the telephone wires over the road in a reasonably safe condition for the public to pass under them. This ground has been fully considered and discussed above.

Upon the whole case, we are of opinion, for the reasons stated above, that there was no error in the judgment complained of, and it will be affirmed.

Affirmed.

(120 Va. 611)

TOWN OF VIRGINIA BEACH v. OGLE.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

MUNICIPAL CORPORATIONS \Leftrightarrow 821(2) — JURY QUESTION—EXISTENCE OF STREET.

Whether a municipal corporation accepted part of a street so as to be liable for defects in it was made a jury question, where Acts 1906, c. 76, incorporating the town, referred to a map prepared by its council pursuant to Code 1904, § 1014, and the town had done some repairing on such portion of the street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1746.]

Sims, J., dissenting.

Error to Circuit Court, Princess Anne County.

Action by Lilly M. Ogle against Town of

Virginia Beach. Judgment for plaintiff, and defendant brings error. **Affirmed.**

A. Johnston Ackiss, of Norfolk, for plaintiff in error. J. Edward Cole, of Norfolk, for defendant in error.

WHITTLE, J. The judgment under review was recovered by Mrs. Ogle against the town of Virginia Beach for personal injuries caused by a defective board walk on a public street of the town.

Virginia Beach was incorporated March 6, 1906 (Acts 1906, p. 80), but long prior to that time the town had been laid off into lots and streets and had been built up and occupied as an unincorporated town known as "Virginia Beach." The survey and map, called the "Hughes map," was duly recorded, and is expressly referred to in the act of incorporation, and answers the statutory requirement that:

"The council of every city and town shall (unless it has already been done) cause to be made a survey and plan of such city or town, showing distinctly each lot, public street, and alley therein, the size and number of the lots, and the width of the streets and alleys, with such explanations or remarks as may be deemed proper. * * * Va. Code 1904, § 1014.

The town is a seaside resort connected with the city of Norfolk by the Norfolk Southern Railroad. The contention on behalf of the town is that the point at which the accident happened was originally an approach built by the railroad to a pleasure pavilion erected by the company for the accommodation of excursionists and passengers traveling over its line. But at the time of the accident a new excursion and amusement pavilion had been constructed by the company to which its patrons were taken by train, and that the use of the old pavilion had been discontinued.

The opposing contention of the plaintiff is that this board walk was an extension of Arkansas avenue, or Tenth street, one of the original streets of the town, and connected it with the board walk along the water front, and that it had long been constantly used by the public and accepted and maintained by the town as a street.

It is true exception was taken to the giving and refusal of instructions, but the case, at last, was fairly submitted upon a simple issue of fact, which the jury, upon conflicting evidence, resolved in favor of the plaintiff. Their verdict was approved by the trial court, and its ruling in the matter of instructions does not, we think, constitute reversible error.

The judgment must therefore be affirmed. **Affirmed.**

SIMS, J. (dissenting). The vital point in this case is whether there was any duty resting upon the appellant to keep the sidewalk in repair when the accident occurred. The alleged breach of such duty is the basis of the action.

It does not necessarily follow that such duty existed if the street in question, whereon the said sidewalk was located, had been accepted by the appellant as a public street (as to whether the duty in question exists where there has been such acceptance, it is not necessary in this case to inquire), but the authorities are in accord in holding, and we do not understand that counsel for appellee controverts such position, that such duty did not exist unless such street had been accepted as a public street by the appellant.

Now such acceptance by a town may be express, that is, by resolution of its proper corporate authority, or such acceptance may be implied from the acts of those exercising the corporate authority. *Harris' Case*, 20 Grat. 333.

The rule in Virginia as to highways is different. As to these, before the county can be charged with the duty to repair, etc., there must be evidence of an express acceptance by the proper authority. *Kelly's Case*, 8 Grat. 634. This rule, however, is not in accord with the weight of authority in other states. See note 27 Am. Dec. 563-566.

There is a difference between cases where the acceptance is beneficial from those where it entails a burden with respect to the proof of acceptance required. In the latter class of cases, the rule in Virginia seems to be that mere user by the public of the locus in quo will not of itself constitute an acceptance—that is, an acceptance will not be implied therefrom, unless such user be of a character and for the length of time corresponding with the requirements of the statute of limitations applicable to real actions in the jurisdiction where the question arises. *Harris' Case*, supra; *Winchester v. Carroll*, 99 Va. 727, 739, 40 S. E. 37; and authorities cited in those cases; *Elliott on Roads and Streets*, § 171, note.

The user by the public is not relied on in this case, as we understand it, to raise the implication of acceptance by the town for the reason that the latter was not incorporated until 1906, and sufficient period has not elapsed so that such implication could possibly arise.

Appellant contends, as we understand the position of counsel, that said acceptance by appellant was both (a) express and (b) implied, for the reasons stated below. We will consider these positions in their order as stated.

(a) Was there an express acceptance of said street by appellant?

Appellee, in the brief of counsel for her, bases her position that the street was expressly accepted by the town as a public street upon the claim that such street "was adopted" as a public street by the act of assembly by which appellant was incorporated. In oral argument of such counsel it was also urged that by virtue of section 1014 of the Code of Virginia (Pollard's Code, 1904), the plat referred to in the said act of

incorporation, known as the "Hughes map," is prima facie evidence of the existence of such public street, and hence of its acceptance by appellant as such. The majority opinion sustains the latter position. In this, for reasons stated below, I cannot concur.

The act of incorporation referred to, so far as pertinent, is as follows:

"Chap. 76.—An act to incorporate the town of Virginia Beach, in the county of Princess Anne, Virginia. Approved March 6, 1906.

"1. Be it enacted by the General Assembly of Virginia, That the following described territory in Princess Anne county be, and is hereby, incorporated as a town, to be known as Virginia Beach.

"2. Beginning at a point in the county of Princess Anne, on the Atlantic Ocean, where the Chautauqua by the Sea and W. H. Hall's line adjoin; thence running northerly along Atlantic Ocean to Twenty sixth street to Linkhorn Bay; thence running southerly along Linkhorn Bay and following the westerly boundary of the Virginia Beach Development Company's property until it strikes Parks avenue, as shown on the plat of Virginia Beach, recorded with the deed to Robert M. Hughes, duly recorded in the clerk's office of Princess Anne circuit court, July twenty-first, eighteen hundred and eighty seven; thence running south down the centre of Parks avenue through the property now or formerly the Atlantic Investment Company until it strikes the lines of the Virginia Beach development company's property; thence following the boundary of the Virginia Beach Development Company's property to a cove in Lake Rudee; thence running eastwardly along the southern boundary of the Virginia Beach Development Company's property to a point in Hall's line; thence eastwardly in a straight line to the point of beginning."

The plat referred to in this act is not of the territory thereby incorporated as the "Town of Virginia Beach," but of a larger territory theretofore designated by its private owners as "Virginia Beach." The reference in the act of assembly to the plat and streets thereon mentioned is manifestly for the sole purpose of designating the outside boundary of the territory incorporated; not for the purpose of evidencing the acceptance of any streets as public streets.

Moreover, Arkansas avenue, or Tenth street, the street on which the accident occurred which is the basis of the action in the instant case, is not mentioned in said act of incorporation.

Section 1014 of the Code of Virginia (Pollard's Code 1904) is as follows:

"The council of every city and town shall (unless it has already been done) cause to be made a survey and plan of such city or town, showing distinctly each lot, public street, and alley therein, the size and number of the lots, and the width of the streets and alleys, with such explanations or remarks as they may deem proper. The said plan, when approved by the council, shall be entered in some one of their books, and afterwards recorded, in the case of a city, in the clerk's office of the corporation or hustings court of such city, and in case of a town, in the clerk's office of the county in which said town or the greater part thereof is, and when so recorded shall remain in said office. Said plan shall be prima facie evidence of the boundaries of the said lots, streets, and alleys."

It is manifest from the reading of this statute that before any plat can have the ef-

fect as evidence as prescribed thereby it must not only have been made as the majority opinion assumes as sufficient, but must also be approved by the council " * * * entered in some one of" the books of the town, "and afterwards recorded * * * in the clerk's office of the county in which said town or the greater part thereof is. * * * " None of these statutory requirements appear in the instant case to be met by the plat relied on by appellee. Hence this statute does not aid appellee in proof of the acceptance of the street in question as a public street by the appellee.

Therefore there was no express acceptance of the street in question in the instant case.

(b) Was there an implied acceptance of said street by appellant?

The only testimony before the jury of acts of appellant bearing on this question tended to show the following state of facts:

That the sidewalk in question was originally built by private parties before the town was incorporated; that it was kept in repair by the railroad company up until it moved its pavilion near by which this sidewalk passed, which occurred about two years before the accident which was the basis of the action; and that appellant did some repairing to the sidewalk in question, when, the character or amount, or under what circumstances, is not stated by the two witnesses who testify to this fact, nor does this information otherwise appear in evidence.

Further, a former town sergeant testifies that the mayor of the town on one occasion refused to give a concession to a private person for the use of the street on the side of which the sidewalk in question was located for some private purpose, the witness stating that in this the mayor acted under authority of the town council, and that later decided that this was a public street, and that it could not rent it out. Appellant objected to this parol testimony and called for record evidence of such alleged action of the town council.

Considering the matter of the alleged action of the town council referred to in the last paragraph, first: It is clear that the minutes of the meeting of the town council at the time of its alleged action was the best evidence of the alleged fact. Neither such record nor any copy from it was produced. No foundation was laid for introduction of secondary evidence on the subject. The parol testimony as to the alleged action of the town council was therefore clearly inadmissible, and must be regarded as not before the jury.

Coming now to whether the acts testified to of repairing the sidewalk done by appellant and of the mayor refusing the concession for use of the street alongside such walk for private purposes above referred to:

If the proof of such acts had shown that

they were of a character inconsistent with any other position on the part of the town (appellant) than that it had accepted said street, it would have been sufficient to have warranted the jury in implying the fact that such acceptance had taken place. The testimony as introduced was far too meager and indefinite to measure up to such requirement.

The testimony on this subject should furnish some definite evidence that the act relied on was in fact an act which was authorized by the proper corporate authority.

"A dedication of land for streets may be complete without any act of acceptance on the part of the public, but in order to charge the municipality with the duty to repair or make it liable for injuries there must be an acceptance of the dedication. It may be express or implied, and if implied by repairing, it must be repaired by the authority which has the legal right to adopt it." 2 Dillon on Mun. Corp. 642.

It is true two witnesses in the instant case testified that there was repairing done by appellant. But it was a conclusion of fact inadmissible as testimony upon objection being made, as was made, to its admissibility. See for rule on this subject *Shenandoah Valley, etc., Co. v. Murray*, 91 S. E. 740, decided at this term of this court. This testimony, to have been admissible, should have been of such specific character as to who did the repairing, when, under what circumstances, and what was the nature of the repairs as to have furnished some definite evidence that it was done directly or indirectly by the proper corporate authority.

The mere act of a surveyor repairing streets is not sufficient in itself to show acceptance. *State v. Bradbury*, 40 Me. 154, 157.

There must be something more than an occasional act of repairing a street to constitute an acceptance. *Ogle v. Cumberland*, 90 Md. 59, 44 Atl. 1015.

For the foregoing reasons, I do not think that there was any evidence before the jury to sustain a finding that a duty rested on the appellant to repair the sidewalk in question, and hence the verdict should be set aside and a new trial granted.

(120 Va. 697)

TYLER, Clerk of Circuit Court, v. GARRISON.
(Supreme Court of Appeals of Virginia. March 20, 1917.)

APPEAL AND ERROR §—389(1)—STATUTE—APPELLATE PROCEEDINGS.

Code 1904, § 3538, declaring that a poor person may be allowed by a court to sue or defend a suit without paying fees or costs, whereupon he shall have, from any counsel whom the court may assign him, and from all officers, all needful services and process, without any fees, does not apply to appellate proceedings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2072, 2073.]

Error to Circuit Court, Prince William County.

Action between W. W. Garrison and George

G. Tyler, Clerk of the Circuit Court of Prince William County. There was judgment for the former, and the latter brings error. Reversed.

R. A. Hutchison, of Manasses, for plaintiff in error.

PER CURIAM. This day came again the parties, by counsel, and the court, having maturely considered the transcript of the record of the judgment aforesaid and argument of counsel, is of opinion that section 3538 of the Code of Virginia does not apply to appellate proceedings. It is therefore considered that the judgment complained of be reversed and annulled, and that the plaintiff in error recover of the defendant in error his costs by him expended about the prosecution of his writ of error and supersedeas aforesaid here.

And this court proceeding to enter such judgment as the said circuit court ought to have entered, it is further considered that the plaintiff take nothing by his petition, and that the defendant go thereof without day and recover of the plaintiff his costs by him expended about his defense in the said circuit court.

Which is ordered to be certified to the said circuit court of Prince William county.

(120 Va. 690)

LAWSON v. HOBBS.

(Supreme Court of Appeals of Virginia. March 18, 1917.)

1. EVIDENCE \S 441(9) — PAROL EVIDENCE—VARYING CONTRACT OF SALE—PLACE OF DELIVERY.

Where a written contract of sale specified delivery of engine to be "f. o. b. Suffolk" without qualification, parol evidence showing that it was to be delivered at defendant's place of business at Norfolk was properly rejected, because varying the plain terms of the written instrument.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1787.]

2. SALES \S 74, 201(4)—CONSTRUCTION OF CONTRACT—PLACE OF DELIVERY—"FREE ON BOARD"—"F. O. B."

A contract for sale "free on board" or "f. o. b." a certain place without qualification means that goods are to be placed on board cars for shipment without act or expense of buyer, and that title then passes, and the property is then wholly at the buyer's risk, and such words are not open to construction.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 203-213, 535, 536.

For other definitions, see Words and Phrases, First and Second Series, Free on Board; f. o. b.]

3. EVIDENCE \S 442(6) — PAROL EVIDENCE—EXPLAINING CONTRACT OF SALE—PLACE OF DELIVERY.

Parol evidence showing that more specific shipping directions were to be given where contract of sale merely specified "f. o. b." is admissible, where the point is material, not to contradict the contract, but as consistent with it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887.]

4. WITNESSES \S 275(2) — CROSS-EXAMINATION—SCOPE—REASON FOR REPUDIATING CONTRACT.

Where defendant proved that he had been obliged to purchase another engine on account of delayed delivery of one purchased of plaintiff, the plaintiff could inquire on cross-examination what he paid for it, to show a motive for repudiating his contract with plaintiff and to show the entire transaction.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 968.]

5. SALES \S 81(3)—TIME OF SHIPMENT—"AT ONCE."

Where a contract of sale required shipment of engine "at once," shipment as soon as railway company furnished a car and within two days was sufficient.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 219.

For other definitions, see Words and Phrases, First and Second Series, At Once.]

Error to Law and Chancery Court of City of Norfolk.

Action by L. F. Hobbs against Louis Lawson. Judgment for plaintiff, and defendant brings error. Affirmed.

R. W. Tomlin, of Norfolk, for plaintiff in error. Henry Bowden, of Norfolk, for defendant in error.

PRENTIS, J. The facts, so far as they are necessary in order to determine the questions here involved, are that the plaintiff in error, Lawson, was a contractor, and, while engaged in doing certain paving work on the streets of Norfolk under a contract with the city subjecting him to heavy penalties for every day's delay beyond the day agreed on for the completion of his contract, had the engine with which he was performing his work to break down so completely as to be incapable of repair. This occurred on Wednesday, October 20, 1915. Negotiations previously begun were thereupon concluded with the defendant in error, L. F. Hobbs, who was a manufacturer's agent engaged in selling engines, machinery, etc., in Norfolk, the result of which was that Hobbs sold an engine to Lawson, which at that time was located in Suffolk.

Their bargain was reduced to writing, and is in the following words and figures:

"Order No. 173-B-C. Oct. 20, 1915.

"L. F. Hobbs:

"Ship to L. Lawson

"At Norfolk

"How ship Norfolk

"Terms:

When	Once
Salesman	Hobbs
Buyer	Lawson

"1—A & S Steam engine—50 h. p.—first-class rebuilt condition—ready to steam f. o. b. Suffolk\$500

"[Signed] L. Lawson."

The seller understood that the engine was needed by the purchaser at once, and the purchaser knew that the engine was in a repair shop at Suffolk, 20 miles distant, that a railway car had to be procured, and that it

had to be loaded thereon and by the carrier transported to Norfolk. Hobbs admits that before the contract was signed in Norfolk he told Lawson that "if it can be loaded tomorrow, Thursday, it should be here Friday morning."

Hobbs drove to Suffolk in his automobile on Wednesday afternoon, directed the shipment of the engine, and placed the order with the Norfolk & Western Railway Company for the car on Wednesday night. He went with Lassiter, who was Lawson's superintendent, to the Norfolk & Western station in Norfolk on Friday, and was informed that the engine had not arrived. It appears that the engine was not loaded in Suffolk until Friday because the necessary railway car was not furnished until then, and that it reached Norfolk on Saturday. Lawson states that on Friday he told Hobbs that he would not take the engine because he had failed to deliver it on that day, and Hobbs testifies that he did not tell him that on Friday, but that he did so on Saturday. Before the engine arrived in Norfolk, Lawson bought another engine for \$380, and refused to accept the engine sold to him by Hobbs because of the delay in the delivery.

[1] The controversy arises chiefly over the effort of the purchaser to introduce evidence to the effect that the contract required Hobbs to deliver the engine in Norfolk at his (Lawson's) place of business on Friday, the order having been placed on Wednesday. The court below, however, refused to permit such parol evidence to be introduced, upon the ground that the parties had reduced their contract to writing, that there was no ambiguity therein as to the place of delivery, and that no evidence to vary or contradict it was admissible.

The court was of opinion that "f. o. b. Suffolk" in the contract so plainly indicated the place of delivery that parol evidence could not be introduced to contradict the agreement thereby evidenced. There seems to be no doubt as to the correctness of this ruling.

In the case of *Vogt v. Schlenebeck*, 122 Wis. 491, 100 N. W. 820, 67 L. R. A. 757, 106 Am. St. Rep. 989, 2 Ann. Cas. 814, a similar question was decided. In that case 100,000 feet of one inch-pine lumber was sold f. o. b. cars, Butternut, Wis. The seller claimed the right to introduce parol evidence to the effect that it was understood that the buyer was to furnish the cars, and the lower court permitted the introduction of the testimony. The appellate court reversed the judgment upon the ground that the written contract was plain, saying, among other things, that:

"A sale f. o. b. cars means that the subject of the sale is to be placed on cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass absolutely to the buyer, and the property be wholly at his risk, in the absence of any circumstances indicating a retention of such control by the seller as security for purchase money, by preserving the right of stoppage in transitu."

Many authorities are cited in support of this proposition, and it is stated that:

"All of such authorities declare that a sale 'f. o. b. cars' so plainly indicates that the seller, without expense to the buyer, is to deliver the subject of the sale on cars ready to be taken out by the carrier, that the term is not open to construction."

It is not difficult to cite other cases in which the letters "f. o. b." at a designated place, without other qualifying words, as applied to the sale of personal property have been thus construed, and, so far as we are advised, there is no difference of opinion as to their accepted meaning.

An instructive case in which qualifying words were used is that of *Detroit Southern R. Co. v. Malcomson*, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390. This case construes a contract whereby a coal company agreed to furnish all the coal that might be required for the use of an illuminating company of Detroit for certain purposes at "the following prices f. o. b. Michigan Central Railroad." The court there held that the place of delivery was at its destination on the Michigan Central tracks in Detroit. Words and Phrases (2d Ser.) vol. 3, p. 1174.

[2] Where qualifying words are used in connection with the words "free on board" or "f. o. b.," then the contract may be construed to have a different meaning, but, so far as we are informed, there is no dissent from the proposition that where, referring to shipments by rail, the words "free on board," or the letters "f. o. b.," a certain place, are used, without any other words in the contract indicating a qualification of their meaning, the courts have construed them to mean that the subject of sale is to be placed on board cars for shipment without any expense or act on the part of the buyer, and that as soon as so placed the title is to pass to the buyer, and the property be wholly at his risk, and that such words are not open to construction. *Chandler Lumber Co. v. Radke*, 136 Wis. 495, 118 N. W. 186, 22 L. R. A. (N. S.) 713; *Capehart v. Furman F. & I. Co.*, 103 Ala. 671, 16 South. 627, 49 Am. St. Rep. 60.

The only case in which the term has been construed by this court, so far as we are advised, is *Aspegren Co. v. Wallerstein*, 111 Va. 570, 69 S. E. 957. In that case the seller, under contract to deliver goods f. o. b. New York, loaded the cars but gave secret instructions to the carrier not to transport them until further notified; the motive of the seller being to assure himself that the purchase price would be paid. The court there declared that this was a violation of the contract by the seller, and that f. o. b. meant "free on board and ready to go forward at once."

We think that it was the duty of the court to construe the written contract, and that it would have been error to have permitted evidence to so vary, add to, and contradict the

contract as to make it appear that the place of delivery was at Lawson's plant on the Norfolk & Western in Norfolk, when according to the plain terms of the written contract the place of delivery was at Suffolk.

[3] There is a line of cases upon which the plaintiff in error relies which in effect permit the introduction of evidence in contracts of this character so as to show that it was understood between the parties that certain more specific shipping directions were to be given. So in this case, as the contract only gave the word "Norfolk" as the destination, it might have been proper, if the case had turned upon this point, to permit parol evidence to the effect that the engine was to be shipped by way of the Norfolk & Western Railroad, destined for the plant of Lawson, the purchaser, within the delivery limits of the carrier at Norfolk. Such evidence would not contradict the written agreement, but would be consistent with it. *Marsteller v. Warden*, 115 Va. 353, 79 S. E. 332. The case, however, does not depend upon this question, because the purchaser repudiated the contract, either on Friday or Saturday, before the engine reached Norfolk, and there seems to be no contradiction of the statement of Hobbs to the effect that the Norfolk & Western would have delivered it free of charge at Lawson's plant. It may be that in a proper case such evidence would be admissible. Under the circumstances of this case it was immaterial, and the court properly rejected it.

We are clearly of opinion that it was the court's duty to construe the written contract, that it properly construed the place of delivery to be on the cars of the carrier at Suffolk, and that the evidence offered tending to show that the place of delivery was to be at the plant of Lawson at Norfolk was properly rejected.

[4] This disposes of all the errors alleged except that referred to in the defendant's bill of exceptions No. 3. Lawson had testified on his examination in chief that on Saturday morning he bought another engine and put it to work on Saturday night. Upon cross-examination he was asked what price he paid for it, and the court required him to answer the question over the objection of his counsel, and this ruling is alleged to be erroneous.

Whatever may have been the motive for introducing the evidence that he (Lawson) had been forced to buy another engine because of one day's delay in the delivery of the engine he had bought from Hobbs, that testimony had been introduced. From it his counsel were justified in arguing that he did it because of the necessities of his business. It was therefore perfectly proper for opposing counsel to introduce evidence that he only paid \$380 for it, and from this circumstance to argue that he repudiated his bargain because he desired to save \$120, the

difference between the price of the two engines.

The question was perfectly legitimate on cross-examination, both to show the entire transaction, part of which had been introduced in the interest of the plaintiff in error, as well as to show the motive which might possibly have influenced the plaintiff in error to repudiate his contract.

[5] The contract required the engine to be shipped at once, and there was no delay which the utmost diligence of the vendor could have avoided, and we are of opinion that there is no error in the judgment.

Affirmed.

(120 Va. 595)

STANDARD PAINT CO. v. E. K. VIETOR & CO.

(Supreme Court of Appeals of Virginia. March 15, 1917. Rehearing Denied March 28, 1917.)

1. APPEAL AND ERROR \S 231(2)—DEMURRER—FAILURE TO POINT OUT DEFECT—EFFECT.

The overruling of a demurrer cannot be reviewed where the assignment of grounds of demurrer pointed out no defect which was under Code 1904, \S 3272, subject to attack; special demurrers having been abolished.

2. APPEAL AND ERROR \S 231(2)—PRESERVATION OF GROUNDS OF REVIEW—MISJOINDER OF CAUSES.

An objection that declaration after a trial amendment misjoined causes of action cannot be considered, not having been specified as a ground of demurrer, and defendant having pleaded not guilty.

3. SALES \S 425—BREACH OF WARRANTY—REMEDY.

Trespass on the case is a proper remedy for breach of warranty as to the sale of personal property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 1207, 1208.]

4. ACTION \S 40—JOINDER OF CAUSES—TORT—BREACH OF WARRANTY.

Roofing sold plaintiff by defendant proving wholly unsatisfactory, plaintiff replaced it with other and sued for damages. The first two counts of the declaration were plainly in tort alleging deceit, guilty knowledge, and fraud, while the third count, though containing essentially the same allegations, set up a breach of warranty. *Held*, that the declaration after amendment so as to set forth the dates of the several contracts sued on was not subject to attack on the ground that it misjoined causes of action; the third count, trespass on the case, being proper remedy for breach of a contract of warranty, obviously being one in tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. \S 320-327.]

5. APPEAL AND ERROR \S 1041(2)—AMENDMENTS—EFFECT OF.

In an action for damages for fraud and breach of warranty in the sale of defective roofing, where the dates of the sales of the roofing were alleged under a videlicet, the allowance of trial amendment to set forth the correct dates as established by defendant's testimony was no ground for complaint, the amendments being immaterial, as the dates need not have been proven as laid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4107.]

6. PLEADING **↔237(7) — AMENDMENTS — ALLOWANCE.**

In such case the amendment, if material, was authorized under Code 1904, § 3384, declaring that, if at the trial of any action there appears to be a variance between the evidence and the allegations or recitals, the court, if it consider that substantial justice will be promoted, and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended on such terms as may be just, and Act March 27, 1914 (Acts 1914, c. 331), providing that the court may at any time, in the furtherance of justice, permit any proceeding or pleading to be amended.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 610, 617.]

7. PLEADING **↔248(4) — AMENDMENTS — NEW CAUSE OF ACTION.**

In an action for damages for furnishing defective roofing which allowed water to escape into the building, where, though the sales were made on several different occasions, they were all made pursuant to a general representation that the roofing would be satisfactory and in a continuous course of dealing, a trial amendment to the declaration which inserted the correct dates of the several sales is not objectionable on the ground that each sale and warranty constituted a different and new cause of action, and that the amendments thus added new, separate, and distinct causes of action; for the several causes of action might properly be joined.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701-706, 708½.]

8. ACTION **↔40 — JOINDER — DIFFERENT TRANSACTIONS.**

Where several causes of action arose out of purchases of roofing materials at different times, the purchaser may, in an action for damages for delivery of inferior materials, join his several causes of action in one declaration.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 320-327.]

9. PLEADING **↔230 — AMENDMENT — STATUTES — CONSTRUCTION — REMEDIAL STATUTES.**

Code 1904, § 3384, and Act March 27, 1914, relating to amendments in the interests of justice, being remedial, should receive a liberal construction.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 592.]

10. SALES **↔437(3) — BREACH OF WARRANTY — ACTIONS — RECOVERY.**

In trespass on the case for damages for false and fraudulent warranty made in a sale, the averment that the warranty was made with knowledge of its falsity need not be proven.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1253.]

11. APPEAL AND ERROR **↔882(12) — ESTOPPEL TO ALLEGE ERROR — REQUESTED INSTRUCTION.**

Where, on defendant's request, an improper instruction inconsistent with the correct instruction was given, defendant, not being injured, could not complain of the inconsistency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602.]

12. TRIAL **↔312(2) — CONDUCT OF COURT AND JURY — ANSWER TO QUESTIONS.**

In trespass for breach of warranty, where the warranty was not only contained in a written instrument, but in correspondence between the parties, it was not error for the court, which had fully and accurately instructed the jury, to state in answer to their inquiry as to whether they were confined to the written

guaranty merely that they should take into consideration the letters, the written guaranty, etc., and determine the contract from them all.
[Ed. Note.—For other cases, see Trial, Cent. Dig. § 744.]

13. SALES **↔273(3) — GUARANTIES — IMPLIED GUARANTIES.**

There is an implied guaranty that an article sold shall be reasonably fit for the peculiar use to which the vendor knows it is to be put.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 774.]

14. SALES **↔260 — GUARANTIES — SCOPE.**

Where a seller of roofing executed a written guaranty reciting that, in case of leakage caused by any defect in the roofing or its application from ordinary careful use, the seller would make repairs immediately upon notice, and it appeared that the roofing was sold after the buyer had complained of other similar roofing, and correspondence as to its fitness passed between the parties and many repairs were made, the warranty as to the roofing was not restricted solely to the written guaranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 719-726.]

15. EVIDENCE **↔442(6) — PAROL EVIDENCE — ATTEMPT TO VARY.**

Where the warranty as to roofing was only partly contained in a written guaranty, it being modified by written correspondence between the parties, evidence of such correspondence and the conduct of the parties was admissible in its construction; it not being an attempt to vary a written instrument by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1877, 1886, 1887.]

16. APPEAL AND ERROR **↔1031(1) — DISREGARD OF ERROR — STATUTE.**

Under Act March 27, 1914, entitled an act to simplify and expedite the administration of justice by the elimination of useless technicalities and vexatious delays, and providing that the court may at any time, in the furtherance of justice, allow any proceeding or pleading to be amended, and must disregard any error which does not affect the substantial rights of the parties, injury cannot be presumed from the fact of error, but must affirmatively appear from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038, 4045, 4046.]

Error to Circuit Court of Richmond.

Action by E. K. Vietor & Co. against the Standard Paint Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

O'Flaherty, Fulton & Byrd and Thos. B. Byrd, all of Richmond, for plaintiff in error. Willis B. Smith, of Richmond, for defendant in error.

PRENTIS, J. The Standard Paint Company, manufacturer and dealer in a prepared and ready to lay roofing, designated by them as "Ruberoid," sold to E. K. Vietor, trading as E. K. Vietor & Co., during the years 1907, 1908, and 1909, a considerable quantity of their roofing to be put on the roofs of his tobacco warehouses and factories, part by the vendor, and the residue under its direction. Previous to these contracts Vietor had purchased ruberoid roofing from a dealer in the city of Richmond, and not directly from the

manufacturer, and had applied it to one of his buildings. This roofing proved very unsatisfactory to him and upon his making complaint the manufacturer claimed that the reason the roof complained of leaked was because the material, ruberoid, had not been properly applied, and especially because the sheathing boards upon which the roof was laid had thereafter shrunk because green; that they were of varying widths and uneven. To correct this difficulty the plaintiff in error agreed, for the sum of \$500, to supply and apply their waterproof felt to this particular roofing, and claimed that this would remove all cause of complaint. About the same time Vietor bought 125 squares more ruberoid roofing directly from the Standard Paint Company, with the express understanding, however, that the material was to be applied by the vendor to the roof of another adjacent building of the vendee. In 1908 and in 1909 Vietor bought more ruberoid roofing for his factory and warehouses, upon similar conditions, that is, that it was to be applied to the roofs by the vendor, or under the direction of its expert agents. The total cost of such roofing was \$1,827. It was all sold upon assurances that, if properly applied, the roof would not leak, accompanied by a typewritten paper or guaranty reading thus:

"On payment of invoice, we hereby agree in case of leakage caused by any defect in the ruberoid roofing or its application from ordinary careful use during the ten years ensuing from * * * [the date when the roof has been completed] to make the necessary repairs at our own expense immediately upon notice of said leakage being given us.

"But this guaranty shall not be construed to cover damage by fire, tempest, or other extraordinary means or causes, and is made with the distinct understanding that the entire surface of the roofing is to be given one coat of our ruberine paint within four (4) years after it is laid; said coat to consist of one gallon of said ruberine paint for not more than 200 square feet of surface."

During all this period numerous complaints from time to time were made of the insufficiency of the roofing, and from time to time the vendor sent experts to inspect it, and each time made repairs thereto and stopped leaks therein, until in 1912 it declined to make any further repairs, basing the refusal solely upon the claim that the defects then in the roofs were caused by a hailstorm, and that it was not responsible for such damage. The vendee after ample notice to the vendor of his purpose, unless the leaks were stopped, to put a new roof on the building at vendor's expense, did so, at an expense of \$2,100, and introduced evidence tending to prove damage to tobacco stored in the warehouses caused by the leaks in the roofs. There are many other facts brought out in the testimony, and so far as they are material they will be hereafter referred to.

There was a verdict and judgment for \$1,417.50 in favor of the vendee, and of that judgment the vendor is here complaining.

There are 14 bills of exception, but in the petition they are reduced to 6 assignments of error, which we will consider.

[1] 1. There was a demurrer to the original declaration, which was overruled. It is only necessary to say as to this that section 3272 of the Code makes it plain that this action is without error, because special demurrers have been abolished in Virginia by that statute, and the assignment of grounds of demurrer pointed out no defect not thereby cured.

[2] After the plaintiff had rested and the defendant had introduced one witness, who had been examined in chief and cross-examined, the court allowed the plaintiff to amend the declaration by setting out the precise dates upon which the various contracts and sales had been made, and, the declaration having been thus amended, the point was made that the declaration, as amended, misjoins causes of action.

The action is trespass on the case in tort, and the claim is made that the third count in the declaration is a count in contract, and not in tort. The only amendment which was made in the declaration, as above indicated, was the addition of certain dates.

We are clearly of opinion that, even if the point has merit, inasmuch as the vendor had failed to specify this ground in the original demurrer, and had pleaded not guilty, it had been waived. 81 Cyc. 731. This, of course, is sufficient to dispose of the point.

[3, 4] However, even if this ground had been specified in the demurrer to the original declaration, it should have been overruled. The third count in the declaration which is complained of alleges a breach of warranty, and in *Trice v. Cockran*, 8 Grat. (49 Va.) 442, 56 Am. Dec. 151, this court determined that case is a proper remedy for breach of warranty as to the sale of personal property.

In *Ferrill v. Brewis' Adm'r*, 25 Grat. (66 Va.) 769, this court said:

"Another rule of the courts is to treat the count as partaking of the nature of the action. So that, if the action is *ex delicto*, the count will be intended as *ex delicto* also, unless there be something in its form and structure which plainly forbids such intendment. And it is not unusual for the declaration to contain allegations sufficient to support it, either in tort or in *assumpsit*. And this upon the ground that the same circumstances which show a breach of duty constituting a tortious neglect show also a breach of promise implied from the consideration of the hire. *Gelston v. Burr*, 11 Johns. [N. Y.] 482."

"Wherever the causes of action are of the same nature and the same judgment is to be given in all, they may be joined in one declaration." 4 Min. Inst. (3d Ed.) 1160.

The only difference between the third count in the declaration and the other two counts, so far as this question is concerned, is that the first two counts are clearly and plainly in tort, alleging deceit, guilty knowledge, and fraud. Each of the three counts, however, also alleges the warranty and its breach, and are plainly intended to include the same general cause of action, and, though the declara-

tion is inartificially drawn, it is so framed that the defendant could not possibly have been deceived as to the subject of the controversy.

In *Harvey v. Skipwith*, 16 Grat. (57 Va.) 403, an analogous question was thus disposed of by this court:

"Each of the counts is a count in case for a tort. The second is confessedly so; and the statements and allegations in respect to the contract of hiring contained in the first do not impress upon that count a different character."

The gist of the counts in that case, as in this, is the same. Here the action is based upon a breach of warranty, and, while the complainant may, if he chooses, waive the tort and sue upon contract, he is equally at liberty, where there is a breach of warranty, to sue in tort; and this is what the vendee did in this case.

[5, 6] 2. It is claimed that the court erred in permitting the plaintiff to amend the declaration during the progress of the trial.

The circumstances under which the amendment was allowed were that during the trial the vendor's counsel complained of the erroneous statements in the declaration as to the dates of the various sales. It is not perceived that these were material allegations. The dates were each alleged under a *videlicet*, and it seems to us that the precise dates were immaterial, except as they might have been necessary to give the defendant notice. In this case the defendant knew the precise dates of each sale, and after one of its witnesses had supplied those dates the court permitted each count in the declaration to be amended by the insertion of the precise dates which had just been proved by the vendor's witness. As above indicated, we do not think that these were material amendments, but, if they were, they are fully authorized by the statute (section 3334 of the Code) which provides:

"If, at the trial of any action, there appears to be a variance between the evidence and allegations or recitals, the court, if it consider that substantial justice will be promoted and that the opposite party cannot be prejudiced thereby, may allow the pleadings to be amended, on such terms as to the payment of costs or postponement of the trial, or both, as it may deem reasonable. Or, instead of the pleadings being amended, the court may direct the jury to find the facts, and, after such finding, if it consider the variance such as could not have prejudiced the opposite party shall give judgment according to the right of the case."

In addition to this there is the act approved March 27, 1914 (Acts 1914, c. 331, p. 641), entitled "An act to simplify and expedite the administration of justice in this state by the elimination of useless technicalities and vexatious delays and permitting amendments under certain conditions in causes hereafter instituted," which reads as follows:

"Be it enacted by the general assembly of Virginia, That in any suit or action hereafter instituted, the court may at any time, in furtherance of justice, upon such terms as may be just, permit any proceeding or pleading to be

amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

These statutes then authorized the action of the court, even if the amendments had been material.

[7-9] It is claimed, however, that because the sales were made on different dates, and each sale and warranty constitute a different and new cause of action, to permit these amendments added new, separate, and distinct causes of action to each of the counts in the original declaration.

In *New River Mineral Co. v. Painter*, 100 Va. 507, 42 S. E. 300, the plaintiff was allowed to amend the declaration, which charged that a lawful act had been negligently done, by adding a count which alleged that the act itself was unlawful, and the rule is stated thus:

"Counsel have not cited, nor have we in our investigation found, any decision of this court which indicates what amendments of the declaration the court may allow after appearance; but there are many decisions upon the question in other jurisdictions. The rule generally prevailing seems to be that such amendments will be permitted as have for their object the trial and determination of the subject-matter of the controversy upon which the action was originally based, but amendments will not be allowed which bring into the case a new and substantive cause of action different from that declared on, and different from that which the plaintiff intended to assert when he instituted his action. If the plaintiff in the amended declaration is attempting to assert rights and to enforce claims arising out of the same transaction, act, agreement, or obligation, however great may be the difference in the form of liability as contained in the amended from that stated in the original declaration, it will not be regarded as for a new cause of action. In such cases the original and amended declarations and the count or counts in each are regarded as variations in the form of liability to meet the possible scope and varying phases of the testimony, which is one of the very objects and purposes of adding several counts, and of making amendments to a declaration. *Snyder v. Harper*, 24 W. Va. 206, 211; *Smith v. Palmer*, 6 Cush. (Mass.) 513, 519; *Yost v. Eby*, 23 Pa. 327, 331."

The amendment allowed here was strictly within the rule.

From the institution of this action the cause of the controversy was clearly and distinctly understood by both parties to it. It was the subject of numerous interviews between them and of voluminous correspondence, and the case made by the amendments was the same case referred to in the declaration, namely, the breach of the vendor's warranty as to the roofing material referred to. It would seem clear that it was the duty of the vendee to join all of his causes of action in one declaration, but certainly, if it was not his duty, it was his right to do so.

In 23 Cyc. 395, this is said:

"As a general rule, it may be stated that a plaintiff may join all his causes of action in one declaration, if in separate suits he can recover on each in the same form of action, although

the several causes of action are distinct rights of action, so that a judgment in one will not bar a recovery for the other. This rule is, however, subject to the qualification that the causes of action must be in the same right."

This statement of the law is well supported by the authorities there cited.

In this case, if the vendee had vexed the vendor with several suits, he would have been the subject of criticism. Even where the torts are distinct and independent, if they are of the same nature and if the same judgment may be given in each, they may, as a general rule, be joined. 23 Cyc. 398; *Fisher v. Seaboard Air Line R. Co.*, 102 Va. 371, 46 S. E. 381, 1 Ann. Cas. 622. Here the torts complained of grew out of a continuous course of dealing between the same parties with reference to one article of commerce, the roofing, and its application to the factory and warehouses of the vendee.

The statutes above quoted are remedial, and must be liberally construed to advance the remedy and avoid the evils which they seek to cure. *McKee v. Bunting*, *McNeal R. E. Co.*, 114 Va. 639, 77 S. E. 518; *Langhorne v. Richmond City R. Co.*, 91 Va. 367, 22 S. E. 357; *Norfolk & Western Ry. Co. v. Perdue*, 117 Va. 117, 83 S. E. 1058.

[10] 3. It is claimed that the jury was misdirected. This assignment is based upon the theory that, because the first two counts of the declaration alleged a false and fraudulent warranty, and it was made with knowledge of such falsity, such allegation must be proved. The court gave to the jury certain instructions based upon that theory. It also gave them instructions based upon the theory that such guilty knowledge was not necessary in order to support a recovery.

In *Trice v. Cockran*, 8 Grat. (49 Va.) 442, 56 Am. Dec. 151, this court expressly decided that it is not necessary to allege the defendant's knowledge, and that, if alleged, it is not necessary to prove it. And in *Schuchardt v. Allen*, 1 Wall. (68 U. S.) 360, 17 L. Ed. 645, this is stated:

"The ancient remedy for a false warranty was an action on the case sounding in tort. *Stuart v. Wilkins*, 1 Douglas, 18; *Williamson v. Allison*, 2 East, 447. The remedy by assumpsit is comparatively of modern introduction. In *Williamson v. Allison*, Lord Ellenborough said it had 'not prevailed generally above 40 years.' In *Stuart v. Wilkins*, Lord Mansfield regarded it as a novelty and hesitated to give it the sanction of his authority. It is now well settled, both in English and American jurisprudence, that either mode of procedure may be adopted. Whether the declaration be in assumpsit or tort, it need not aver a scienter. And if the averment be made it need not be proved."

See, also, *Gresham v. Postan*, 2 Carrington & Payne, 540; *Brown v. Edgington*, 2 Man. & Granger, 279; *Holman v. Dord*, 12 Barb. S. C. 336; *House v. Fort*, 4 Blackf. 293; *Trice v. Cockran*, supra; *Lassiter v. Ward*, 11 Ired. 443.

[11] It is true that the instructions are contradictory and inconsistent, but, inasmuch as the erroneous instructions are those

which were granted by the court at the instance of plaintiff in error, it cannot now complain of that as error which could not possibly have injured its cause. The danger was the injustice it might have done to the defendant in error.

[12] Among the assignments is this: That the court erred in making a reply to the jury, who, while considering of their verdict, returned into the courtroom and asked the following question:

"Whether or not they were limited in deciding this case to the typewritten guaranty introduced in evidence and marked Exhibit 2?"

In reply to this the court said:

"They are not, and must take into consideration the oral evidence, the letters, and written guaranty, and to decide from all the evidence what the contract was and a breach of it, if any, and the damages, if any."

If the case had depended entirely upon the typewritten guaranty, then this reply would have been harmful, but under the evidence in this case, if the court had told the jury that they were limited to the typewritten guaranty, that would certainly have been misleading. The typewritten guaranty was only one part of the evidence—a very material part, it is true; but it had to be interpreted in the light of the circumstances under which it was given, the letters contemporaneously and subsequently written, the construction put upon it by the parties themselves, and the pertinent oral evidence indicating a breach or lack of breach. So it is difficult to understand how the court could have made any complete reply to the question without fully reinstructing the jury upon all of the questions involved in the case. They had already been instructed in writing, and we must assume that the jury considered not only this reply which is complained of, but the other instructions which they had previously received.

We find no reversible error in the instructions given.

[13, 14] 4. The refusal of the court to grant three instructions asked for by the plaintiff in error is assigned as error. One of the instructions refused, No. 5, is based upon the claim that the written guaranty hereinbefore quoted should have been pleaded in those precise words in the declaration, and the liability thereby incurred always expressed in the precise words of that paper.

It is perfectly well settled that, when one sells an article of personal property, there is an implied guaranty that it shall be reasonably serviceable and fit for the peculiar uses to which the vendor knows it is to be put (*Gerst v. Jones*, 32 Grat. [73 Va.] 518, 34 Am. Rep. 773); and it seems clear that, notwithstanding the written paper, inasmuch as it is perfectly certain that the vendor knew that the roofing was intended for buildings required to be water-tight, it may be fairly inferred that there was this implied guaranty. It is not necessary, however, to rely

upon the guaranty implied by law in such cases; for a fair construction of the paper referred to necessarily implies such a guaranty. The paper embodies not the specific words of the guaranty that the roof should be water-tight, but does specify the obligation of the vendor in case the roof should leak, and clearly defines its duty in such event. The very fact, however, that it makes definite promises and imposes certain specific duties upon the vendor in case the roof should leak creates the necessary implication in the paper itself that the vendor guaranteed that the roof would not leak. The declaration is framed upon the theory that there was this guaranty that the roof would be water-tight, and a great deal of the controversy in this case grows out of the fact that the vendor appeared to claim that the roof was never so guaranteed. That both parties to the controversy understood that the roofing was sold upon a guaranty that, if properly applied, it would be water-tight, is perfectly apparent from the contemporaneous letters and evidence on both sides. The court took the same view, and instruction 5 was rightly refused because the vendee's rights under the contract could not be limited in the way it was sought to limit them.

The other instructions refused were sufficiently covered by the instructions which were granted, ten in number, and they sufficiently protected every legal right of the vendor.

[15] 5. What has been said is sufficient to indicate our view as to the several motions to exclude all the correspondence between the parties, and indeed substantially all the evidence introduced in support of the vendee's claim. This testimony did not seek to vary or contradict the written guaranty. On the contrary, such evidence accorded with it, showed the attending circumstances, the construction placed upon it by the parties, and their subsequent conduct with reference thereto. The motions were properly overruled.

[16] 6. It is claimed that the verdict is contrary to the law and the evidence.

It sufficiently appears that the vendee bought the roofing material for the purpose of roofing in a certain tobacco factory and appurtenant warehouses, which were required to be water-tight, and that the vendor knew all the surrounding circumstances and the necessities of the vendee, and had the roofing applied to the roofs under its own supervision and direction. The evidence is ample to show that the roofs gave a great deal of trouble and leaked after almost every rainfall, and that from time to time for nearly five years the vendor sent its agents to have the leaks stopped, and that finally it refused to pay any more attention to the vendee's claims, and said that a part of the roof had been damaged by a hailstorm, and

that for this damage it was not responsible. There is no sufficient explanation of why part only of the roofing was thus damaged, and the evidence is conflicting on this point.

Since the act of March 27, 1914, supra, it is apparent that this court should extend the doctrine of harmless error to its logical conclusion, namely, that error is harmless which does not injuriously affect the interests of the party complaining, and that such injury is not presumed, but must affirmatively appear from the record; for that act in simple and unambiguous language directs the courts, at every stage of the proceeding, to disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

In this court the doctrine of harmless error has been frequently announced and enforced in many cases where there has been a misdirection of the jury, a refusal to grant proper instructions, where evidence has been illegally admitted, and where there have been mistakes and errors in pleading.

This case has been fairly tried upon a cause of action clearly indicated in the declaration, about the facts of which the defendant was as well informed as the plaintiff: they have submitted their controversy to a jury upon all the evidence which they themselves deemed pertinent; it appears that all of the substantial rights of the parties have been safeguarded; and we find no prejudicial error in the proceedings.

The judgment will therefore be affirmed.
Affirmed.

(120 Va. 488)

MOTLEY v. HODGES.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. VENDOR AND PURCHASER — §343(2)—REMEDIES OF PURCHASER — SALE BY ACRE—DEFICIENCY.

In cases of sale of land by the acre, a court of equity holds the vendor liable for any deficiency on the ground of mistake.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 1024.]

2. MORTGAGES — §372(1)—SALE UNDER DEED OF TRUSTS—DEFICIENCY IN ACREAGE.

The purchaser at a sale by a trustee in a deed of trust on land to secure debts cannot recover in equity against the beneficiary and the trustee for a deficiency in acreage on the ground of mistake; the principle of caveat emptor applying.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1102.]

Sims, J., dissenting.

Appeal from Circuit Court, Pittsylvania County.

Suit by W. L. Hodges against John J. Motley and James L. Tredway, trustee. From a decree for plaintiff against Motley, he appeals. Decree reversed.

Jas. L. Tredway, of Chatham, and S. A. Anderson, of Richmond, for appellant. Clement & Clement, of Chatham, for appellee.

WHITTLE, J. The case is this: Woody by two deeds conveyed a tract of land described as containing 70 acres, more or less, to James L. Tredway, trustee, in trust to secure distinct debts due to appellant. The land was sold at public auction and knocked out to the creditor at \$875, who shortly thereafter transferred his bid to appellee, Hodges, who complied with the terms of sale, and by direction of Motley the trustee conveyed the land to him and paid the proceeds to Motley. The purchaser subsequently had the land surveyed and found that the boundary only contained 46¾ acres. Thereupon Hodges filed his bill against Motley and Tredway, trustee, to recover for the deficiency in acreage. From a decree granting the prayer of the bill against Motley this appeal was granted.

[1,2] The judge of the circuit court apparently rested his decision upon the principle of that line of cases which, speaking generally, deal with what are known as contracts of sale by the acre in contradistinction to contracts of hazard. In cases which belong to the former class, a court of equity holds the vendor liable for the deficiency on the ground of mistake. This subject is lucidly treated by Judge Baldwin in the leading case of *Blessing's Adm'r v. Beatty*, 1 Rob. (40 Va.) 304. Yet, obviously, the case in judgment is not of that type. Indeed, in the instant case, the former owner of the land is not a party to the litigation; but, as remarked, the suit is between the purchaser at a trustee's sale, on the one hand, and the beneficiary and trustee in an ordinary deed of trust on land to secure debts, on the other. In such transaction there is no element of guaranty or warranty, either of title or quantity of the land.

In a note to the case of *Petermans v. Laws*, Va. Rep. Ann. (6 Leigh) 476, it is said:

"A purchaser of land at a public sale made by a trustee must look to the title of the grantor of the land, and he is entitled only to a deed with special warranty of title. He cannot look to the trustee for a good title, for in making the sale he is but an agent; he cannot look to the creditor, for he sells nothing, and is merely to receive the proceeds of the sale. To such a sale the principle of caveat emptor applies. *Fleming v. Holt*, 12 W. Va. 143, citing the principal case, and *Saunders v. Pate*, 4 Rand. 8; *Sutton v. Sutton*, 7 Grat. 234 [56 Am. Dec. 109]; *Findlay v. Toncray*, 2 Rob. 374; *Rawle, Cov.* 418; *Goddin v. Vaughn*, 14 Grat. 117."

In *Sutton v. Sutton*, supra, Baldwin, J., who delivered the opinion of the court, states with convincing ability the reasons why a purchaser at such sale cannot hold either the trustee or the creditor liable for any defect in the title or deficiency in the quantity of the land sold as follows:

"The principle upon which equity relieves against a mistake in the estimated quantity of land sold has no application to a case like this. The foundation of such relief is, that the price agreed upon by the parties must be presumed to have been influenced by the estimated quantity, unless it appears that they intended a contract of hazard; and the mistake is correct-

ed not only in cases of deficiency, but also in cases of excess. Here there was no estimate of the quantity as between the trustee and the purchaser, but a mere statement thereof in the grantor's conveyance to the trustee. That statement was mere matter of description, and was no element of the contract between the grantor and the trustee, for which the consideration inured not from the trustee, but the *cestuis que trust*, and was in no wise dependent upon the supposed quantity of the land. The purpose of the conveyance was, that the property should be sold by the trustee, at all events, for whatever it would bring, and the grantor undertook no responsibility either as to title or quantity. If the quantity had turned out after the sale by the trustee to be greater than that mentioned in the deed, neither he, nor the grantor, nor the *cestuis que trust*, could have exacted from the purchaser compensation for the excess; and by parity of reason, they are not responsible for a deficiency. There is no principle, therefore, whether of defective title or deficient quantity, upon which the appellee is entitled to relief. * * *

The authorities cited are conclusive of the question involved, and further discussion of it is unnecessary.

For these reasons, the decree of the circuit court must be reversed.

Reversed.

SIMS, J. (dissenting). This case involves an executed contract of sale by a trustee.

The suit of appellee, plaintiff in the court below, was in equity to recover the value of a deficiency in quantity of land sold by the acre. The court below had jurisdiction to give relief in such a case on the ground of mutual mistake of fact affecting the substance of the thing contracted for. *Blessing's Adm'r v. Beatty*, 1 Rob. 266, Va. Rep. Ann. note p. 252; *Kelly v. Riley*, 22 W. Va. 249; *Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897.

It is true that if in this case there had been no mistake affecting the identity or quantity of land bought and conveyed, and there had been merely a failure of title to a part or the whole of it, unless the vendor was aware of a fact from which the defect of title arose and which the vendee had no means of knowing, and there was a fraudulent misrepresentation or concealment of such fact on the part of the vendor, the vendee would have no remedy save upon the covenant of warranty in his deed. In such a case of failure of title, where there is no warranty in the deed or where, as in the case at bar, there is a special warranty only, the vendee would have no remedy. "The rule 'caveat emptor' strictly applies." *Beale v. Seiveley*, 8 Leigh (35 Va.) 672-675. The mutual mistake upon which a court of equity will grant the relief in question must be a mistake of fact (see authorities cited 9 Enc. Dig. Va. & W. Va. Rep. 861), not a mistake of law (Id. 861-863), and must affect the substance of the thing contracted for (*Rogers v. Pattie*, 96 Va. 498, 31 S. E. 897; *Thompson v. Jackson*, 3 Rand. [24 Va.] 504, 507, 15 Am. Dec. 721; *Glassell v. Thomas*, 3 Leigh, 113). A mistake as to title, when the party making

it has knowledge of the facts or means of knowledge, is a mistake of law (Zollman v. Moore, 21 Grat. [62 Va.] 313), and does not affect the substance of the thing contracted for, but merely the title to it. This distinction is fundamental in principle and underlies the caveat emptor rule. Hence it is that where the mistake is merely one of title, and there is a conveyance by a trustee without warranty or only with special warranty of title, equity affords no remedy to the vendee for deficiency in the quantity of the thing contracted for. *Sutton v. Sutton*, 7 Grat. (48 Va.) 234, 56 Am. Dec. 109; *Petermans v. Laws*, 6 Leigh (33 Va.) 523; *Findlay & Mitchell v. Hickman*, 10 Leigh (37 Va.) 354. This is not because the conveyance is by a trustee, but because the conveyance is without warranty, or only with special warranty, of title, and the rule would be the same where applied to the conveyance of any vendor. *Beale v. Selveley*, supra.

Therefore the circumstance that the conveyance in the case at bar was by a trustee is of no distinguishing importance. There may be mutual mistake as to quantity in any sale by a trustee equally as in sales by other vendors.

In the case of *Sutton v. Sutton*, supra, this court in effect so held. That was a case of a sale by a trustee; a deficiency in the quantity of the land contracted for due to a defect in its title, and there was no warranty in the deed from the trustee, and not by the acre. The purchase price was a sum in gross. There was no evidence of an actual sale by the acre. There was not even a deed by the trustee to the purchaser referring to the land as containing a definite number of acres, but a mere indorsement of a conveyance by the trustee on the original deed of trust, mentioning no acreage and conveying merely "all the right, title and interest" conveyed to the trustee by the original deed of trust. It is true that it was held therein that the vendee was not entitled to any relief, but as appears from the opinion of the court by Baldwin, J. (the same distinguished judge who rendered the opinion in the case of *Blessing's Adm'r v. Beatty*, supra), it was so held, not because that was a sale by a trustee, but because it was not a case of a mistake as to the identity, or in the estimated quantity of the land, where, says the opinion, " * * * the foundation of the relief is, that the price agreed upon between the parties must be presumed to have been influenced by the estimated quantity, unless it appears that they intended a contract of hazard." "Here," says the court (speaking of that case), "there was no estimate of the quantity as between the trustee and the purchaser * * * and was no element of the contract between the grantor and trustee." If that had been such a case, the opinion by necessary implication is to the effect that the vendee would have

been entitled to relief, although he purchased from a trustee. The court held in such case that:

" * * * If there was any mistake, it was not of that nature. The property sold was the identical property conveyed by the deed; and there was no room for any mistake unless in regard to the validity of the grantor's title. A mistake in respect to that matter is no ground for relief to a purchaser, where he takes upon himself the risk as to the title, as he does when he purchases land without agreement, express or implied, for a conveyance with warranty of the title."

And it was on the latter ground that the relief in that case was denied, and not because it was a sale by a trustee.

In the instant case the sale was expressly by the acre, and it expressly appears that the amount of purchase money was fixed by the estimated quantity of the land. Therefore the case falls within the general line of authorities in Virginia on this subject. See note to case of *Blessing's Adm'r v. Beatty*, 1 Rob. (Va. Rep. Ann.) 251 et seq. Of course, if in case of such mistake the trustee acting bona fide and without notice of it had paid over the purchase money to the cestui que trust before suit is brought, equity will put the saddle on the right horse and the cestui que trust should refund the value of the deficiency. This was required to be done by the decree complained of. Hence there was no error in such decree, and it should be affirmed.

(120 Va. 431)

BONEWELL et al. v. SMITH et al.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. DESCENT AND DISTRIBUTION § 39 — DESCENT FROM INFANT—STATUTE.

Under Code 1904, § 2556, providing that if an infant die without issue, having title to realty derived by gift, devise, or descent from a parent, the whole shall descend and pass to his kindred on the side of the parent from whom it was derived, if any such be living, and that, if there be none such, it shall descend and pass to his kindred on the side of the other parent, on failure of issue of an infant last seised of realty, the inheritance descends to the infant's kindred on the side of that parent from whom the realty was derived, when there are such kindred living at the death of the infant; that is, the statute does not permit ascension beyond the infant's parent, to the grandparent, or to any other ancestor of the infant, in order to reach the first purchaser as the root from whom the inheritance shall descend, the parent only being made such root, whether or not he be the first purchaser.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 112-115.]

2. DESCENT AND DISTRIBUTION § 21 — DESCENT FROM INFANT—STATUTE—"KINDRED."

The word "kindred," used in the statute, has the meaning of "next of kin."

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 57-62.]

For other definitions, see Words and Phrases, First and Second Series, Kindred.]

Appeal from Circuit Court, Warwick County.

Suit by J. F. Bonewell and others against Johnson D. Smith and others. From a decree dismissing the bill on demurrer, plaintiffs appeal. Affirmed.

Nelms, Colonna & McMurrin, of Newport News, for appellants. F. S. Collier, of Hampton, for appellees.

SIMS, J. This is a suit for partition of a tract of land to which Virgie Bonewell had title at the time of her death, derived by descent from her father, William T. Bonewell. The latter derived title to this land by descent from his father, William Bonewell (being the only son of the latter), who derived title to it by purchase. Virgie Bonewell was the only child of William T. Bonewell, and died an infant without issue, leaving appellees, defendants in the court below, as her next of kin on the side of her father living at the time of her death. Appellants, plaintiffs in the court below, are the descendants of the whole blood of William Bonewell, and they claim that they are the kindred of the whole blood of Virgie Bonewell on the side of her father, and as such are entitled under the provisions of section 2556 of the Code of Virginia to all of said estate except a small interest to which the defendants would be entitled by reason of intermarriage.

There was a demurrer to the bill and an agreed statement of facts, which are in effect as stated above. The court below, by its decree, sustained the demurrer and dismissed the bill of the plaintiffs. This decree is complained of by the appellants, and the following grounds of error are assigned in their petition for appeal:

"First, because it does not recognize William Bonewell as the first purchaser.

"Second, because it recognizes the defendants as being the kindred, and the only kindred, of Virgie Bonewell, when in fact they are not the kindred (of the blood), that is, of common ancestor, of Virgie Bonewell.

"Third, because the court has construed the word 'kindred' to mean 'next of kin.'

"Fourth, because the court construed the descent from Virgie Bonewell to be to the defendants, when it should have decreed to the plaintiffs."

It seems that in no case which has been heretofore decided by this court were the descendants of the first purchaser claimants as such of the real estate of an infant decedent, so that the precise questions involved in the instant case are now presented for the first time to this court for decision.

The statute, section 2556 of the Code of Virginia, is as follows:

"If an infant die without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the whole of it shall descend and pass to his kindred on the side of that parent from whom it was so derived, if any such kindred be living at the death of the infant. If there be none such, then it shall descend and pass to his kindred on the side of the other parent."

The history of this statute before and including its form as contained in the Code of

1819 (chapter 96, §§ 11, 12), and the decisions thereon, are given in 1 Tucker's Commentaries (Ed. 1836) pp. 196-198. The form of this statute in the Code of 1819 remained unchanged until the Code of 1849 (chapter 123, § 9), when it was enacted in the precise form in which it now appears in said section 2556 of the present Code.

The report of the revisors of the Code of 1849 (volume 2, pp. 636, 637) recognizes that this statute is a relic of "the prejudice of the common law in favor of the feudal preference of the blood of the first purchaser." The following authorities recognize the same position, namely: *Medley v. Medley*, 81 Va. 272; 2 Minor's Inst. (3d Ed.) p. 536; *Graves' Notes on Real Prop.* p. 94; *Davis v. Rowe*, 6 Rand. (27 Va.) 393. Such common-law rule is set forth in 2 Minor's Inst. (3d Ed.) 520-522, 526-529; 2 Minor on Real Prop. §§ 982, 986, 987; *Tucker's Com.* (1836 Ed.) 184-193.

However, counsel for appellants do not even contend that such statute re-establishes the common-law rule on this subject in its entirety. Hence we do not feel that any light would be thrown on the case before us by setting forth here the common-law canons of descent as they originally existed, or as they were modified by the invention of the feud of indefinite antiquity, or by English statute law; and especially do we feel that no help would be thus derived in the solution of the question of how far the Virginia statute under consideration re-establishes the common-law rule, because that must be determined by the statute itself.

[1] It seems to us plain from the language of the statute that, on failure of issue of an infant last seised, the inheritance descends to the infant's kindred on the side of that parent from whom the real estate was derived, when, as in the case at bar, there are such kindred living at the death of the infant. That is to say, in such cases, by reason of the express provision of the statute in the quest for the ancestor of the infant who shall constitute the root, or stem, or propositus, from whom the inheritance shall descend, we can ascend only to the parent of the infant from whom the real estate was derived. Such parent, it is true, may chance to be the first purchaser of the estate, or he may not be such purchaser. In the latter case, however, he would be of the blood of the first purchaser. To that extent the statute in question recognizes "the feudal preference of the blood of the first purchaser," but no further. The statute does not permit us to ascend beyond the parent to the grandparent, or to any other ancestor of the infant, in order to reach the first purchaser as the propositus from whom the inheritance shall descend. The parent only, and in no case any more remote ancestor, is made by the statute such propositus. Therefore, whether the parent be, or be not, the first purchaser, is not made a test by the statute for the ascertainment of

the person who shall constitute the propositus, from whom the inheritance shall descend. He is by the statute designated to be such person, without further qualification than that he must be the parent of the infant from whom the title to the real estate "was derived by gift, devise or descent." This, we think, is the proper construction of this statute.

It follows that there is no merit in the first assignment of error.

From the conclusion that the parent, William T. Bonewell, is the root, or stem, or propositus, from whom the inheritance in question descended, and not William Bonewell, the grandparent, it also follows that the remaining assignments of error are not well taken, giving to them the meaning they are intended to have. It is not contended by counsel for appellants, as we understand it, that if William T. Bonewell, the parent, is the propositus mentioned, the next of kin of the infant, Virgie Bonewell, on the side of that parent, are not the persons designated by the statute as the heirs of the infant. If the contention had been otherwise, there can be no doubt that such is the proper construction of this statute.

[2] As stated by Mr. Minor (2 Min. Inst. [3d Ed.] pp. 538, 539), it was held by this court in the early case of *Davis v. Rowe*, 6 Rand. (27 Va.) 393, that our statute of descents, as first enacted, "was founded on the affections of the heart, and follows the current of its natural flow, preferring as heirs the classes nearest in blood." The same consideration, in our opinion, applies to that portion of the statute of descents embodied in section 2556. The word "kindred," therefore, used in such statute has the meaning of "next of kin."

The case of *Johnson v. Phillips*, 85 Ark. 86, 107 S. W. 170, is cited and strongly relied on in behalf of appellants. The latter case was controlled by the Arkansas statute (Kirby's Dig. § 2647), which is materially different from our Virginia statute. The Arkansas statute applies to adults as well as infants, and forbids the inheritance going to kindred not of the blood of the deviser or ancestor. It had been construed in the prior case of *Kelly's Heirs v. McGuire*, 15 Ark. 555, to have the meaning and intention to prohibit the half blood, and their descendants alike, from sharing in the inheritance of an estate which might come to the intestate by descent, devise, or gift from any ancestor. In the case of *Johnson v. Phillips*, supra, J. A. Phillips died seised and possessed of the land in controversy, leaving surviving him his widow, a brother, and a sister, the heirs of another sister, and three children. His widow married one Houston, and of that marriage there were two children. Houston died, and the widow married one Edwards, and died while the suit was pending. Two

of the Phillips children died in infancy; Elizabeth Phillips alone survived. She married one Nelson, and one child, Elizabeth Nelson, was born of that union. Both the mother and father of the latter died leaving such child surviving, and subsequently the child died without issue. The suit was brought by the brother and sister and the heirs of the other sister of Phillips against Mrs. Edwards and the Houston children to establish and quiet their title. It was held that the case was ruled by said prior Arkansas case of *Kelly's Heirs v. McGuire*, and in effect that the inheritance could not descend to the next of kin of the infant, Elizabeth Nelson, because they were of the half blood of Mrs. Nelson, which was forbidden by the statute to inherit. But for such statute such next of kin would have inherited. There is therefore no conflict in such decision with our construction of the Virginia statute.

The same is true of the New Jersey statute (2 Comp. St. 1910, p. 1919, § 5) on the subject, which is similar to the Arkansas statute, and the construction of that statute referred to in the case of *Cox v. Clark*, 93 Ala. 400, 9 South. 458, cited and relied on by counsel for appellants.

In view of what is said above, we do not feel that any detailed reference is necessary to other authorities cited by counsel for appellants bearing upon the construction of the word "kindred" when found in contexts other than the Virginia statute in question.

For the reasons stated, we find no error in the decree complained of, and it will be affirmed.

Affirmed.

(120 Va. 475)

EWELL v. BROCK.

(Supreme Court of Appeals of Virginia. March 15, 1917. Rehearing Denied March 28, 1917.)

1. WILLS §491—CONSTRUCTION—POWERS OF COURT.

Where the will writing is complete in itself and its subject-matter is certain or the facts are ascertained, it is the duty of the court to construe it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058.]

2. WILLS §491—CONSTRUCTION—LATENT AMBIGUITY—QUESTIONS FOR JURY.

Where at time of his death testator lived on a 60-acre farm and owned an adjoining 80-acre farm, and devised to his daughter "the farm on which I now live," there was a latent ambiguity, and the question what land was devised is for the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1058.]

3. APPEAL AND ERROR §362(2)—SCOPE OF REVIEW—RECORDS—SUFFICIENCY.

A petition for writ of error is a pleading, and must conform to the rules of pleading as to certainty and distinctness of allegation of errors relied on for reversal, or the errors will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1961.]

Error to Circuit Court, Princess Anne County.

Ejectment by J. L. Ewell against Pinkie E. Brock. Judgment for plaintiff, and defendant brings error. Affirmed.

Thos. W. Shelton, of Norfolk, for plaintiff in error. R. R. Hicks and Peechie E. Brock, both of Norfolk, for defendant in error.

SIMS, J. There was a verdict of a jury and judgment for the defendant in error, plaintiff in the court below, against the plaintiff in error, defendant in the court below.

The question upon the merits of the case is the identity of the land devised by the following clause of the will of John T. Batten, namely:

"I give, devise and bequeath unto my daughter, Lena Batten, the farm on which I now reside. * * *

At the date of his will and death, the testator owned land which he had acquired at different times in separate tracts or parcels, which lay contiguous to each other. The residence of the testator was on the farm, which he acquired about 35 years before his death, known as Morris Neck, containing about 60 acres. About 14 years prior to his death he purchased an adjoining farm, containing about 30 acres, known as the Cooper tract or Cooper farm. The latter is the land involved in the action of ejectment before us.

The question before the court below was whether the Morris Neck farm alone was devised by the will of said testator to Lena Batten, or both the Morris Neck and Cooper farms. The plaintiff in error claims that both farms were devised to her by the will, and that the court should have instructed the jury, by a peremptory instruction, that such was the true construction and effect of the language of the will above quoted. Instructions Nos. 5 and 6, asked for by the appellant and refused by the court, embodied this proposition. These instructions were as follows:

"(b) The court further instructs the jury that the will of John T. Batten offered in evidence, vested in his daughter, Lena Batten, a fee-simple title in the Cooper tract in the declaration described, and she had the right to convey like good title to J. L. Ewell, the defendant in this case. If, therefore, you believe from the evidence that Lena Batten conveyed the property to said J. L. Ewell, and that he still holds title to the same, then you shall find for the defendant. And the court further instructs you that the deed of bargain and sale from Lena Batten to J. L. Ewell, exhibited in evidence, is a good and sufficient deed."

"(6) The court instructs the jury that John T. Batten, by his will, conceding all parol testimony adduced in this trial to be true and allowing to it its full legal effect, devised to his daughter, Lena Batten, the property claimed in this controversy, and that she has conveyed the same to J. L. Ewell, the defendant, by a good and legal deed."

[1] Counsel for plaintiff in error bases his contention that these instructions should

have been given, and that thus the court should have decided the question of the identity of the land and should have taken it from the jury, upon the authority of *Burke v. Lee*, 76 Va. 386, 388. That is a leading case in Virginia on the subject of the duty of the court to construe written instruments. It has been long settled that such is the duty of the court when the writing is complete in itself and the subject-matter of it is certain, or the facts are ascertained.

In the case of *Burke v. Lee*, as the court there stated, the property involved fitted the description in the will. There was no uncertainty as to the identity of the property described in the devise, there was no uncertainty in applying the language of the devise to the property, the description to the locus in quo. The court said of that case as it was presented to the court below:

"It was not a case of latent ambiguity, in which the description is equally applicable to two objects, and therefore parol testimony is essential to remove the uncertainty."

[2] The case before us is clearly a case of latent ambiguity. The language in question contains a description which is equally applicable to two objects, namely, the farm consisting of the Morris Neck tract alone, or a farm consisting of the two tracts, the Morris Neck and Cooper tracts. Parol evidence was essential to remove this uncertainty. Certainly the appellant could have had no standing in court to claim that the Cooper tract passed to Lena Batten by the devise without the aid of parol testimony. This question of identity of the subject-matter of the devise was a question of fact for the jury and not for the court.

There was considerable parol evidence properly admitted by the trial court, bearing on the surrounding circumstances existing when the will was executed, the situation of the land, and where the testator then resided. See 7 Ency. Dig. Va. & W. Va. Rep. pp. 858, 859, for authorities too numerous to cite here. This evidence need not be referred to by us in detail, since no question is raised before us as to lack of such evidence to sustain the verdict of the jury or as to such verdict being against the evidence, but only that the court and not the jury should have decided the question of fact as to what land met the terms of the description in the will.

It is clear that the case of *Burke v. Lee*, supra, does not sustain the position of counsel for appellant on this subject, but the contrary.

In the case before us the court below did not decide the question of fact as to the identity of the land described in the devise, but submitted that question to the jury, under the following instruction, namely:

"(1) The court instructs the jury that the will of John T. Batten devised to his daughter, Lena Batten, the farm on which he resided at the date of the will; and the jury are instructed that if they believe from the evidence that the property described in the declaration was not

a part of the place on which said John T. Batten resided at the date of his will, then they must find for the plaintiff, but if the jury believe from the evidence that the property described in the declaration was a part of the place on which John T. Batten resided at the date of his will, then they must find for the defendant."

This action of the trial court is assigned before us as error. The ground of such assignment is the same as that above noted, urged in support of instructions Nos. 5 and 6, asked for by plaintiff in error. For the reasons above stated, we think the position on which this assignment of error is based is not well taken.

A number of bills of exceptions were taken by plaintiff in error, involving various questions, but we do not understand that the points thus saved are assigned in the petition as errors relied on for reversal. They were not clearly so stated in the petition, or in the reply brief of counsel for plaintiff in error, or in oral argument by him. The action of the trial judge upon one single question only, namely, that considered and passed upon by us above, seems to be assigned and relied on as error for reversal. The following is the statement of the petition on the subject:

"The Narrow Question Involved is One for the Judge and Not the Jury.

"The sole and simple question in this case, therefore, is whether the Cooper field was considered as, and intended to be, by John T. Batten, a part of the farm on which he resided when he wrote his will. It is on all fours with the case of *Burke v. Lee*, 76 Va. 386, and the trial court should have followed Judge Staples' views on both the procedure and the law, which he refused to do."

[3] It is true certain other rulings and actions of the court below are subsequently referred to in the petition as errors, but they are not set out as errors relied upon to reverse the judgment with that clearness and distinctness required in a petition for a writ of error. Such a petition is a pleading, and must conform to the rules of pleading with respect to certainty and distinctness of allegation of errors relied on for reversal, otherwise they will not, as a rule, be considered. *Sutherland v. Wampler*, 119 Va. 800, 89 S. E. 875; *Orr v. Pennington*, 93 Va. 268, 24 S. E. 928; *Hawpe v. Bumgardner*, 103 Va. 91, 48 S. E. 554; Code of Va. § 3464. Hence we do not deem it necessary to consider the other matters referred to in the several bills of exception and in the petition.

Counsel for defendant in error raises some questions in his reply brief as to the bill of exceptions which purports to contain all the evidence being properly in the record, but as our opinion upon the merits of the case is in favor of the defendant in error, we do not consider it necessary to consider such questions.

Hence, for the reasons given above, the judgment complained of will be affirmed.

Affirmed.

(120 Va. 458)

CONRAD v. ELLISON-HARVEY CO.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. MASTER AND SERVANT ⇨80(13)—DISCHARGE—ACTION FOR SALARY—QUESTION FOR JURY.

In a discharged bookkeeper's action on the common counts in assumpsit for salary, whether the plaintiff was discharged or quit the service of defendant of his own accord *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 121, 122.]

2. APPEAL AND ERROR ⇨232(2)—RESERVATION OF GROUNDS OF REVIEW—ISSUES AND PROOF.

In view of Code 1904, § 3384, authorizing amendments whenever a variance between pleadings and proof develops during the trial, in a discharged bookkeeper's action for salary, where the declaration contained only the common counts in assumpsit and plaintiff offered in evidence his contract covering his original employment of one year, but defendant at the trial made no objection on the ground of variance between the declaration and proof or upon the insufficiency or the inaptness of the evidence to sustain recovery on the common counts, but his sole objection to the admission of the contract being that it was not then in force, defendant cannot on review successfully contend that plaintiff should have declared especially on his contract and its breach, since parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1430, 1431.]

3. MASTER AND SERVANT ⇨80(5)—ACTIONS FOR WAGES—CONTRACT OF EMPLOYMENT.

The original written contract of employment for one year was admissible to show the terms of the original hiring.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 114.]

4. MASTER AND SERVANT ⇨80(1)—DISCHARGE—ACTION FOR SALARY—PLEADING.

Where a bookkeeper was employed under a written contract for one year and subsequently continued in service for several years thereafter receiving one increase in salary, the appropriate remedy on his discharge was an action on the common counts in assumpsit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 107.]

5. PLEADING ⇨230—AMENDMENTS—STATUTE—CONSTRUCTION.

Code 1904, § 3384, authorizing amendments when a variance between pleadings and proof develops during the trial, is to be construed with liberality by the courts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 592.]

6. MASTER AND SERVANT ⇨80(13)—ACTION FOR WRONGFUL DISCHARGE—QUESTION FOR JURY.

As plaintiff after his original employment for the year 1910 continued in the service of defendant without further contract and received one increase of salary, whether he was employed by the month or by the year in 1914, when he left defendant's service, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 121, 122.]

7. MASTER AND SERVANT §80(7)—WRONGFUL DISCHARGE—ACTION FOR SALARY—EVIDENCE—ADMISSIBILITY.

Plaintiff was entitled to show the circumstances and negotiations under which he began his original term of service, to be considered with the original contract itself in determining the probable intention of the parties to continue in the relation after the first year had expired.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 116.]

8. MASTER AND SERVANT §9—CONTRACT OF EMPLOYMENT—PRESUMPTION.

The fact of plaintiff's subsequent employment implied some sort of a contract, which depends upon the intention of the parties, and there is a rebuttable presumption that he was again employed for a like term.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 11.]

9. FRAUDS, STATUTE OF §44(3)—ORAL CONTRACT OF EMPLOYMENT FOR ONE YEAR.

Where a bookkeeper was employed under a written contract for one year and continued from year to year thereafter, his contract for each of the succeeding years was a contract for one year's service to begin and be performed within the year, and consequently was not within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 66.]

Error to Law and Equity Court of City of Richmond.

Action by L. A. Conrad against the Ellison-Harvey Company. Judgment for defendant, and plaintiff brings error. Reversed, verdict set aside, and cause remanded for new trial in conformity with the opinion.

J. C. Page, of Richmond, for plaintiff in error. Jo. Lane & Cary Ellis Stern, of Richmond, for defendant in error.

KELLY, J. L. A. Conrad, claiming to have been employed as a bookkeeper by the Ellison-Harvey Company, a corporation, for a period of one year from January 1, 1914, and to have been unlawfully discharged on June 30, 1914, brought this action of assumpsit to recover on account of his salary for the balance of the year. There was a verdict and judgment against him, and thereupon he obtained this writ of error.

Conrad's original employment with the Ellison-Harvey Company began on January 1, 1910, under a written contract which fixed his compensation at \$100 per month and his term of service at one year. When the year expired, he continued in the same employment without anything being said as to a new arrangement. In May, 1911, the company, upon a recommendation made by Mr. Harvey at a meeting of the directors, increased Conrad's salary to \$125 per month. So far as the record discloses, this increase was not intended to have, or regarded as having, any effect upon the term of his employment. He remained in the service of the company throughout the years 1911, 1912, 1913, and until June 30, 1914, when, as he alleges, he was discharged.

The assignments of error relate exclusively to the action of the trial court upon the in-

structions to the jury, which necessarily resulted in a verdict for the defendant. Before taking up these assignments, however, it will be in order, and will facilitate and clarify the discussion of the assignments themselves, to dispose of certain contentions of the defendant which, if sound, would defeat the plaintiff's action entirely, and make it necessary for us to affirm the judgment on the ground that no other verdict could have been properly returned, regardless of the instructions.

[1] The first of these contentions is that the plaintiff was not in fact discharged, but quit the service of his own accord. Of this it is sufficient to say that, while the evidence is by no means clear upon the question, it was, in our opinion, one for the jury to determine. The defendants would not deal frankly with him, were moving their principal effects and main place of business out of the state, appeared to have no further position or use for him, and would give him no assurance whatever as to his future employment. Without discussing it in detail, the evidence seems to us, when viewed as a whole, to have tended to show that the company had secretly determined to drop him, and in effect had done so, before he instituted this suit and attached their estate to secure his claim. In this state of the evidence, the question whether he was discharged, or quit, was one for the jury to answer. *Goldsmith v. Latz*, 96 Va. 680, 685, 32 S. E. 483.

[2, 3] It is urged by the defendant, in the second place, that, as this is an action based upon a wrongful discharge, the plaintiff should have declared specially upon the contract and its breach, whereas his declaration contains only the common counts in assumpsit, and that therefore his action must fail. This point was not made in the lower court and cannot be successfully raised for the first time here. It is true that, when the plaintiff offered in evidence the written contract covering the original employment for the year 1910, the defendant objected, but the objection was not upon any such ground as is here suggested. The objection, and the sole objection indicated, was that the written contract "is not the contract in force in 1914," and that the plaintiff should "be confined to proving the contract under which he is claiming." The contract for 1910 was clearly admissible for the purpose of showing the terms of the original hiring. 26 Cyc. 976, note; 20 A. & E. Encyc. (2d Ed.) 16, note; *Hermann v. Littlefield*, 109 Cal. 430, 42 Pac. 443; *Tatterson v. Suffolk Mfg. Co.*, 106 Mass. 56; other authorities cited *infra*. At no time during the progress of the trial was there, so far as the record shows, any intimation that the the defendant relied upon a variance between the declaration and the proof, or upon the insufficiency or inaptness of the evidence to sustain a recovery upon

the common counts. Parties are not permitted to make one objection to evidence in the trial court and another and different one in the appellate court, but are regarded as having waived all objections save those specifically pointed out. *Warren v. Warren*, 93 Va. 73, 74-76, 24 S. E. 913; *McCrorey v. Thomas*, 109 Va. 373, 376, 63 S. E. 1011, 17 Ann. Cas. 373.

In *Warren v. Warren*, *supra*, Judge Buchanan, speaking for this court, said:

"The parties must stand or fall by the case as made in that (the trial) court. An appellate court is not a forum in which to make a new case. It is merely a court of review to determine whether or not the rulings and judgment of the court below upon the case as made there were correct. Any other rule, it has been well said, would overturn all just conceptions of appellate procedure in cases at law, and would result in making an appeal in such action a trial de novo, without the presence of witnesses, or the means of correcting errors and omissions."

[4, 5] Furthermore, and perhaps more directly to the point in this connection, the action of assumpsit was the appropriate remedy, if the plaintiff was entitled to recover upon the facts as proved, and, conceding that the declaration was defective, it was the duty of the defendant, if it intended to rely upon that point, to then and there call the court's attention to it. Section 3384 of the Code of Virginia, authorizing amendments, upon terms fair to both parties, whenever a variance between the pleadings and the proof develops during the trial, was expressly designed to meet just such a situation as would have been presented in the trial court if the question now made before us had been raised there. This statute has always, and most properly, been regarded with favor, and construed with liberality by the courts of this state; and its terms would have fully met the condition now complained of by defendant. Having failed to avail itself of the remedy thus provided, or to give the plaintiff or the court the opportunity to invoke it, the defendant cannot now take advantage of the irregularity which the statute would have cured. This conclusion is in accord with the well-settled policy and repeated decisions of this court. *Eagles v. Hook*, 22 Grat. (63 Va.) 510, 512; *Langhorne v. Richmond City*, 91 Va. 364, 367, 22 S. E. 357; *Bertha Mineral Co. v. Martin*, 93 Va. 791, 801, 22 S. E. 869, 70 L. R. A. 999; *Moore Lime Co. v. Johnston*, 103 Va. 84, 86, 48 S. E. 557; *Va. & S. W. Ry. Co. v. Bailey*, 103 Va. 205, 228, 49 S. E. 33; *Newport News, etc., R. Co. v. McCormick*, 106 Va. 517, 518, 56 S. E. 281; *N. & W. Ry. Co. v. Perdue*, 117 Va. 111, 117, 83 S. E. 1038; *Hawkins & Buford v. Edwards*, 117 Va. 311, 317, 84 S. E. 654; *Goode v. Bryant*, 118 Va. 314, 87 S. E. 588; *Burks Pl. & Pr. pp. 585-587, 770.*

[6] Another contention of the defendant, urged as conclusive against the plaintiff's demand, is that he was employed in 1914 by the month and not by the year, and that

therefore any action by him based upon a yearly contract must fail. In our view of the evidence the question thus presented, to say the most that can be said of it for the defendant, was one for the jury to settle. The evidence certainly tended to show, if it did not conclusively show, that the plaintiff, having been originally hired for a fixed term of one year, held over in the succeeding years of 1911, 1912, 1913, and 1914, without any new agreement or different understanding as to the term of service. The only change ever made was the increase of salary in May, 1911, already pointed out. Nothing whatever appears in the record to explain the occasion or purpose of this increase, except the uncontradicted statement of Conrad that, in the course of the original negotiations with representatives of the defendant, he was hesitating about accepting their offer of \$100 per month, and called their attention to the fact that he then held an equally remunerative position which he could keep as long as he chose, whereupon Mr. Ellison, the president of the company, said:

"Well, come on with us and we will give you \$100 a month now, and later on will increase you."

This statement was objected to at the trial solely on the ground that Mr. Ellison was then dead; but, when it was made to appear that Mr. Harvey also was present during the conversation, the objection was not further urged. The statement does not appear to us to be very material in any aspect of the case. If it be left out of view entirely, the mere unexplained increase in salary would not in itself be sufficient to show any intent to convert into a monthly employment one which had commenced under a yearly contract.

[7] But the plaintiff was entitled to show, for whatever they were worth, the circumstances and negotiations under which he began his original term of service, so that they might be considered along with the original contract itself in determining the probable intention of the parties continuing the relationship after the first year had expired. The contract for the year 1911, or for any succeeding year, did not exist, and is not claimed to have existed, until the preceding year had expired; but when, after the end of each year, the employment continued, some sort of contract was necessarily implied, and the question of what this implied contract was depended upon the intention of the parties. In ascertaining this intention, it was proper for the jury to have before them the original contract and the circumstances under which it was made. It is to be remembered in this connection that the defendant, not the plaintiff, was relying upon the increase of salary, invoking that fact to sustain its contention that the hiring after 1910 was by the month; and, in this aspect, the case became peculiarly one for the ap-

plication of the general rule permitting evidence of previous dealings and negotiations.

In *Tatterson v. Suffolk Mfg. Co.*, supra, the court used the following language, which is especially pertinent here:

"There was no express stipulation, either written or oral, which fixed the time for the continuance of the employment of the plaintiff by the defendant. That element of their contract depended upon the understanding and intent of the parties, which could be ascertained only by inference from their written and oral negotiations, the usages of the business, the situation of the parties, the nature of the employment, and all the circumstances of the case. It was an inference of fact, to be drawn only by the jury. The whole question, what was the contract existing between the parties, at the time the defendants undertook to terminate the employment? was properly submitted to the jury."

In the case of *Chamberlain v. Stove Works*, 103 Mich. 124, 61 N. W. 532, the plaintiff had worked for the defendant company for some years at a yearly salary, and then, in January, 1886, he was elected a director and secretary of the concern. Thereafter he continued to render the same service as formerly, but at an increased salary. He was also re-elected as director and secretary each succeeding year until 1892, when another person was chosen in his place. In May, 1892, he was discharged from the company's employment, and, in an action brought by him, the jury found that he was employed for a full year and that this employment continued distinct from his offices in the corporation. It was held, on appeal, that the character of the hiring was properly left to the jury, and that their determination was not improper. See, also, *Mechem on Agency* (2d Ed.) 602, and cases cited.

[8] So, in the instant case, we find no difficulty in holding that, under the law and the evidence, the jury might very properly have found that the plaintiff had a contract by implication for the entire year 1914. The evidence has already been sufficiently reviewed, and the law applicable to it is perfectly well settled. The English rule is that every general hiring is presumed to be for one year, in the absence of stipulations or circumstances to rebut the presumption. 1 Min. Inst. (4th Ed.) p. 209; 26 Cyc. 973. In the United States the prevailing doctrine is that every such general hiring is terminable at the will of the parties. *Lile's Notes on 1 Min. Inst.* p. 54; 20 A. & E. Enc. (2d Ed.) p. 14; 26 Cyc. 974. Both in England and in this country, however, when one enters the employment of another for a definite period (of one year or less) and continues in that employment after the expiration of that period without any new agreement, the presumption, rebuttable of course by evidence, is that he is again employed for a like term.

"A person who has been previously employed by the month, year, or other fixed interval, and who is permitted without any new arrangement to continue in the employment after the period limited by the original employment has expired, will, in the absence of anything to show a con-

trary intention, be presumed to be employed until the close of the current interval and upon the same terms. This, however, is merely a presumption, and gives way before evidence that such a continuation was not intended." *Mechem on Agency* (2d Ed.) § 606, p. 434.

See, also, to the same effect, 20 Am. & Eng. Enc. (2d Ed.) p. 16; 26 Cyc. p. 976; *McCullough Iron Co. v. Carpenter*, 67 Md. 554, 11 Atl. 176; *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Tatterson v. Suffolk Mfg. Co.*, supra; *Standard Oil Co. v. Gilbert*, 84 Ga. 714, 11 S. E. 491, 8 L. R. A. 410; *Kelly v. Carthage Wheel Co.*, 62 Ohio St. 598, 57 N. E. 984; *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, 23 N. E. 806, 7 L. R. A. 822.

In the *Gilbert Case*, cited above, the Supreme Court of Georgia, in the course of the opinion, said:

"In the argument notice was taken of the difference between the English and the American rule as to presuming that an indefinite hiring is for a whole year. It was said that in the former country this presumption holds, but in the latter it does not. *Wood, Mast. and Serv.* § 136.

"We think, however, this presumption has nothing to do with the matter; for whether the first hiring has its duration fixed by express or implied contract, if it be fixed in either way, the term (if not longer than one year) admits of duplication by tacit as well as express agreement. When we have a definite term of service, no matter how we get it, subsequent service of the same kind, where no new contract is made and nothing appears to indicate a change of intention, may be referred to the previous understanding and to a tacit renewal of the engagement."

Summarizing the results of the foregoing discussion, we are of opinion: (1) That the objection to the form of the plaintiff's declaration comes too late to avail the defendant in this court; (2) that whether the plaintiff was discharged, or quit the service prematurely and of his own accord, and (3) whether he was employed for the entire year 1914, or for a shorter period within that year, were questions upon which, under the evidence adduced, the plaintiff (to say the least of his rights upon the latter question) was entitled to a determination by the jury. And it follows further, therefore, that we cannot say, upon any of the anterior contentions of the defendant, that a verdict in its favor was necessarily proper as being the only one which could have been legally found.

This brings us to the plaintiff's assignments of error, which, in view of what has already been said, may be very briefly disposed of. They involve two rulings of the trial court, both of which were erroneous. The first was the refusal of the court to instruct the jury, at the instance of the plaintiff:

"That when one enters into the service of another for a definite period, and continues in the employment after the expiration of that period, without any new agreement, the presumption is that the employment is continued on the terms of the original agreement, and this presumption must prevail, unless there be a new agreement shown, or at least facts which are sufficient to rebut the legal presumption and

that a different hiring was in fact intended the parties."

s instruction contained a correct statement of the law as applicable to the case, and I have been given.

The second error complained of, and in which the jury was well assigned, was the refusal of the court to give plaintiff's instruction No. 1, which was instead thereof instruction A. Instruction No. 1, refused, was as follows:

"The court instructs the jury that if they find from the evidence and all the facts attending the contract between L. A. Conrad, defendant, and Ellison-Harvey Company, that it was the intention of the parties to enter into a contract of employment by the year, and the said contract to commence at once, it was not error that the agreement should be in writing, and if they further believe from the evidence that L. A. Conrad was discharged on the 7th of July, 1914, they shall find for the defendant, and assess his damages at such amount as he would have received in wages for the remainder of his term, less the amount earned by him from other employment."

Instruction A was as follows:

"The court instructs the jury that they should consider the oral testimony on the part of the plaintiff tending to prove the contract for a year's service with the defendant covering the year 1914, for a breach of which the plaintiff claims the statutory law requires such a contract to be in writing, or to be proven by a written instrument or other writing signed by the parties to be charged."

The contract which the plaintiff claimed the defendant ought to prove was a contract for one year's service beginning on January 1, 1914. There was no contention that the agreement for one year was made prior to the day on which the contract began. The evidence, both oral and written, of the previous contract and relationship between the parties, was introduced for the purpose of throwing light upon the intention of the parties during the subsequent year of 1914, and as such has already been held to have been proper, even though in the jury it did tend to prove a contract came into existence during a subsequent year. It was a contract based upon oral evidence and presumption drawn in part from previous dealings between the parties, but nevertheless a new contract, not made until the year 1914 began, and to be performed within that year. In other words, it was the ordinary case of a contract for a year's service, to begin and be performed within the year, and consequently not within the year of frauds, or parol agreements. 3 C. (2d Ed.) 197; 1 Chitty on Contracts (10th Am. Ed.) p. 101; 20 Am. & Eng. L. & C. (2d Ed.) 48, and cases cited in note 1. The position of the defendants would be correct if the plaintiff relied upon the original contract as the contract upon which his claim was founded. The written evidence does not show any contract which binds the defendant to employ the plaintiff for the whole of a year. That obligation, if it exists, must rest on some agreement into which the plaintiff entered within the year. They did enter into an agreement, by the mere fact of their relations of employment and that it was a relation of contract. The

terms of the contract, in the absence of express words, are to be ascertained, not alone by what occurred within the year, but also from all that had transpired previously. From all the evidence the jury must determine, as an inference of fact, what was the understanding with which the parties entered upon the second year of employment and service. That, when found, constitutes their contract. The contract which resulted from the original negotiations did not by its terms, and could not by reason of the statute, extend into the second year. But those negotiations were competent evidence from which to infer what were the terms of the new contract under which the parties continued their relations. We think that the jury were rightly instructed that the statute of frauds did not apply to the contract upon which the plaintiff relied. * * * Tatterson v. Suffolk Mfg. Co., supra.

The judgment complained of will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in conformity to the views expressed in this opinion.

Reversed.

(120 Va. 552)

CITY OF RICHMOND v. McCORMACK.

(Supreme Court of Appeals of Virginia. March 15, 1917.)

1. PLEADING \S 433(3) — STATUTE OF JEOPARDIES.

A declaration containing a defective statement of a good cause of action is of the class of errors that the statute of Jeoffails (Code 1904, \S 3449) is designed to cure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1456.]

2. JUDGMENT \S 263(2)—MOTION IN ARREST—DEFECTIVE PLEADINGS—SURPLUSAGE.

In action against city for injury from sidewalk obstruction, the fact that the complaint overstated the city's duty of care in keeping the sidewalk safe was not ground for arresting judgment after verdict for plaintiff where the allegations of fact stated a good cause of action; the allegation of duty being a conclusion of law which might be disregarded as mere surplusage, in view of Code 1904, \S 3246, 3272, requiring formal defects in pleading to be disregarded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 469.]

3. PLEADING \S 407—WAIVER OF DEFECTS.

Defendant, by pleading the general issue and going to trial upon the merits, waives technical defects in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1360.]

4. APPEAL AND ERROR \S 1039(4)—HARMLESS ERROR—PLEADINGS.

That complaint in suit against a city for injuries from sidewalk obstructions overstated the city's duty in keeping its sidewalks safe was not injurious to it where its duty was accurately defined by instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4077.]

5. MUNICIPAL CORPORATIONS \S 763(1) — DEFECTIVE STREETS—DUTY OF CITY.

A city should exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes by night as well as day, provided such persons are themselves exercising

reasonable and ordinary care to avoid injury and danger while using the same.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1612.]

6. MUNICIPAL CORPORATIONS \Leftrightarrow 806(2) — DEFECTIVE STREETS—DUTY OF TRAVELER.

Generally a traveler upon a street may assume that it is in a reasonably safe condition, and is not bound to use ordinary care to discover and avoid dangerous defects and obstructions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1673.]

7. TRIAL \Leftrightarrow 260(1)—INSTRUCTIONS—REFUSAL OF INSTRUCTION COVERED BY ONE GIVEN.

Where an instruction given substantially embodies the same proposition of law as that contained in an instruction refused, error, if any, in refusing the requested instruction, is harmless.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

8. TRIAL \Leftrightarrow 296(4, 5)—INSTRUCTIONS—CURE OF ERROR.

In action against city for injury from sidewalk obstruction, the refusal of an instruction that if plaintiff failed to exercise such care and caution as his knowledge of the obstruction and of the darkness and other circumstances shown by the evidence would reasonably require of an ordinarily prudent man, his contributory negligence would bar recovery, was not reversible error where another instruction embodied the same proposition of law without emphasizing the darkness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709.]

9. TRIAL \Leftrightarrow 260(1)—INSTRUCTION—REQUESTS—REPETITION.

The refusal of a requested instruction was not error where the case was sufficiently covered by other instructions covering about 2½ printed pages, since to multiply instructions would have tended to confuse, and not to aid, the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651.]

10. MUNICIPAL CORPORATIONS \Leftrightarrow 822(5)—OBSTRUCTION IN STREET — ACTION — INSTRUCTIONS.

In action against city for injury from obstruction on sidewalk, an instruction denying recovery if plaintiff was injured because of his inattention was properly refused because not based on the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1762.]

11. MUNICIPAL CORPORATIONS \Leftrightarrow 819(7) — STREET OBSTRUCTION—ACTION—EVIDENCE—SUFFICIENCY.

In action against city for injuries from stumbling in the nighttime over a dangerously projecting tree root on sidewalk, evidence as to plaintiff's care held to justify recovery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1742.]

12. APPEAL AND ERROR \Leftrightarrow 1001(2)—REVERSAL—GROUNDS.

Where a question is properly submitted in the court below, a mere doubt as to whether the jury decided properly is insufficient to justify reversing the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3922.]

Hustings Court of Richmond.

Action by J. T. McCormack against the City of Richmond. From judgment for plaintiff, defendant brings error. Affirmed.

H. R. Pollard, of Richmond, for plaintiff in error. L. O. Wendenburg and T. Grar Haddon, both of Richmond, for defendant in error.

PRENTIS, J. This is an action for damages for personal injury, growing out of a fall of J. T. McCormack, caused by his tripping over and having his feet entangled in the exposed roots of a tree in the sidewalk on Cary street, in the city of Richmond, in which there was a verdict and judgment for the plaintiff.

1. The refusal of the court to sustain a motion of the plaintiff in error in arrest of judgment is assigned as error. The ground of this motion is that the declaration alleged that it was the duty of the city to keep its streets sound, safe, and suitable for public use and travel, and particularly the sidewalk of the street known as Cary street. The point made is that the city owed no such duty as that alleged, but that it fulfilled its duty when it had made its streets reasonably safe for those exercising reasonable care for their own protection.

[1] There is no merit in this contention. The case comes strictly within the line of cases relied on by the plaintiff in error, namely, the declaration contained a defective statement of a good cause of action, and it is just this class of error that the statute of Jeofails is designed to cure. *Roanoke Land & Imp. Co. v. Karn & Hickson*, 80 Va. 595.

In *Virginia, etc., Wheel Co. v. Harris*, 103 Va. 713, 49 S. E. 991, the rule is stated thus:

"An allegation of duty is only a conclusion of law; and where the facts alleged show the duty, and are stated with sufficient clearness to prevent surprise and enable the court to proceed upon the merits of the cause, the declaration ought to be sustained."

[2] Section 3243 of the Code provides that:

"No action shall abate for want of form, where the declaration sets forth sufficient matter of substance for the court to proceed upon the merits of the cause."

And section 3272 of the Code provides that:

"On a demurrer (unless it be to a plea in abatement), the court shall not regard any defect or imperfection in the declaration or pleadings, whether it has been heretofore deemed mispleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense, that judgment, according to law and the very right of the cause, cannot be given."

The allegation of duty, then, was mere surplusage, and if a demurrer had been interposed, the court would have overruled it, or possibly, to avoid controversy, the plaintiff would have amended the declaration. *Thomas v. Electrical Co.*, 54 W. Va. 398, 46 S. E. 217; *Hogg's Plead. and Forms* (2d Ed.) p. 59; *Andrews' Stephen's Plead.* 411.

As above indicated, the statute of Jeofails (Va. Code, § 3449) providing that "no judgment or decree shall be stayed or reversed * * * for any defect, imperfection, or omission in the pleadings which could not be

regarded on demurrer, or for any other defect, imperfection, or omission, which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of," is also conclusive.

[3] In this case the defendant pleaded the general issue and went to trial upon the merits, and thereby waived any technical defect such as is now relied upon.

[4, 5] Again, if by possibility the plaintiff in error could have been injured by this surplusage in the declaration, such injury was made impossible by the manner in which the case was conducted and the instructions of the court, which clearly and accurately defined the duty of the city thus:

"* * * Its duty is to exercise reasonable and ordinary care to keep its streets in a reasonably safe condition for use by persons traveling thereon in the usual modes, by night as well as by day, provided such persons are themselves exercising reasonable and ordinary care to avoid injury and danger while using the same."

2. The pertinent facts of the case are: That the plaintiff, a man 71 years of age, was going along the south side of Cary street at about 8 o'clock p. m. on Christmas night, December 25, 1913, towards his woodyard, to catch mischievous boys who he thought would attempt to steal his wood to make bonfires. That when he reached the point opposite to where Lombardy street comes into Cary street from Main, he caught his foot in the root of a tree, and was thrown to the ground, causing the injuries complained of. This root is described as coming from an elm tree about 13 inches in diameter that stood on the outer edge of the sidewalk, and had extending from it a root about 6 or 7 inches in diameter at the tree, extending diagonally across the sidewalk, its height being about 11 or 12 inches above the surface of the walk at the tree, and gradually diminishing in size until it disappeared in the ground at the fence on the inner side of the sidewalk. That this root had several branches. That he caught his foot in it and stumbled and fell over on his side, struck his stomach or bowels, injured his knee, and hurt his side. The night was dark and rainy, and the wind was blowing at the time. That after the accident and up to the time he testified, October 28, 1914, he suffered a good deal of pain. That he sent for the doctor, and has had varicose veins, and has been lame ever since.

Other errors assigned are the refusal of the court to give certain instructions:

(a) The defendant offered an instruction reading as follows:

"The court instructs the jury that a person using a street is bound to exercise his faculties in a reasonable manner to discover and avoid dangerous defects or obstructions in the way, and that the care thus required must be in proportion and commensurate with the danger, or appearance of danger. And if the jury believes from the evidence that the plaintiff in this case by the reasonable exercise of his faculties, could have discovered and avoided the defect or obstruction complained of, and that the accident or injury to the plaintiff occurred by reason of

his failure so to exercise his faculties and his consequent failure to discover and avoid the defect or obstruction, then the court tells the jury that the plaintiff was guilty of contributory negligence, and the jury must find for the defendant, the city of Richmond, even though the jury may believe from the evidence that the city was guilty of negligence, and that the sidewalk was not in a reasonably safe condition."

The court refused to give this instruction, but in lieu thereof gave instruction marked "No. 4," reading as follows:

"The court instructs the jury that a person using a public street is required to use ordinary care and to exercise his faculties in a reasonable manner to avoid injury to himself, and the care thus required must be commensurate with the conditions by which he is surrounded. And if the jury believe from the evidence that the injury to the plaintiff occurred or was contributed to by reason of his failure to use ordinary care or to make reasonable use of his faculties, then he was guilty of contributory negligence, and the jury must find for the defendant, the city of Richmond, even though they may believe from the evidence that the city was guilty of negligence, and that the sidewalk was not in a reasonably safe condition."

[8, 7] Probably the instruction was refused because it was thought to be misleading to the jury to instruct it that it was the duty of a traveler upon a highway to use ordinary care to discover and avoid dangerous defects or obstructions, whereas the general rule is that he has the right to assume that the street is in a reasonably safe condition. *Bedford City v. Sitwell*, 110 Va. 299, 65 S. E. 471; *Richmond v. Pemberton*, 108 Va. 220, 61 S. E. 787. However this may be, we believe that the instruction given substantially embodied the same proposition of law as that contained in the instruction refused, namely, that care should be exercised to avoid obvious dangers, and hence that the error, if any, was harmless.

(b) Then again, defendant in error asked the court to give the following instruction:

"If the jury believe from the evidence that the plaintiff traveled on the south side of Cary street at the point in question after dark, knowing of the defect or obstruction in the street complained of, the court tells the jury that he was bound to use ordinary care commensurate with the danger of which he had knowledge, taking into consideration the fact of the darkness, and that he was required to exercise more caution in such case than if he was ignorant of the defect or obstruction and it was daylight. And if the jury believe from the evidence that the plaintiff failed to exercise in this case such care and caution as the fact of such knowledge and of the darkness and other circumstances shown by the evidence would reasonably require of an ordinarily prudent man, then the plaintiff was guilty of contributory negligence, and the jury must find for the defendant, the city of Richmond."

[8, 8] We think this exception is without merit, also, because instruction No. 5, which was given by the court, embodies precisely the same proposition of law, the difference being that the instruction refused emphasizes the darkness, but instructs the jury that the plaintiff was required to exercise such ordinary care and caution in passing or avoiding the obstruction complained of as knowl-

edge of its existence and the other circumstances of the case shown by the evidence would reasonably require of an ordinarily prudent person. This, in effect, tells the jury that they should consider the darkness as well as all the other facts shown by the evidence. Among these other facts were, the rain which was falling, and the wind which was blowing, at the time of the accident as well as the street lights and the shadows, if any. *Southern Railway Co. v. Baptist*, 114 Va. 731, 77 S. E. 477. We find no reversible error in the refusal of the court to give this instruction. It may be said, however, that another objection to giving it may be found in the fact that the court had already given the jury eight instructions, covering two pages and a half of the printed record, and that these instructions sufficiently covered every phase of the case, and that to multiply instructions would have tended to confuse and not to aid the jury.

(c) It is also alleged as error that the court refused to give the following instruction:

"If the jury believes from the evidence that the accident and injury complained of occurred by reason of inattention to or forgetfulness of his surroundings, or by reason of the fact that the plaintiff was walking along the sidewalk with his face turned in a different direction from that in which he was moving, and so failed to discover and avoid the obstruction complained of, the jury must find for the defendant, the city of Richmond, even though the jury may believe from the evidence that the city was guilty of negligence, and that the street was not in a reasonably safe condition."

[10] This instruction is based upon the assumption that the injury may have occurred because of the inattention of the plaintiff, forgetfulness of his surroundings, or by reason of the fact that the plaintiff was walking along the sidewalk with his face turned in a different direction from that in which he was moving. Because the jury had already been fully and properly instructed, and because there was no evidence upon which it could properly be based, this instruction was properly refused.

(d) Another error alleged is the failure of the court to give an instruction reading thus:

"If the jury believe from the evidence that the defect in the street complained of in the declaration was such that notwithstanding the defect a person of ordinary prudence in view of all of the circumstances and conditions surrounding the defect as shown by the evidence would have considered the street reasonably safe before the accident for travel in the usual modes by one who was using ordinary care and prudence to avoid accidents, then the jury must find for the defendants."

The refusal of this instruction is fully justified by the fact that the jury had already been fully instructed as to the degree of care required of the city as well as the care required of a traveler upon the streets, and the multiplication of instructions and repetition of the same propositions of law in different language is a practice to be discouraged.

In *Sutherland v. Wampler*, 119 Va. —, 89 S. E. 875, Whittle, J., said:

"Time and again this court has condemned the practice of multiplying unnecessary instructions, the only effect of which is hopelessly to perplex the jury and to introduce error into the record. It is the settled rule of this court not to reverse a judgment for the refusal of the trial court to give other instructions when it appears that the jury already have been correctly and fully instructed. This question was dealt with in as many as six cases in 117 Va. Reports: *Ney v. Wrenn*, 117 Va. 85 [84 S. E. 1], *N. & W. Ry. Co. v. Perdue*, 117 Va. 111 [83 S. E. 1058], *Eastern Motor Co. v. Apperson-Lee Co.*, 117 Va. 495 [85 S. E. 479], *Ratcliffe v. Walker*, 117 Va. 569 [85 S. E. 575], *Southern Ry. Co. v. Snow*, 117 Va. 627 [85 S. E. 488], and *Wygat v. Wilder*, 117 Va. 596 [86 S. E. 97]."

3. The other error assigned is the failure of the court to set aside the verdict on the ground that it was contrary to the law and the evidence.

The negligence of the city is plainly manifest from the testimony. The tree root had been in substantially the same condition ever since the annexation of the territory in 1906. It was not simply a root over which one might stumble, but it was a root fully exposed with branches described by several witnesses as follows:

"There was a kind of a step—one root above another, you know. It was a kind of a step with a kind of a hollow there. It was a mean thing to step in. In bad weather when snow was there I wouldn't attempt to go over there at all, because you couldn't tell where to step. The roots are sort of tangled there."

In answer to another question, this witness said:

"I got one little stumble there. I went down to my knees."

One of the city's witnesses described it as a place that was a little hard for people to walk over, and that one could catch his foot in it. The plaintiff stated that he examined the root after the accident, and that it rose eight inches above the level of the sidewalk, and had an opening like a horseshoe, in which his foot was caught.

[11, 12] The only defense which could be seriously relied on was the defense which is most urged by counsel for the city, namely, that this obstruction was so obviously dangerous that no one could stumble over it without himself being guilty of contributory negligence. When it is remembered, however, that the plaintiff denies that he had knowledge of its existence, that he was a man 71 years of age, that the night was dark and rainy, that the wind was blowing, and that there is a conflict in the evidence as to whether the incandescent light a short distance away and the arc lights at the street corners directly and sufficiently lighted the root, or whether it was obscured by the shadows, and that the city, the plaintiff in error, is here as a demurrant to the evidence, then it seems clear to us that as the question of contributory negligence was properly submitted to the jury, under well-established principles, a mere doubt as to

whether the jury decided the question properly is plainly insufficient to justify this court in reversing the judgment. It will therefore be affirmed.

Affirmed.

(146 Ga. 617)

TRAPNELL et al. v. CANDLER COUNTY et al. (No. 310.)

(Supreme Court of Georgia. March 13, 1917.)

(Syllabus by the Court.)

1. COUNTIES \S 28 — BOARD OF REVENUES — POWERS OF.

The act approved August 12, 1915 (Acts 1915, p. 168), creating the board of roads and revenues of Candler county, conferred on that body, among other things, power to direct and control all of the property of the county according to law, "and generally to have and exercise all the powers heretofore vested in the ordinary of said county when sitting for county purposes."

(a) The powers so conferred upon the commissioners comprehended, among others, the power to select a site upon which to construct a courthouse, and in the exercise of such power the commissioners have a broad discretion that will not be disturbed by the court unless plainly and manifestly abused. *Dyer v. Martin*, 132 Ga. 445, 64 S. E. 475; *Gaines v. Dyer*, 128 Ga. 585(1), 58 S. E. 175.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 26, 27.]

2. COUNTIES \S 106 — PUBLIC PROPERTY — DISPOSITION.

When any public property shall be unserviceable, it may be sold or otherwise disposed of by order of the proper authority. Civ. Code 1910, \S 313, 314. Public property becomes unserviceable in the purview of this law, so as to empower the proper authority to sell the same, where such property cannot be beneficially or advantageously used under all the circumstances. *Dyer v. Martin*, 132 Ga. 445, 64 S. E. 475.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 167, 170-173.]

3. COUNTIES \S 106, 108 — COURTHOUSE — SELECTION OF SITE—DISCRETION OF COMMISSIONERS—ANSWER.

The county had purchased a site upon which to construct a courthouse. Subsequently, an owner of land, who was one of the county commissioners, donated a different site, which was accepted. A deed was executed, which contained the clause, following the description of the land: "The purpose for which this conveyance is made is that said tract of land is to be used for the courthouse of said Candler county and for vacant grounds to surround it, and for no other purposes whatever, except that said parties of the second part are authorized to build the county jail on said lot if they so desire." Having decided to construct the courthouse on the site so conveyed, the commissioners determined to sell, as property which was no longer serviceable, the site which had been previously acquired. Certain citizens and taxpayers instituted an action to enjoin the sale of the property and the construction of the courthouse on the site last acquired, on the grounds that the commissioners were unauthorized to make the sale and that it was an abuse of discretion to locate the courthouse at the place intended. In this connection, it was urged that the commissioners should not expend a large sum of public money for the construction of a courthouse on land to which there was a limitation upon the use for which the land could be employed, as expressed in the deed. In the answer filed by the defendants, among whom was the

grantor named in the deed, it was alleged that the grantor "agrees and stands ready to quitclaim said property as soon as the courthouse of said county is erected thereon, and as soon as said courthouse is erected said Josiah Bird [the grantor] will convey said property to said county without limitation, qualification, or said proviso." There was no contention that Bird did not have title to the property. *Held*:

(a) In view of this statement in the answer, Bird would be bound to execute a deed to the land upon construction of the courthouse, and the limitations expressed in the deed which he had previously executed would not require the court to enjoin the commissioners from constructing the courthouse on the site described in the deed. *Gaines v. Dyer*, 128 Ga. 585(3), 58 S. E. 175.

(b) The county having two sites upon either of which to construct a courthouse, it was within the discretion of the commissioners to select one which they would use, and to sell the other. *Dyer v. Martin*, 132 Ga. 445, 64 S. E. 475.

[Ed. Note.—For other cases, see Counties, Cent. Dig. \S 167, 169-173.]

4. DENIAL OF INJUNCTION.

There was no abuse of discretion in refusing the injunction.

Error from Superior Court, Candler County; R. N. Hardeman, Judge.

Action between G. R. Trapnell and others and Candler County and others. There was a judgment for the latter, and the former bring error. Affirmed.

Williams & Bradley, of Swainsboro, for plaintiffs in error. Hines & Jordan, of Atlanta, and W. H. Lanier, of Metter, for defendants in error.

ATKINSON, J. Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 513)

BROWN et al. v. HARDEN. (No. 272.)
(Supreme Court of Georgia. Feb. 16, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 340(3) — TRIAL \S 85 — RECEPTION OF EVIDENCE—SUFFICIENCY OF OBJECTIONS—ADMISSIBILITY—PROBATE RECORDS.

Certain children of Joseph H. Harden, deceased, instituted an action against the widow of the deceased, seeking to enjoin the sale of certain personal and real property described in an instrument alleged to be a deed executed by the decedent to the defendant for the use of herself and all of the children of the grantor, which deed it was alleged had been fraudulently withheld from record and destroyed by the widow. It was also sought to require the widow to deliver up possession of the instrument, if it had not been destroyed, in order that the same might be recorded and the interests of the plaintiffs protected; that, if the instrument had been destroyed, a copy thereof be established; and that the defendant be required to account for the value of all such parts of the property as she had disposed of. The defendant denied that the paper was valid either as a deed or a will, or that it was delivered, and set up that the deceased owned the property at the time of his death, and that it had been duly set apart to her in the court of ordinary as a year's support, and that she had been in possession thereof under order of court for more than seven

years before the institution of the suit. After the conclusion of evidence introduced by both sides, the judge directed a verdict for the defendant. The plaintiffs' motion for a new trial was overruled, and they excepted. *Held*:

It was not erroneous to admit in evidence certified copies of the record from the court of ordinary in the proceedings to set apart a year's support to the widow, in which the return of the appraisers, in addition to showing that the land referred to in such return was property of which the decedent died seized and possessed, described the land as "115 acres of lot number 305, 17th district Laurens county, * * * 202½ acres of lot number 321, 17th district Laurens county, * * * 100 acres of lot number 326, 17th district Laurens county," over an objection to the testimony as a whole on the ground that the description of the property was too indefinite; it appearing that some of the testimony objected to was admissible and some not. *Goddard v. Boyd*, 144 Ga. 18(2), 85 S. E. 1013; *Ginn v. Ginn*, 142 Ga. 420(1), 83 S. E. 118. The evidence with respect to land lots Nos. 321 and 326 was admissible, it being shown by the official map that the former consisted of 202½ acres, and that the latter was a fractional lot, containing 100 acres only.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1297; *Trial*, Cent. Dig. §§ 222-225.]

2. NEW TRIAL §128(2) — ASSIGNMENTS OF ERROR—SUFFICIENCY.

The grounds of the motion for a new trial complaining of the admission of certain other evidence failed to state what grounds of objection, if any, were interposed to the introduction of the evidence at the time it was admitted, and were too indefinite to present any question for decision.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 258.]

3. CONSTRUCTION OF INSTRUMENTS.

Properly construed, the copy of the paper which it was sought to establish in lieu of the original was a deed, and not a will.

4. TRIAL §143 — DIRECTION OF VERDICT — PROPRIETY.

Upon conflicting evidence on the material issues raised by the pleadings, it was erroneous to direct a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343.]

Evans, P. J., dissenting in part.

Error from Superior Court, Laurens County; J. L. Kent, Judge.

Action between N. H. Brown and others against R. A. Harden. There was a judgment for the latter and the former bring error. Reversed.

Larsen & Crockett, of Dublin, for plaintiffs in error. J. S. Adams, of Dublin, for defendant in error.

HILL, J. Judgment reversed. All the Justices concur.

EVANS, P. J. (specially concurring). I concur in the judgment of reversal, but I dissent from the ruling of the majority as to the sufficiency of the assignment of error as contained in the fifth ground of the amended motion for new trial, which was as follows:

"Because the court erred in permitting the defendant, Mrs. Roxie A. Harden, to introduce aliunde testimony supplying the description as

to property sued for and mentioned in said 12 months' support, and holding that aliunde evidence was sufficient to supply said description, and in permitting one C. C. Gay to testify as follows: 'We set aside the entire estate, real estate and personal property, to Mrs. Roxie A. Harden, as a year's support.'"

I think the assignment of error sufficient to raise the point as to the admissibility of the testimony of the witness Gay.

(146 Ga. 528)

BRANNAN v. McWILLIAMS. (No. 280.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. TRIAL §252(5)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The evidence did not warrant a finding that the transaction of the defendant in the purchase of the two tracts of land in controversy created a resulting or implied trust in favor of the plaintiff. At the time of the purchase, the defendant sustained no fiduciary relation to the plaintiff; there was no contractual relation of principal and agent between them; and the defendant did not have in his hands funds of the plaintiff. That being true, the court did not err in failing to give to the jury instructions based upon the theory that there was existing, at the time of the transaction referred to, a fiduciary relation between plaintiff and defendant.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 600.]

2. NEW TRIAL §24—MOTION—GROUNDS.

That a decree does not follow or is not authorized by the verdict upon which it is entered is not good ground of a motion for a new trial. *Potts v. City of Atlanta*, 140 Ga. 431, 79 S. E. 110.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 35.]

3. TRIAL §351(2)—ISSUES—SUBMISSION.

The questions submitted by the court to the jury substantially covered the issues involved, at least in a general way; and, if other more particular questions were desired, counsel should have suggested them to the court. *Greer v. Willis*, 67 Ga. 48.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 837.]

4. NEW TRIAL §128(5)—MOTIONS—GROUNDS.

A ground of a motion for a new trial complaining that the finding of the jury was contrary to specified portions of the charge amounts merely to a complaint that the verdict was contrary to law, and the general grounds of the motion cover that exception.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 261.]

Error from Superior Court, Henry County; W. E. H. Searcy, Jr., Judge.

Action by Gladys Brannan, by next friend, against S. O. McWilliams. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Smith & Russell, of McDonough, for plaintiff in error. E. J. Reagan, of McDonough, for defendant in error.

BECK, J. [1] 1. The plaintiff, a minor, suing by next friend, alleged that the defendant, her guardian, had purchased two tracts

nd belonging to the estate of her mother, undervalue, by representing to prospective bidders that he proposed to buy the land in order that her money might be well used; and she prayed that he be decreed to hold the land as her trustee. No demurrer to the petition was filed. On the trial was evidence tending to show that the defendant was the plaintiff's uncle, and, not before the sale of the land by the administrator of her deceased mother, he applied for letters of guardianship of the property of the plaintiff. On the day of the sale and prior to the sale, the defendant told certain prospective bidders that he intended to purchase the land for the plaintiff, and misled the plaintiff's grandfather as to the hour of sale. The defendant personally bid off one tract, and another-in-law bid off the other tract. There were no other bidders. The land was sold for more than the amount bid. The administrator of the plaintiff's mother made a deed to the defendant, receiving from him \$1,000 cash and his due bill for \$700, which sums satisfied the purchase money for both tracts of land. Several months after the deed to the defendant was appointed and qualified guardian. He settled his due bill to the administrator by receipting for a sum amounting as a payment by the administrator to his ward, which he has accounted for in his returns as guardian. The court affirmed the case for return of a special writ.

The plaintiff moved for a new trial, explained, among other grounds, that the court failed to instruct the jury that if the defendant assumed to purchase the land for the plaintiff's ward, and told her and her friends that he intended purchasing the land for her, the bidding at the sale was suppressed and the land would be impressed with a trust in favor of the plaintiff. The evidence warranted a finding that the transaction was a purchase of the land by the defendant in the purchase of the land, creating a resulting or implied trust in favor of the plaintiff. At the time of the sale, the defendant sustained no fiduciary relation to the plaintiff. He had no authority. There was no contractual relation between the plaintiff and the defendant. The defendant, who was plaintiff's guardian several months after the sale, settled his due bill for the purchase price of the land by giving the administrator his receipt as administrator, does not impress a trust on the land. An implied trust only results when the land is used at the time of the sale.

The defendant included this money in his returns and accounted for the interest thereon. The defendant sold the lands with his own funds; and, in the right the plaintiff may have as an administrator to vacate the sale to the plaintiff on the ground of fraud, she did not make the beneficial owner of the land,

under the most favorable view of the evidence.

[2-4] 2-4. The rulings made in headnotes 2, 3, and 4 require no elaboration. There was no merit in any of the other grounds of the motion.

Judgment affirmed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 519)

CHANCE v. SIMPKINS et al. (No. 274.)
(Supreme Court of Georgia. Feb. 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 9—REVIEW—OTHER REMEDY.

Where the issues of a case are submitted to the judge, without the intervention of a jury, for his decision upon all matters of fact and of law, and he renders a judgment therein in term time, the losing party may review the judgment either by a direct bill of exceptions or by a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 25-33.]

2. INSURANCE \S 587—LIFE POLICY—BENEFICIARY.

The naming of a beneficiary in an insurance policy is an integral part of the contract, and cannot be changed without a compliance with the stipulations in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. \S 1469.]

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Bill of interpleader by the Metropolitan Life Insurance Company against Paul T. Chance, administrator, and Ellen Simpkins and another. There was a judgment for the latter, and the representative defendant brings error. Reversed.

Wm. H. Fleming and Paul T. Chance, both of Augusta, for plaintiff in error. Geo. T. Jackson and C. Henry & R. S. Cohen, all of Augusta, for defendants in error.

GILBERT, J. The Metropolitan Life Insurance Company issued two policies of insurance on the life of Mary Collins. Frances Collins was named as beneficiary in one policy, and as beneficiary in the application for the other policy. The death of the beneficiary preceded that of the assured. There being conflicting claims for the payment of the amounts due under the policies, the insurance company, admitting liability, filed a petition to require all the claimants to interplead, and for direction from the court as to whom the money should be paid. Paul T. Chance, administrator of Mary Collins, and Ellen Simpkins, filed their interventions; the former claiming on the ground that the beneficiary left the assured as her only heir. Ellen Simpkins claimed on the ground that the assured had appointed her as the "new beneficiary." She alleged that Frances Collins was the original beneficiary under both policies, and obtained judgment based on

these allegations. As the insurance company stood ready to pay either claim, according to the direction of the court, the contest was between the two interveners. The whole case was submitted to the judge, without the intervention of a jury, for his decision upon all matters of fact and of law; he being "clothed with all of the privileges, rights, powers, and authority that is within the province of a jury and judge in determining civil cases at law," etc. The court rendered a judgment in favor of Ellen Simpkins. Chance, administrator, filed a motion for a new trial, which was overruled, and he excepted.

[1] 1. The defendant in error insists that the remedy of the plaintiff in error was by a direct bill of exceptions to the findings of the court, citing *Lester v. Johnson*, 64 Ga. 297, and *Moreland v. Stephens*, 64 Ga. 289. The difference between the cases cited and the instant case is that in the former the judgments of the court were rendered in vacation. In the case now under consideration, the judgment of the court was rendered in term time. When the judgment is rendered in term time, the losing party may review the ruling either by a direct bill of exceptions or by a motion for a new trial. *Crumbley v. Brook*, 135 Ga. 723, 70 S. E. 655.

[2] 2. It appears from the facts disclosed in the record that the intervener, Simpkins, together with one Vaughn, an employé of the insurance company, made an effort to induce the insured, during her last illness, to execute a paper of some character for the purpose of making Ellen Simpkins the beneficiary. This paper was sent to the home office of the insurance company in New York, and, without assent to such change, was returned to the Augusta office together with an inquiry as to the insurable interest of Ellen Simpkins. This paper was destroyed by Vaughn, and it is insisted by the administrator of Mary Collins that the procuring of the paper above mentioned was a fraud upon the part of Vaughn and Ellen Simpkins, and that the same was ineffectual and did not amount in law to a change of beneficiary. If in fact such a paper was ever signed by the assured, it had no legal effect. The terms of both policies were explicit, and there was no compliance whatever therewith. The naming of a beneficiary in an insurance policy is an integral part of the contract, and cannot be changed without a compliance with the stipulations in the policy. There is no suggestion that the insurance company in this case ever consented to any change in the terms of the contract made with the insured. *Thomas v. Metropolitan Life Ins. Co.*, 144 Ga. 367, 87 S. E. 303; *Royal Arcanum v. Riley*, 143 Ga. 75, 84 S. E. 428. The judgment of the court, therefore, finding in favor of Ellen Simpkins, was unauthorized.

Judgment reversed. All the Justices concur.

(146 Ga. 597)

GEORGIA CASUALTY CO. v. PALMER.

(No. 297.)

(Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

1. JUDGMENT \Rightarrow 212—RENDITION—VACATION. The relief granted upon prayers contained in the answer of the respondent was of such a character that it could not be granted except after final hearing, which could not be had in vacation except upon order passed in term time. *Booth v. State*, 131 Ga. 750, 63 S. E. 502.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 389.]

2. BANKS AND BANKING \Rightarrow 77(6)—RECEIVERS—INJUNCTION—TERMS—ERROR.

Under the facts it was error to grant the injunction, upon the terms stated in the order.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 176.]

Error from Superior Court, Crisp County; W. F. George, Judge.

Suit by the Georgia Casualty Company against B. H. Palmer, receiver of the Farmers' State Bank of Cordele, in which the defendant prayed for an injunction. Judgment for plaintiff on condition and restraining plaintiff from certain acts, and the plaintiff brings error. Reversed.

On April 11, 1914, the Farmers' State Bank of Cordele (hereinafter called the Cordele Bank) made and delivered its promissory note, due November 10, 1914, to the Mutual Alliance Trust Company of New York (hereinafter called the Trust Company), for \$5,000, together with certain collateral notes given to secure payment of the principal debt. On January 29, 1915, the Cordele Bank gave to the Macon National Bank (hereinafter called the Macon Bank), for a loan its promissory note for \$6,500, due 90 days after date. This was also secured by certain collateral notes described in the memorandum attached to the principal note. On March 1, 1915, the Cordele Bank, being indebted in the sum of \$21,500 to the Georgia Casualty Company (hereinafter called the Casualty Company), executed its written transfer to the Casualty Company of whatever equities the bank had in the collateral notes placed with the Trust Company and the Macon Bank to secure the indebtedness of these two creditors. No delivery was made, as the collateral was in the possession of the Trust Company and the Macon Bank. On March 17, 1915, the Cordele Bank was adjudged insolvent, and B. H. Palmer was appointed its receiver. He qualified, and has continued to act as its receiver since that time. Subsequently the Macon Bank paid off the debt owing to the Trust Company and took a transfer of the \$5,000 note given by the Cordele Bank to the Trust Company. The Casualty Company stipulated in a written agreement that it would not only repay to the Macon Bank the money thus advanced, provided the collections from

the collateral obtained did not reimburse the said bank by November 1, 1915, but also that it would pay the \$6,500 note which had been executed by the Cordele Bank to the Macon Bank, provided the collection of the said collateral had not at the above date satisfied this note also. After obtaining possession of all of the collateral hereinbefore referred to, the Macon Bank entered into a written agreement with B. H. Palmer, as receiver of the Cordele Bank, whereby he became agent of the bank for the purpose of collecting these collateral notes. This agreement was approved in writing by M. M. Eakes, as attorney for B. H. Palmer, by W. E. Small, as president of the Casualty Company, and by the judge of the superior court under whose order Palmer was appointed and was acting as receiver. In a receipt for the collateral Palmer, receiver of the Cordele Bank, stipulated that he had agreed to collect the collateral for the Macon Bank, "as its agent, and to remit the proceeds of all paper to said bank as collected, and to return to said bank all papers which are uncollected whenever the same may be called for by said bank; all of said paper, and the proceeds thereof when collected, being held in trust for said bank by the undersigned." Palmer succeeded in collecting but little of the collateral. Pursuant to the contract the Casualty Company had to pay the Macon Bank the balance due on the Trust Company note and the Macon Bank note. This payment was made on January 15, 1916, and amounted to \$9,385. About November 1, 1915, the Macon Bank requested Palmer to return to it all the collateral. He returned a part of it, which is now in the possession of the Casualty Company, but a part of it he did not return; he having placed it in the hands of an attorney for the purpose of suit. Subsequently the part which Palmer had not returned was delivered back to him by the attorney who held it, but Palmer refused to deliver it to the Casualty Company after demand. The Casualty Company filed its petition to the judge of the superior court of Crisp county, and prayed that the receiver be required by order of the court to deliver to petitioner the collateral in his hands, received by him under the circumstances set forth above. The receiver filed his answer, contesting the validity of the transfer of the collateral to the Casualty Company, and insisting that the contract of pledge between the Cordele Bank and the Trust Company and that between the Cordele Bank and the Macon Bank should be declared null and void, for the reason that it was not authorized by the governing board of directors of the Cordele Bank and was made without legal authority on the part of the officer making the same. He prayed that the contract of the Cordele Bank made and executed to the Casualty Company on March

1, 1915, purporting to create a second pledge of all the collateral securities previously placed, as above stated, with the Macon Bank and the Trust Company, be delivered up by the Casualty Company and be canceled as void, that the receiver be confirmed in possession of such collateral as he then held, and that the Casualty Company be directed and required to deliver to the receiver of the Cordele Bank the notes and choses in action which it then held, the same to be held by the receiver as a part of the assets of the Cordele Bank. The receiver also prayed for injunction restraining the Casualty Company from in any way interfering with the receiver in the handling of the collateral; also for injunction restraining the Casualty Company from proceeding with the enforcement of its claims. At the interlocutory hearing the court passed an order directing the receiver to pay or offer to pay to the Casualty Company the amount due for the original claim of the Trust Company and that of the Macon Bank, conditioned, however, that the Casualty Company deliver over to the receiver all the collateral previously hypothecated as described above. This order also restrained the Casualty Company from collecting any of the notes due on any such collateral and from selling or transferring any of the same, and from in any way interfering with the receiver of the Cordele Bank in his administration of the assets of the defunct bank, and restrained the Casualty Company, after the payment or offer to pay as directed in the order, from holding or keeping possession of any of the said described securities or funds arising therefrom. The Casualty Company excepted to this judgment, insisting that it was error to impose the conditions set forth in the order of the court, that it was not competent for the court to grant such an order at an interlocutory hearing, and that it was entitled to unconditional return of all of the collateral securities sought to be recovered.

P. F. Brock, of Macon, for plaintiff in error. Mather M. Eakes, of Cordele, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 594)

PORTER et ux. v. McALLEY. (No. 296.) (Supreme Court of Georgia. March 1, 1917.)

(Syllabus by the Court.)

1. HABEAS CORPUS \S 113(6, 10)—APPEAL—PREMATURE WRIT OF ERROR.

A mother filed in the court of ordinary a petition for the writ of habeas corpus to recover possession of her child, a girl 12 years of age. The respondents claimed a right to the child by virtue of a gift from her mother, set up other grounds for keeping the child, and prayed that their right be established by judg-

ment of the court, and that the custody be permanently awarded to them. At the hearing a judgment was rendered awarding the custody of the child to the respondents as prayed. Without excepting to this judgment, the plaintiff on the following day brought a similar action against the same respondents before the judge of the superior court. The respondents by answer set up the judgment of the ordinary in bar, and by separate answer the original defense before the ordinary. By consent both pleas were heard together. After introduction of evidence by both sides, the judge passed an order as follows: "Neta Vernice Skidmore being brought before the court upon a petition for habeas corpus granted at the instance of Mrs. Bessie McCalley, her mother, alleging that said child was in the custody of J. F. Porter and his wife, Clara Porter, and alleging that said child, being of the age of 12 years, was illegally detained by said J. F. Porter and wife, Clara Porter, to which writ said defendants have made response and answer, admitting that the said Neta Vernice Skidmore is the child of the said Bessie McCalley, and was committed to their custody by her, but alleging that the said Bessie M. McCalley is not a fit and proper person to have the care and custody and training of said child, after hearing the evidence offered by the respective parties and the argument of counsel, it is ordered, considered, and adjudged that the supervision and control of said child will be held by the court in abeyance; that for the present the custody of said child be remanded to J. F. Porter and wife, Clara Porter, to be kept by them until the last day of May, 1916, at which time the public schools will close, then delivered to the applicant, Bessie M. McCalley, to be retained by her until such time as the public schools in Cobb county shall be again opened, and the child shall then be returned to the said J. F. Porter and wife and kept by them until the 1st day of December, 1916, at which time the court will hear evidence as to the continued good conduct and evidences of reformation upon the part of the mother, and will then provide further order for the custody of said child; it being the purpose of the court that in the event satisfactory evidence is brought to the court to show that its mother had permanently reformed, leading a correct life, the custody and care of the child shall be fully restored to her. Neither party is allowed to remove the child beyond the limits of the state of Georgia, and any removal of the child beyond the limits of the state of Georgia, except by express leave of the court, shall be considered as an act of contempt of the court and render the parties liable to punishment therefor. Granted this the 29th day of March, 1916." The respondents excepted. A motion was made in the Supreme Court to dismiss the writ of error, on the ground that the judgment complained of was not final and the case was prematurely brought to this court.

Held, properly construed, the judgment overruled the plea in bar, and deprived the respondents, at least temporarily, of the possession of the child, and gave it to the opposite party. This being the effect of the judgment, and it having been rendered in a habeas corpus proceeding, the writ of error was not premature; and accordingly the motion to dismiss the bill of exceptions is denied. *Richards v. McHan*, 139 Ga. 37, 76 S. E. 382.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 108, 112.]

2. HABEAS CORPUS §117(1)—POSSESSION OF CHILD—JUDGMENT OF COURT OF ORDINARY—CONCLUSIVENESS.

The judgment of the court of ordinary, until reversed or set aside, was conclusive on the question of gift of the child to the respondents,

and upon their right as against the plaintiff to its possession, and as to their fitness to have possession of the child. There was no evidence to authorize the finding that, after the judgment by the ordinary, any change arose affecting the welfare of the child or the circumstances of the respondents, as illustrating their fitness to have possession of the child. *Kirkland v. Canty*, 122 Ga. 261, 50 S. E. 90; *Barlow v. Barlow*, 141 Ga. 535, 81 S. E. 433, 52 L. R. A. (N. S.) 683.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 119.]

3. HABEAS CORPUS §85(1)—CUSTODY OF INFANT—PRACTICE—AFFIDAVITS.

"Where the writ of habeas corpus is used as a means of determining the custody of an infant, the better practice is to hear evidence *viva voce*, or taken by deposition or interrogations, after notice and with opportunity for cross-examination. But this is not an absolute and inflexible rule, and the presiding judge is vested with discretion as to admitting affidavits under the circumstances of a particular case which render it necessary or proper." *Robertson v. Heath*, 132 Ga. 310(2), 64 S. E. 73. When affidavits are permitted to be used, they should be executed at least with the same formality as is required at interlocutory hearings for injunction. In such cases affidavits which do not, upon the face of the paper, describe the case in which they are intended to be used, are not admissible in evidence. *Horton v. Fulton*, 130 Ga. 466, 60 S. E. 1059.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 77, 78.]

4. CUSTODY OF CHILD—JUDGMENT.

The judge erred in rendering the judgment upon which error is assigned.

Hill, J., dissenting.

Error from Superior Court, Cobb County; *H. L. Patterson*, Judge.

Habeas corpus by *B. M. McCalley* against *J. F. Porter* and wife to recover possession of a child. From the order made, the defendants bring error. Reversed.

N. A. Morris and *Geo. D. Anderson*, both of Marietta, for plaintiffs in error. *J. L. Anderson*, of Atlanta, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except *FISH, C. J.*, absent, and *HILL, J.*, dissenting.

(146 Ga. 507)

KNOWLES et al. v. KNOWLES et al.

(No. 271.)

(Supreme Court of Georgia. Feb. 16, 1917.)

(Syllabus by the Court.)

PARTITION §107—PROCEEDINGS—CONFIRMATION.

Under the special facts of the case the court did not err in vacating the confirmation of the sale of the land, made by virtue of an order directing the property to be sold in the partition proceeding for the purpose of division between the common owners of the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 362-374.]

Error from Superior Court, Bartow County; *A. W. Fite*, Judge.

Petition by *Mrs. S. E. Knowles* and others against *W. A. Knowles* and another for partition. There was a judgment vacating a

judgment confirming a prior sale, and defendants bring error. Affirmed.

Mrs. S. E. Knowles, Sarah Louise Waller, E. D. Jones, Mary Madison Jones, Minnie Knowles Jones, and E. D. Jones, as trustee for the last two named parties, gave notice to W. A. Knowles and Mrs. Ella Cunningham that they would apply for a partition of certain realty owned by them as tenants in common. Agreeably to the notice the applicants filed a petition in the superior court alleging that applicants and W. A. Knowles and Mrs. Cunningham were joint owners and tenants in common of a tract of land lying in the county of Bartow, as follows:

"All of lot 127 and fractions of lots 128 and 129 lying northeast of the Bauxitely road, and 45 acres more or less of lot 142, and 12 acres more or less of lot 130, all situated in the Sixteenth district of said county of Bartow, containing 400 acres more or less, formerly known as the Hanson place, now known as the Joshua Knowles place."

It was alleged that the land belonged to Joshua Knowles at the time of his death, March 27, 1885, and that it was inherited by his widow, S. E. Knowles (who elected to take a child's part), and his three children, W. A. Knowles, Mrs. Ella Cunningham, and Mrs. Minnie Knowles Jones. The last named in March, 1902, conveyed to a trustee for her four children, Sarah Louise Waller, E. D. Jones, Mary Madison Jones, and Minnie Knowles Jones, her undivided one-fourth interest in the property. On June 17, 1912, commissioners were appointed by the court to make a partition of the premises. On July 30, 1912, the commissioners filed a report that the property could not be equitably divided in kind, and recommended a sale thereof. On January 16, 1913, the court passed an order directing the land to be sold for the purpose of division, and appointed three commissioners to conduct the sale. On August 27, 1913, the commissioners appointed to conduct the sale of the land made a report to the court that they had sold the land after having duly advertised it to Mrs. A. Waller (who was one of the applicants under the name of Sarah Louise Waller) for the sum of \$2,700; and on September 8, 1913, the court passed an order confirming the same to Mrs. Waller, ordering the commissioners to make to her a deed to the land upon payment of the purchase price. On November 3d the commissioners made a report to the court that Mrs. Waller refused to comply with her bid, and prayed for further directions; and on November 6, 1913, the court passed an order directing the commissioners to sell the land at the risk of Mrs. Waller. Thereafter, on July 31, 1915, the commissioners submitted a further report reciting their acts and doings as follows: They offered the property for sale on the first Tuesday in March, 1913, and Thompson Hiles was the highest and best bidder for the sum of \$3,305. He refused to pay the amount of the bid, because the description of the property

was incorrect and incomplete, and the parties at interest agreed that the property should be resold by correct description, and that the bidder should not be held liable on his bid. Thereafter the commissioners were furnished by the attorney of W. A. Knowles with what purported to be a correct description of the property, which was attached to their report, and in accordance with the direction of the parties the land was readvertised for sale for the first Tuesday in August, 1913, at which sale Mrs. A. Waller was the highest and best bidder at and for the sum of \$2,700, and that the sale was confirmed by order of court on September 8, 1913. Mrs. Waller refused to pay the purchase price, and on November 6, 1913, the court ordered a resale of the property at the risk of Mrs. Waller. The commissioners thereupon readvertised the property for sale on the first Tuesday in December, 1913, and it was sold at the risk of Mrs. Waller and knocked off to W. A. Knowles for the sum of \$500. The commissioners demanded of Knowles the purchase price, and he refused to pay it. The commissioners set out the expenses to which they had been put, and prayed such order be passed as to the court might seem proper. The court granted a rule nisi upon this report, fixing a hearing for September 11, 1915, which was continued to September 18, 1915. On that day Mrs. Cunningham filed objections to the confirmation of the last sale, on the ground that the price bid for the property was grossly inadequate. On the same day the applicants for partition filed an equitable petition in aid of their application for partition, alleging: Commissioners were appointed on June 17, 1912, to partition the land as described in their application and as containing 400 acres. By virtue of certain orders the land was advertised for sale on the first Tuesday in March, under an advertisement which excepted 50 acres of land previously sold by Joshua Knowles to Thomas Kitchens. At the first sale the land was knocked off to W. A. Knowles, either for himself or for some responsible principal, for \$3,305. Knowles had been in possession of the property for many years prior to the sale, was familiar with it, and furnished the descriptive boundaries, with which he was more fully acquainted than any one else concerned in the suit. Knowles and his principal failed to comply with his bid, and petitioners never consented to their release from it. Thereafter, on the 16th day of January, 1913, the commissioners attempted to make a sale of the property for the purpose of division among the heirs at law of Joshua Knowles, and advertised the property, not as described in the application, but as described in Exhibit A attached to the equitable petition, which description was different from that in the original application for partition; and a sale was attempted thereunder on the first Tuesday in August, 1913. The commissioners were without authority

from the court to sell the property as described in Exhibit A, and that the court was without any advice or suggestion relative to the advisability of selling the land as so described. At the sale occurring on August 27, 1913, counsel for Sarah Louise Waller bid the sum of \$2,700. Petitioners were not personally present at the sale; they were not as familiar as W. A. Knowles with the property; and petitioner Sarah Louise Waller understood that in the sale and purchase by her she would get title to nearly 400 acres of land, and would secure title to all the property of Joshua Knowles in Bartow county, and that W. A. Knowles or his principal was bound by his former bid of \$3,305. Upon finding that the property had not been so surveyed as to give accurately the number of acres, and that the description would necessitate a deed consistent therewith which described the property at less than 300 acres, and upon finding that W. A. Knowles had refused to make up the difference between the amount of his bid, and upon finding that no orders had been taken therein giving authority to the commissioners to sell the property as described in Exhibit A, Mrs. Waller failed to make payment of the amount bid for the property by her attorney. The sale on the first Tuesday in August, 1913, was void for the reasons above stated. On November 6, 1913, an order appears to have been taken without the actual knowledge or consent of petitioners as to its exact terms and conditions, and the commissioners advertised the property as described in Exhibit A for sale on the first Tuesday in December, 1913. On that day, and prior to any bid being made for the property offered by the commissioners, it was definitely announced that Absalom Waller held a mortgage for \$500 principal upon an undivided half of the property, executed by S. A. Knowles and Minnie Knowles Jones on January 7, 1902, and that the note secured by the mortgage was indorsed by W. A. Knowles, and was assigned in 1903 to Absalom Waller. At that sale Knowles was the highest bidder at \$500, but he has failed to pay the same or any part thereof, and has failed to make any payment whatever on the mortgage. This mortgage has never been foreclosed, and is a first and superior lien on an undivided half interest in the land therein described. W. A. Knowles for many years has been using the property of the estate of Joshua Knowles for the purpose of cutting and selling timber and pasturing his cattle and sheep, and has never made an accounting for the rents arising therefrom; and in equity he should be made to account for the rents, issues, and profits. It was prayed that Knowles and his principal be required to comply with their bid of \$3,305, and accept the deed from the commissioners to the exact property described in the original application, subject to the mortgage held by Absalom Waller; that the sale on the first Tues-

day in August, 1913, to Mrs. Sarah Louise Waller should be declared null and void; that if for any reason the sale to Knowles in March, 1913, and the sale to Mrs. Waller in August, 1913, be declared void, then Knowles be required to comply with his bid at the sale on the first Tuesday in December, 1913, and take the property for the sum of \$500, incumbered by the mortgage; that, should all of the sales be declared void, Absalom Waller be made a party and be required to bring his mortgage into court, and the sale be made free of the lien of the mortgage, and the proceeds be distributed as justice and equity to all the parties should require; that W. A. Knowles be required to come to an accounting for the rents, issues, and profits received from the land; that, if necessary, an order be taken requiring Absalom Waller to set up in this litigation his rights under the mortgage, showing the exact amount due thereon, and for general relief. W. A. Knowles answered the petition; and on the hearing the court passed the following order:

"The above case coming on to be heard on petition of commissioners, petition herein of plaintiffs, and the answer of W. A. Knowles and of Mrs. Cunningham, it is ordered, decreed, and adjudged that all former sales of said property referred to in the petition herein, and the orders confirming or ratifying same, are hereby vacated and declared void and of no effect, and not binding on any of the bidders herein; that the property described in Exhibit A of the petition of S. E. Knowles and others, filed herein on September 18, 1915, be sold by the commissioners herein, after advertising the same through November for sale for cash on the first Tuesday in December, 1915, and that the same be sold as follows: If Absalom Waller shall consent and does foreclose his mortgage herein before the first advertising week in November, then the commissioners shall advertise a one undivided half interest for sale free from any lien or incumbrance, and also advertise the other undivided one-half interest, satisfy aforesaid foreclosed mortgage, and make said sales separately. If Absalom Waller does not foreclose his mortgage herein, then said commissioners shall advertise a one undivided half interest for sale free from any lien or incumbrance, and also advertise the other undivided one-half interest subject to the mortgage held by Absalom Waller, and make said sale separately."

Exception to this judgment and decree was taken by W. A. Knowles and Mrs. Cunningham, on the ground that the court was without power to vacate the judgment confirming the sale to Mrs. Waller.

Dean & Dean, L. H. Covington, and Graham Wright, all of Rome, and Neel & Neel, of Cartersville, for plaintiffs in error. C. C. Pittman and J. T. Norris, both of Cartersville, for defendants in error.

EVANS, P. J. (after stating the facts as above). The exception to the judgment under review is limited to so much thereof as vacates the confirmation of the sale of the land to Mrs. Waller, and our ruling will be confined to that question. The case began as a statutory proceeding to partition land be-

tween common owners, by virtue of Civil Code 1910, § 5358 et seq. A sale of the land was authorized by the court, and the property offered for sale by the commissioners was bid off by the attorney of one of the applicants. The statute (section 5366) directs that commissioners conducting the sale shall return their proceeding to the same term of the court ordering such sale, if then in session; otherwise to the next term. The statute provides for a confirmation of the sale before it becomes binding and effective. *Oswald v. Johnson*, 140 Ga. 62, 78 S. E. 333. An order was taken confirming this sale, but in the equitable intervention filed in the case its vacation is prayed on the grounds that the parties had no actual notice of any application for the confirmation; that the land as actually sold was less in quantity, and did not comport in description with the land sought to be partitioned as described in the order; that a prior sale had been ignored by the commissioners; that the commissioners and interested parties had waited for two years before offering the property for resale at the risk of this purchaser; and that it appeared at the last effort to sell the land that one half of it was incumbered, etc. In view of these considerations, we do not think that the court abused his discretion in setting aside the order confirming the sale. The case had assumed such complications that it is decidedly to the best interests of all parties concerned that a future sale for the division of the property should not be involved with the intricacies in which the case seems to have become entangled.

Judgment affirmed. All the Justices concur.

(146 Ga. 615)

SMITH et al. v. DALTON et al. (No. 307.)
(Supreme Court of Georgia. March 13, 1917.)

(Syllabus by the Court.)

COURTS — 480(1) — JURISDICTION — INJUNCTION — RECEIVER.

James M. Smith, a resident of Oglethorpe county, died intestate, without leaving a widow or parent or lineal descendant. He was engaged actively in business, principally in farming, and left an estate consisting of real and personal property valued in the aggregate at more than \$1,000,000, none of which was located in Habersham county. There developed several sets of adverse claimants to the estate, each set claiming to be collateral heirs to the intestate, the claims being based on different contentions as to the parentage of the deceased. Certain persons alleging themselves to be creditors were, upon application, appointed by the ordinary of Oglethorpe county temporary administrators. Some of the same persons, alleging themselves to have been selected by one of the classes of claimants to heirship, applied to the ordinary for permanent letters of administration. Representatives of two of the other classes of claimants to heirship filed caveats to such appointment. Representatives to a fourth class instituted an equitable action in the superior court of Habersham county, alleging, among other things, all that is stated above; fraud on the part of the temporary ad-

ministrators in obtaining their appointment; mismanagement of the estate by them; disqualification of the ordinary; impracticability, on account of the character and amount of the estate, of administering it through the instrumentality of administrators in the court of ordinary; avoidance of a multiplicity of actions, and advantage to all persons concerned to have the several claims to the estate settled in one action, and the estate administered in equity. It was prayed that the temporary administrators be enjoined from interfering with the property of the estate; that the applicants for permanent letters of administration and the class of claimants who nominated them, the caveators to such appointment, and the ordinary be enjoined from further proceeding in the matter of appointment of permanent administrators; that receivers be appointed to take charge of the estate and administer and distribute it in accordance with orders and the decree of the court; and that all of the several classes of claimants be made parties. On the contention that the action was in the nature of equitable partition, and in order to get jurisdiction in Habersham county, it was alleged that some of the plaintiffs and certain of the defendants who filed caveats to the appointment of permanent administrators in the court of ordinary were residents of Habersham county. There were no other facts relied on to draw the venue to that county. By demurrer and plea, objection was duly made, among other things, to the want of jurisdiction of the court. On the interlocutory hearing, the judge granted injunction and appointed receivers as prayed, and exception was taken to this judgment. *Held*:

The jurisdiction to administer on the estate was in Oglethorpe county, where the intestate resided at the time of his death. The fact that certain of the plaintiffs alleged to be heirs of the intestate, and some of the defendants who objected to the appointment of administrators in the court of ordinary, resided in Habersham county, was insufficient to draw to that county jurisdiction to enjoin the proceedings in the court of ordinary of Oglethorpe county, and to administer the estate in equity.

(a) As the court was without jurisdiction, it was erroneous to grant an injunction and appoint a receiver.

(b) Under the circumstances, it is unnecessary to deal with other questions involved in this case.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 1270, 1271, 1274-1278.]

Error from Superior Court, Habersham County; J. B. Jones, Judge.

Action between L. K. Smith and others and J. T. Dalton and others. There was a judgment for the latter, and the former bring error. Reversed.

Hamilton McWhorter, Horace M. Holden, and Cobb, Erwin & Rucker, all of Athens, Sibley & McWhorter and Paul Brown, all of Lexington, E. F. Nall, and Tye, Peeples & Tye, of Atlanta, for plaintiffs in error. W. A. Charters and H. H. Perry, both of Gainesville, W. W. Stark, E. C. Stark, W. D. Martin, G. P. Martin, and W. A. Stevenson, all of Commerce, Davis & Davis, of Toccoa, and J. S. James & J. R. Bedgood, of Atlanta, for defendants in error.

ATKINSON, J. Judgment reversed. All the Justices concur, except FISH, C. J., absent on account of sickness.

(146 Ga. 525)

HOSHOR et al. v. FITZPATRICK et al.

FITZPATRICK et al. v. HOSHOR et al.

(No. 277.)

(Supreme Court of Georgia. Feb. 24, 1917.)

*(Syllabus by the Court.)*1. PLEADING \Leftrightarrow 311—ANSWER—CONSTRUCTION.

The allegations of the defendants' answer on the subject of accord and satisfaction are to be construed, upon demurrer, in connection with the recitals of certain exhibits attached to and made a part of the answer. When the whole answer thus constituted is considered, it is insufficient to set up accord and satisfaction of any of the matters in dispute.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 54, 55, 118, 945.]

2. REFERENCE \Leftrightarrow 100(2)—OBJECTION TO AUDITOR'S REPORT.

Objection to the form of the auditor's report should be taken advantage of by motion to recommit, and not by exceptions of law to the report. *Southern Pine Co. v. Dickey*, 136 Ga. 662, 71 S. E. 1110.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 158.]

3. RULINGS ON EVIDENCE.

The rulings on evidence to which exceptions were taken by plaintiffs and defendants present no novel questions, and show no error.

4. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 501—ACCOUNTING—COMMISSIONS—COMPENSATION.

In the Civil Code 1910, §§ 4062, 3392, provision is made for an administrator or executor to charge "a commission of two and one-half per cent. on all sums of money received" on account of the estate, except money loaned and repaid to him; and a like commission on all sums paid out by him, either to debts, legacies, or distributees. By section 4065 it is provided that no commission shall be paid to any administrator or executor for delivery of any property in kind; but the ordinary may allow "reasonable compensation for such service, not exceeding 3 per cent. on the appraised value." *Held*, that in an equitable suit by legatees against executors, for an accounting, it is competent for the executors to be decreed an allowance for commissions to which they would be entitled under the Code section first mentioned, and also to reasonable compensation to which they might be entitled under the section last mentioned, notwithstanding no application has been allowed therefor in the court of ordinary.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2072, 2140, 2142-2148.]

5. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 510(9)—EXTRA COMPENSATION—EVIDENCE—PRESUMPTION AND BURDEN OF PROOF.

It is provided in the Civil Code 1910, § 4067, that "extra compensation may be allowed by the ordinary. But in no case is the allowance of extra compensation by the ordinary conclusive upon the parties in interest." *Held* that, where it appears that the ordinary has formally allowed the executors extra compensation under this section of the Code, such allowance being within the jurisdiction of the ordinary, it will be presumed that he had before him sufficient evidence upon which to base his order; and where, in an equitable proceeding such as is mentioned in the preceding note, an order of this character is attacked as being unauthorized by the evidence, the burden is up-

on the party attacking the order to show that the allowance was improperly made.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2250.]

6. FINDINGS OF AUDITOR—APPROVAL.

Applying the principles announced in the preceding notes, there was no error in approving the findings of the auditor on exceptions both of law and fact relating to the allowance of commissions, reasonable expenses, and extra compensation.

7. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 480, 494—SUIT FOR ACCOUNTING—CHARGES AGAINST EXECUTOR.

One of the executors was a partner of the testator at the time of his death, and among the properties of the partnership were certain storehouses over which was a hotel. In the exercise of his discretion, the surviving partner, pending the winding up of the partnership affairs, conducted the hotel at a loss. There was evidence which authorized a finding that the hotel business was so conducted with the knowledge and assent of the legatees who were the plaintiffs. The suit for an accounting had reference to the partnership property as well as the general property of the testator. *Held*, that there was no error, under the circumstances, in refusing to charge the executor with the loss accrued in running the hotel, or in allowing the surviving partner a reasonable charge for services in conducting the hotel.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2084-2087.]

8. ASSIGNMENTS OF ERROR.

None of the assignments of error in either bill of exceptions shows cause for reversal.

Error from Superior Court, Wilkes County; B. F. Walker, Judge.

Suit by Charlotte Hoshor and others against Lena Fitzpatrick, executrix, and others, for an accounting. Judgment allowing the executrix certain commissions and compensation, etc., and both parties take exceptions. Judgment affirmed on each bill of exceptions.

Wm. Wynne, of Washington, Ga., and Saml. H. Sibley, of Union Point, for plaintiffs in error. Callaway & Howard, of Augusta, and W. A. Slaton, of Washington, Ga., for defendants in error.

PER CURIAM. Judgment affirmed on each bill of exceptions. All the Justices concur, except FISH, C. J., absent, and HILL, J., disqualified.

(146 Ga. 525)

CRAWFORD & ASHBY v. CARTER.

(No. 278.)

(Supreme Court of Georgia. Feb. 24, 1917.)

*(Syllabus by the Court.)*1. EJECTMENT \Leftrightarrow 65—ACTIONS—PETITION.

"An action of complaint for land cannot be dismissed on demurrer to the abstract of title annexed to the declaration. The object of the abstract is not to show title in the plaintiff on the face of the pleadings, but only to give notice of what will be relied upon at the trial." *Yonn v. Pittman*, 82 Ga. 637, 9 S. E. 667.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 165-174.]

2. PLEADING \S 307 — EXHIBITS — ANNEXATION.

In a suit for land in the statutory form the petitioners alleged the following: Defendant is in possession of a specified tract of land situated in the county; "petitioners claim title to said land, being seised thereof in fee;" "defendant refuses to deliver said land to petitioners, though requested to do so"—wherefore they pray process, etc. Attached to the petition is an abstract of title originating in 1887, and by mesne conveyances extending to the plaintiffs in 1905. The defendant demurred to the petition, on the ground that it set forth no cause of action, and that "the abstract of title attached to said petition fails to show legal title in plaintiffs in said case in such way as to authorize the plaintiffs to a recovery of the lot of land involved, as against this defendant or any other person." Held, that under the ruling quoted in the preceding headnote, the court erred in sustaining the demurrer and dismissing the petition.

(a) The abstract of title was not made a part of the petition by being incorporated therein or attached thereto as an exhibit and made a part thereof, and hence this case does not fall within that class of cases covered by the rulings in the cases of *Dugas v. Hammond*, 130 Ga. 87, 60 S. E. 268(3), and *Chidsey v. Brookes*, 130 Ga. 218, 60 S. E. 529.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 930-934.]

3. APPEAL AND ERROR \S 874(4) — REVIEW — QUESTIONS PRESENTED.

The assignment of error on the allowance of the court, over objection of the plaintiffs, of an amendment to the defendant's answer, cannot be considered, since the action of the court in sustaining the demurrer to the petition left no pleadings in the case; the answer being a pleading of the defendant subject to his demurrer testing the sufficiency of plaintiff's petition. See *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932(3).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3535, 3537-3540.]

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between Crawford & Ashby and S. M. Carter. There was a judgment for the latter, and the former brings error. Reversed.

Starr & Paschall, of Calhoun, for plaintiff in error. W. O. Martin, of Dalton, and J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

PER CURIAM. Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(146 Ga. 530)

NATIONAL BAUXITE CO. v. REPUBLIC MIN. & MFG. CO. et al. REPUBLIC MIN. & MFG. CO. v. NATIONAL BAUXITE CO. BRIESNICK v. SAME. (No. 281.)

(Supreme Court of Georgia. Feb. 24, 1917.)

(Syllabus by the Court.)

1. PARTITION \S 5—PAROL PARTITION—SUFFICIENCY OF EVIDENCE.

There was no error in overruling the exceptions to the auditor's finding as to partition,

under parol agreement, of certain lands in controversy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 13-17.]

2. REFERENCE \S 100(4)—EXCEPTIONS TO AUDITOR'S REPORT—EVIDENCE.

"An exception to an auditor's report, complaining of the admission of evidence, should set forth the evidence objected to."

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 160, 161.]

3. APPEAL AND ERROR \S 1050(2)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

If certain evidence which was admitted over objection was immaterial, as insisted, nevertheless it was not harmful to the complaining party and was not cause for the grant of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154.]

Error from Superior Court, Wilkinson County; J. B. Park, Judge.

Suit by the National Bauxite Company against the Republic Mining & Manufacturing Company and others. From a judgment sustaining certain of plaintiff's exceptions to an auditor's findings of fact and law and overruling other exceptions and overruling the defendants' exceptions, plaintiff excepts and brings error, and defendants file a cross-bill of exceptions and bring cross-error. Affirmed upon plaintiff's bill of exceptions, and defendants' cross-bills of exceptions dismissed.

The National Bauxite Company brought suit to recover a one-fourth undivided interest in a certain tract of land, and mesne profits, against the Republic Mining & Manufacturing Company and R. E. Briesnick. The case involved also an accounting between the parties, and was referred, under appropriate orders, to an auditor. The auditor, after a hearing, made and filed his report containing various findings upon the questions of law and fact, and a general finding that the plaintiff was not entitled to recover. The auditor found in regard to the title that there had been a partition of lands, with the consent of the life tenant in possession of them, between the four children of the life tenant; that each of the children took and held exclusively the parts awarded to them in severalty; and that the defendants acquired title to the land in controversy by purchase and conveyance; but, if they had not so acquired title, that they had acquired a good prescriptive title by 20 years' adverse possession of the lands. The plaintiff and the defendants filed exceptions to the auditor's findings of law and fact. The court sustained certain of the plaintiff's exceptions and overruled others, and overruled the exceptions filed by the defendants. The plaintiff by bill of exceptions brought the case here for review. Each of the defendants filed a cross-bill of exceptions to bring under review the rulings adverse to them. The other material facts appear in the opinion of the court.

Maddox & Doyal, of Rome, and John S. Davis, of Irwinton, for plaintiff in error. John P. Ross, Dupont Guerry, and L. D. Moore, all of Macon, Courtland Symmes, of Brunswick, and Geo. H. Carswell, of Irwinton, for defendants in error.

BECK, J. (after stating the facts as above). In 1872, James E. Jackson executed a deed to his sisters, Harriet B. Jackson and Faithy C. Hunnicutt, conveying to them land lot 164 in the Fourth land district of Wilkinson county. The conveyance to Faithy C. Hunnicutt created a life estate in her, and at her death to her four children, Harriet, Walter, Rufus (J. R.), and Dora. The land lot was divided between Harriet B. Jackson and Faithy C. Hunnicutt, and under the division Harriet B. Jackson took possession of the southern half of the lot, and Faithy C. Hunnicutt and her children as remaindermen took as their part the northern half; Faithy Hunnicutt having a life estate therein, with remainder over to children. Both the plaintiff and the defendants trace their title to James E. Jackson as common grantor. The statement as to division of lot 164 is taken from a finding of the auditor not excepted to.

[1] The auditor also found that there had been a parol partition, between the children of Faithy C. Hunnicutt, of the northern half of lot 164, which Faithy C. Hunnicutt took in the division between herself and Harriet B. Jackson, which partition was made in pursuance of a parol agreement between Faithy C. Hunnicutt and her children. To the finding of the auditor that the partition and division of the land was valid and vested the four children of Faithy C. Hunnicutt with title to the separate parcels of land into which the northern half of lot 164 was divided, the plaintiff excepted and says that it was without evidence to authorize it. This exception was overruled by the trial judge, and we think it was properly overruled. We agree with the finding of the auditor that:

"While there was some evidence that at certain times this possession [of the children of the life tenant] was permissive on the part of the life tenant, the preponderance of evidence shows that the division and possession was by direction and consent of the life tenant for the purpose of placing the title of the property in her several children, and the division was ratified by Dora Daniel, a minor, at the time of the division, after she arrived at majority."

And if J. R. Hunnicutt, one of the children, was not of age at the time of the division and partition of the land in controversy, the uncontroverted evidence shows that he ratified, after becoming of age, the division that was made under the agreement and by the consent of the life tenant.

[2] Material evidence to establish the fact of the division and partition of the northern half of lot 164, as set forth above, was given by J. R. Hunnicutt, who was a witness at the hearing before the auditor. Relatively to the

testimony of J. R. Hunnicutt, the auditor noted the following objection to evidence offered by defendant:

"Objection to and motion to rule out every question and answer of witness with reference to any agreement to partition this land, on the ground that he has sold a one-fourth interest in the property sued for to the plaintiffs, and is estopped from denying his own title, and also every question and answer made by the witness in reference to any statement of Faithy Hunnicutt, on the ground that she is dead, and he is incompetent to testify and is estopped from testifying to anything in derogation of his own title."

To this ruling the plaintiff excepted as follows:

"Plaintiff excepts to the ruling of the auditor as shown on page 7 of his report, admitting the testimony of J. R. Hunnicutt over the objection of plaintiff's counsel as therein set forth, and for grounds of exception says: (a) That the said J. R. Hunnicutt conveyed to the plaintiff, National Bauxite Company, the interest in said property sued for, same being an undivided one-fourth interest therein, and that he is estopped from denying his own title to the property and is estopped from testifying to any fact showing, or tending to show, that he did not own the property at the time he made said deed. (b) That he is estopped from testifying to any fact or any action whatever in derogation of his own title to the property conveyed by him by warranty deed, to the plaintiff in this case. (c) For the evidence pertinent to this exception, see the auditor's brief of evidence, page 1, showing the deed from J. R. Hunnicutt and wife to National Bauxite Company, dated April 27, 1900, conveying a one-fourth undivided interest in the 75 acres of land described in the petition; and the evidence of J. R. Hunnicutt, pages 39, 40, 41, and 42 of the auditor's brief of evidence."

This exception to the ruling of the auditor upon the admission of evidence is incomplete and insufficient. The exception does not contain literally or in substance the evidence objected to, and it is not sufficient to refer this court to other parts of the record to ascertain what the evidence was.

"An exception to an auditor's report, complaining of the admission of evidence, should set forth the evidence objected to." *Griffin v. Collins*, 125 Ga. 159, 53 S. E. 1004.

"Assignments of error based on the ground that an auditor improperly overruled objections urged against the admission of evidence cannot be considered unless the evidence objected to be set forth, either literally or in substance, in the exceptions filed in his report." *Trentham v. Bluthenthal & Bickart*, 118 Ga. 530, 45 S. E. 421(2).

This is also ruled in the case of *Rusk v. Hill*, 117 Ga. 722, 45 S. E. 42.

This rule applies, of course, where the admission of evidence over objection is excepted to in motions for new trial, and scores of cases could be cited laying down the rule as applicable to grounds of a motion for a new trial. There is no reason why the rule should not prevail with all its strictness in cases of exceptions to the admission of evidence by an auditor. In fact, there is reason for applying the rule more stringently there than in ordinary cases, because the record of cases referred to auditors are generally voluminous, and it would place an intolerable burden upon this court to compel the court to turn from

one part of the record to another in order to render an exception complete.

What we have said in reference to the exception to the admission of the testimony of J. R. Hunnicutt applies also to the exceptions to the admission of the testimony of several other witnesses, and to the admission of a certain affidavit in evidence over objection. There was no attempt at all to set forth in the exceptions, either literally or in substance, the evidence alleged to be objectionable.

[3] If the deeds conveying certain portions of the southern half of lot 164 were immaterial, as insisted by the plaintiff in error, because they do not embrace any of the lands in controversy, still their admission in evidence did not hurt the plaintiff in error.

The exceptions of the plaintiff in error not specifically referred to are without merit.

It follows from what is said above that the judgment of the court below is affirmed upon the main bill of exceptions, and the cross-bills of exceptions filed by the defendants will be dismissed. All the Justices concur, except FISH, O. J., absent.

(19 Ga. App. 447)

BROWN v. CITY OF ATLANTA. (No. 7935.)

(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

CONVICTION—EVIDENCE.

The evidence did not authorize the conviction of the defendant in the recorder's court. Accordingly, the superior court judge erred in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Pearl Brown was convicted, and she brings error. Reversed.

Morris Macks, Albert Kemper, and Saml. A. Massell, all of Atlanta, for plaintiff in error. J. L. Mayson and S. D. Hewlett, both of Atlanta, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 446)

DENNIS v. STATE. (No. 7923.)

(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 564(2)—TRIAL—VENUE—PROOF.

The Constitution of the state requires that all criminal cases shall be tried in the county in which the crime is committed, and the venue must be proved beyond a reasonable doubt. *Murphy v. State*, 121 Ga. 143, 48 S. E. 909; *Cooper v. State*, 106 Ga. 119, 32 S. E. 23; *Smith v. State*, 2 Ga. App. 413, 58 S. E. 549.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1278.]

2. NEW TRIAL FOR FAILURE TO PROVE VENUE.

In this case the question as to failure to prove venue is specifically raised in the motion for a new trial, as provided by the act of 1911 (Acts 1911, p. 150), and is argued in the brief of counsel for the plaintiff in error; and, there being in the brief of evidence no proof of venue, this court must hold that the trial judge erred in overruling the motion for a new trial. It is unnecessary to pass upon the other assignments of error. *Moye v. State*, 65 Ga. 754; *Wade v. State*, 11 Ga. App. 411, 75 S. E. 494.

Error from Superior Court, Morgan County; J. B. Park, Judge.

Albert Dennis was convicted, and he brings error. Reversed.

A. G. Foster and E. R. Lambert, both of Madison, for plaintiff in error. Doyle Campbell, of Monticello, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 473)

JOHNSON v. HOLT. (No. 7944.)

(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE § 126—JUDGMENT—AMENDMENT.

A justice of the peace has the power to amend a judgment rendered by himself, where the amendment is in a mere matter of form; and this may be done at a term of court subsequent to the trial term. *N., O. & St. L. Ry. v. Brown*, 3 Ga. App. 561, 60 S. E. 319(3), 565; *Elliott v. Wilks*, 16 Ga. App. 466, 35 S. E. 679; *Bell v. Bowdoin*, 109 Ga. 209, 34 S. E. 339; *Rucker v. Williams*, 129 Ga. 828, 60 S. E. 156.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 400, 464.]

2. JUDGMENT OF JUSTICE OF THE PEACE—AMENDMENT.

The amendment to the judgment by the justice of the peace in the instant case was as to a matter of form, and the court did not err in overruling the certiorari.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action between W. D. Johnson and W. H. Holt. Judgment for the latter, and the former brings error. Affirmed.

J. W. Culpepper, of Fayetteville, for plaintiff in error. W. B. Hollingsworth, of Fayetteville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 481)

ROWLAND v. DEVON MFG. CO. (No. 7675.)

(Court of Appeals of Georgia, Division No. 1.
March 16, 1917.)

(Syllabus by the Court.)

PETITION FOR CERTIORARI.

The jury was authorized to find that the contract sued upon was not based upon a gambling, immoral, or illegal consideration, and the

judge of the superior court did not err in overruling the petition for certiorari.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action between J. W. Rowland and the Devon Manufacturing Company. Judgment for the latter, and the former brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. Sharp & Sharp, of Rome, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 494)

ROGERS et al. v. SWORD. (No. 7925.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §—592(2) — RECORD—BRIEF OF EVIDENCE—AFFIRMANCE.

It does not appear, either from the transcript of the record or by a recital in the bill of exceptions, that the brief of the evidence has ever been approved by the trial judge, and, there being no suggestion that there is such an approved brief on file in the office of the clerk of the trial court, and that which purports to be a brief of the evidence in the case, sent up with the record, not being approved or authenticated in any way by the trial judge, and there being no assignment of error which can be determined without a consideration of the evidence in the case, no reversal of the judgment of the court below is legally possible, and it must, accordingly, be affirmed. Morrison v. Dodge, 94 Ga. 730, 20 S. E. 422; Mayor and Council of Waycross v. Neal, 94 Ga. 731, 19 S. E. 758; Ingram v. Clarke, 96 Ga. 777, 22 S. E. 334; Kirby v. Lippincott, 98 Ga. 426, 25 S. E. 267; Moss v. Birch, 102 Ga. 556, 28 S. E. 623; Sayer v. Brown, 119 Ga. 539, 46 S. E. 649; Douglas County v. Sayer, 119 Ga. 551, 46 S. E. 654; Price v. Price, 122 Ga. 321, 50 S. E. 91; Hawkins v. Tanner, 129 Ga. 497, 59 S. E. 225.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2620, 3126.]

2. AMENDMENT TO MOTION FOR NEW TRIAL—APPROVAL.

Moreover, it fails to appear, either from the bill of exceptions or from the record, that the trial judge approved any of the grounds of the amendment to the motion for a new trial, or the purported charge of the court, sent up with the record.

Error from City Court of Nashville; C. A. Christian, Judge.

Action between Effie Rogers and others and T. J. Sword. Judgment for the latter, and the former bring error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiffs in error. Jos. A. Alexander, of Nashville, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 495)

DRISCOLL et al. v. REDWINE BROS. (No. 7839.)

(Court of Appeals of Georgia, Division No. 1. March 16, 1917.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE §—71—PLACE OF HOLDING COURT—JUDGMENT—NOTICE.

The place of holding a justice's court cannot be changed otherwise than by giving a duly published notice of the proposed change of location as required by law, and a judgment rendered at any other place than that fixed by law is void. Hilson v. Kitchens, 107 Ga. 230, 33 S. E. 71, 73 Am. St. Rep. 119; Carter v. Atkinson, 12 Ga. App. 390, 77 S. E. 370.

(a) From the magistrate's answer, it appears that the judgment in question was rendered at the place fixed by law, and that this had been the "regular place" of holding the justice's court for this district for the past 18 or 20 years. The case is not altered by the fact that the justice's court for the district had been previously held at a place other than that legally fixed as the place of holding that court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 232, 233.]

2. OVERRULING CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action between John Driscoll and others, and Redwine Brothers. Judgment for the latter, and the former bring error. Affirmed.

W. B. Hollingsworth, of Fayetteville, for plaintiffs in error. J. W. Culpepper, of Fayetteville, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 441)

STUCKEY v. STATE. (No. 7890.)

(Court of Appeals of Georgia, Division No. 1. March 13, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §—67—FRAUDULENT BREACH OF CONTRACT—PROOF—STATUTE.

Where one is indicted under section 715 of the Penal Code of 1910, it is incumbent on the state to prove the contract as alleged, and to prove such a state of facts as will authorize the jury to find that at the time he procured the thing of value upon the contract he did not intend to perform the services which he contracted to perform, but then and there had the intent to defraud.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 75.]

2. FORMER DECISIONS.

This case is controlled by the decisions in the cases of Taylor v. State, 124 Ga. 798, 53 S. E. 320; Green v. State, 6 Ga. App. 324, 64 S. E. 1121; Johnson v. State, 125 Ga. 243, 54 S. E. 184; Durham v. State, 17 Ga. App. 810, 88 S. E. 594.

3. MOTION FOR NEW TRIAL.

The evidence did not authorize the verdict of guilty, and the court erred in overruling the motion for new trial.

Error from City Court of Dublin; J. B. Hicks, Judge.

David Stuckey was convicted of procuring money on a contract for service fraudulently, and he brings error. Reversed.

J. S. Adams, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 481)

COOK v. McMURRIA. (No. 7718.)

(Court of Appeals of Georgia, Division No. 2.
March 18, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1003—REVIEW—COURT OF APPEALS—WEIGHT OF EVIDENCE.

"This court by the constitutional amendment creating it is limited in jurisdiction to the correction of errors of law alone, and therefore has no power to grant a new trial on the ground that the verdict is strongly contrary to the weight of the evidence, if there is any evidence at all to support it." *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943.]

2. VERDICT—CERTIORARI.

No other error being complained of in the instant case, and there being some evidence to support the verdict, the trial judge did not err in refusing to sanction the certiorari.

Error from Superior Court, Miller County; W. C. Worrill, Judge.

Action between J. P. Cook and A. G. McMURRIA. Judgment for the latter, and the former brings error. Affirmed.

Billie B. Bush, of Colquitt, for plaintiff in error. P. D. Rich, of Colquitt, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 478)

MIDDLETON v. JOHNSON. (No. 7759.)

(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)

(Syllabus by the Court.)

1. GARNISHMENT §246—DISSOLVING JUDGMENT ON BOND—REQUISITES.

Before judgment can be rendered upon a bond dissolving a garnishment, two prior judgments are necessary, first, a judgment in the main action, and then a judgment declaring the money or property subject. *National Surety Co. v. Medlock*, 2 Ga. App. 669, 58 S. E. 1131.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 464.]

2. GARNISHMENT §246—BONDS—JUDGMENT.

After the two judgments referred to in the preceding headnote are obtained, the plaintiff may enter up judgment against the principal and the surety on the bond to dissolve the garnishment, as judgment may be entered against sureties on bail; and while the judgment may be against the principal and the surety jointly

and severally, yet "a second judgment against the principal can add nothing whatever to the strength of plaintiff's position, for at the very time he seeks to enter judgment on the bond he actually has the principal's property bound by as efficacious a judgment lien as he could possibly obtain." *Maddox v. American Trust & Bkg. Co.*, 109 Ga. 789, 35 S. E. 155, Civ. Code 1910, §§ 5280, 5937.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 464.]

3. TROVER AND CONVERSION §31—SURETY ON BOND—LIABILITY.

"It is too well settled now to admit of any discussion that a surety on an eventual condemnation—money bond in an action of trover is bound by the judgment against his principal, and will not be heard after judgment to raise any question which could have been raised by his principal before judgment." *Waldrop v. Wolff & Happ.*, 114 Ga. 620, 40 S. E. 830. The record in this case shows that the alleged payments for which the plaintiff in error claims his principal should be given credit were made before the judgment was rendered against him. *Craig v. Herring & Turner*, 80 Ga. 709, 6 S. E. 283; *Jackson v. Guilmartin & Co.*, 61 Ga. 544.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 184, 185.]

4. AFFIDAVIT OF ILLEGALITY—DEMURDER.

The trial judge did not err in sustaining the demurrer to the affidavit of illegality and dismissing the affidavit.

Error from City Court of Baxley; A. V. Sellers, Judge.

Proceedings in execution by M. B. Johnson against F. P. Middleton. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Bennett, of Baxley, for plaintiff in error. D. M. Parker, of Waycross, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 451)

BAKER v. STATE. (No. 8029.)

(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §815(5)—OFFENSES—POSSESSION—KNOWLEDGE.

The accused was convicted under a count in the accusation charging that he did, in the county of Chatham, on the 29th day of August, 1916, unlawfully have in his possession at one time more than two quarts of spirituous liquors. He contended that he was employed to bring a boat from Jacksonville, Fla., to some point in the state of South Carolina, and stopped at Savannah, Ga., for certain supplies; and that he had no knowledge of the contents of certain boxes on board, which were in fact filled with whisky. The court charged the jury as follows: "If you find from this evidence, if evidence has been adduced, that there was a craft moored in this harbor, and that this craft or vessel contained a quantity of liquor, and the defendant was in charge of said vessel, he would be guilty under the law." On a request of the foreman of the jury to "read over about the boat being moored," the court charged as follows: "I charge you that if you find that there has been evi-

dence in this case that a craft, or boat, or vessel, was moored in this harbor on or about the date charged in the accusation—that if there was a craft, boat, or vessel moored in this harbor in this state and county, and that it contained a quantity of liquor, and that the defendant was in charge of such vessel, then he would be guilty as charged." *Held*, the foregoing instructions were error, and require a new trial of the case. They ignored altogether the contention of the defendant that he had no knowledge of the contents of the boxes; and the court nowhere in the charge instructed the jury that if they believed the defendant's contention, and found that he did not know that the whisky was on board the boat, they could not convict him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1986.]

2. ASSIGNMENTS OF ERROR.

Discussion of the other assignments of error is unnecessary, since the errors complained of are not likely to occur on another trial.

Error from City Court of Savannah; John Bourke, Jr., Judge.

O. A. Baker was convicted of unlawfully having in his possession at one time more than two quarts of spirituous liquors, and he brings error. Reversed.

Oliver & Oliver, of Savannah, for plaintiff in error. Walter C. Hartridge, Sol. Gen., of Savannah, for the State.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 484)

QUINN v. NEAL et al. (No. 7774.)

(Court of Appeals of Georgia, Division No. 1. March 16, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT §332(1)—INJURY TO THIRD PERSONS — OPERATION OF AUTOMOBILES—ACTION FOR INJURY—NONSUIT—EVIDENCE.

The court did not err in awarding a nonsuit. Though agency may sometimes be implied from circumstances in proof (Griffin v. Russell, 144 Ga. 275, 87 S. E. 10), there was nothing to show that the automobile that inflicted the injury for which the plaintiff sued, and that was driven by the unaccompanied minor daughter of one defendant (the father of the other defendant, the owner of the car), was being operated with the knowledge or consent of either defendant; nor did it appear from the evidence that the automobile was in fact being used on the particular occasion in carrying on or aiding the business of either or both of the defendants. There was testimony of admissions made by the father that his daughter "had been in the habit of driving down to his office at lunch time and taking him home in the car," but how often or how long this habit had been indulged in does not appear, nor does it appear that the owner of the car ever knew of its use by his sister on this or any other occasion, for this or any other purpose; and from the evidence it may only be surmised that she was on the way to the place of business occupied by her father and brother at the time of the accident, and, if so, that she was perhaps driving in that direction for the purpose and with the intention of conveying her father to lunch, since it is not disclosed by any undenied allegation in the plaintiff's petition, or by any evidence in

his behalf, even at what hour in the day the accident occurred, or to what place or for what purpose the automobile was being driven.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1274.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by E. T. Quinn against W. A. Neal, Sr., and others. Judgment of nonsuit, and plaintiff brings error. Affirmed.

D. K. Johnston and M. Herzberg, both of Atlanta, for plaintiff in error. E. V. Carter and Frank Carter, both of Atlanta, for defendants in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 487)

MASSILLON ENGINE & THRESHER CO. v. BURNETT. (No. 7866.)

(Court of Appeals of Georgia, Division No. 1. March 16, 1917.)

(Syllabus by the Court.)

1. MORTGAGES §5—DEED OR MORTGAGE—STATUTE.

An instrument in the usual form of a security deed under section 3306 of the Civil Code of 1910, but containing a clause providing that should the grantor, "faithfully perform and keep all the covenants and agreements herein set out, this conveyance shall cease, determine and be void," is a mortgage, and not a deed. Burckhalter v. Planters' Loan & Savings Bank, 100 Ga. 482, 28 S. E. 236; Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 4.]

2. MORTGAGES §5—DEED OR MORTGAGE—CONSTRUCTION OF INSTRUMENT.

Especially is the instrument construed in this case a mortgage and not a deed passing title, because its first words are: "This mortgage, made this 18th day of September, 1915," and in several other places therein it is described as "the mortgage," indicating that it was the intention of the parties that the instrument be construed to be a mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 4.]

3. CERTIORARI PROPERLY DENIED.

The construction of the contract upon which the claimant based title being the only question presented for determination, and the trial court having correctly construed the instrument to be a mortgage and not a deed, the court did not err in overruling the certiorari.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between the Massillon Engine & Thresher Company and W. B. Burnett. Judgment for the latter, and the former brings error. Affirmed.

A. L. Henson, of Calhoun, for plaintiff in error. J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 483)

FINKELSTEIN v. INGRAM. (No. 7678.)(Court of Appeals of Georgia, Division No. 1.
March 16, 1917.)*(Syllabus by the Court.)***1. CERTIORARI** \S 57—**PETITION AND ANSWER**—ISSUES.

All issues raised in a petition for certiorari must be determined upon the answer to the petition, and where the answer does not verify the allegations of the petition, the trial court will consider only the issues shown by the answer.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 145.]

2. PETITION FOR CERTIORARI.

Upon the petition for certiorari and the answer the judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between H. Finkelstein and R. F. Ingram. Judgment for the latter, and the former brings error. Affirmed.

Morris Macks and Sam. A. Massell, both of Atlanta, for plaintiff in error. Virlyn B. Moore, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 479)

MULINIX v. DAVENPORT BROS. et al. (No. 7766.)(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 583—**BRIEF OF EVIDENCE—DOCUMENTARY EVIDENCE.**

Documentary evidence set out in the pleadings or attached thereto as exhibits should not be included in the brief of evidence otherwise than by reference thereto. Civ. Code 1910, \S 6093; Oconee Oil Co. v. Planters' Oil Co., 6 Ga. App. 413, 65 S. E. 144; Slappey v. Charles, 7 Ga. App. 796, 68 S. E. 308.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2607-2610.]

2. APPEAL AND ERROR \S 707(2) — **BRIEF OF EVIDENCE—DOCUMENTARY EVIDENCE—REVIEW.**

As all the grounds of the exceptions to the judgment rendered by the trial judge (sitting by consent without the intervention of a jury) depend upon a consideration of the evidence, and as what purports to be a brief of the evidence, both oral and documentary, contained in the bill of exceptions is interspersed with objections to testimony and the rulings thereon, and there being apparently no effort to brief the documentary evidence, but the same being included in extenso in the brief of evidence, notwithstanding such documentary evidence is attached as exhibit to the pleadings in the case, the exceptions cannot be considered, and the judgment of the trial court must be affirmed. Civ. Code 1910, \S 6093; Ingram v. Clarke, 96 Ga. 777, 22 S. E. 334; Roberts v. City of Cairo, 133 Ga. 642, 66 S. E. 938; Mewborn v. Weitzer, 15 Ga. App. 668, 84 S. E. 141, and cases there cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2942.]

Error from City Court of Cartersville; Joe M. Moon, Judge.

Action between J. B. Mulnix, Sr., and Davenport Bros. and others. Judgment for the latter, and the former brings error. Affirmed.

I. F. Mundy, of Rockmart, and Neel & Neel, of Cartersville, for plaintiff in error. Paul F. Akin, of Cartersville, for defendants in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 469)

BELL v. EVANS. (No. 7913.)(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)*(Syllabus by the Court.)***1. FIXTURES** \S 35(2)—**VERDICT—EVIDENCE.**

This was a suit on an account, for \$28.50, the alleged value of certain permanent fixtures, to wit: about a half of a small privy, a little more than one roll of fence wire, and some planking and fence posts, all attached by the plaintiff to land which, according to parol testimony of the defendant, admitted without objection, belonged to the defendant, and which were removed from the land by the defendant. The verdict in favor of the defendant was therefore not without evidence to support it.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. \S 73, 74.]

2. APPEAL AND ERROR \S 362(1), 725(1), 728 (2)—**ASSIGNMENTS OF ERROR—SUFFICIENCY.**

The assignments of error based upon the allowance of an amendment to the plea of the defendant, and also upon the admission of certain documentary evidence, cannot be considered, since the exact nature and effect of the amendment does not appear, and the contents of the documents are not disclosed either by the assignments themselves, or by any recitals in the petition for certiorari. The petition alleging error must itself show error, and where the assignments of error therein are insufficient to accomplish this purpose, they cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1960, 3002, 3003, 3005, 3011, 3082-3284.]

3. OVERRULING CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Cherokee County; H. L. Patterson, Judge.

Suit by W. F. Bell against H. C. Evans. Judgment for defendant, and plaintiff brings error. Affirmed.

Howell Brooke, of Canton, for plaintiff in error. Geo. I. Teasley and W. D. Mills, both of Canton, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 471)

ANDERSON v. KING. (No. 7450.)(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)*(Syllabus by the Court.)***1. COURTS \S 189(13) — MUNICIPAL COURTS—
FAILURE TO ANSWER—DIRECTED VERDICT.**

When in a suit on a promissory note in the city court of Atlanta the petition recites the giving of the statutory notice for the collection of attorney's fees, and the case is in default, the judge may, without further proof than the admission implied by the failure of the defendant to answer, direct a verdict in favor of the plaintiff for the amount sued for. *Ivey v. Payne*, 8 Ga. App. 760, 70 S. E. 140; *Valdosta, etc., v. Citizens' Bank of Valdosta*, 14 Ga. App. 329, 80 S. E. 913.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 409, 458.]

**2. COURTS \S 189(15) — MUNICIPAL COURTS—
OPENING DEFAULT—STATUTE.**

Where such judgment has been rendered, the statute relating to the opening of default has no application, although in such a case a motion to vacate the judgment might be made upon proper grounds. *Nessmith v. Peoples*, 14 Ga. App. 145, 80 S. E. 528.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 409, 458.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Suit by R. R. King against Mrs. Anna E. Ragsdale. Judgment for plaintiff, and J. T. Anderson, as administrator of defendant, brings error. Affirmed.

J. S. James & J. R. Bedgood, of Atlanta, for plaintiff in error. Bryan, Jordan & Middlebrooks, of Atlanta, for defendant in error.

JENKINS, J. R. R. King filed suit in the city court of Atlanta, returnable to the March term, 1916, against Mrs. Anna E. Ragsdale, upon a promissory note which stipulated for the payment of 10 per cent. of the principal and interest as attorney's fees. The defendant was served personally. The plaintiff prayed for the establishment of his special lien upon certain land in Fulton county, Ga., created by a certain loan deed made by the defendant to secure the payment of the note sued on. The petition set out the terms of the loan deed, and contained allegations showing that the defendant was duly served with notice in accordance with section 4252 of the Code of Georgia of 1910, for the purpose of collecting attorney's fees, and a copy of the notice was attached to the petition. No answer or appearance or pleading of any kind was filed by the defendant, and at the call of the appearance docket for the March term, 1916, of the city court of Atlanta, the case was in default. Afterwards the court directed a verdict for the plaintiff for the amount of the principal, interest, attorney's fees, and costs, and setting up the plaintiff's special lien as prayed for; and a judgment signed by the court and by the plaintiff's attorneys was rendered in accordance with the verdict. The defendant filed a motion for a

new trial, on the grounds that the verdict and judgment are contrary to law and to the evidence, decidedly and strongly against the weight of the evidence, and without any evidence to support them. At the hearing of the motion the defendant filed an amendment alleging that she was at her home in Atlanta, sick, on the first Monday in March, 1916, the last day for filing pleadings in the said case, and therefore was unable to file a defense. Attached to the amended motion for a new trial was a copy of a plea which the defendant desired to file, setting up usury. The motion for a new trial as amended was overruled, and the defendant filed a bill of exceptions to the judgment overruling the motion.

It is not necessary to add anything further to what is ruled in the headnotes.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J.,
concur.

(19 Ga. App. 450)

MCCARTHY v. STATE. (No. 8014.)(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)*(Syllabus by the Court.)***1. CRIMINAL LAW \S 739(2)—REVIEW—ALIBI.**

The evidence accepted as credible by the court, sitting without the intervention of a jury, sufficiently authorized the conviction of the accused.

(a) The value of testimony offered to set up the defense of alibi was altogether for the trial court.

**2. CRIMINAL LAW \S 941(1) 942(1)—NEWLY
DISCOVERED EVIDENCE — CUMULATIVE EVIDENCE—IMPEACHING EVIDENCE.**

The alleged newly discovered evidence is purely cumulative and impeaching in character, and therefore did not require the grant of a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2328, 2330, 2331.]

Error from City Court of Macon; Du Pont Guerrey, Judge.

Albert McCarthy was convicted, and he brings error. Affirmed.

Hubert F. Rawls and J. A. Monsees, both of Macon, for plaintiff in error. John P. Ross, Sol. Gen., and Will Gunn, both of Macon, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 440)

WHITE v. STATE. (No. 7877.)(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)*(Syllabus by the Court.)***CRIMINAL LAW \S 1159(2)—APPEAL—REVIEW
—VERDICT.**

The evidence authorized the conviction, both upon the count charging the sale of intoxicating liquors and upon the count charging that the ac-

cused kept such liquors on hand at his place of business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

Error from Superior Court, Tattnall County; W. W. Sheppard, Judge.

Kesley White was convicted of selling intoxicating liquors, and keeping such liquors on hand at his place of business, and he brings error. Affirmed.

H. H. Elders, of Reidsville, for plaintiff in error. W. F. Slater, Sol. Gen., of Eldora, for the State.

LUKE, J. 1. The defendant in this case was indicted in two counts, charging that on January 3, 1916, he did sell intoxicating liquors; and that he did keep on hand at his place of business intoxicating liquors; and the jury found him guilty on both counts. The evidence clearly showed his guilt of selling liquor, and the jury were authorized to find that the room in which it was shown he had liquors stored was his place of business. The only assignment of error was that the verdict was contrary to the evidence. Where there is evidence, adduced upon the trial of the case, upon which the jury could have based the verdict found, this court will not interfere. Accordingly the court did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 479)

SPIKES v. SASNETT. (No. 7881.)

(Court of Appeals of Georgia, Division No. 2. March 15, 1917.)

(Syllabus by the Court.)

1. REPLEVIN \S 8(2)—GROWING SUGAR CANE—IDENTIFICATION.

Where a party leaves a certain number of stalks of cane in a bed, and another party, without consent of the owner thereof, takes it up and plants it, and subsequently thereto an agreement is reached between the parties by which the cane should be cultivated by the one planting it and the original owner of the cane could "come and get her one-half of it in the fall," trover will not lie for "about 2,500 stalks of sugar cane raised on a certain patch grown by the said Jack Sasnett," the person who planted the cane, where there has been no segregation of the said 2,500 stalks from the whole amount raised, so as to render the same subject to identification. *Camp v. Casey*, 110 Ga. 262, 34 S. E. 277.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 46, 47, 55–57.]

2. APPEAL AND ERROR \S 854(5)—NONSUIT—REVIEW.

"If a nonsuit must necessarily have been awarded, although the reason assigned for its grant may have been wrong, yet the grant itself will be upheld." *Tompkins v. Phipps*, 68 Ga. 155.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3417–3419.]

Error from City Court of Dublin; J. B. Hicks, Judge.

Action by Essie Spikes against Jack Sasnett. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 454)

GREEN v. WADE CHAMBERS GROCERY CO. (No. 7690.)

(Court of Appeals of Georgia, Division No. 1. March 15, 1917.)

(Syllabus by the Court.)

1. EXECUTION \S 194(1)—ADMISSIONS—PROOF OF TITLE IN DEFENDANT IN FI. FA.

In a claim case, the following admission was made: "It is admitted by counsel for plaintiff and claimant that R. T. Green [defendant in fi. fa.] acted as agent of Mrs. A. Green [claimant], his wife, in the purchase of the mill property [the property levied upon]. It is further admitted that the defendant was in possession of the property at the time of levy." Held, this admission on the part of the plaintiff explained the possession of the defendant in fi. fa., and did not relieve the plaintiff from the necessity of showing title in the defendant in fi. fa.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 571, 572.]

2. EXECUTION \S 197—CHARGE—ERROR—BURDEN OF PROOF—"PREPONDERANCE OF TESTIMONY."

Where the plaintiff in fi. fa., under the facts stated above, undertook to prove title in the defendant in fi. fa., it was error for the court to charge the jury as follows: "The burden of proof is upon the claimant to show by competent evidence the facts which she alleges, in order to relieve the property from being subjected to the fi. fa. of the plaintiff in this case. The duty rests upon her, under the rules of law, to carry this burden of proof by a preponderance of the evidence; and by a 'preponderance of the testimony' is meant that superior weight of the evidence upon the issue involved which, while not enough to wholly free the minds and consciences of a reasonable doubt, is yet sufficient to incline the minds of impartial jurors to one side of the issue rather than to the other." Civ. Code 1910, § 5170.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 577.

For other definitions, see Words and Phrases, First and Second Series, Preponderance.]

Error from City Court of Quitman; Wm. H. Long, Judge.

Action by the Wade Chambers Grocery Company against R. T. Green, defendant in fi. fa., in which Mrs. A. Green, his wife, filed a claim. Judgment for plaintiff, and claimant brings error. Reversed.

M. Baum, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 475)

CHEROKEE SAWMILL CO. v. NASHVILLE, C. & ST. L. RY. (No. 7741.)(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)*(Syllabus by the Court.)***1. CARRIERS** \Leftrightarrow 218(3)—**LIVE STOCK—BILL OF LADING—TIME FOR BRINGING SUIT.**

A stipulation in a bill of lading issued by a common carrier, that the carrier cannot be held liable for any injuries inflicted upon live stock transported by it, unless suit therefor is brought within six months after the right of action accrues, is not unreasonable, and is valid and binding. *Missouri, Kansas & Texas R. R. Co. v. Harriman*, 227 U. S. 657, 673, 33 Sup. Ct. 397, 57 L. Ed. 690, 698; *Maxwell v. Liverpool Ins. Co.*, 12 Ga. App. 127, 76 S. E. 1036.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 674-696, 938.]

2. CARRIERS \Leftrightarrow 225 — **LIVE STOCK — ACTION FOR INJURY—LIMITATION—FRAUD.**

Such a stipulation as is mentioned above takes the place of the statute of limitations and is governed by the same rules; and, where fraud is relied upon to prevent the bar of the statute or the superseding stipulation from attaching, it must be such fraud as involves moral turpitude. *Austin v. Raiford*, 68 Ga. 201; *Maxwell v. Walsh*, 117 Ga. 467, 471, 43 S. E. 704. In the instant case no such fraud was alleged in the plaintiff's petition, nor were any facts therein shown which disclosed actual fraud of any kind.

3. PETITION—DISMISSAL.

Under these rulings the court did not err in dismissing the plaintiff's petition on general demurrer.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action by the Cherokee Sawmill Company against the Nashville, Chattanooga & St. Louis Railway. Judgment for defendant, dismissing the petition on general demurrer, and plaintiff brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. Tye, Peeples & Jordan, of Atlanta, and Dean & Dean and L. H. Covington, all of Rome, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 487)

BELK v. CANNON. (No. 7972.)(Court of Appeals of Georgia, Division No. 1.
March 16, 1917.)*(Syllabus by the Court.)***1. BILL OF EXCEPTIONS—DISMISSAL.**

A motion to dismiss the bill of exceptions is made upon the grounds: (1) That there is no proper pauper's affidavit attached to the exceptions; (2) that service was acknowledged by the defendant in error after the filing of the bill of exceptions with the clerk of the superior court and after the certificate of the trial judge; (3) that there is no sufficient assignment of error in the bill of exceptions. The assignments of error are sufficient, the cost in this court has been paid, the service of the bill of exceptions was in time, and nothing else matters. Civil Code 1910, § 6179. The motion must be denied.

2. CERTIORARI \Leftrightarrow 43—**SECURITY FOR COSTS—AFFIDAVIT IN LIEU OF BOND.**

When a party applies for the writ of certiorari under section 5187 of the Civil Code of 1910, he must make affidavit not only that he is advised, but that he believes, that he has a good cause for certiorari. The provision of this Code section is that, if the party is unable to give the bond and security required by section 5185, he may make and file with his petition for certiorari "an affidavit in writing that he is advised and believes that he has good cause for certioraring the proceedings to the superior court, and that owing to his poverty he is unable to pay the costs or give security as the case may be." When this affidavit is made, it shall in every respect answer instead of the certificate and bond required under section 5185. *Dorsey v. Black*, 55 Ga. 815(1). In the present case the affidavit does not state that the petitioner believes that he has good cause for certiorari. The judge of the superior court therefore erred in overruling the motion to dismiss the petition for certiorari.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 74, 80, 91-97.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action between C. R. Belk and Mrs. J. S. Cannon. Judgment for the latter, and the former brings error. Reversed.

W. H. Terrell, of Atlanta, for plaintiff in error. O. E. Buchanan, of Atlanta, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 457)

TOWNS v. ROME RY. & LIGHT CO.
(No. 7867.)(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)*(Syllabus by the Court.)***TRIAL** \Leftrightarrow 317—**UNSWORN JUROR—WAIVER OF OBJECTIONS.**

After the rendition of a verdict in a civil case, it is too late to object that one or more of the jurors who tried the case had not been sworn, even though this fact was not known by the losing party or his counsel before the verdict was rendered.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 751, 752.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between Henry Towns and the Rome Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

McHenry & Porter, of Rome, for plaintiff in error. Dean & Dean and L. H. Corrington, all of Rome, for defendant in error.

WADE, C. J. There is no contention in this case that the verdict was unsupported by evidence, and the only question for determination is whether the losing party in a civil suit may, after the rendition of a verdict, urge for the first time the objection that one or more of the jurors trying the case

had not been sworn. In other words, can the administration to one or more jurors in a civil case of the oath prescribed by our statute be lawfully waived; and, if so, does the failure to direct the attention of the trial court to such omission at the time constitute a sufficient waiver?

We find no direct ruling on this question by either the Supreme Court or this court, but in many other jurisdictions it has been held that the failure to swear the jury in a civil case is a mere irregularity which is waived if objection is not made at the time, and that, in the absence of timely objection, the omission will not affect the validity of the verdict thereafter returned. Section 860 of the Penal Code of 1910 provides that:

"Each panel of the petit jury shall take the following oath: 'You shall well and truly try each cause submitted to you during the present term, and a true verdict give, according to the law as given you in charge, and the opinion you entertain of the evidence produced to you, to the best of your skill and knowledge, without favor or affection to either party, provided you are not discharged from the consideration of the case submitted. So help you God.'"

Section 1005 of the Penal Code provides that:

"In all criminal cases, the following oath shall be administered to the petit jury, to wit: 'You shall well and truly try the issue formed upon this bill of indictment between the State of Georgia and A. B., who is charged (here state the crime or offense), and a true verdict give according to evidence. So help you God.'"

In *Slaughter v. State*, 100 Ga. 323, 28 S. E. 159, our Supreme Court held:

"Though the fact that the oath prescribed in * * * the Penal Code had not been administered to the jury trying a criminal case was known to counsel for the accused while the trial was in progress, it was not too late after verdict to take advantage of the court's omission to have the jury duly sworn. The administration of this oath, literally or in substance, was essential to the legality of the trial, and was therefore not a matter which could be waived by the accused or his counsel, either expressly or by silence."

In the opinion in that case, Lumpkin, P. J., after quoting from various authorities, said:

"In so far as it may be gathered from any of the above authorities that a failure to swear one, or more, or all, of the jurors trying a civil case, would be fatal to the verdict rendered, even where the losing party knew of such failure before the trial ended, and yet made no objection or complaint, we do not wish to be understood as now agreeing to such a conclusion. Our present decision is limited to the question before us as it relates to criminal cases. In civil cases, the oath, under our law, is administered to all regularly impaneled jurors at the beginning of each term; and there is no practice of specially swearing the jury in each case, as our criminal procedure requires, except, perhaps, as to the oath prescribed for juries impaneled to try claim cases. Our conclusion in the present case is that, while administering the wrong oath to a jury in a criminal case may be regarded as a mere irregularity of which the accused cannot avail himself after deliberately maintaining silence until after verdict, a total failure to swear the jury is a matter which cannot, in any manner or under any circumstances, be waived; and, as a consequence, a conviction by an unsworn jury is a mere nullity,

of which the accused could not, upon a subsequent arraignment, avail himself by a plea of *autrefois convict*."

In view of the trend of more recent decisions, it may perhaps be questioned whether the strict technical rule laid down in the *Slaughter Case*, supra, would now be enforced by the Supreme Court if the same question were again presented for adjudication. In fact, it may be reasonably inferred from the ruling in *Frank v. State*, 142 Ga. 741, 83 S. E. 645, L. R. A. 1915D, 817, that a broader view might now be entertained by that court, and that even in a criminal case the failure of the accused to raise the objection that one or more jurors had not been sworn before the verdict was returned would amount to a sufficient waiver of this irregularity. In the decision in that case it was said:

"While a defendant indicted for crime in this state has the legal right to be personally present at every stage of his trial, as before stated, there are certain matters which he may waive, and which many prisoners do waive at their trial. They may waive copy of indictment, formal arraignment, and list of witnesses before the grand jury, all of which are important rights. They may waive a preliminary hearing before a committal court, a jury of 12 to try them, or any legal objection to jurors who have qualified on their *voir dire*; they may even waive trial entirely, plead guilty of murder, and be sentenced to hang. *Sarah v. State*, 28 Ga. 576(2), 581; *Wiggins v. Tyson*, 112 Ga. 745, 750, 38 S. E. 86."

This is held notwithstanding that every person accused of crime is entitled under the Constitution of this state, to be furnished "with a copy of the accusation, and a list of the witnesses on whose testimony the charge against him is founded," etc. Civil Code, § 6361. So far as we have been able to discover, the ruling in the *Slaughter Case*, supra, has never been followed or approved by either the Supreme Court or this court, but stands alone and unsupported by any other ruling from our courts. We need not speculate, however, upon whether or not the Supreme Court might on review modify or rescind the ruling made in the *Slaughter Case*, because that ruling is confined by its express terms to criminal trials, and therefore is no more than persuasive authority in determining the question at issue in the case under consideration.

In *Hardenburgh v. Crary*, 15 How. Prac. (N. Y.) 307, it was held that a failure to swear one of the jurors who did not arrive at the courthouse until the rest of the panel had been sworn was immaterial if no objection was made.

In *Cahill v. Delaney* (Co. Ct.) 68 N. Y. Supp. 842, where, in a trial in a justice's court, a jury was summoned and accepted to try the issues involved, both parties being present and represented by counsel, and, after a trial, retired and returned a verdict, but the jury was not sworn, it was held:

"The failure of the justice to swear the jury was an irregularity only, which the parties waived by proceeding with the trial without objection being made when the omission might have been supplied and error avoided."

So, too, in *Jenkins v. City of Hudson*, 16 Abb. N. C. (N. Y.) 137, it was held:

"A verdict in a civil action is not void or irregular merely because the trial proceeded to verdict without the jury being sworn, if neither party requested that they be sworn."

In *Clements v. Crawford*, 42 Tex. 604, it was held that after verdict and judgment it is too late to object to the formality of an oath administered to a jury.

In *Burns v. Mathews*, 46 S. W. 79, the Court of Civil Appeals of Texas said, as to the failure to swear certain jurors:

"The attorneys did not swear that they did not know of it, and, if they had, it would not have changed the status of affairs, because it was too late after trial to spring such a matter. * * * It was the duty of counsel to be on the alert, and see that the jury was properly sworn."

See, also, *T. & P. Ry. Co. v. Butler*, 52 Tex. Civ. App. 323, 114 S. W. 671.

In *Ross v. Grand Pants Co.*, 241 Mo. 296, 145 S. W. 410, where it appeared that one of the jurors who tried the case had not been sworn, it was said:

"We conclude that any irregularity in administering the oath to the jury, or a total or partial failure to administer the oath at all in a civil case, is purely a matter of exception. Being such, an exception should have been saved at the time the omission occurred. Counsel cannot be heard to say he did not know of the omission. His business in court was to see that the trial proceeded in an orderly manner, and that every right of his client was preserved, and make the records show his exception in case he felt his client aggrieved by any adverse ruling. The point was made too late, and was waived by the delay in making it."

In a case decided by our own Supreme Court (*Candler v. Hammond*, 23 Ga. 493, 499), where a defendant submitted to trial by a special jury under their oath, without objection, and knowing that they had not been sworn as required by the escheat act of 1817, it was held:

"It was too late for the defendant to object to the form of oath administered to the jury, after he had proceeded to trial without objection on that account. He was willing to risk the chances of a verdict in his favor, under the oath as administered, and it is now too late, after verdict against him, to object."

That case differs in its facts from the case now under review, but is in accord in principle with what is herein ruled.

It is true that our Code (Penal Code, § 860) declares that "each panel of the petit jury shall take the following oath," etc.; but it is equally true that in the statute law of this state there is no express provision that the verdict of an unsworn jury shall be void or even voidable; and, since parties to cases (either criminal or civil) may waive constitutional rights guaranteed them, we see no valid reason why the administration of the oath prescribed by our law to three jurors, or to the entire jury, may not be waived, and, if so, why it may not be waived impliedly, but effectually, by failure to interpose objections at the trial and before its ter-

mination. We hold therefore that the fact that three jurors were not sworn in this case was only an irregularity, which could be waived and was waived by the omission to urge objection upon this ground before the return of the verdict. These jurors doubtless acted as conscientiously and as impartially as they would have done under oath, and at any rate the contrary is not shown. Since the failure to administer the oath to every member of the jury trying a civil case is purely a matter of exception, it is the business of counsel to ascertain if all the jurors are in fact sworn as well as generally to know that all proper forms are complied with and every substantial right of the client is preserved. It follows that an affidavit by counsel for the losing party, that until after verdict they were ignorant of the fact that three of the jurors trying the case had not been sworn, will not suffice to remove the implied waiver. This fact could have been ascertained by counsel by a simple inquiry before offering evidence or even selecting the jury from the list of jurors submitted; and, as we hold that the failure to swear jurors in a civil case is a matter which may be waived, we see no reason for applying a different or a stricter rule than in the case of challenge to a juror, which a party waives by neglecting to bring the disqualification of the juror to the attention of the court until after a verdict has been returned against him, notwithstanding he is then ignorant of such disqualification.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 493)

EMPIRE COTTON OIL CO. v. MAXWELL.
(No. 7905.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1917.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** § 452(3)—**DEFENSES**—**WANT OF CONSIDERATION.**

"It is a good defense to an action on a negotiable promissory note under seal, in the hands of the original payee, that it was executed without any lawful consideration." *Lacey v. Hutchinson*, 5 Ga. App. 865, 64 S. E. 105(1); *Saul v. Southern Seating, etc., Co.*, 6 Ga. App. 847, 65 S. E. 1065; *Toller v. Hewitt*, 12 Ga. App. 496, 77 S. E. 650(1); *Strickland v. Farmers' Supply Co.*, 14 Ga. App. 664, 82 S. E. 161; *Seawright v. Dickson*, 16 Ga. App. 442, 85 S. E. 625.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1367-1376.]

2. **GENERAL DEMURDER.**

The defense filed was sufficient to withstand the general demurrer of plaintiff, and the trial judge did not err in refusing to dismiss it.

Error from City Court of Cairo; W. J. Willie, Judge.

Action between the Empire Cotton Oil Company and R. A. L. Maxwell. Judgment

for the latter, and the former brings error. Affirmed.

W. I. Custer, of Bainbridge, for plaintiff in error. S. P. Cain, of Whigham, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 486)

BEDINGFIELD v. LAMB. (No. 7845.)

(Court of Appeals of Georgia, Division No. 1. March 16, 1917.)

(Syllabus by the Court.)

FRAUDS, STATUTE OF §17—PROMISE TO ANSWER FOR DEBT OF ANOTHER—STATUTE.

A promise to answer for the debt of another must be in writing, in order to bind the promisor. Civ. Code 1910, § 3222. This case falls squarely within the rule laid down in *Harris v. Paulk*, 10 Ga. App. 334, 73 S. E. 430, and *Foot v. Reece*, 17 Ga. App. 799, 88 S. E. 689, and is distinguished by the facts from the cases of *Evaus v. Griffin*, 1 Ga. App. 327, 57 S. E. 921, and *Palmetto Manufacturing Co. v. Parker*, 123 Ga. 798, 51 S. E. 714, and *Ferst Sons & Co. v. Bank of Waycross*, 111 Ga. 229, 36 S. E. 773. Under the facts the court did not err in sustaining the certiorari.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 13, 16, 17.]

Error from Superior Court, Emanuel County; R. N. Hardeman, Judge.

Action between Mrs. W. E. Bedingfield and A. J. Lamb. Judgment for the latter, and the former brings error. Affirmed.

T. N. Brown, of Swainsboro, for plaintiff in error. I. L. Price and Saffold & Jordan, all of Swainsboro, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 501)

PATTERSON v. BLEASE. (No. 7807.)

(Court of Appeals of Georgia, Division No. 1. March 19, 1917.)

(Syllabus by the Court.)

PETITION FOR CERTIORARI.

The petition for certiorari did not set out such a state of facts as demanded that it be sanctioned. Therefore the court did not err in refusing the sanction.

Error from Superior Court, Fulton County; B. H. Hill, Judge.

Action between J. A. Patterson and E. B. Blease, Jr. Judgment for the latter, and the former brings error. Affirmed.

Albert Kemper, of Atlanta, for plaintiff in error. Philip Weltner, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 456)

JONES v. WHITE. (No. 7811.)

(Court of Appeals of Georgia, Division No. 1. March 15, 1917.)

(Syllabus by the Court.)

1. FRAUDS, STATUTE OF §32—PROMISE TO PAY DEBT OF ANOTHER.

"An agreement between a creditor, his debtor, and a third person, whereby said third person, in consideration of the creditor's releasing the debtor, agrees to pay the amount of the debt to the creditor, and the creditor releases the debtor and agrees that said third person shall be substituted for the debtor, is not within the statute of frauds." Especially is this true where the original debtor, a tenant of the creditor, is in possession of property on which the creditor has a lien, which is waived by the creditor in consideration of the promise of the third person. *Harris v. Jones*, 140 Ga. 768, 79 S. E. 841 (1); *Palmetto Mfg. Co. v. Parker & Anderson*, 123 Ga. 798, 51 S. E. 714.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 49.]

2. VERDICT — PETITION — MOTION FOR NEW TRIAL.

The evidence in this case discloses substantially the foregoing facts, the verdict of the jury is not without evidence to support it, and the court did not err in overruling the motion to dismiss plaintiff's petition, or in overruling the defendant's motion for a new trial.

3. NEW TRIAL §150(1)—NEWLY DISCOVERED EVIDENCE—MOTION.

The ground of the motion for new trial based upon alleged newly discovered evidence is without merit. The motion does not disclose the source of the alleged newly discovered testimony, and no supporting affidavit whatever is attached to the motion. Civ. Code 1910, § 6086.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 306, 307.]

Error from Superior Court, Upson County; W. E. H. Searcy, Jr., Judge.

Action by J. O. White against J. F. Jones. Judgment for plaintiff, and defendant brings error. Affirmed.

John B. McDonald, of Yatesville, for plaintiff in error. Jas. R. Davis, of Thomaston, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(173 N. C. 180)

MOORE v. GREENVILLE BANKING & TRUST CO. et al. (No. 181.)

(Supreme Court of North Carolina. March 21, 1917.)

1. PLEADING §350(3)—ENTRY OF JUDGMENT—CONSTRUCTION OF PLEADINGS.

When a judgment is entered for plaintiff upon the pleadings, defendant's pleading should be given the most favorable interpretation.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1075, 1077.]

2. BANKS AND BANKING §134(1)—DEPOSITS—APPLICATION TO PAYMENT OF DEBTS.

A bank's right to apply a deposit in payment of a debt is referable to principles of equity, as well as statutory set-off provisions.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 353.]

3. BANKS AND BANKING \S 134(3, 8)—DEPOSITS—APPLICATION TO PAYMENT OF DEBTS.

The rule that a depositor's liability as surety or partner cannot ordinarily be applied against his individual deposit is modified, when his insolvency requires a set-off to prevent a miscarriage of justice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 355, 364, 365.]

4. BANKS AND BANKING \S 134(9)—DEPOSITS—APPLICATION TO PAYMENT OF DEBTS.

A bank may apply a deposit standing in plaintiff wife's name against a debt due it from her husband, where the deposit was made in the wife's name to defraud creditors, since Revisal 1905, \S 960-962, invalidates fraudulent transfers.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 366.]

5. BANKS AND BANKING \S 154(1)—DEPOSITS—APPLICATION TO PAYMENT OF DEBTS.

A bank's defense, when sued for a deposit, that such deposit was fraudulently made in plaintiff wife's name to avoid her husband's payment of a debt due the bank, is available as a bill in the nature of an equitable *fi. fa.*

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. \S 502, 503, 515.]

Appeal from Superior Court, Pitt. County; Lyon, Judge.

Action by Mrs. M. S. Moore against the Greenville Banking & Trust Company and another. Judgment for plaintiff, and defendant named appeals. Reversed.

Issues were submitted, and the jury, having failed to agree upon a verdict, were discharged from further consideration of the case, and thereupon, on motion, his honor gave judgment for plaintiff on facts as admitted in the pleadings, and defendant bank excepted and appealed.

Alblon Dunn and Skinner & Cooper, all of Greenville, for appellant. W. F. Evans and F. G. James & Son, all of Greenville, for appellee.

HOKE, J. The action was instituted by plaintiff against the Banking & Trust Company to recover the balance of a deposit standing in her name on the books of defendant bank. On facts set forth in the answer, defendant prayed that it might offset against this claim, or a portion of it, an indebtedness due the bank from plaintiff's husband, W. M. Moore, and the partnership of Hall & Moore, of which he was a member. On motion, said W. M. Moore has been duly made a party, and filed an answer in denial of the right claimed by the defendant bank. On issues submitted the jury failed to agree, and, having been duly discharged, as stated, from further consideration of the case, judgment was entered for plaintiff on the facts admitted in the pleadings.

From these facts, taken from the admissions and averments of defendant bank more directly relevant to the question presented, it appears that in the fall of 1915 the husband made a deposit in the bank in his wife's name, to the amount of \$6,000, and this de-

posit was recognized by the bank, and plaintiff allowed to check thereon, reducing the same, on February 2, 1916, to \$3,744.38; that during this year, 1915, after February 2, 1916, the firm of Hall & Moore, composed of W. M. Moore, now a defendant, and W. L. Hall, carrying on a mercantile and insurance business, in the course of said business, had continued dealing with defendant bank, and to secure any indebtedness which might be due to defendant executed the demand note of the firm to the bank in the sum of \$2,000, said note being also executed by said W. L. Hall and W. M. Moore, the individual members of the firm; that in the fall of 1915, the firm being indebted for as much or more than the amount of said note, demand was made for payment of same, and the bank was told by Moore that he would never pay the debt, and "to get it out of him if they could"; that thereupon defendant began an investigation into the affairs of the firm and its members, and ascertained that said firm was insolvent; that Hall was also insolvent, and that defendant W. M. Moore had no property whatever available to creditors, except his interest in the deposit in question, now standing in the name of his wife, the feme plaintiff. Averment is made, further, that this deposit and claim is in fact and in truth the property of said W. M. Moore, the bank's debtor, and was made by him in his wife's name, without valuable consideration moving from her, with intent to withdraw his property from the reach of his creditors, and to avoid payment of his debt due to plaintiffs and others; that the plaintiff was knowingly a participant in the fraudulent act and purpose of her husband, and if defendant is not allowed to appropriate the indebtedness as prayed, he will be without relief in the premises, and lose entirely the value of his debt and claim against said W. M. Moore.

[1] These allegations of ownership on the part of the husband, and of unlawful and fraudulent act or intent on his part, are all fully denied by plaintiff and by her husband; but, assuming the averments of defendant bank to be true, and giving them the interpretation most favorable to its claim, the rule which should prevail when a judgment is entered against a litigant on the pleadings, we are of opinion that the defendant is entitled to have the cause submitted to the jury on appropriate issues.

[2] This right of a bank to appropriate a debt in payment of a deposit is referable to the principle of set-off, dependent, in a court of law, on the construction of the different statutes applicable, but existent also, as an equitable principle independent of positive statute when necessary to prevent a miscarriage of right. In 3 Ruling Case Law, p. 591, title Banks, and section 219, it is said to obtain "between persons occupying the relation of debtor and creditor and between whom

there exist mutual demands, and it is familiar law that mutuality is essential to the validity of a set-off, and, in order that one demand may be set off against another, both must mutually exist between the same parties."

[3] It is held here and in other jurisdictions that this requirement of mutuality ordinarily forbids that the debt of a partnership may be set up against the claim of an individual partner who is a depositor. *Hodg-in v. Bank*, 124 N. C. 540, 32 S. E. 887; *Adams v. Bank*, 113 N. C. 332, 18 S. E. 513, 23 L. R. A. 111. And the same principle usually prevails in a suit by a surety for his individual deposit. The bank may not apply, in satisfaction of such a claim, the amount of a note in which he is only a surety. *Lamb, Receiver, v. Morris*, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; *Morse on Banking*, § 326. But these strict applications of the principle of set-off, as it prevails at law, may be and are properly modified when, by reason of the insolvency of the parties, the question has been reduced as a matter of fact to one of mutual indebtedness between the bank and the claimant, and it is necessary to allow an appropriation of the debt to prevent a palpable miscarriage of justice. *Sloan v. McDowell*, 71 N. C. 358; *March v. Thomas*, 63 N. C. 87; *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596-615, 14 Sup. Ct. 710, 38 L. Ed. 565; *Barnes v. McMullins*, 78 Mo. 260-271; 2 *Story's Eq. Jur.* § 1437a; 3 *Ruling Case Law*, pp. 591, 592. In the citation to *Story*, the position is stated as follows:

"The authorities upon this question are considerably examined, and the following results arrived at, in a late case. The general rule, in equity as well as at law, is that joint and separate debts cannot be set off against each other. But while at law the rule admits of no exceptions, and the parties to the record only will be regarded, a court of equity will, in a case of insolvency, regard the real parties—those ultimately to be affected by the decree—and allow a set-off of demands in reality mutual, although prosecuted in the name of others nominally interested. Courts of equity exercised a jurisdiction over the subject of set-off previous to the enactment of the statutes upon the subject, and their jurisdiction does not in any manner depend upon these statutes."

And in *Rolling Mill v. Ore & Steel Co.*, supra, Associate Justice Jackson, delivering the opinion, said:

"The adjustment of demands by counterclaim or set-off, rather than by independent suit, is favored and encouraged by the law, to avoid circuity of action and injustice [citing *Railway Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513]. By the decided weight of authority it is settled that the insolvency of the party against whom the set-off is claimed is a sufficient ground for equitable interference"

—citing numerous authorities, and further:

"In *Schuler v. Israel*, 120 U. S. 506, 510 [7 Sup. Ct. 648, 650, 30 L. Ed. 707], it was said by Mr. Justice Miller, speaking for the court, that, 'While it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could, by filing a bill in

chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due, would be lost, be relieved by a proper decree in equity; and as a garnishee is only compelled to be responsible for that which, both in law and equity, ought to have gone to pay the principal defendant in the main suit, he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity.'"

[4] In the present instance, as we have seen, the claim of the defendant bank is against both the partnership and the individual members who indorsed its note as sureties, and under the doctrine recognized and approved by these and like authorities on the subject, if the facts should be established as alleged and contended for by defendant bank, the right of appropriation, to the extent required to satisfy the claim, would arise to the bank, and the defendant is therefore entitled, as stated, to have the questions determined on proper issues. And the principle is in no way affected by the fact that the deposit now stands in the name of the plaintiff, the bank having taken it in ignorance of the true conditions affecting its rights. If, as defendant avers, it was in fact and truth the husband's property, and placed in the wife's name with intent to defraud creditors, and the husband being insolvent, she was a volunteer, or, if she participated in the fraudulent purpose, in such case the attempted appropriation is avoided by our statute to prevent fraudulent gifts and conveyances (*Revisal*, §§ 960-962), and the question can, for the purposes of this defense, be considered and dealt with as if the deposit stood in the name of the husband, a course pursued with approval in *Citizens' Bank of Garnett v. Bowen*, 21 Kan. 354, an apt authority for the disposition we make of the present appeal.

[5] Even if the doctrine of equitable set-off did not, in strictness, apply on the facts alleged in the answer, the defendant would be entitled to have its defense considered as a bill in the nature of an equitable *fi. fa.*; the property in question not being available to creditors under ordinary legal process. *Mebane v. Layton*, 86 N. C. 572; *Bank v. Harris*, 84 N. C. 206; *Tabb v. Williams*, 57 N. C. 352; *Harrison v. Battle*, 16 N. C. 541. We have disposed of the present appeal on the issuable facts alleged by the defendant, that this deposit was the property of the husband placed in the name of the wife with intent to defraud the husband's creditors, and have purposely refrained from discussing the evidential facts, also appearing in the pleadings, that the deposit in question was part of the proceeds from the sale of a piece of property held by the husband and the wife as an estate by entireties. What may have been the nature of the original investment in this property, and what the effect of the subsequent sale and any agreement that may have been made by the parties concerning it, or the proceeds from it, can best be determined

when the evidence has been more fully disclosed on the trial of the issue.

There is error, and this will be certified, that the cause may be submitted to the jury. Reversed.

(106 S. C. 496)

GLADDEN et al. v. CHAPMAN et al.
(No. 9634.)

(Supreme Court of South Carolina. March 9, 1917.)

1. JUDGMENT \S 497(1)—COLLATERAL ATTACK—STATUTE.

In view of Code Civ. Proc. 1912, \S 185, as to purchasers in good faith under judgments, judgment in a partition suit, and sale made thereunder, must be sustained against collateral attack in an action to recover possession of the land, unless it affirmatively appears on the face of the record that the court had no jurisdiction of the subject of the action and of the parties; a purchaser in good faith at a judicial sale being bound only to see that the court has jurisdiction of the subject of the action and the parties, not being affected by irregularities or errors in the record for which the judgment may be vacated on direct attack or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 937.]

2. PARTITION \S 42—JUDGMENT—JURISDICTION.

Where the heirs of a decedent left the state 20 years before his death, in suit by remaining heirs to partition the decedent's lands, the court acquired jurisdiction of the absent heirs, though it held them to be dead for purposes of distribution; the matter merely suggesting error in the judgment, which, if conceded, would not avail the absent heirs in a collateral attack upon it.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 106.]

3. JUDGMENT \S 495(1)—COLLATERAL ATTACK—PRESUMPTION.

It must be presumed, from judgment ordering sale of land for partition, that the court considered and adjudicated the regularity and sufficiency of every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process on defendants, and the rights and interests of the parties to the action under the allegations and evidence, and, though the conclusions might have been erroneous and reversible on appeal, they would not make the judgment void collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 549½, 933.]

4. JUDGMENT \S 18(2)—PLEADING—FAILURE TO STATE CAUSE OF ACTION—JURISDICTION.

Merely because the complaint in a partition suit did not state facts sufficient to constitute a cause of action against absent defendants, the court did not fail to acquire jurisdiction of the action as to them, there being no connection between jurisdiction and sufficient allegations.

5. PROCESS \S 103—SERVICE—PUBLICATION—NAMES OF DEFENDANTS.

Judgment in a partition action was not void as to defendants, who left the state 20 years before the death of the owner of the land, because they were summoned by publication and sued in the names by which they were known when they left the state, and not by any others acquired by marriage or otherwise.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 129, 131.]

6. JUDGMENT \S 489—COLLATERAL ATTACK—PREMATURE ACTION—PARTIES—ADMINISTRATOR—RULE OF COURT.

The defect that an action for partition of decedent's land was brought within 12 months after his death, and that the administrator was not made a party, as required by rule 55 of the circuit court, was not jurisdictional.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 924, 925.]

Appeal from Common Pleas Circuit Court of Chesterfield County; H. F. Rice, Judge.

Action by Minnie L. Gladden and others against P. E. Chapman and another. From a judgment against certain plaintiffs, they appeal. Affirmed.

Stevenson & Prince, of Cheraw, for appellants. Miller & Lawson, of Hartsville, for respondents.

HYDRICK, J. This is an action to recover possession of a tract of land, which plaintiffs claim as heirs of James H. Kessiah. Defendants claim as purchasers under a judgment of the circuit court under which the land was sold for partition amongst the heirs of James H. Kessiah. The record in that action, which defendants pleaded as an estoppel, showed that two of the plaintiffs were not parties thereto and that four of them were. The court directed a verdict for the two who were not parties and against the four who were. The latter appealed.

In 1888, Martha, the wife of James H. Kessiah, left him and went to North Carolina, taking with her their children. Kessiah died, intestate, April 1, 1908. His brother, George W. Kessiah, administered upon his estate, and in October, 1908, brought an action for partition of his land, wherein he was plaintiff, and another brother, Robert, and a sister, Catherine, and Martha, the wife of James H., and four of their children were named as defendants. The verified complaint in that action alleged, inter alia, that the plaintiff and the defendants Robert and Catherine were the only heirs of James H., and were the owners, as tenants in common, of the land sought to be partitioned; that Martha, the wife of James H., and Elvie, Albert, Henry, and Susannah, his children, left the state more than 20 years before, and had never returned or been heard of, and that their places of residence, if they were alive, were unknown, and could not, with due diligence, be found. The relief prayed for was that the land be sold and the proceeds divided amongst the brothers and sister of James H. Plaintiff's affidavit, filed with the complaint, stated that a cause of action existed in his favor against the defendants, on the grounds stated in the complaint, and (after reiterating the allegation as to their absence and his inability to ascertain their places of residence) that, if living, they had an interest in the land sought to be partitioned. Upon the complaint and affidavit,

an order of publication was granted and the summons was duly published accordingly. On proof of default of defendants, the cause was referred to a referee to take testimony and report. The referee took testimony, and thereupon reported that the allegations of the complaint were true, and that plaintiff was entitled to the relief prayed for. His report was confirmed and made the judgment of the court. The land was sold, and bought by defendants, who paid the purchase price and took possession under the deed made to them by the officer of the court.

[1] This being a collateral attack upon it, that judgment and the sale made under it must be sustained, unless it affirmatively appears upon the face of the record that the court had no jurisdiction of the subject of the action, or of the parties. Sound public policy requires that the solemn judgments of the courts and rights acquired thereunder be sustained against collateral assault, if in reason and justice it can be done. If such judgments and rights are lightly overthrown, the courts are brought into disrepute and merited contempt. What sort of an opinion must the average layman entertain of a court and its administration of justice, if that court should sell him land and take his money for it, and afterwards tell him that he has no title and take it away from him? Our people have an abiding faith in "court titles," and it should not be shaken. Hence the rule is as above stated, and the purchaser in good faith at a judicial sale is bound only to see that the court had jurisdiction of the subject of the action and of the parties in interest. He is not affected by irregularities or errors in the record for which the judgment might have been vacated in a direct attack, or reversed on appeal, or by secret vices affecting the judgment, which are not disclosed by examination of the record. *Trapier v. Waldo*, 16 S. C. 276; *Turner v. Malone*, 24 S. C. 398; *Tederal v. Bouknight*, 25 S. C. 275; *Hunter v. Ruff*, 47 S. C. 525, 25 S. E. 65, 58 Am. St. Rep. 907.

While section 185 of the Code of Civil Procedure, which authorizes the publication of the summons in certain cases, provides that the defendant against whom publication is ordered shall be allowed to defend the action before and after judgment, on conditions specified, and even that restitution may be ordered, if the judgment has been collected or enforced, yet, in accord with and confirmation of the principle and policy above stated, it provides further that "the title to property sold under such judgment to a purchaser in good faith shall not be thereby affected." *Yates v. Gridley*, 16 S. C. 496; *Clemson College v. Pickens*, 42 S. C. 511, 20 S. E. 401; *Hunter v. Ruff*, supra.

Jurisdiction of the subject of the action has not been, and cannot be, questioned. But appellants contend that the judgment is void as to them, because it appears on the

face of the complaint therein that no cause of action was stated against them. Their contention is that, by necessary implication, it is there alleged that they were all dead, and also that they all died without leaving issue, for otherwise the allegation that plaintiff and his brother and sister were the only heirs of their father and the owners of his land was false as matter of law; that, if dead, they could not have been made parties, and, if alive, no cause of action was stated against them; that it would be inconsistent to hold that they were alive for the purpose of acquiring jurisdiction of them, but dead for the purposes of distribution; that, if they were alive, so that they could be reached by the jurisdictional arm of the court, they were within reach of its distributing hand.

[2] The argument is specious, but unsound. The fallacy of it lies in ignoring the fact—not a supposition—that they were alive. Therefore they were within reach of the jurisdictional arm of the court. The fact that the court adjudged that they were dead for purposes of distribution does not affect its jurisdiction, but merely suggests error in the judgment, which, if conceded, would not avail them in a collateral attack upon it. As said by Mr. Justice Johnson for the New York Court of Appeals, in *People v. Sturtevant*, 9 N. Y. 263, 269, 59 Am. Dec. 536:

"Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out, as well as any supposed case would. It presents these questions: Have the plaintiffs shown a right to the relief which they seek? and has the court authority to determine whether or not they have shown such a right? A wrong determination of the question first stated is error, but can be re-examined only on appeal. The other question is the question of jurisdiction."

[3] It must be presumed from the judgment rendered that the court considered and adjudicated the regularity and sufficiency of each and every step in the proceedings leading up to it, including the sufficiency of the complaint, the issuance and service of process upon the defendants, and the rights and interests of the parties to the action under the allegations and evidence; and although the conclusions with respect to those matters, or any of them, might have been erroneous, so that they would have been reversed on appeal, they do not make the judgment void collaterally. *Hunter v. Ruff*, supra; *Van Fleet on Collateral Attack*, § 1; 23 Cyc. 1078.

[4] But, if it be conceded that the complaint did fail to state facts sufficient to constitute a cause of action against the absent defendants, that was not a jurisdictional defect. 23 Cyc. 1071, 1093. As to the suffi-

ciency of allegations to confer jurisdiction, Judge Van Fleet, in section 61 of his work on Collateral Attack, says:

"The rule is this: *Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted or that he was entitled thereto?* If it can, the allegations will shield the judgment from collateral assault."

Further on, in the same section, the learned author says:

"A large number of cases are cited in chapter VIII, *infra*, where the judgment is not void, although the affidavit, complaint, or petition showed affirmatively that the plaintiff had no cause of action whatever. These illustrations show that there is no connection between jurisdiction and sufficient allegations. In other words, in order to 'set the judicial mind in motion,' or to 'challenge the attention of the court,' it is not necessary that any material allegation should be sufficient in law, or that it should even tend to show facts that are sufficient. If that were the rule, the absence of any material allegation would always make the judgment void, because it cannot be said that such a complaint has any tendency to show a cause of action. It will be seen from the cases about to be cited that, when the allegations are sufficient to inform the defendant what relief the plaintiff demands, the court having power to grant it in a proper case, jurisdiction exists, and the defendant must defend himself."

He concludes:

"That, if there is any petition at all invoking the action of the court, its judgment is not void."

The subject is given elaborate consideration in *Jarrell v. Laurel Coal & Land Co.*, 75 W. Va. 752, 84 S. E. 933, L. R. A. 1916E, 312, and an editorial note to that case in which it appears that the rule laid down by Judge Van Fleet is sustained by the weight of reason and authority.

[5] Appellants contend, further, that the judgment is void as to them, because they were not sued by their correct names: For instance, that Ella V. Martin was not lawfully summoned by the name of Elvie Kessiah, nor Macon Albert Kessiah, by the name of Albert Kessiah, and so on. The answer to that contention lies in the undisputed evidence that, when they left the state, they were known by the names in which they were sued, and none other, and that they knew themselves by those names; and if they had any other, it was known only to them and their parents. There is no evidence that they were known by any other names than those in which they were sued, except that Susannah was called Susie, which is commonly known to be one of the diminutives of that name. If Ella V. Martin saw the published summons to Elvie Kessiah (whether she did or not is immaterial—*Hunter v. Ruff*, *supra*), she must have concluded that she was the person intended, for she knew that, when a child, she was called Elvie Kessiah, and especially so when that name appeared in

connection with the names of her mother and sister and brothers. Under the circumstances of this case, it would be unreasonable to hold that the court acquired no jurisdiction of her, because she was sued in her maiden name, instead of that which she acquired by marriage after she left the state. The practical effect of such holding would be that she could not have been made a party at all; for she could not have been sued by description as an heir of James H. Kessiah whose name was unknown, because her name was known. Moreover, as she was unmarried when she left the state, and had not been heard of for more than 20 years, and as due diligence could not discover whether she was dead or alive, or, if alive, her place of residence, how could it be said that it should have discovered her married name? So, also, as to the others. We must conclude, therefore, that the names given the appellants in the published summons were sufficient for the purpose of giving them notice of the action. *Emery v. Kipp*, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141.

[6] The next objection to the judgment is that the action was prematurely and improperly brought, because it was commenced within 12 months after the death of the intestate, and because the administrator of his estate was not made a party, as required by rule 55 of the circuit court. The wisdom of the rule is unquestioned. Some of the reasons why it should be observed are pointed out in the opinion of this court in *Ex parte Worley*, 49 S. C. 41, 26 S. E. 949. But it is only a rule of practice, and, while the failure to observe it may have been error, which would have been corrected on application to the court, or on appeal from the judgment, clearly it was not a jurisdictional defect.

The undisputed evidence shows that the defendants in this action were purchasers in good faith under a judgment rendered by a court that had jurisdiction of the subject of the action and of these appellants. It follows, under the authorities above cited, that appellants cannot be permitted to attack that judgment in a collateral action. No doubt a wrong was done them; but they were not altogether without fault. Their conduct, in remaining absent from the state so long, without communicating with their relatives or friends here, made it possible; and they have no just ground to complain because the court declines to correct the wrong done them by doing a greater wrong to the defendants, and, in so doing, set a mischievous precedent.

Judgment affirmed.

GARY, O. J., and FRASER and GAGE, JJ., concur. WATTS, J., took no part.

(106 S. C. 512)

SWEAT v. WOLFE. (No. 9642.)

(Supreme Court of South Carolina. March 16, 1917.)

1. APPEAL AND ERROR \S 714(4) — MATTERS CONSIDERED—ADMISSIONS BY COUNSEL.

A statement of facts in counsel's argument may be accepted as against him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2962.]**2. REPLEVIN \S 68 — AMENDMENT — REFUSAL TO ALLOW AMENDMENT OF A CLAIM AND DELIVERY COMPLAINT.**

Refusal to allow amendment of a claim and delivery complaint against the administrator of an estate, by eliminating any damage claim against the estate, is not erroneous, since the amendment would leave the estate liable for costs, whereas only the representative individually is liable.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. \S 251-256.]

Appeal from Common Pleas Circuit Court of Richland County; R. W. Memminger, Judge.

Action by T. O. Sweat against George W. Wolfe, administrator of the estate of J. L. Smith. From a judgment dismissing the action, plaintiff appeals. Affirmed.

John A. Hiers, of St. George, for appellant. Legare Walker, of Summerville, for respondent.

HYDRICK, J. Plaintiff brought this action of claim and delivery against defendant as administrator of the estate of J. L. Smith, deceased, to recover possession of some cattle which he alleges he bought of Smith in his lifetime, and \$500 damages for the detention thereof. The court below sustained a demurrer to the complaint and dismissed the action, refusing plaintiff's motion to be allowed to amend.

[1, 2] It is stated in the "case" that a motion was made by plaintiff's counsel to amend the complaint, but it does not appear what amendment was asked for. Appellant states in the argument that he asked to be allowed to amend by eliminating all claim for damages against the estate of Smith. While we may not consider a statement of fact found only in the argument of counsel in his favor, we may accept it against him. Assuming, then, that counsel asked to be allowed to amend as stated, there was no error in refusing his motion, for that would have left the action to proceed against the defendant in his representative capacity; and, if plaintiff had recovered, the judgment for costs at least would have been entered against the estate. In *Elmore v. Elmore*, 58 S. C. 289, 36 S. E. 656, 51 L. R. A. 261, it was held that an executor or administrator cannot be sued in his representative capacity in claim and delivery for a chattel in his possession as property of the estate which he represents. If sued for such a chattel the action must be against him as an individual. If plaintiff had asked to be allowed to amend by making

the action one against the defendant individually, the allowance of such an amendment would have been within the discretion of the court, and it might have been granted; but, as we have seen, the amendment asked for was properly refused.

Judgment affirmed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 495)

McFADDEN v. CLARK et al. (No. 9636.)

(Supreme Court of South Carolina. March 12, 1917.)

PARTIES \S 7—TRUSTEE OF EXPRESS TRUST—FORECLOSURE — MASTER AS PARTY PLAINTIFF.

Where decree provided that bonds representing interest payments of mortgage which was the share of minor defendants were to be executed and delivered to the master to be held until infants' majority or to be turned over to their duly authorized guardian, and that bonds which were the share of adult defendants be assigned to them by the master, the master was not a trustee of an express trust within the statute, and was not a proper party plaintiff to foreclose the mortgage, being merely a custodian thereof.

[Ed. Note.—For other cases, see Parties, Cent. Dig. \S 9-11.]

Gary, C. J., and Fraser, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Mendel L. Smith, Judge.

Suit by A. D. McFadden, Master, against Washington Clark and another. Order overruling objection by defendants to plaintiff's right to bring action, and defendants appeal. Reversed, and complaint dismissed.

H. N. Edmunds and Logan & Graydon, all of Columbia, for appellants. Cooper & Cooper and Jas. S. Verner, all of Columbia, for respondent.

WATTS, J. I cannot concur in the opinion of the Chief Justice herein. I think the judgment should be reversed and the complaint dismissed. The plaintiff is not the owner and holder of the bonds and mortgage complained upon. He has no interest whatsoever therein. He has no right to maintain the suit. He is not the real owner, but merely the custodian of the bonds and mortgage. He is not the trustee of an express trust, and this is not such a case as he is authorized by statute to sue.

The decree of the court under which the sale was made whereby he acquired the bonds and mortgage is as follows:

"That the bonds representing the deferred payment of the interest as may be ascertained to be the shares of the minor defendants, Marion Earle Turner and Margaret Smiley Turner, were to be executed and delivered to the master for Richland county to be held by him for such minors until they become of age or to be turned over by him to a duly appointed guardian on their behalf. That the bonds representing the deferred payment of the interest as may be as-

certained to be the shares of the adult plaintiffs herein be executed and delivered to the master for Richland county, and that the same be forthwith assigned to them by said master according to their respective rights therein. The proceeds of the said sale and the interest on the deferred payment represented by the bonds and mortgages above referred to shall be distributed and assigned among the parties hereto as follows: Jas. E. Turner, $\frac{1}{3}$ thereof, and to each of the following children, to wit, C. W. Turner, J. A. Turner, J. T. Turner, O. E. Turner, Clyde Turner, Marion Earle Turner, and Margaret Smiley Turner, $\frac{2}{21}$ each upon the execution and delivery to the master for Richland county of the bonds and mortgages above mentioned and the payment to him of \$5,000 in cash."

The record in the case further shows the following: This judgment roll No. 10892 (Jas. E. Turner, Plaintiff, v. Marion Earle Turner, et al., Defendants) showed that the bonds and mortgages sought to be foreclosed in this action were executed pursuant to a decree of the court of common pleas for Richland county taken in an action which was commenced for the purpose of securing authority from the court to convey to the defendant Washington Clark the real estate covered by said mortgages, which was part of the estate of Lavinia E. Turner, who died intestate, leaving as her only heirs at law the parties to the action of Turner v. Turner above referred to, two of whom were infants. In order to convey the interest of the infants in said property application was made to the court in the said case of Turner v. Turner.

This conclusively shows that the master is merely a custodian of the securities. It is not his business to collect them, and his institution of the suit is without authority of law. It is not his business to collect for the adult parties. That is their affair, and he cannot institute the suit for the infants, as the decree requires him to hold them for them until they become of age "or to be turned over by him to a duly appointed guardian on their behalf." The cash portion at the sale was \$5,000, which was distributed as provided for by the decree.

In the decree in this case a large amount is allowed for attorney's fees. It is difficult to conceive how the parties can be benefited by allowing the master to foreclose and how they can be benefited by paying attorney's fees and commissions to the officers of court. The decree in the former case contemplated that the adults manage their own interests, and that of the minors was protected by the order of court. The evidence in the case fails to show that the plaintiff is in any manner entitled to maintain this suit. He has no authority from any one interested therein and no order from the court. He is merely a custodian of the securities and a volunteer in the matter without authority of law

to bring the action, and I think the judgment should be reversed, and the complaint dismissed.

Judgment reversed.

GAGE and HYDRICK, JJ., concur.

GARY, C. J. (dissenting). This is an appeal from an order overruling the objection interposed by the defendants that the plaintiff did not have the right to bring the action, to foreclose the mortgage given to secure payment of the bonds hereinafter mentioned, on the ground that he was not the real party in interest. The plaintiff contended that such an objection could not be entertained, unless it was made by demurrer or answer; and his honor the circuit judge so ruled.

In the present case, the question whether the plaintiff is the real party in interest is very important, as it is contended by the defendants that the bringing of this action by the plaintiff is in violation of the previous orders of the court, in the proceedings out of which this action arose, which provide that the bonds representing the shares of the minors be delivered to the master for Richland county, to be held by him for such minors, until they become of age, or to be turned over by him to a duly appointed guardian on their behalf; and that the bonds representing the shares of the adults be delivered to the master for Richland county, and that the same be forthwith assigned to them by said master, according to their respective rights therein. Furthermore, it occurs to the court that the question may hereafter arise as to the liability of the plaintiff, in his official capacity, for any losses that may be sustained under these proceedings, if he should be allowed to proceed with the action.

In the case of Parker v. Victoria Co., 105 S. C. 375, 89 S. E. 1068, the court used this language:

"The case of Haygood v. Boney, 43 S. C. 63 [20 S. E. 808], as well as numerous others that might be cited, clearly shows that the court has the power to order the amendment, or it can remand the case to the circuit court for the purpose of enabling the plaintiff to make a motion to that effect."

Under the peculiar circumstances of this case, we deem it advisable to order that the defendants be allowed to amend their answers, so as to present the question under consideration, in proper form.

FRASER, J., concurs.

On Petition for Rehearing.

PER CURIAM. Petition dismissed, and order staying remittitur revoked.

(79 W. Va. 771)

THOMPSON v. CURRY et al. (No. 3092.)
(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** ⇨243—**INDORSEER—LIABILITY.**

A person who, otherwise than as maker, drawer, or acceptor, places his name upon a negotiable instrument, executed according to the Uniform Negotiable Instruments Law, is deemed to be an indorser, unless by appropriate words he indicates an intention to be bound in some other capacity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553.]

2. **BILLS AND NOTES** ⇨243—**INDORSEER—CONTRACT.**

The contract of one who so indorses a negotiable instrument drawn under that act is, as at common law, upon the sole condition that he will pay the obligation, if the maker fails to pay it when due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553.]

3. **BILLS AND NOTES** ⇨396—**LIABILITY OF INDORSEER—PRESENTMENT.**

But, to render such an indorser liable, presentment for payment at the time and place designated in the paper and notice of dishonor are essential, unless he waives these requirements; and this he may do, expressly or impliedly, either before or after the maturity of the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022-1028.]

4. **BILLS AND NOTES** ⇨526—**LIABILITY OF INDORSEER—WAIVER OF PRESENTMENT—EVIDENCE.**

The facts herein proved, although as to them the testimony conflicts, held sufficient to show such a waiver after maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1840-1846.]

Error to Circuit Court, Lincoln County.

Action by Lawson Thompson against B. B. Curry, D. E. Wilkinson, Granville Curry, S. S. Johnson, and John W. McColgin. Judgment for plaintiff against Wilkinson only, and plaintiff brings error. Reversed, and judgment rendered for plaintiff against Wilkinson and Johnson, and dismissing as to Granville Curry, without prejudice.

Jacob Smith, of Hamlin, for plaintiff in error. A. F. Morris, of Hamlin, for defendants in error.

LYNCH, P. The note sued on in this action, when delivered to the payee, showed on its face the names of B. B. Curry and D. E. Wilkinson as makers, and on the reverse side the names of Granville Curry and S. S. Johnson, and none others. It bears date January 1, 1912, and reads:

"Twelve months after date we promise to pay to the order of John W. McColgin, without offset, one thousand dollars, payable at the Lincoln National Bank of Hamlin, W. Va."

As thus executed, McColgin before maturity and without recourse, indorsed and delivered it to Lawson Thompson, who, without presenting it for payment on the date and at the

place appointed therefor, afterwards brought assumpsit against the signatories named except the payee. The circuit court, by agreement of the parties, tried the case in lieu of a jury, and rendered judgment against D. E. Wilkinson only. Thompson complains, because the court denied him the right to recover against S. S. Johnson and the personal representative of Granville Curry, who died pending the suit. The theory of the defense they proposed, the one apparently approved and adopted by the court in determining the rights of the parties, was that, under section 63, c. 98A, Code (sec. 4234), they were indorsers, and as such relieved from liability because plaintiff failed to present the note for payment at the time and place fixed therein for that purpose and to give them formal notice of its dishonor. This he admits he did not do, and was not aware that it was necessary to do to bind them.

Nor were presentment and notice required at the common law, as interpreted by the courts of this state, because, as Granville Curry and Johnson placed their names in blank upon the back of the instrument before delivery, for the accommodation of the makers, the payee or his indorsee could, under the common-law principles, elect to hold them as joint makers or as guarantors or indorsers. *Peters v. Nolan Coal Co.*, 61 W. Va. 392, 56 S. E. 735, and cases cited. The note was negotiable at common law; the indorsements were made before delivery and above the indorsement of the payee.

[1] But, by section 63 of the Negotiable Instruments Act:

"A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity."

And the next section (sec. 4235) adds:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as *indorser* in accordance with the following rules: (1) If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties; (2) if the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer; (3) if he signed for the accommodation of the payee, he is liable to all parties subsequent to the payee."

And further, by clause 6 of section 17 (sec. 4188):

"Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser."

These details of the act clearly identify Granville Curry and Johnson as indorsers, and this identification renders certain the capacity in which they joined in executing the instrument sued on.

The uncertain status of an irregular or anomalous indorser at the common law, as interpreted by the courts of the different juris-

dictions, was, as generally agreed, one of the chief inducements for the movement that culminated in the adoption of the Uniform Negotiable Instruments Law by many of the states of the Union. The varied interpretation of the relation that an indorsement in blank created, as between the apparent makers, indorsers, and others, during the course of the instrument, operated as an impediment or obstruction to its commercial circulation and currency. For if as held in this state in the case cited, the payee or indorsee of such paper had the option to treat as a joint maker, guarantor, or indorser one who signed his name in blank on the back thereof, his status was one of doubt and uncertainty wherever the paper found its way in commercial transactions, because other jurisdictions gave him a different status. 3 R. C. L. §§ 340-347; 8 C. J. § 118 et seq.

Giving to sections 63 and 64, c. 98A, Code, their logical and legitimate interpretation and effect, in view of the purpose of the whole act, the conclusion seems to be inevitable that where, before delivery to the payee, a person signs his name in blank on the back of an instrument in form negotiable, otherwise than for the purpose of transferring the title, he is to be deemed as having consented to be bound in the capacity of an indorser and not otherwise, although under the common-law rules his status may have been different. These sections fix and determine the exact relation he bears to the paper, when it passes by delivery to the payee; a relation that remains fixed and stable during the entire circulation of the instrument. Until it is paid, he occupies the position of an indorser, and, as such, is subject to the burdens imposed by that relation, and entitled to whatever protection it affords. That relation, its burdens and immunities, are the same in all jurisdictions wherein the Uniform Negotiable Instruments Act has been enacted and now is in force. His liability is no longer susceptible of doubt or uncertainty. The statute fixes his status, a status wholly beyond the power of alteration or change at the option of the payee or any subsequent holder. Such indeed is, with one exception, the consensus of opinion, so far as expressed by authors and decisions dealing with the new form of legislation. *Baumelster v. Kuntz*, 53 Fla. 340, 42 South. 886; *Hough v. State Bank*, 61 Fla. 290, 55 South. 462, Ann. Cas. 1912D, 1200; *Williams v. Paintsville National Bank*, 143 Ky. 781, 137 S. W. 535, Ann. Cas. 1912D, 350; *Haddock v. Haddock*, 192 N. Y. 499, 85 N. E. 682, 19 L. R. A. (N. S.) 136; *Rockfield v. First National Bank*, 77 Ohio, 311, 83 N. E. 392, 4 L. R. A. (N. S.) 842; *Deahy v. Choquet*, 28 R. I. 338, 67 Atl. 421, 14 L. R. A. (N. S.) 847; *Bank of Montpelier v. Montpelier Lumber Co.*, 16 Idaho, 730, 102 Pac. 685; *First National Bank v. Bickel*, 143 Ky. 754, 137 S. W. 790; *Bamford v. Boynton*, 200 Mass. 560, 86 N. E. 900, 19 L. R. A. (N. S.) 871, 128 Am.

St. Rep. 378; *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775, 118 Am. St. Rep. 455; *Perry Co. v. Taylor Bros.*, 148 N. C. 362, 62 S. E. 423; *Farquhar Co. v. Higham*, 16 N. D. 106, 112 N. W. 557. For other citations see 1 Daniel, Neg. Inst. § 714; *Rockaway Bank v. Norton*, 186 N. Y. 484, 79 N. E. 709.

[2, 3] So that, as so interpreted, and indeed as the act itself renders obvious the persons whose names appear on the back of the instrument are indorsers. Their contract, as at common law, was upon the condition that they would pay the debt if the makers failed to pay it when due. But no liability attached unless when presented for payment at the time and place fixed in the contract, payment was refused by those primarily liable, and notice of nonpayment was communicated to the indorsers, unless waived either expressly or impliedly before or after the maturity of the instrument. Section 109, c. 98A, Code (sec. 4280). The trial of the case, indeed, proceeded upon the theory, advocated by the plaintiff, that, although Granville Curry and Johnson were indorsers, entitled to notice of dishonor, they were nevertheless bound because, before and after the maturity of the note, they waived these requirements; and to establish or disprove waiver was the purpose of practically all the testimony introduced upon the trial of the case. Conceding the efficacy of the testimony introduced to show a verbal promise of payment made by the indorsers after the dishonor of the instrument, of which it appears by their own admissions they had knowledge, the inquiry is whether the trial court erred in denying plaintiff judgment against them also, in view of the waiver provisions contained in section 109 that:

"Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied."

[4] Obviously there were negotiations among all the parties to the instrument before and after it became due, in anticipation of the makers' inability to pay it, owing to the loss by fire of their stock of merchandise before that date. While the testimony of Granville Curry and Johnson does not in every particular agree with that of the plaintiff in regard to what was said during these negotiations, yet on some phases of the transaction there is no discord between them. Johnson says:

"I told" the plaintiff "to go and see Curry and Wilkinson in regard to the matter. I think he talked with Curry in the first place, and then with Wilkinson, and came back and said he was not in shape to do anything. I told him to go to Mr. Wilkinson, and if he would give us a deed of trust over something to secure us we would make arrangements and get the money and pay the note off, and we would hold the trust until they could make arrangements to pay us."

The context shows the presence of the plaintiff, Granville Curry, and Johnson at the time referred to in the quotation. The

evident purpose of the negotiations then in process, in contemplation of the continued liability of the indorsers, was to secure from Wilkinson a lien on his property to indemnify them as indorsers on the note of himself and B. B. Curry. Johnson further testified:

"I don't know as Thompson made demand of me to pay it. I told him we were talking about the matter. Q. Did he come to you and tell you he wanted the money on that note? A. I don't remember how the conversation came up. Q. Did you tell him you would or would not pay it? A. I don't think at that time I told him either way. I told him we would get the money if he would get D. E. Wilkinson to give us a deed of trust over real estate to make us safe."

Granville Curry says:

"I told him, if the parties would give us a deed of trust and make us safe, we would give a new note. * * * I knew it had not been paid."

These questions were propounded and the answers given on the first trial. Upon the second trial Thompson, with some modification, repeated the conversations he had with the two indorsers:

"I was down here somewhere between the 1st and middle of December on some other business, and Mr. S. S. Johnson spoke to me concerning this note, and asked me if I had ever spoken to Mr. B. B. Curry and D. E. Wilkinson concerning the matter, whether they were going to be able to pay that note when it was due January 1st or not, and I told him I had not, but would do so before I went away, and I did speak to Mr. Curry." "Mr. Johnson asked me if I had spoken to them about the note, and he went on and stated to me that the note would be due January 1st, and he would like to find out what if anything they would be able to do with it."

This conversation was had before the note became due. After it became due, he says:

"I stayed overnight at the house of Granville Curry," about three weeks after the note became due, "when we were going over to" Hamlin. "We were going over there, and we were to come together and see what could be done about the payment of this note and what kind of shape they were in." That at that time, in the presence of plaintiff and Granville Curry, Johnson said he "did not think there was anything that Mr. B. B. Curry had they could get at, as his property was so wrapped up in mortgage liens or something like that, and that they did not think there was anything they could get at, or that he had anything they could make it out of, but Mr. Wilkinson had a lot of property that was not involved, and that they would make one more proposition and send for Mr. Wilkinson, and that if he would give them a deed of trust on some property of some kind worth the amount involved they would make a note to the bank and get the money and pay me, and as long as Mr. Wilkinson took care of the note they would give him time."

After Wilkinson declined to execute the trust, Thompson says:

"I returned back there and told what Mr. Wilkinson said. Then they said to go ahead and bring suit on the note, and what we couldn't make out of him they would pay; that they had been worried considerably about it, and were getting anxious to settle this thing, and to go ahead and push it, and have my attorney bring suit on the note, and what I couldn't make out of Mr. Wilkinson they would pay me. * * * I think it was the same day when they ordered me to bring suit on the note, and I went ahead and put the note in the hands of

an attorney. * * * I ordered that suit brought as they ordered me to do. * * * Mr. Johnson told me, 'Now you live at Holden, some distance from here, and I feel interested in this matter;' and he said, 'I will watch after the matter myself, and if anything turns up, or if there is any disposition of any property that I think is not right, I will notify you or Mr. Evans'—his attorney. 'I told him I would appreciate very much if he would do so; that I was away from Hamlin, and was not handy here, and could not be here very often without considerable expense to myself, and I would appreciate it very much if he would do it.' Afterwards 'I wrote to Mr. Johnson, but did not get any answer. I came down here, and went over to his store, and he came around and shook hands with me, and said, 'I didn't answer your letter,' and he went on and told me the reason he did not, and he said he felt ashamed about it, and so he said he found since a hole to crawl out of, and he says, 'I am going to get out; there is no use to deny it any longer; I am going to get out of it; I am going off the note. I will be frank to tell you that I am going to get out of it, and that is why I did not answer your letter.'"

The correctness of this statement Johnson did not deny upon his second examination; and when asked, "Did you or Mr. Curry say there at that time that you would pay the balance of this note that the plaintiff could not make off of D. E. Wilkinson or B. B. Curry?" he answered, "I told him in a conversation there that, if we had to pay any, it would only be what Curry and Wilkinson couldn't pay; that would be the only part we would pay." Of course, the liability of the indorsers, being secondary, extended only to such balance. But he added that if Thompson—

"would get Mr. Wilkinson to give us a deed or trust over some property to make us safe, Mr. Curry and I would execute our note at the bank to get the money and pay him; but I did that to accommodate Mr. Thompson." "I just done that to accommodate Mr. Thompson."

And Granville Curry said:

"The only promise or conversation I had with Lawson Thompson, or rather I made a statement to Lawson in which I told him, if the balance would pay their part, I would pay mine; on condition they would pay their part, I would pay mine."

While these quotations do not contain all the testimony introduced on the question of waiver, they do fairly represent what was said by the parties during the negotiations between them immediately before and after the date on which the obligation matured. And when it is remembered that, as the evidence clearly shows, the indorsers then knew the note was not paid, nor presented for payment, when due, the question arises whether, from the testimony, there was such a waiver by them of the failure to make presentment and demand for payment and give notice of dishonor as still continued their liability in force.

The authorities are abundant to the effect, and the statute itself indicates, that an effectual waiver may occur, either before the time for giving notice has arrived, or after the omission to give due notice, and that the

waiver may be express or implied, and, further, that no consideration is necessary to make it effectual. An indorser other than one who transfers the title can, after the instrument is due, waive proof of demand and notice, or, what is important here:

"He can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial." *Yeager v. Farwell*, 13 Wall. 6, 20 L. Ed. 476; *Hoadley v. Bliss*, 9 Ga. 303; *Harrison v. Bailey*, 99 Mass. 620, 97 Am. Dec. 63; *Sparham v. Carley*, 8 Man. 246; 8 C. J. 698. "An oral promise by the indorser of a promissory note to pay the same, made, without being misled, after maturity of the note, and with the knowledge that there has been no demand for payment upon the maker, or notice of nonpayment given to himself as indorser, and of all other material facts, is a waiver of the want of demand and notice, and renders him liable on the note without a new consideration, although the note is payable on demand, and he does not know that upon such a note the law required demand and notice." *Matthews v. Allen*, 62 Mass. (16 Gray) 594, 77 Am. Dec. 430; *Lockwood v. Brock*, 50 Minn. 142, 52 N. W. 391.

Third National Bank v. Ashworth, 105 Mass. 503, states the same proposition; and *Rindge v. Kimball*, 124 Mass. 209, says a waiver is as effectual after as before maturity of the note. As early as 1820, the Supreme Court of Virginia, in *Walker v. Laverly*, 6 Munf. (20 Va.) 487, a decision binding on this court, held that if a drawer of a protested bill of exchange, being applied to in behalf of the holder for payment, acknowledges the debt to be just and promises to pay it, saying nothing about his having received notice, the holder in an action of debt upon the bill against such drawer is not bound to prove that notice was given to him of the protest. This decision was followed in *Pate v. McClure*, 4 Rand. (25 Va.) 164. And in *Peabody Insurance Co. v. Wilson*, 29 W. Va. 541, 2 S. E. 888, 895, it was said:

"If it be true, as alleged in the affidavit of Layne, that the indorser, Buffington, 'always acknowledged his liability for the debt sued and promised to pay the same,' and these facts had been proved on the trial, such acknowledgment and promise to pay the note, was a waiver of all notice, although nothing was said about notice in the acknowledgment, for in such case the holder is not bound to prove, that notice of the protest thereof was given him."

See, also, *Devendorf v. Oil Co.*, 17 W. Va. 175.

The decisions in the cases cited, it is true, antedate the enactment of the Uniform Negotiable Instruments Act; but that fact is immaterial, because the act, in addition to the recognition of the doctrine of waiver, does not attempt to determine all the details that tend to fix the liability of an indorser, and, in so far as applicable now, that liability remains as it was at the common law, except as modified by that act. However, whether the common-law principles apply or not, and we are satisfied they do, a Kentucky case holds that an indorser of a negotiable instrument, who after the time for giving notice of dishonor declares his intention

to pay the note, waives notice of dishonor, regardless of whether he had knowledge that he had been discharged by reason of failure to receive notice of dishonor. *Doherty v. Bank (Ky.)* 186 S. W. 937. The court in this case interpreted the section of the act regarding waiver, being section 109 of our act.

There is also the same degree of uniformity among the decisions holding unnecessary a consideration to support a waiver. *Burgettstown National Bank v. Nill*, 213 Pa. 456, 63 Atl. 186, 3 L. R. A. (N. S.) 1079, 110 Am. St. Rep. 554, 5 Ann. Cas. 476, citing numerous authorities. For additional authorities, see note to this case in 5 Ann. Cas. 478. Besides, the rule seems to be general that a waiver of notice of nonpayment of a note also constitutes a waiver of presentment for payment in accordance with the implied provisions of the contract of indorsement. *Bank v. Nill*, supra; *Barclay v. Weaver*, 19 Pa. 396, 57 Am. Dec. 661; *Worley v. Johnson*, 60 Fla. 294, 53 South. 543, 33 L. R. A. (N. S.) 639; *Baumelster v. Kuntz*, supra; *Pollard v. Bowen*, 57 Ind. 232; *Bank v. Mason*, 121 Iowa, 570, 90 N. W. 612, 97 N. W. 70; *Pinney v. McGregory*, 102 Mass. 186; 8 C. J. 696.

It cannot reasonably be contended that, because some of the statements emanating from the indorsers themselves, or attributed to them by the plaintiff, did not contain all the elements of a waiver, because conditional, a waiver did not arise. Some of the statements so made were not conditional. They were positive and unequivocal, and were such as to induce the belief that, when made, the indorsers did not intend to escape liability by relying upon the delinquency of plaintiff to make presentment for payment and give notice of dishonor. They did not contradict the statement of plaintiff that they authorized him to sue on the note, and would pay whatever amount he failed to collect from the makers. That was a concession of their liability to that extent. The only attempted denial was the conclusion that they did nothing to waive their legal rights, and that denial came only upon the pressure by counsel after an apparent disinclination to answer the question propounded to them. "A waiver may result from implication, * * * or from any words and acts which by fair and reasonable construction are of such a character as will satisfy the mind that a waiver was intended, although the words are to be strictly construed." Where an indorser, who knows a note on which he is liable has not been paid, and not presented for payment, by language indicates an intention to be bound by his contract notwithstanding the laches of the holder, accompanied by a request that he try to collect of the maker, this will operate as a waiver. *Parsons v. Dickinson*, 23 Mich. 56. A further illustration of a waiver is the statement, "When I come to town I will set

that matter to rights," made by an indorser in answer to a letter of the holder after laches in giving notice of nonpayment of the note at maturity. *Anson v. Bailey*, Bull. N. P. 276.

These reasons lead to the conclusion that the judgment is erroneous, in that it discharged Johnson and Granville Curry's estate in the hands of his executor from all liability on the instrument, though of course no judgment could be rendered against the executor jointly with Johnson and Wilkinson, because by death the action abated as to the testator, and thereafter could not be revived, so as to proceed jointly against all of them at the same time. *Henning v. Farnsworth*, 41 W. Va. 548, 23 S. E. 683.

We therefore reverse the judgment, because it attempts to discharge the indorsers from liability, and render judgment here jointly against D. E. Wilkinson and S. S. Johnson for the sum of \$866, the amount of the recovery allowed by the trial court, with interest from September 11, 1915, the date of the judgment complained of, and dismiss the action as to Granville Curry without prejudice to another suit, with costs to the plaintiff in error.

(79 W. Va. 768)

ALLEMAN et al. v. SAYRE et al.
(No. 3213.)

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. EQUITY §226—GENERAL AND JOINT DEMURRER—EFFECT.

A general and joint demurrer of two or more defendants to a bill in equity, showing a cause of action against some of them, does not reach the question of the propriety of the joinder of one of them.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 504.]

2. BANKS AND BANKING §77(6) — COMMISSIONER OF BANKING — SUIT AGAINST RECEIVER.

Leave of the Commissioner of Banking to sue a receiver of an insolvent bank, appointed by him, is not essential to the institution or maintenance of a suit against him.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 176.]

3. BANKS AND BANKING §77(6)—RECEIVER—PREFERENCE—PARTIES.

The general creditors of an insolvent bank are not necessary parties to a suit against the receiver thereof, having for its purpose establishment of a right of preference in payment out of the assets of the bank in his hands.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 176.]

4. EQUITY §91—PARTIES—CREDITORS.

Having no title to the assets nor any lien thereon, such creditors are not persons interested in the subject-matter of the suit, within the meaning of the equity rule requiring all persons so interested to be made parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 248-251.]

5. BANKS AND BANKING §127—DEPOSITS—CHECKS—EFFECT.

Entries made by a bank officer, on the deposit of a check, draft, or other similar paper, importing creation of the relation of debtor and creditor between the bank and the depositor, prove, in the absence of evidence to the contrary, an assignment of the instrument deposited, to the bank; but they are provisional, and such assignment subject to the right of rescission, in the absence of circumstances precluding exercise thereof, and the relation of debtor and creditor is not irrevocably established until the money for which the deposited paper calls has been actually collected.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310.]

6. BANKS AND BANKING §127—DEPOSITS—AGENT FOR COLLECTION—RETURN OF CHECK.

If, before such collection has been made, the bank fails and closes its doors to business, it is deemed in law to have been the agent of the depositor for collection of the money evidenced by the deposited paper, in the absence of circumstances precluding restoration of the status quo by the depositor, and the latter, on making such restoration, is entitled to have the paper returned to him, on demand therefor before collection by the receiver, and to have the full amount collected thereon, if the receiver has collected it before such demand is made.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 304, 310.]

7. BANKS AND BANKING §80(4)—DEPOSITS—RECEIVER—DIVIDEND.

Acceptance of a dividend from the receiver, on such a demand, after it has been made and while the depositor is insisting upon payment of the claim as one entitled to preference, is not a waiver of the right of preference, nor does it estop the latter from assertion thereof.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 187, 188.]

Error to Circuit Court, Jackson County.

Proceeding by R. C. Alleman and another against T. J. Sayre, receiver, etc., and others. Decree denying plaintiff's right of preference in distribution of assets, and they bring error. Reversed in part, and decreed that receiver pay to plaintiffs a certain sum, with interest.

Warren Miller, of Ripley, and N. C. Prickett, of Ravenswood, for appellants. J. L. Wolfe and T. J. Sayre, both of Ripley, for appellees.

POFFENBARGER, J. The alleged vice in the decree appealed from is its denial of the plaintiffs' claim of right to preference of the debt due them, in the distribution of the assets of an insolvent bank, on any of the four grounds asserted as bases of the claim, namely: (1) Insolvency of the bank, on the date of the deposit; (2) fraud on the part of the cashier in receiving the deposit with knowledge of the insolvency of the bank; (3) noncollection of the check deposited, before closure of the bank; and (4) the character of the deposit, the plaintiff claiming it to have been special.

There is but little controversy as to the facts. At about 20 minutes before noon of May 14, 1915, the plaintiffs deposited in the

Bank of Ravenswood their certified check for \$750, drawn on the First National Bank of Parkersburg, in favor of a member of their firm, and at the same time obtained a certified check from the Bank of Ravenswood for \$576.35, drawn by themselves, in favor of the town of Ravenswood, and, on the next day, May 15, 1915, at about 8 o'clock a. m., an assistant state banking commissioner took full charge and control of the assets and affairs of the bank and closed it, because of its insolvency, and irregularities in the management thereof. The occasion of the deposit of the larger check and procurement of the smaller one was the purpose of the depositors, Alleman and Alleman, of Parkersburg, W. Va., to file the latter with their bid for the contract for the construction of certain sewers for the town of Ravenswood. The contract having been let to some other person or firm, the check they filed with the city authorities was returned to them. The assistant banking commissioner, finding the check of Alleman and Alleman for \$750 among the other papers of the bank, indorsed it, collected it through the Jackson County Bank, and paid it to T. J. Sayre, receiver of the Bank of Ravenswood, appointed by the state banking commissioner. On June 7, 1915, Alleman and Alleman returned their check on the Bank of Ravenswood to the receiver thereof, for cancellation, and it was canceled by him and returned to them, June 11, 1915. A 25 per cent. dividend was distributed among the creditors of the bank, January 18, 1916, in which Alleman and Alleman shared to the extent of \$187.50, which was credited on their claim of \$750.

The sufficiency of the bill making the receiver, the commissioner of banking, and one James M. Wease, another depositor claiming a right of preference, parties defendant, was challenged by demurrer, on four separate grounds: (1) misjoinder of the commissioner of banking; (2) institution of the suit against the receiver, without the consent of the commissioner of banking; (3) nonjoinder of the creditors and depositors of the bank; and (4) disclosure on the face of the bill of the receiver's admission of the bank's indebtedness to the plaintiffs in the amount claimed.

[1, 2] None of these positions are well taken. If the commissioner of banking is an improper party, it would have been the duty of the court to dismiss the bill as to him, on his separate demurrer thereto; but the general and joint demurrer of all of the defendants did not reach such an objection.

The statute (section 81a VII, c. 54, Code of 1913, ser. sec. 3058), impliedly sanctions a suit against the receiver of an insolvent bank, appointed by the commissioner of banking, and it omits any requirements of an application to the appointing officer, for leave or consent to institute such a suit. It makes it the duty of the receiver, on the order of

the commissioner to pay ratable dividends of the money in his hands, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction. The status of a receiver appointed by an executive officer is not analogous to that of one appointed by a court in a judicial proceeding, for the latter is under judicial control, and the property in his hands is actually subject to judicial power. An unauthorized suit against him would be an encroachment upon the court's jurisdiction of the subject-matter of the suit in which he was appointed. For these reasons, a receiver appointed by a court cannot be sued without leave of the appointing court. In the case of a receiver appointed by an executive officer, pursuant to law, the property he takes charge of has not been brought within the jurisdiction of any court by procedure against it. There is no seizure or attachment of the judicial power. The commissioner having the power of appointment is an executive officer, and the receiver appointed is a state officer of subordinate authority, charged with duty of administration of the funds in his hands, in accordance with law. Such is the status of a receiver of a national bank, appointed by the comptroller of the currency. *Stephens v. Bernays* (C. C.) 44 Fed. 642; *Price v. Abbott* (C. C.) 17 Fed. 506; *Thompson v. Pool* (C. C.) 70 Fed. 725. Whether he is technically an officer or not, he is subject to judicial control in the execution of his powers, and is not himself a judicial officer. Both he and his chief must obey and execute the law as interpreted and applied by the courts, and the reason for requiring procurement of leave from a court, to sue its receiver wholly fails in his case.

[3, 4] The third ground of demurrer involves an erroneous assumption respecting the relation of general creditors to the assets of the bank. They are not interested in the subject-matter of the suit, within the meaning of the equity rule requiring all interested persons to be made parties. They have no title to the assets, nor any lien thereon. The receiver holds the title as fully and completely as an administrator holds that of the personal estate of a deceased person. *Scott v. Armstrong*, 146 U. S. 499, 507, 13 Sup. Ct. 148, 36 L. Ed. 1059; *Bank v. Colby*, 21 Wall. (88 U. S.) 609, 22 L. Ed. 687; *Bank v. Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341; *Bank v. Bank*, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; *Hayes v. Kenyon*, 7 R. I. 136; *McGregor v. Bank*, 124 Ga. 557, 53 S. E. 93; *Weslosky v. Quarterman*, 123 Ga. 312, 51 S. E. 426. Though the assets constitute a trust fund for the benefit of the creditors, the receiver's plenary power and authority over them make him a complete administrator thereof. It is his duty to find the creditors and their duty to present their claims to him. He must resist all invalid claims of preference, attack all fraudulent conveyances and transfers, and protect the

assets in the interest of the general creditors. If such a creditor's right of participation is denied, he has a remedy, of course, but he can have nothing to do with the administration of the assets, in the absence of a disclosure of some failure of duty on the part of the receiver, working injury to him. Until the contrary is shown, the receiver must be deemed and held to represent his remote interest fully and completely. As to the last ground of demurrer, it suffices to say the bill discloses no admission of the claim of preference it sets up, by the receiver.

[5] Right of recovery on the ground of the admitted noncollection of the check, deposited before the bank was closed, and the theory of a relation of agency on the part of the bank, for collection of the check, at the date of the failure, and termination of that agency and authority, by the failure, is opposed by the contention that the deposit made in the ordinary form and the certification of the check drawn against it, legally and necessarily passed the title of the check deposited, and therefore created the relation of debtor and creditor between the depositor and the bank. Assuming insufficiency of the evidence to prove any contract or agreement other than that imposed by the entries made, without deciding it, and conceding effectuation of an assignment of the instrument deposited, the relation of debtor and creditor is not necessarily established by the transaction. Some authorities hold that it is. *Bank v. Fuel Company*, 58 Minn. 141, 59 N. W. 987; *Brusegaard v. Ueland*, 72 Minn. 283, 75 N. W. 228; *Bank v. Manufacturing Co.*, 150 Ill. 336, 37 N. E. 227; *Showalter v. Cox*, 97 Tenn. 550, 37 S. W. 286; *Vaughn v. Bank*, 59 Tex. Civ. App. 380, 126 S. W. 690. Readily conceivable circumstances would make the assignment irrevocable, and they may have done so in some of the cases disposed of upon the assumption of the controlling force of the assignment. But its controlling influence in all cases would be obviously inconsistent with well-settled principles of law. There are grounds upon which almost any sort of a contract may be rescinded, and the right of rescission belongs to the injured party. There is nothing in the character of a bank which necessarily absolves it, on all occasions, from the influence of this principle, nor on any occasion, unless its effect would be to contravene or overthrow some principle of commercial law. If the depositor is in debt to the bank, at the time of the assignment represented by the entry of the deposit, the assignment ought to be irrevocable to the extent of the indebtedness. If, at the time of the making of the deposit, or afterwards, he should draw checks against it and put them in the hands of innocent holders, so as to make the bank liable, or in some way induce it to incur liability in reliance upon the deposit made, the assignment ought to be irrevocable. But, in the absence of such cir-

cumstances, rescission of the contract works no such change in the situation of any person as will cause him loss or injury. If the bank can be put in statu quo, it is not hurt, nor are its depositors. Even though a check has been drawn against the deposit and certified, if the depositor repossesses himself of it and relieves the bank of liability thereon, in the exercise of his right of rescission, before the deposited check has been actually collected, there is neither a technical, nor a substantial, reason for denying right on his part to treat the money collected on the check or draft, after the bank has closed its doors, as a trust fund belonging to him. His deposit is based upon an assumption of the bank's solvency. That assumption is the basis of the whole transaction. Failure thereof is loss of the real inducement. There could be no firmer basis of the right of rescission. An executed sale of goods may be practically rescinded by a stoppage in transitu, on such ground, though the transaction is not generally classed as one of rescission. 2 Kent's Com. 702. Failure of consideration relieves from a note or bond, and may be ground for setting aside a deed, if the consideration is a covenant. Accordingly, it is held by the great weight of authority, that the relation of debtor and creditor is not effected until the deposited check, draft, or note has been collected, and that if the collection was not made before the bank was closed, the relation at the date of the insolvency was that of principal and agent for collection. *Armstrong, Receiver, v. Bank*, 90 Ky. 431, 14 S. W. 411, 9 L. R. A. 553; *Commercial Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533, 37 L. Ed. 363; *Bank v. Bank*, 2 Wall. 252, 17 L. Ed. 785; *Jones v. Kilbreth*, 49 Ohio St. 401, 31 N. E. 346; *Levi v. National Bank*, 5 Dill. 104, Fed. Cas. No. 8,289; *Richardson v. Coffee Co.*, 102 Fed. 785, 43 C. C. A. 583; *Bank v. Strauss*, 66 Miss. 479, 6 South. 232, 14 Am. St. Rep. 579; *Guignon v. Bank*, 22 Mont. 140, 55 Pac. 1051, 1097; *Higgins v. Haydon*, 53 Neb. 61, 73 N. W. 280; *Blake v. Bank*, 12 Wash. 619, 41 Pac. 909; *Bolles, Modern Banking*, p. 194; *Michie, Banking*, pp. 1417, 1420.

[6] Plaintiffs had power to restore the status quo, and did so. They returned the check drawn on the insolvent bank. Indeed, it was drawn for a temporary purpose, and with no intention that it should ever be paid. One of the plaintiffs says it would have been returned on the day of its issue, and the whole transaction with the bank then terminated, but for an accident, and that failure of the bank on the next day prevented the settlement.

The right of recovery asserted here is unembarrassed by the difficulty usually found in efforts to recover money collected by the bank before it closed. In that class of cases, it is sometimes impossible for the depositor to prove the presence of his money in the bank at the date of the failure, and, in order

to recover, he must do that. *Michie, Banking*, p. 1428; *Bolles, Modern Law, Banking*, pp. 188, 193. That the money represented by the check deposited by the plaintiffs was collected after the bank had failed and went into the assets in the hands of the receiver are admitted facts. Right of recovery does not depend upon the plaintiffs' ability to prove possession of the identical money collected. It is only necessary to show that the money went into the hands of the receiver, or was in the bank when it closed. That being done, there may be a judgment or decree for an equivalent sum.

It is hardly necessary to say a deposit of actual money would be governed by principles somewhat different from those here enunciated. Ordinarily, the relation of debtor and creditor is established the moment the deposit is made.

[7] No element of waiver or estoppel is found in the acceptance of the dividend. Though the receipt given therefor makes no express reservation of right, it refers to the claim the plaintiffs had filed, and it was filed as a preferred claim. The right of preference was insisted upon strenuously from the beginning. As plaintiffs were entitled to payment of their claim in full, acceptance of a partial payment manifestly injured no one. *Importers' and Traders' Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319.

As the plaintiffs are entitled to the relief they seek, on the ground here indicated, there is no occasion to say whether any of the other grounds therefor, alleged in the bill, are well founded or not.

In so far as the decree complained of denies the plaintiffs' right of preference in the distribution of the assets of the bank and confines them to a pro rata share thereof, and awards costs to the defendants, it will be reversed, and it will be here adjudged, ordered, and decreed that the receiver pay to them, out of the funds remaining in his hands as such, the sum of \$609.27, with interest thereon from the 29th day of June, 1916, the date of the decree appealed from, together with their costs in the court below as well as in this court.

(79 W. Va. 782)

CENTRAL NAT. BANK OF PORTSMOUTH
v. SCIOTOVILLE MILLING CO.
et al. (No. 3204.)

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

BILLS AND NOTES — 422(2) — PROTEST — WAIVER — STATUTE.

Both at the common law and under section 110, c. 98A, Code (sec. 4231), where a negotiable instrument contains on the back thereof a printed waiver of protest and notice of dishonor, and several persons before its delivery to the payee, at the same time and in regular order sign their

names in blank beneath such printed form, the waiver binds alike all, not merely the first, of such indorsers.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1200.]

Error to Circuit Court, Cabell County.

Action by Central National Bank of Portsmouth against the Sciotoville Milling Company, Elizabeth L. Wriston, and others. Judgment for plaintiff, and defendant Elizabeth L. Wriston brings error. Affirmed.

A. G. Robinson, Daugherty & Riggs, and Williams, Scott & Lovett, all of Huntington, for plaintiff in error. John O. Milner and Noah J. Dever, both of Portsmouth, Ohio, and Meek & Renshaw, of Huntington, for defendant in error.

LYNCH, P. The controlling, if not the sole, question presented for determination in this case is whether one only or all of the indorsers who successively write their names on the back of a negotiable instrument below a printed waiver of protest and notice of dishonor are bound thereby. The note involved is one for \$4,400, payable to plaintiff, executed by the Sciotoville Milling Company as maker. The name of Elizabeth L. Wriston, who complains of the judgment rendered against her, is the second name written below the printed waiver. The case was tried by the court, by agreement of the parties, upon a stipulation of the facts signed by counsel. On the back of the note, and printed thereon is the following:

"The within note is hereby indorsed and demand, notice of nonpayment and protest waived."

Below it these signatures appear in the order named: W. F. Marting, Elizabeth L. Wriston, C. L. Marting, L. E. Marting, and W. E. Tobert. These signatures were affixed in Ohio before delivery of the note to the payee, who paid therefor a valuable consideration to the maker.

The judgment was rendered against Elizabeth L. Wriston only. She contends that no liability against her as an indorser attached, because the note, when due, was not presented for payment at the place designated for that purpose, and no notice of the protest given to her. But if by signing her name in the manner indicated she waived these requirements, as the circuit court evidently found, noncompliance therewith is wholly immaterial in any phase of the case. For her it is insisted that, by section 110 of the Negotiable Instruments Act, in force in the state of Ohio when the contract was entered into, the waiver clause operated as an exemption only as to the person represented by the first signature thereunder. That section provides:

"Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser it binds him only."

This provision she would have us interpret to exclude her; and for this construction she cites *Lyndon Savings Bank v. International Co.*, 78 Vt. 169, 62 Atl. 50, 112 Am. St. Rep. 900. Even if the principle therein stated be conceded to be sound, that case readily is distinguishable from this. There the indorsers released placed their names upon the paper after its delivery. Their contract of indorsement was separate from and independent of that made by the former indorsers. But in the instant case all the parties to the note executed it at the same time, apparently with full knowledge that the waiver then was printed on the back thereof, and was one of the conditions of its acceptance by the payee.

Moreover, at the common law, the weight of authority is to the effect that all indorsers who sign below a waiver of protest are concluded by it, though it begins with, "I hereby waive," where nothing therein indicates a different intent. Likewise, when not written by the first indorser, but printed or stamped above the names of others in the same relation, the waiver is presumed to be the contract of all of them. *Farmers' Bank v. Ewing*, 78 Ky. 266, 39 Am. Rep. 231; *Bank v. Altura Gold Mining Co.*, 129 Cal. 283, 61 Pac. 1077. And in *Portsmouth Savings Bank v. Wilson*, 5 App. D. C. 8, where before the instrument was put into circulation, the indorsers signed beneath a printed waiver, the court enforced the presumption that they saw and read the words and adopted them as part of their contract. See, also, in support of the same proposition *Parshley v. Heath*, 69 Me. 90, 31 Am. Rep. 246; *Johnson v. Parker*, 86 Mo. App. 860, holding the indorsers bound by the waiver, although they placed their names under it at different times, without knowing it was on the paper when indorsed by them. "The indorsers of a note which has upon its back a printed waiver of notice of nonpayment, the blanks in which are not filled out, are bound by the waiver, as if they did not intend to be bound they should have canceled it." *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463.

It is argued, however, that, as by the section cited a distinction is made between "all parties" in the first provision and only one in the second, the contract of indorsement did not bind subsequent indorsers. We cannot accept that conclusion. A more sound and potent reason indicates the aptness of the terms used by the draftsman. Originally there may be, and usually is, more than one party to a negotiable instrument besides an indorser, all of whom the statute intended should be controlled by a waiver written into it. There may be, and often is, but one indorser; frequently none except the payee, who negotiates it. It is more reasonable to assume that the purpose of the section was to declare, not to abrogate, the common-law

rule governing that subject. Its plain intention, we think, is that, where there are several indorsers, the waiver binds those who sign under it, and not those who do not so sign; but if all of them do place their signatures under it, with or without knowledge that it is printed or stamped thereon at that time, it will render unnecessary presentment for payment and notice of dishonor.

Being of this opinion, we affirm the judgment.

(79 W. Va. 747)

STATE v. DUSHMAN. (No. 3151.)

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. JURY §70(7) — CHALLENGE — STATUTORY PROVISIONS.

By section 3, c. 159, Code 1913 (sec. 5579), one accused of a felony is entitled as a matter of right to a panel of twenty jurors, unexceptionable under the rules of the common law, before being called upon to exercise his right of peremptory challenge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 323, 330.]

2. JURY §92 — DISQUALIFICATION — INTEREST.

An employee of a railway company prima facie is disqualified to sit as a juror in the trial of one indicted for stealing or buying and receiving property of the railway company alleged to have been stolen.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 420-422.]

3. CRIMINAL LAW §451(2) — OPINION EVIDENCE.

The opinion of a witness, not an expert, as to any fact in issue before the jury is not generally admissible, unless from the very nature of the subject in issue it cannot be stated or described in such language as will enable persons not eye witnesses to form an accurate judgment regarding it, and an opinion based on an inconclusive fact and argumentative in character should not be admitted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1040.]

4. RECEIVING STOLEN GOODS §8(2) — EVIDENCE — KNOWLEDGE.

On the trial of one accused of buying and receiving stolen goods, knowing them to have been stolen, evidence that such goods were bought and sold in the same market by and from individuals, mining companies, and manufacturing concerns, and is merchandise commonly on the market, is properly admissible on the question of the guilty knowledge of the accused and the bona fides of the transaction.

[Ed. Note.—For other cases, see *Receiving Stolen Goods*, Cent. Dig. § 15.]

Error to Circuit Court, Cabell County.

Ben Dushman was convicted of receiving stolen goods, and he brings writ of error. Judgment reversed, verdict set aside, and a new trial awarded.

Daugherty & Riggs, of Huntington, for plaintiff in error. A. A. Lilly, Atty. Gen., and John B. Morrison and J. El. Brown, Asst. Attys. Gen., for the State.

MILLER, J. Indicted, tried, found guilty, and sentenced to imprisonment in the peni-

tentiary for the term of three years for unlawfully and feloniously buying and receiving certain pieces of brass of the value of sixty dollars, of the goods and chattels of the Chesapeake & Ohio Railway Company, lately before feloniously stolen, taken and carried away, well knowing the same to have been so feloniously and unlawfully stolen, taken and carried away, defendant by the present writ of error seeks reversal of the judgment.

The first point of error in logical sequence is that the court below on impanelling of twenty jurors, and on their *voir dire*, denied counsel for the prisoner the right or privilege of inquiring whether they were employees of the Chesapeake & Ohio Railway Company, the company whose property was alleged to have been stolen, and who stated that three of said jurors, namely, H. L. Clark, Mandeville Crawford, and Joseph Merritt, if he was permitted to ask of them would say that they were then in the employ of said railway company.

[1] By section 3, chapter 159, Code 1913 (sec. 5579), one accused of felony is entitled as a matter of right to a panel of twenty jurors who according to the common law must be *omni exceptione majores*, before exercising his right of peremptory challenge. 2 Cooley's Blackstone, Book III (4th Ed.) p. 1124, star page 363; *State v. Johnson* and *Devinney*, 49 W. Va. 684, 39 S. E. 685, Syl. 2; *Hufnagle v. Delaware & Hudson Co.*, 227 Pa. 476, 76 Atl. 205, 40 L. R. A. (N. S.) 982, 19 Ann. Cas. 850. In *Melson v. Dickson*, 63 Ga. 682, 36 Am. Rep. 128, the court said:

"The defendant had the right to a panel of twenty-four from which to strike—all twenty-four impartial men. [Mayor of Columbus v. Gaetehins] 7 Ga. 139; [Justices v. Griffin & W. P. Plank Road Co.] 15 Ga. 39; [Howell v. Howell] 59 Ga. 145. He was denied this right and was forced to exhaust four strikes upon two brothers and two cousins of the opposing parties who had an interest, a pecuniary interest, in the verdict and judgment they were pressing to obtain. The denial was erroneous and hurtful. A big part of the battle is the selection of the jury, and an impartial jury is the corner-stone of the fairness of trial by jury."

[2] The question then is, is an employee of a railway company disqualified *propter affectum*, for suspicion of bias or partiality, to sit as a juror? We held in *State v. Hatfield*, 48 W. Va. 561, 37 S. E. 626, that the object of the law, in all cases in which juries are impanelled to try the issue, is to secure men for that responsible duty whose minds are wholly free from bias or prejudice, either for or against the accused, or for or against either party in a civil case. And our statute, section 17, c. 116, Code 1913 (sec. 4656), provides specifically that:

"Either party in any action or suit may, and the court shall, on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall ap-

pear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause."

At the common law the principal causes of challenges, *prima facie* disqualifying jurors, were: (1) Kinship to either party within the ninth degree; (2) was arbitrator on either side; (3) that he has an interest in the cause; (4) that there is an action pending between him and the party; (5) that he has taken money for his verdict; (6) that he was formerly a juror in the same case; (7) that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him; and causes of the same class or founded upon the same reason should be included. Our statute does not remove these common law disabilities; and it has been held that unless superseded by express terms they remain in force as common law disabilities. *Crawford v. United States*, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

All authorities agree that if a juror offered is related to the party, occupies the relation of master, servant, etc., he may be challenged for cause. Here, strictly speaking, the railway company is not actually a party; but it is certainly interested in this prosecution; its employees would certainly not be competent jurors to sit in the trial of an action against defendant for the value thereof or the recovery of the specific property stolen. Is it not so interested in the result of this prosecution as to make the reason for the rule applicable? We are disposed to hold that it is, and that its employees offered as jurors would presumptively be subject to some bias or prejudice, or be under some control or influence of the corporation. In *Dimmack v. Wheeling Traction Co.*, 58 W. Va. 226, 52 S. E. 101, point 2 of the syllabus, we held, that an employee of a stockholder or manager of a corporation was not *prima facie*, and on that ground alone, disqualified as a juror in an action in which the corporation was a party; this upon the ground that the relationship to the party was too remote. In *Hopkins v. State of Florida*, 52 Fla. 39, 42 South. 52, the court was unanimously of the opinion that it is the better practice in cases like the one at bar to excuse jurors who are employees of a railway corporation, but were equally divided in opinion as to whether the trial court could be held in error for refusing to do so. But in *Berbette v. State*, 109 Miss. 94, 67 South. 853, the Mississippi court held, in a case exactly like the case at bar, that the court erred in denying defendant's challenge of a juror for cause because he was an employee of the corporation from which the property was alleged to have been stolen. In *Burnett v. Burlington & M. R. R. Co.*, 16 Neb. 332, 20 N. W. 280, the court held that an employee of a railroad company was incompetent to sit as a juror in a case where the company is a

party. In *State v. Coella*, 3 Wash. 99, 28 Pac. 28, it was held that:

"Under Code 1881, §§ 212 and 1078, the former employer of a decedent is disqualified as a juror in a trial for his murder."

In view of our statute and these authorities we hold that *prima facie* an employee of a railroad company is disqualified to sit as a juror in the trial of one accused of the larceny of its property, or where one as in this case is about to be put upon his trial for buying or receiving such property knowing it to be stolen, and that the court below erred in denying defendant the right to inquire of or prove by them or others that the three jurors offered and impanelled were related to the railway company as employees.

[3] The next point is that the court below, over objection by defendant's counsel, erroneously permitted the witness Beckelheimer, in answer to the question, whether defendant knew the brass was stolen, to say that:

"He couldn't help from knowing it, Judge, because it was branded there. *If I get hold of anything that belongs to you or has your name on it I am bound to steal it; you don't give it to me.*"

The ground of objection was that this was opinion evidence of an ordinary witness, not an expert, and inadmissible under the general rule. Such is the law. *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813, Syl. 4; 2 Jones Commentaries on Evidence, § 359. But the attorney general replies that this answer falls under an exception to the general rule, where, as often happens, it is impossible for a witness to detail all the pertinent facts in such a manner as to enable the jury to form a conclusion without the opinion of the witness; and when the witness may not be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself. Mr. Jones, 2 Jones Commentaries on Evidence, § 360, says:

"The ground upon which opinions are admitted in such cases is, that, from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it. The opinions of non experts are admissible, therefore, provided they state, so far as practicable, the facts on which the opinions are based, on questions of identity as applied to persons, things, animals, or handwriting; and of the size, color and weight of objects; of time and distances; of the mental state or condition of another; of insanity and intoxication; of the affection of one for another; of the physical condition of another, as to health or sickness (in which latter case, however, the opinion of a nonexpert will not be heard upon the particular disease or the cause thereof); of values; of the soundness of animals; and of all subjects where it is not practicable nor possible to put the jury in possession of all the primary facts upon which the opinions of the witnesses are grounded."

See, also, 1 Wharton on Criminal Evidence, (9th Ed.) § 457. Examples illustrating the exception to the general rule are found in the note to Mr. Jones' text cited; and Mr. Wharton says:

"What is opinion? Did A shoot B? C, a bystander, answers, 'My opinion is that he did; I saw the pistol aimed; I heard the report; I saw the flash; I saw B fall down, as I supposed dead; from all this I infer that A shot B.' This is all inference on the part of the witness, yet it is admissible."

Illustrations are also found in our cases of *State v. Welch*, 36 W. Va. 690, 15 S. E. 419, where it was held that a witness may give his opinion that stains seen by him are blood stains, and that a certain large stain seen by him upon bed clothing was the stain of a pool of blood; and that a depression in a bed was from its shape and appearance caused by the head of a person, he having seen and examined it; and *Kunst v. City of Grafton*, 67 W. Va. 20, 67 S. E. 74, 26 L. R. A. (N. S.) 1201, where witnesses, after describing as well as they could all the facts, and the appearances of the property viewed at or about the time of the injuries, were permitted to give their opinions as to the real cause of a slip or slide on plaintiff's lot. And other illustrations may be found in cases cited in 5 Ency. Dig. Va. & W. Va. Repts. 792 et seq.

Does the evidence of the witness objected to fall within the exception to the general rule? The first part of the answer is not a direct answer; he does not say positively that defendant did know the property was stolen, but that "he couldn't help from knowing it", and gives as a reason, "because it was branded there." The rest of the answer is argumentative, and does not amount to even an opinion. Previously witness had testified that there were some twenty or more of the pieces of brass, and he could not tell whether all of these pieces were so branded, but said he saw as many as four or five, did not look at all of them. It would not follow conclusively that because some or all of the pieces of brass had some brand on them that defendant knew the property had been stolen, and an opinion based on that one fact would be of little value, if not wholly incompetent, and certainly the argument of the witness following was improper. It may be that the witness did not intend to limit his opinion to this one fact in evidence, but to other matters testified to by him and other witnesses. Such opinion evidence should only be admitted after the witness has detailed all the facts and circumstances to the jury, and if these can be placed before the jury, and they are of such a nature that jurors generally are just as competent to form an opinion in reference to them and to draw inferences from them as the witness then the opinion of the witness should not be admitted.

[4] The next point is, that the court erred in rejecting the evidence of Sam Abrahams to the effect that brass of the kind and character described in the indictment in this case was bought and sold by all junk dealers in the City of Huntington, and is bought and sold in the open market by and from individ-

uals, mining companies, and manufacturing concerns, and is merchandise which is commonly on the market. We are of opinion that this evidence should have been admitted. Of course it would not be conclusive, on the question of good faith, or want of knowledge of the stolen character of the property, but it evidences a fact which bore on the question of good faith or knowledge on the part of defendant that the property was stolen.

"It is not necessary, however," says Mr. Greenleaf, quoted in *Watts v. State*, 5 W. Va. 582, "that the evidence should bear directly upon the issue. It is admissible, if it tends to prove the issue, or constitutes a link in the chain of proof."

Lastly, it is urged that the court below erred in overruling defendant's motion to set aside the verdict and to award him a new trial. It is said the evidence fails to show actual knowledge on the part of defendant that the property purchased was stolen. Of course this is an essential element of guilt and must be shown by positive proof of the fact, or of such facts as will satisfy the jury beyond a reasonable doubt that defendant is guilty. As the evidence may be different on another trial we refrain from expressing any opinion on the sufficiency of the evidence now before us.

The judgment will be reversed, the verdict set aside, and defendant awarded a new trial.

(79 W. Va. 748)

BURKE v. NUTTER.

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. ASSUMPSIT, ACTION OF \S 5 — COMMON COUNTS.

The common counts in assumpsit constitute a kind of equitable action, applicable to almost every case where money has been received by one, which, in justice and conscience, ought not to be retained.

[Ed. Note.—For other cases, see *Assumpsit*, Action of, Cent. Dig. §§ 14-26.]

2. ASSUMPSIT, ACTION OF \S 5—MONEY ADVANCED.

Money advanced by plaintiff to defendant, to whom he is then engaged to be married, and in expectation of marriage, whether understood and intended as a loan or a gift, is recoverable in assumpsit upon the common counts, if the defendant thereafter breaks the engagement without plaintiff's fault.

[Ed. Note.—For other cases, see *Assumpsit*, Action of, Cent. Dig. §§ 14-26.]

Error to Circuit Court, Cabell County.

Action by J. W. Burke against Bettie Nutter. Judgment for plaintiff, and defendant brings error. Affirmed.

Williams, Scott & Lovett, of Huntington, and Cato & Bledsoe, of Charleston, for plaintiff in error. M. P. Wiswell and J. W. Perry, both of Huntington, for defendant in error.

WILLIAMS, J. Defendant seeks reversal of a judgment recovered against her in an action of assumpsit. The declaration contains only the common counts, and is supplemented by a bill of particulars showing plaintiff's claim is for money lent at different times and in various sums, in the months of March, April and July, in the year 1914, aggregating \$1,940.11, including interest to the date of the verdict. The action was tried to a jury on the general issue, resulting in a verdict for plaintiff. Defendant admits she received \$1,240 of the amount sued for, but insists it was not a loan, but an absolute gift to her, and denies receiving any more than that sum.

When plaintiff let defendant have the money he lived in Huntington and she in Charleston, W. Va., and it is admitted they were then engaged to be married. Defendant broke the engagement by becoming the wife of James Nutter on the 3d of September, 1914. They had been engaged about 20 years before that time and had lived together illicitly in Huntington, but that engagement was broken off, and they became estranged from each other until some time in February, 1914, when it appears they again agreed to become husband and wife, and numerous letters passed between them. Under date of February 27, 1914, defendant wrote plaintiff from Charleston that she was in trouble and would be compelled to go to jail if she did not raise \$500, and said, "No other chance for me unless you will send me a check for that amount." In response to that request he deposited \$500 to her credit in the Twentieth Street Bank of Huntington, on the 3d of March, and she drew it out. He likewise deposited \$500 on the 23d of March, \$100 on the 27th of March, and \$100 on the 7th of April, all to her credit in the same bank, and she used it. He let her have \$40 at another time. She admits she received all the foregoing sums, and denies she received any other sum or amount. But plaintiff swears he met her in Huntington on the 16th of July, and then let her have \$500 in gold, swears he drew the money out of bank and delivered it to her, and, to corroborate his testimony, proved by Mr. A. R. Losee, assistant cashier, that he deposited \$800 in the bank on the 6th, and drew it out on the 15th of July. Defendant swears she did not get it. This disputed fact was a question for jury decision, and we cannot disturb their finding.

[1, 2] Counsel for defendant insist that the proof shows the money was given in consideration of marriage, and, being so given, it cannot be recovered on the common counts, but must be recovered, if recoverable at all, only on a special count, alleging breach of promise. Both parties admit the engagement, and that they had agreed to marry in July, 1914. In some of his letters to defendant,

plaintiff addressed her as "dear wife," and in some of her letters to him, she signs as "wife." But she admits, in her testimony, she had no intention at any time of carrying out her promise of marriage. So that, if she obtained the money as a gift, she obtained it fraudulently, and no authority need be cited to support the proposition that money fraudulently obtained may be recovered in assumpsit. Hence, whether the transaction was a loan, or a gift in consideration of marriage to be thereafter consummated, is immaterial, because, upon either theory, the present action is maintainable. If the money was a gift, it was made in consideration of marriage, and was fraudulently obtained, according to defendant's own admission, and it would be unconscionable to allow her to retain it after having broken her contract to marry plaintiff.

"The action of assumpsit, under the count for money had and received, is an equitable action, and applicable to almost every case where money has been received by one, which, in justice and conscience, ought to be refunded." *Hughes et al. v. Frum*, 41 W. Va. 445, 23 S. E. 804; *Jackson v. Hough*, 38 W. Va. 236, 18 S. E. 575, and 4 Cyc. 329.

"If an intended husband make a present, after the treaty of marriage has been negotiated, to his intended wife, and the inducement for the gift is the fact of her promise to marry him, if she break off the marriage, he may recover from her the value of such present." *Thornton on Gifts and Advancements*, 94.

"Where the plaintiff, being under engagement to marry with the defendant, sent her money with which to buy her wedding outfit and bear her expenses to the place of marriage, he may recover these sums in an action of assumpsit, if she, without cause, refuses to fulfill her engagement." *Williamson v. Johnson*, 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. Rep. 117.

Notwithstanding plaintiff swears the money was lent to defendant, he wrote her on one occasion, after he had advanced her \$1,200, inclosing a note for that amount, for her to sign, and stated in the letter:

"Not that I want you to pay it, the note, it is just simply to be on the right side, if anything should happen to you before we would get married, for because what I have is yours."

In view of the conflict in the evidence, and the instructions given by the court covering both theories of the case, we do not know on which theory the jury found its verdict. But, as before stated, it is not material, because plaintiff can recover in this action, whether the money was a loan or a gift in consideration of a marriage agreement which was broken by defendant without fault of plaintiff, provided the jury believed defendant received the money. The instructions fairly and properly presented to the jury the law applicable to the case.

Complaint is especially made of plaintiff's instruction No. 1, which reads:

"The court instructs the jury that the presumption of law is against gifts, and where the defendant, as in this case, claims the money received by her from the plaintiff was a gift, the burden of proof rests upon her, and the jury

should carefully scrutinize the evidence, and before the defendant can recover the proof should be clear and convincing that the money so received by the defendant was intended for, and was a gift at the time it was received by her."

This instruction was more strongly against plaintiff than the facts admitted by defendant warranted. It contains the implication, at least, that plaintiff cannot recover if the money was a gift, which is not the law of this case in view of defendant's admittedly broken promise. As an abstract legal proposition the instruction is generally true, but not applicable here. It is only applicable where the proof of a gift would defeat recovery.

The judgment is affirmed.

(79 W. Va. 726)

ASHLEY v. TRI-STATE LUMBER CO.

(No. 3185.)

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. TRIAL \S 154—DEMURRER TO EVIDENCE—WRITING.

The rules of practice require that a demurrer to evidence be reduced to writing, and that all of the evidence submitted be incorporated therein.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 351, 353.]

2. TRIAL \S 154—DEMURRER TO EVIDENCE—INCORPORATION OF EVIDENCE—WAIVER.

Where, at the conclusion of the evidence introduced in a case, the defendant demurs orally thereto, and the court permits such oral demurrer to be filed, and the plaintiff without objection joins therein, and there is subsequently filed a certificate of the evidence which was introduced upon the trial, properly certified by the judge, it will be held that the requirement that the demurrer should be in writing has been waived, and this court will consider the case as though the demurrer to the evidence had been formally entered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 351, 353.]

3. MASTER AND SERVANT \S 217(11) — "ASSUMPTION OF RISK"—KNOWLEDGE.

Ordinarily a servant who, with full knowledge of a defect in machinery or appliances with which he is working, and with a clear understanding of the result of the operation thereof in such defective condition, continues in the service with such defective machinery or appliances, will be held to have assumed the risk from an accident occasioned thereby.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 583.

For other definitions, see Words and Phrases, First and Second Series, Assumption of Risk.]

4. MASTER AND SERVANT \S 221(4)—ASSUMPTION OF RISK—PROMISE TO REPAIR.

A servant who complains to the master of defects in machinery or appliances with which he is working, and receives the promise of the master to repair such defects, will not be held to have assumed the risk arising from the operation of such machinery or appliances in such defective condition, where an injury occurs to him therefrom within a reasonable time after the making of such promise to repair, unless such servant fails to exercise reasonable care in doing the work, or unless the danger is so

palpable, immediate, and constant that only a reckless person would expose himself thereto.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 642.]

Error to Circuit Court, Nicholas County.

Action by Arch Ashley against the Tri-State Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. C. Lewis, of Clarksburg, Brown & Ed-
dy, of Richwood, and Stewart & John, of
Morgantown, for plaintiff in error. Alder-
son & Breckinridge, of Richwood, and John
McButcher, for defendant in error.

RITZ, J. This writ of error is prosecuted to a judgment of the circuit court of Nicholas county in favor of the plaintiff rendered upon a demurrer to the evidence. The defendant company was operating in connection with its business of producing lumber a lumber railroad. It had completed its operations at the place where the accident occurred out of which this suit grows, and was taking up the track. The plaintiff was a locomotive engineer in the employ of the defendant, and at the time of the accident his engine with a car in front of it was being used to take up that part of the track which had been abandoned. This abandoned track was upon a steep grade, and in taking it up the steel rails were loosened in front of the car at the end of the track furthest from the center of operations, and were placed upon the car, and then the engine and car were moved further down the hill, so as to permit of more rails being taken up and loaded. At the time of the accident there had been loaded on the car 57 of these steel rails, and the engine with the car in front of it had just been moved down the hill by the plaintiff for the purpose of permitting some additional rails to be taken up and loaded on the car to complete the load, which load was to consist of 60 rails. After the engine was stopped on this occasion the plaintiff got off, as it was his duty to help take up the additional 3 rails and load them on the car. Shortly thereafter the engine and car started down the grade. The plaintiff, observing this, jumped upon the car and got into the engine for the purpose of doing what he could to prevent the runaway. Finding that he was unable to stop the engine and car he jumped from the engine, and just as the car with the rails on it passed the place at which the plaintiff had jumped it became derailed and wrecked, and a number of the rails were thrown upon the plaintiff, severely injuring him. The locomotive was derailed a short distance from the car and turned over on its side.

Plaintiff asserts his right to recover for the injury he sustained on this occasion upon several grounds. He contends that the throttle valve of the engine which he was operating was leaking, and that by reason of this leak the engine and car were started

down the hill on the occasion of the runaway. He contends also that the car was overloaded at the time; that the car had a defective wheel and defective coupling; that it was negligence in the defendant company to instruct him to assist in loading the rails and in not requiring him to remain on his engine while it was standing still; that there was negligence in not furnishing a conductor to be in charge of the train; and that there was negligence in not furnishing an experienced foreman to be in charge of the work.

At the conclusion of the evidence the defendant demurred thereto orally, the court received such oral demurrer, and the plaintiff without objection joined therein. Upon this demurrer the jury rendered a conditional verdict, and the court found for the plaintiff thereon and rendered judgment in his favor.

[1, 2] The court below gave as his reason for overruling defendant's demurrer to the evidence and rendering judgment for the plaintiff the failure of the defendant to furnish a typewritten copy of the evidence. This oral demurrer to the evidence was received without objection, and the plaintiff without objection joined therein. It appears from the record that the evidence had been taken down by an official reporter of the court, and such being the case it was within the power of the court under the law to secure a transcript of the evidence if he desired it. Under the rules of practice a demurrer to the evidence is required to be in writing and to contain all of the evidence introduced upon the trial of the issue, and the defendant cannot be compelled to join in such demurrer unless it is so reduced to writing, and the evidence incorporated therein. However, where the court permits such demurrer to be filed orally, and the plaintiff without objection joins therein, the requirement that the same be reduced to writing will be waived, and where a certificate of the evidence is subsequently furnished and properly certified by the circuit judge, as was done in this case, it will be treated in this court as part of the oral demurrer, and such demurrer considered upon its merits.

That the locomotive which the plaintiff was operating at the time of the accident was equipped with a throttle valve that leaked is admitted. It is also admitted that the company knew of this for some time before the accident; that it had been called to the attention of the superintendent of the company by the plaintiff himself when he took charge of the locomotive some three months before the injury; that at the time the plaintiff called attention to this defect the superintendent of the company advised him that the company did not desire to make any expenditures that were not absolutely necessary, and that he would try to get another throttle valve from some of the other operations of the company; that sub-

sequently another throttle valve was procured, but that it would not fit the engine, and that the old one was continued in use thereon, and was so in use at the time of the accident. It seems that efforts had been made to secure the necessary fittings to correct this defect up to the time of the accident, but such efforts had not been successful. The plaintiff admits that he was fully informed of this defective condition of the throttle valve, and knew the result of this defect upon the operation of the engine. It further appears from his testimony that he operated the engine in this condition and with this knowledge. It is further shown that when the car jumped the track a piece of the flange was broken out of one of the wheels, and that the coupling of the car was broken. This is the only evidence upon which to base the charge that there was a broken wheel upon the car, and that the coupling was defective. From the fact alone that a piece was broken from the flange of one of the wheels when the car was wrecked, and that the trucks of the car were found disconnected after the wreck, it cannot be assumed that there was any defect in the car wheel, or in the coupling prior to the accident. Just such damage as this would be the natural result of the derailment of the car running at high speed down a heavy grade. It is also contended that the car was overloaded. The undisputed evidence is that the car had a capacity of 20,000 pounds; that it had on it at the time of the accident 57 steel rails, weighing 300 pounds each; and that the purpose was to load thereon 60 of such steel rails, making a total load of 18,000 pounds, or 2,000 pounds less than the capacity. The assumption that the car was overloaded is based upon the fact that it ran away. Of course, if it had had a lighter load upon it, it would have been easier to control, and it might be said that it would not have started on the grade; but from this we cannot say that the car was overloaded. It would have been safer to operate the car without any load. There is nothing to show that there was anything unsafe in operating the car loaded to its capacity of 20,000 pounds under the circumstances. Several witnesses, deducing their conclusions from the fact that the car ran away, state that it was overloaded, but it does not appear from any evidence that the car was not entirely sufficient to be loaded to its capacity. Nor can we see how the failure to have a conductor in charge of the train, or a foreman in charge of the loading of the rails, contributed to the accident. The fact that plaintiff, as a part of his duties, was required to assist the remainder of the crew when his engine was not running is charged as negligence, it being assumed that if he had been required to remain on his engine at all times the

accident would not have happened. He shows that he was fully informed as to the probable results of the leaky throttle valve, and if there was danger in allowing the engine to stand with no one on it he was fully advised thereof, and by continuing in the service under these circumstances he assumed the risk of injury from accident resulting from this cause.

After a careful review of the evidence we are forced to the conclusion that this accident was caused by the engine being started by steam leaking into the cylinders because of the leaking throttle valve. The plaintiff, who appears to have a more intelligent conception of the accident than any one else present, attributes it to this cause, and explains how the leaky valve operated so as to cause the engine and car to run away. Counsel for the defendant argues that inasmuch as the plaintiff testifies that he left his engine in such a condition that it would go forward in case of steam escaping into the cylinder, this could not have caused the running away of the car and engine on this occasion. This does not necessarily follow. We think that even though the reverse lever of the engine was set so as to have a tendency to propel the engine forward in case the steam leaked into the cylinder that such movement of it forward in this case had the effect of agitating the loaded car which was then standing still, and it was the shaking or agitation of the car from the movement of the engine that caused it to start and move down the hill. Finding that the accident resulted from this defect in the throttle valve of the engine the defendant company would be liable for the resultant injury to the defendant, unless he assumed the risk of injury to himself on this account by remaining in the service, or unless he was guilty of contributory negligence in jumping on the engine after it had started to move. We cannot say as matter of law that the plaintiff was guilty of contributory negligence in boarding the moving engine and attempting to stop it under the emergency that existed.

[3, 4] This leaves for consideration the question of the assumption of the risk by the defendant of injury from this defective machinery. As before shown, the facts in regard to the plaintiff's knowledge of the defect, and the result of this defect upon the movement of the engine, are admitted by him in his testimony; and the defendant contends that by remaining in the employment of the company and operating this engine with full knowledge of what was likely to result because of this defect, and which did result because thereof, the plaintiff assumed the risk of injury from the very cause which produced his injury. In *Chandler v. Car & Foundry Co.*, 69 W. Va. 391, 71 S. E. 387, it was held:

"It is the duty of the master to furnish his servant reasonably safe means and appliances with which to work; but if the servant knows the purpose and condition of a particular machine or appliance, and undertakes to use it when some of its parts are wanting, he assumes the risk of using it in its incomplete condition."

In *Laverty v. Hambrick*, 61 W. Va. 687, 57 S. E. 240, it was held:

"By entering upon, and continuing in, service in an unsafe place, the dangers of which are known and fully appreciated by him, a servant waives the performance by the master, of the duty imposed upon him by law in respect to the safety of the place in which the service is performed."

Judge Poffenbarger in the opinion of the court in that case (61 W. Va. 691, 57 S. E. 241) says:

"As the plaintiff himself admits that he knew and appreciated the danger incident to the work he was doing under the conditions existing, the applicability and the conclusiveness of these authorities are clearly manifest."

This quotation has peculiar application to the conditions existing in this case. The same doctrine is announced in the case of *Jones v. Railway Co.*, 74 W. Va. 666, 83 S. E. 54, L. R. A. 1915C, 428. Many cases might be cited to support this doctrine, but it is so uniformly applied by the courts that a multiplication of authorities is deemed unnecessary.

This leads to a reversal of the judgment of the circuit court, unless the plaintiff is relieved of the assumption of risk upon his part by the promise of the master to repair the defective throttle valve. Upon this question the plaintiff testifies that when he went to work with the engine he called the attention of the superintendent to this leaking throttle valve, and that such superintendent then informed him that the company did not desire to make any expenditures except such as were absolutely necessary, and that he would send to another operation of the company and get a throttle to take the place of the one out of order; that some time after this the throttle sent for came; that when they attempted to apply it to the engine they found that it could not be properly applied because of some fixtures that were missing; that the superintendent then told the plaintiff to continue working with the engine, and that he would send to an operation of the company at Tioga and get these missing fixtures; that a short time before the accident the plaintiff was informed by the superintendent of the company that he was unsuccessful in getting the needed fixtures at Tioga, but that he would send for them to the office of the company at Uniontown, Pa. This was only a short time before the accident.

The plaintiff contends that this promise upon the part of the defendant company, made to him when he took charge of the engine and repeated on the subsequent occasions, to repair the defect, had the effect of relieving him from the assumption of risk.

He states in his evidence that he relied upon the defendant doing what its superintendent promised, and his conduct in inquiring about the receipt of the new throttle and the necessary fixtures to apply it to the engine corroborates him in this regard.

In *Parfitt v. Veneer & Basket Co.*, 68 W. Va. 438, 69 S. E. 985, the law upon this question is laid down by this court in the following language:

"One of said instructions, covering the concrete case, properly told the jury that if they found from the evidence that plaintiff 'complained of the defective and dangerous condition of the machinery and appliances which he was operating, and that the defendant * * * promised to have the defects in said machinery remedied and the danger removed, but failed so to do within a reasonable time and in consequence thereof the injuries complained of were inflicted upon the plaintiff, then the defendant company is liable, and the jury should find for the plaintiff, unless the jury believe that the plaintiff failed to exercise reasonable care and caution in doing the work in which he was engaged, taking into consideration the plaintiff's experience, or unless the danger was so palpable, immediate and constant that no one but a reckless person would expose himself to it, even after receiving such promise or assurance.'"

In order to relieve the servant from the assumption of the risk of injury by reason of a promise of the master to repair it must appear that the master, or some one authorized to represent him, made such a promise, and that the servant continued in the employment believing that the master would perform the promise. *Labatt on Master and Servant*, § 1342.

The rationale of the doctrine seems to be that, when the master, upon complaint by the servant of the defective condition of machinery or appliances, promises the servant to repair the same, he thereby assumes any risk, at least for a reasonable time, because of such defect, and relieves the servant from such assumption for such reasonable time. The master desires his work to proceed, and it may be well said that he is willing to take upon himself the additional risk of conducting it with the defective machinery in the belief that his interests are better promoted by keeping the work in progress than it would be by discontinuing the use of the defective machinery until the repairs can be made. *Dempsey v. Sawyer*, 95 Me. 295, 49 Atl. 1035; *Railroad Co. v. Holman*, 90 Ark. 555, 120 S. W. 146; *Swift v. O'Neill*, 187 Ill. 337, 58 N. E. 416; *Morden Frog & Crossing Works v. Fries*, 228 Ill. 246, 81 N. E. 862, 119 Am. St. Rep. 428; *Scott v. Parlin & O. Co.*, 245 Ill. 460, 92 N. E. 819; *Altman v. Schwab Mfg. Co.*, 54 Misc. Rep. 243, 104 N. Y. Supp. 349; *A. L. Clark Lumber Co. v. Johns*, 96 Ark. 211, 135 S. W. 892; *Brouseau v. Kellogg Switchboard & Supply Co.*, 158 Mich. 312, 122 N. W. 620, 27 L. R. A. (N. S.) 1052; *Holmes v. Clarke*, 6 Hurst. & N. 349, 30 L. J. Exch. (N. S.) 135; *McFarlan Carriage Co. Co. v. Potter*, 153 Ind. 107, 53 N. E. 465; *Schlitz v. Pabst Brewing Co.*, 57 Minn. 303,

59 N. W. 188; Texas & N. O. R. Co. v. Bingle, 9 Tex. Civ. App. 322, 29 S. W. 674; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Eureka Co. v. Bass, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152; Pleasants v. Raleigh & A. Air-Line R. Co., 95 N. C. 195; Ray v. Diamond State Steel Co., 2 Pen. (Del.) 525, 47 Atl. 1017; Greene v. Minneapolis & St. L. R. Co., 31 Minn. 248, 17 N. W. 378, 47 Am. Rep. 785; Bruns v. North Iowa Brick & Tile Co., 152 Iowa, 61, 130 N. W. 1083; Pavan v. Worthen & A. Co., 80 N. J. Law, 587, 78 Atl. 658; Clarke v. Holmes, 7 Hurlst. & N. 937; Hough v. Railway Co., 100 U. S. 213, 25 L. Ed. 612; Labatt on Master and Servant, § 1438.

From these authorities it seems to be well established that, where a servant complains to the master of defects in the machinery with which he is working, and the master promises to repair such defects, the servant will not be held to have assumed the risk of injury from an accident caused by such defects within a reasonable time after such promise to repair. Many of the courts say that by making this promise the master entered into a new contract with the servant by which he agrees if the servant will continue in the employment with the defective machinery, that the master will assume any risk of injury because thereof, and it seems to us, both from reason and authority, that this is an intelligent reason for the rule. However this may be, the authorities, with little or no dissent, hold that the servant does not assume the risk of injury by continuing in the employment with defective machinery or appliances, which the master has promised to repair, until after the expiration of a reasonable time within which to make such repairs. Applying this rule to the facts in this case we conclude that the plaintiff did not assume the risk of injury; that he had a right to rely upon the repeated statements of the superintendent of the defendant company that the repairs would be made to the engine; and that he did rely thereon is shown not only by his statements to that effect, but by his conduct as well.

The judgment complained of will be affirmed.

(79 W. Va. 736)

MINERAL RIDGE MFG. CO. v. SMITH.

(Supreme Court of Appeals of West Virginia.
March 6, 1917.)

(Syllabus by the Court.)

1. EVIDENCE §461(1) — PAROL EVIDENCE — CONTRACT TO FURNISH AND INSTALL MACHINERY.

Where plaintiff agrees in writing to furnish certain machinery and install it in defendant's coal tippie, guaranteeing it to perform the work intended by the buyer and specifying in writing the character of work it will do, parol evidence

is not admissible to prove what the buyer intended, at the time of its execution, it would do.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2129.]

2. APPEAL AND ERROR §1002 — SALES §445(4)—COMPLIANCE WITH GUARANTY—VERDICT.

Whether such guaranty has been complied with is a question of fact to be determined by the jury, and, when the testimony in respect thereto is so conflicting as to render the matter uncertain, the finding of the jury is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Sales, Cent. Dig. § 1306.]

3. EVIDENCE §448 — DECLARATIONS — TERMS OF WRITTEN CONTRACT.

Evidence of prior or contemporaneous declarations of the parties to a written contract containing no latent ambiguity is not admissible to explain its terms.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2036–2062, 2084.]

Error to Circuit Court, Mason County.

Action of assumpsit by the Mineral Ridge Manufacturing Company against A. E. Smith, doing business, etc. Judgment for defendant, and plaintiff brings error. Affirmed.

Rankin Wiley and Chas. E. Hogg, both of Pt. Pleasant, for plaintiff in error. George S. Wallace, of Huntington, for defendant in error.

WILLIAMS, J. Defendant seeks by this writ of error to reverse a judgment recovered against him in an action of assumpsit for breach of promise to pay a stipulated price for having his coal tippie equipped with certain machinery for screening, weighing, and loading coal. The contract sued on was reduced to writing, and is in the form of a proposition. It was submitted to and accepted by defendant on the 20th of May, 1912. Defendant pleaded the general issue, gave notice of his purpose to recoup damages, and also filed two special pleas averring what the several parts of the machinery were intended to do, and alleging particularly wherein they fail to perform the work intended by the defendant and contemplated by said contract, and further that the machinery never did operate without vibration, as contemplated by the contract; wherefore he claims he has been damaged to the extent of \$4,167. Defendant operates his coal mine in the name of Jackson Coal & Mining Company.

[1] The first assignment of error relates to the refusal of the court to permit defendant to prove, by parol testimony, what work he intended the machinery to perform. The plaintiff having expressly guaranteed the machinery to perform the work "intended by the buyer," it is insisted that parol evidence was admissible to explain his intention, on the ground that it was not expressed in the written contract, and therefore the contract was incomplete in that respect, and consequently parol evidence was admissible to sup-

ply the omission and explain the ambiguity. Admitting that parol evidence, even of the previous or contemporaneous declarations of the parties, is sometimes admissible to explain latent ambiguities in written contracts, this is not a case in which that rule, or exception rather to the general rule respecting the admissibility of parol evidence to contradict, vary, or add to the terms of a writing, can be applied, for the reason that no latent ambiguity is made to appear. Neither do we agree with the learned counsel for defendant in his contention that the contract is silent as to defendant's intention. The contract is as follows:

"Jackson Coal & Mining Co., Hartford, W. Va.—Gentlemen: We propose to furnish you with the following equipment for the price and terms as follows:

"**Shaker Screens.**—Two shaker screens each hung on 7 chilled iron wheel supports, with bearings $2\frac{1}{4}$ " diameter. Sides of screens to be $\frac{1}{4}$ " plate; screen plates $\frac{1}{4}$ " thick—perforations to suit you. All corner angles to be $\frac{5}{16}$ " thick; top and cross angles $\frac{1}{4}$ " thick; eccentrics to be set 180 degrees, or opposite to each other, so screens will operate without vibration. Driving shaft to be $3\frac{7}{16}$ " diameter, with 60" fly wheel, all to be geared to suit the 15 H. P. motor furnished by you, with necessary shafts, bearing, gears, etc., and to be built in accordance with B. P. No. B-2183.

"**Hoisting Rigging.**—We are to furnish all the necessary iron work to install a new hoisting apparatus for your weigh pan, excepting only the counter weights.

"**Weigh Pan.**—One-back dumping weigh pan built with $\frac{5}{16}$ " bottom plates, $\frac{1}{4}$ " side and end plates, all angles to be $\frac{5}{16}$ " thick, together with all necessary iron work to hang and operate same.

"**End Loader.**—One curved chute end loader as shown on B. P. B-2183, together with all necessary iron work to hang and operate same.

"**Bins.**—One (1) slack bin under nut screen and chutes to shaker screen and slack bin and bin under slack part of shaker.

"One (1) bin under nut screen with sliding door; one (1) bin under egg screen with sliding door; also furnish one (1) sliding door for slack bin, which you are to build in accordance with the plans we furnish for bin. In furnishing these bins it is part of the contract, that we furnish all necessary hangers to attach to the structure and levers to operate the sliding doors. The load plates in egg and nut bins are to be $\frac{1}{4}$ " plate; all other plates used $\frac{5}{16}$ ".

"**Box Car Loader.**—One box car loader and chute from end loader with double outlet together with all necessary supporting irons to attach to structure and operate this to be similar to the one shown on E. L. Sternberger blueprint, except it will have to be located at side of tippel—but it will operate along similar lines.

"All the before mentioned material to be in accordance with B. P. No. B-2183, plans to be furnished and accepted, and all workmanship and material to be of the very best. We to guarantee it to perform the work intended by buyer and will replace any part proving defective in workmanship and material for one year from date of contract.

"**Price.**—\$1,845.00 F. O. B. Mineral Ridge, Ohio.

"**Terms.**—One-third contract price to be paid on receipt of Bill-of-lading, showing material has been shipped, one-third thirty days after first shipment, and balance on acceptance.

"**Erection.**—We will furnish a skilled mechanic to superintend the erection and starting of the plant, at the rate of \$6.00 per day and traveling

expenses, one round trip. You to pay for his work every regular pay-day.

"**Shipment.**—At this writing we can promise 35 days shipment, and on receipt of notice material has been received will at once send the mechanic to erect same.

"A working drawing to be made up at once and sent to you for your approval, and changes you may desire then, will be made without additional cost, if they do not require additional material.

"We are also to furnish one (1) dump plate, 5 ft. long by 6 ft. wide, with fly 2 ft. wide opening, and one (1) hipped plate to bolt on dumping plate. This is part of the contract price.

"Yours very truly, Mineral Ridge Mfg. Co.,

"Thad M. Boggs, Salesman.

"Accepted May 20, 1912.

"The Jackson Coal & Mining Co.

"By A. E. Smith."

Appended to or indorsed on the paper was also the following memorandum, which is a part of the contract, viz.:

"Take off Slack to slack bin. Load Nut on 3 track. Load Nut and Slack on 3 track. Load Mine Run on 1 track. Load Nut and Egg on 2 track. Load Egg on 2 track. Load Lump on 1 track. Load Lump and Egg on 1 track. Load box cars on 1 track, with chute and valve. Guarantee apparatus to work well, and produce Clean Nut, Clean Egg, and Clean Lump coal. Shakers so balanced and constructed as to make little or no vibration."

The foregoing contract appears to be full and complete. It expresses the agreement of the parties, and is not ambiguous respecting the work intended to be performed by the various parts of the equipment. The blueprints mentioned in the contract, were made from measurements of the tippel taken by plaintiff's agent, and they, including one showing the working plan, were submitted to and approved by defendant before the machinery was installed. The equipment was completed in September, 1912, and defendant contends it did not work as it was guaranteed to work. He and other witnesses for him were permitted to testify fully respecting the particulars wherein the various parts of the equipment failed to perform the work they were guaranteed to do. But there was direct conflict between his witnesses and the witnesses for plaintiff on this point. William W. Heron, who became plaintiff's general manager after the machinery had been installed, says he visited defendant's plant about April 21, 1913, and found all parts of the machinery in use and working, except the weigh pan which was blocked open, and the reason it was not working was it did not have sufficient height and, consequently, did not drop properly. He swears he found no defect either in the material or the workmanship of installation. Later plaintiff sent two other men, C. H. Stigleman and C. E. Shawver, to defendant's plant. Stigleman, who had an experience of about fourteen years in erecting machinery, swears he was there in May, 1913, and spent about two weeks; that all parts of the machinery were then being used, except the weigh pan and the box car loader, and the reason the weigh pan did not

work was because it did not have the height. He says he lowered the screens so that the weigh pan could drop the coal on the shaker screen, and also put a new chute, or box car loader on the screen. The first one had a curved end, according to the original design, and he took it off and put on a straight one. These changes, he says, were made with the approval of defendant who went with him to Pomeroy to examine the working of other loaders of like kind; and, he testified, that after he had made these changes defendant expressed himself as satisfied. Mr. Shawver, plaintiff's superintendent of construction, swears he made two visits to defendant's plant in June, 1913, and was there about four days the first time and seven days the second. He said he made a careful inspection of the machinery, and that "all parts of the job seemed to be correct in every way." He admits, however, that he attached some parts that seemed to be called for—a hopper under the egg screen and a screen under the nut screen. The screen, he said, was extra. He says he also put some repair bars on the nut screen, which were extra. On his second trip he says he made a curve or diversion in the end chute, which seems to be the second change made in it, and put on a chute, running from the hopper back to the slack bin, and tightened up some of the bearing that had been loosened by the vibrations. He says he did not try to do anything with the box car loader because defendant, or his sons who were there in charge of the plant told him not to, because they had tried it a number of times and knew it would not work, but says he could have made it work, and states as the reason why it would not work, that the railroad track on which the lump coal was to be loaded was higher on the side next to the tippie and tilted the car away from the tippie, and thus made it hard to load it. All the things which plaintiff had guaranteed it would do, so as to cause the equipment to perform the work intended, were fully gone into in the testimony, and the jury had to determine, from the conflicting testimony, whether the guaranty had been fulfilled. Being complete and unambiguous in respect to any of its terms or provisions, parol evidence of statements between the contracting parties, previous to or contemporaneous with the execution of the written contract, is not admissible to vary or contradict it, or add anything to it. 10 Ency. Dig. Va. & W. Va. Cases, 650. So far as it concerns the rejection of defendant's parol evidence, offered to explain the written contract, complete on its face, this case falls clearly within the principles stated and applied in *Griffin v. Runion*, 74 W. Va. 641, 82 S. E. 686. It cannot be said the contract is incomplete because it contains a guaranty to do the work intended by the buyer, and does not expressly state what his intention was, when the writing clearly shows on its face what the work was

that was to be performed by the machinery. If it was defendant's intention that it should do work other than what was expressed in the writing, he should have had it incorporated therein. Parol evidence is not admissible to prove an unexpressed intention to enlarge the scope of the written guaranty.

It is contended that the court improperly rejected parol evidence offered for the purpose of proving that Boggs, plaintiff's agent who made the written contract on its behalf, told defendant the machinery could be adjusted to the tippie as it was then constructed, and no lowering of the floor or other changes in the tippie would be necessary. For the reasons already given, we think this evidence was properly excluded. It was a declaration of the acting agent of one of the parties, made contemporaneously with the execution of the written contract, and would tend to prove a qualifying provision, if admitted. If the machinery was to be installed, without alteration of the tippie, it should have been so expressed in the writing.

Defendant assigns as error the refusal of the court to allow him to prove that it would cost \$500 to replace the alleged faulty box car loader with one that would work. We find that later this same witness was permitted to so testify without objection, in answer to another question. Therefore, assuming that the testimony was proper, defendant was not prejudiced.

[2] There is no complaint that the material or the workmanship, in respect to any of the machinery, was defective, and whether it would, and actually did the work well and in the manner specified and as guaranteed by plaintiff were disputed facts to be determined by the jury. Defendant and some of his other witnesses testified that certain parts of the machinery would not do the work intended, and could not be made to do it well. On the other hand, plaintiff's witnesses, Stigleman and Shawver, testified to the contrary, and Stigleman swore defendant expressed himself as satisfied, after he had made certain readjustments in May, 1913. We have no right to disturb the finding of the jury on such conflicting testimony.

[3] Complaint is also made of the court's refusal to admit certain correspondence between the parties, consisting of telegrams and letters written after the machinery had been installed. Witnesses testified fully in regard to all the matters and things complained of in the correspondence. Plaintiff's witnesses did not dispute anything contained in them, and, so far as those written by defendant are concerned, they are only self-serving declarations, and were properly excluded.

We find no error in the rulings of the court upon the admission or exclusion of evidence. So far as the record discloses, but one instruction was given to the jury. It was given on request of plaintiff and was, in effect,

that the writing was the exclusive evidence of the contract, which could not be altered or varied by parol evidence, and that plaintiff was bound only by the express warranty contained therein. This instruction correctly propounded the law applicable to the case.

The judgment is affirmed.

(120 Va. 356)

CITY OF NORFOLK v. NORFOLK COUNTY.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917. Rehearing Denied March 28, 1917.)

1. PLEADING \S 193(9)—DEMURRER—ASSUMPSIT—DEFECTS IN ACCOUNT.

The account is no part of the declaration in indebitatus assumpsit, and defects in the account cannot be taken advantage of by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 438.]

2. PLEADING \S 187—DEMURRER—ASSUMPSIT—COMMON COUNTS.

A demurrer will not lie to a common-law count in assumpsit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 400.]

3. ASSUMPSIT, ACTION OF \S 4—RECOVERY OF MONEY.

There are three classes of cases in which the action of assumpsit properly lies for the recovery of money: (1) Where there is an express contract in fact and privity in fact between the parties; (2) where there is an implied contract in fact and privity in fact; and (3) where there is an implied contract in law and no privity in fact, but an implied privity in law between the parties.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. § 13.]

4. MONEY RECEIVED \S 6(1)—CONSIDERATION.

In the last class of cases, as well as in the two former, a valid and sufficient consideration, either of benefit moving from or detriment to the plaintiff is essential to support the action of assumpsit.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 21, 23, 24.]

5. MONEY RECEIVED \S 7—IMPLIED PROMISE—WHEN FICTION IS NOT INDULGED.

The fiction of an implied promise to repay money of one person received by another will not be indulged in every case, but only where in equity and good conscience the duty to make such a promise exists, and when defendant has derived no right from plaintiff, and has not by mistake or fraud usurped or gotten the benefit of any original right of plaintiff to the latter's detriment, but relies on a bona fide hostile claim of right, defendant is not under duty to repay the plaintiff, and the law will not indulge the fiction of the existence of an implied promise.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. §§ 28, 29.]

6. MONEY RECEIVED \S 8—RIGHT OF ACTION—RECEPTION OF MONEY.

Where defendant in assumpsit has received money from a third person through some mistake or fraud by law or authority, which, but for the mistake or fraud, would have vested the right to the money in plaintiff, plaintiff may recover.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 30.]

7. MONEY RECEIVED \S 9—RECEPTION OF MONEY IN INDEPENDENT RIGHT.

Where defendant in assumpsit received money by a right independent in its origin from plaintiff's original right, in no way going upon or displacing the latter, recovery is properly denied, since the express facts negative any possibility of a promise of defendant to pay plaintiff anything, and negative any privity between their claims of right, while no consideration exists.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 31.]

8. TAXATION \S 913(4)—DISPOSITION—RECOVERY BY CITY OF MONEY PAID COUNTY.

Where territory formerly in a county was annexed to a city of the same name, and railroad and terminal property was located in such territory, but was erroneously assessed after the annexation as if in the county, and the error in assessment was not corrected within 30 days, so that the assessment was final, and the railroad and terminal companies required by law to pay the taxes to the county, which they did, the receipt of the county being a complete acquittance, the county was liable to the city in an action of indebitatus assumpsit for the money received from the companies.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1750.]

Error to Circuit Court, Norfolk County.

Action by the City of Norfolk against the County of Norfolk. From a judgment sustaining demurrer to the declaration, plaintiff brings error. Reversed, and case remanded for further proceedings.

R. W. Tomlin, Wm. G. Maupin, and J. D. Hank, Jr., all of Norfolk, Va., for plaintiff in error. A. B. Carney and E. R. F. Wells, both of Norfolk, Va., for defendant in error.

SIMS, J. The court below sustained the demurrer of the defendant, the county of Norfolk, to the declaration of the plaintiff, the city of Norfolk.

The declaration contains two counts. The first is the common-law count of indebitatus assumpsit for money had and received. The second is a special count.

There was an account filed with the declaration.

The facts alleged in the declaration, or admitted in argument, are substantially as follows:

That, by a certain act of assembly of Virginia mentioned, certain territory formerly in the county of Norfolk was annexed to such city; that in this territory was located certain property of the Norfolk & Western Railway Company and of the Norfolk and Atlantic Terminal Company; that after such annexation such property of said companies was by mistake erroneously supposed to be situate and taxable in the county of Norfolk, whereas it was in fact then situate and taxable in the city of Norfolk; that by reason of such mistake such property was erroneously assessed for taxes for certain years after such annexation in the county of Norfolk, instead of in the city of Norfolk, as it should

have been; and that the taxes for the years so erroneously assessed were by reason of such mistake paid by said companies to the county of Norfolk. The action was instituted by the city of Norfolk against the county of Norfolk to recover the amount of the taxes thus erroneously paid.

The demurrer was to the declaration as a whole and to each count thereof.

Only two of the grounds of demurrer are relied on before, and need to be considered by, us, the second and third, as the first ground was removed by the amendment of the declaration allowed and made in the court below. These two grounds are as follows:

"Second. The declaration and the account filed therewith show that there is no privity between the plaintiff and the defendant, and therefore set forth no cause of action against this defendant.

"Third. The second count of the declaration shows that there is no privity between the plaintiff and the defendant, and therefore sets forth no cause of action against the defendant."

The order complained of sustained the demurrer to the whole declaration.

The assignments of error are as follows:

"(1) The court should not have sustained the demurrer to the declaration as a whole nor to the first count thereof, because the first count of the declaration is the common count of indebtedness assumpsit for money had and received, and as such is not demurrable.

"(2) The court should not have sustained the demurrer on the ground that there is no privity between plaintiff and defendant."

It is admitted in brief of counsel for appellee that it was through inadvertence that the order complained of sustained the demurrer to the first count, which was, as above stated, a common-law count of indebtedness assumpsit.

[1, 2] The rule established in Virginia that the account is no part of the declaration, that defects in the account cannot be taken advantage of by demurrer (*Campbell v. Angus*, 91 Va. 438, 22 S. E. 167; *Booker v. Donohoe*, 95 Va. 359, 28 S. E. 584; *King v. N. & W. Ry. Co.*, 99 Va. 625, 39 S. E. 701; *Grubb v. Burford*, 98 Va. 554, 37 S. E. 4), and the further rule in Virginia that a demurrer will not lie to a common-law count in assumpsit (*Portsmouth Refining Co. v. Oliver Refining Co.*, 109 Va. 513, 64 S. E. 56, 132 Am. St. Rep. 924), are not controverted by the brief of counsel for appellee.

It is clear, therefore, that the order complained of was erroneous in sustaining the demurrer to the whole declaration and to the first count thereof.

But, as stated above, this was through inadvertence, and does not go to the real controversy in the case, which involves the decision of the court below upon the third ground of demurrer. As the latter will again have to be passed upon in some form if the judgment were reversed upon the sole ground that it was erroneous on the second ground of demurrer, we feel that we should pass upon the real controversy involved in the

demurrer, which is contained in the said third ground of demurrer, namely, the question:

1. Whether privity between the plaintiff and defendant is essential to a cause of action of the plaintiff in such a case as that before us.

[3] Speaking generally, there are three classes of cases in which the action of assumpsit properly lies for the recovery of money, namely:

(1) Where there is an express contract in fact and privity in fact between the parties plaintiff and defendant.

(2) Where there is an implied contract in fact and privity in fact between the parties plaintiff and defendant.

(3) Where there is an implied contract in law and no privity in fact, but an implied privity in law, between the plaintiff and defendant.

The case before us falls within the class last named, which is characterized as quasi ex contractu, the obligation upon which it rests being so designated under the civil law, from which the principle of such obligation was derived.

The history of the origin and growth of the action of assumpsit and the distinctions between the classes of cases mentioned are admirably stated in 2 *Ruling Case Law*, in its treatment of the subject "Assumpsit," from which we will make the following quotations:

"*History.*—In early times the want of a common-law remedy suited to cases of nonperformance of simple promises caused frequent recourse to equity for relief, but in the twenty-five years of the reign of Henry VII it was settled by the judges that an action on the case would lie as well for nonfeasance as for malfeasance, and in that way assumpsit was introduced. In theory it was an action for the nonperformance of simple contracts, and the formula and proceedings were constructed and carried on accordingly. Very early, however, there were successful efforts to apply it beyond its import, and from the reign of Elizabeth this action has been extended to almost every case where an obligation arises from natural reason and the just construction of law that is quasi ex contractu, and is now maintained in many cases which its principles do not comprehend and where fictions and intentment are resorted to to fit the actual cause of action to the theory of the remedy." 2 R. C. L. § 3.

With respect to the first and second classes of cases above mentioned this work says:

"*Express and Implied Contracts.*—The action of assumpsit lies for the enforcement of a contract express or implied, but the contract must necessarily contain all the essentials of an enforceable contract; thus it must be based upon a valid and sufficient consideration, and there must be privity of contract established between the parties. As ordinarily understood, the only difference between an express contract and an implied contract is that in the former the parties arrive at their agreement by words, either oral or written, sealed, or unsealed, while in the latter their agreement is arrived at by a consideration of their acts and conduct. In both of these cases there is, in fact, a contract existing between the parties; the only difference being in the character of evidence necessary to establish

it. To constitute either the one or the other the parties must occupy towards each other the contract status, and there must be that connection, mutuality of will, and interaction of parties, generally expressed, though not very clearly, by the term 'privity.' Without this a contract by implication is quite impossible." *Id.* § 6.

With respect to the third class of cases above mentioned this work says:

"Quasi Contracts.—We have seen that assumpsit will lie for the breach of an express contract or one implied in fact; but, after subtracting express contracts and those implied in fact, there is still left another large class of obligations, to enforce which the action of general assumpsit is a well-established remedy. The principle upon which this latter class of obligations rests is equitable in its nature, and was, like most other equitable principles, derived from the civil law. This obligation was under the civil law designated *quasi contractus*. Stated as a civil law principle, it was an obligation similar in character to that of a contract, but which arose, not from an agreement of parties, but from some relation between them or from a voluntary act of one of them, or, stated in other language, an obligation springing from voluntary and lawful acts of parties in the absence of any agreement. In quasi contracts the obligation arises, not from consent, as in the case of contracts, but from the law or natural equity. The class of obligations now under consideration, and which are treated in works on contracts as contracts implied in law, or quasi contracts, is recognized and enforced by common-law courts by means of a general assumpsit. The liability exists from an implication of law that arises from the facts and circumstances independent of agreement or presumed intention. In this class of cases the notion of a contract is purely fictitious. There are none of the elements of a contract that are necessarily present. The intention of the parties in such case is entirely disregarded, while in cases of express and implied contracts in fact the intention is of the essence of the transaction. In the case of contracts the parties fix their terms and set the bounds upon their liability. As has been well said, in the case of contracts the agreement defines the duty, while in the latter class of cases the duty defines the contract." *Id.* § 8.

[4] It should not be overlooked that in the last class of cases, as well as in the two former, above referred to, a valid and sufficient consideration, either of benefit moving from, or of detriment to (in change of status of), the plaintiff is absolutely essential to support the action of assumpsit.

It will be observed that it is common to the second and third class of cases above mentioned that "the contract in fact" is implied in law in the former; and "the contract in law" is implied in law in the latter. Therefore "contracts in fact" and "contracts in law" are both implied in law under certain circumstances, and are spoken of as "implied contracts" frequently in the cases, without discrimination, which sometimes leads to confusion of thought.

We come now to consider when the law will act and imply a contract and privity, in the third class of cases under consideration, where neither in fact exists, so as to support an action of assumpsit.

In this connection it will be found that the

law will make such implications in the third class of cases in all cases where one person has received money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it and *ex æquo et bono* it belongs to the plaintiff, in which cases there is of necessity the existence of a valid and sufficient consideration of detriment to the plaintiff, otherwise the equity of the latter would not arise, and in which cases also there is an absence of facts expressly proved which *ex æquo et bono* negative the existence of any promise. And this is so irrespective of whether the money was received from the plaintiff or a third person. *Id.* § 34, and numerous cases cited, among which is the case of *Lawson's Ex'r v. Lawson*, 16 Grat. (57 Va.) 230, 80 Am. Dec. 702, cited in brief for appellant, hereinafter more particularly referred to.

An examination of the numerous authorities cited before us for appellant and appellee bear out the correctness of the above distinctions.

Among the authorities cited for appellant are the following:

In *Bayne v. United States*, 93 U. S. 642, 23 L. Ed. 997, it is said:

"Assumpsit will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund."

As said by Mr. Justice Daniels in *Cary v. Curtis*, 3 How. 236, 11 L. Ed. 576:

"The action of assumpsit for money had and received, it is said by Lord Mansfield (*Burr. 1012, Moses v. Macfarlen*), will lie in general whenever the defendant has received money which is the property of the plaintiff and which the defendant is obliged by the ties of natural justice and equity to refund."

In the same case Mr. Justice Story, in his able and elaborate opinion on this subject, says:

"It is an entire mistake of the true meaning of the rule of the common law, which is sometimes suggested in argument, that the action of assumpsit for money had and received is founded upon a voluntary, express, or implied promise of the defendant, or that it requires privity between the parties *ex contractu* to support it. The rule of the common law has a much broader and deeper foundation. Wherever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another, which he has no lawful right to exact or retain from him, there it forces the promise upon him in invitum to pay over the money to the party entitled to it. It is a result of the potency of the law, and is in no shape dependent upon the will or consent or voluntary promise of the wrongful possessor. The promise is only the form in which the law announces its own judgment upon the matter of right and duty and remedy; and under such circumstances any argument founded upon the form of the action that it must arise under or in virtue of some contract is disregarded, upon the maxim '*Qui hæret in litera hæret in cortice.*' Hence it is a doctrine of the common law (as far as my researches extend), absolutely universal, that if a man, by fraud, or wrong, or illegality, obtains, or exacts, or retains money justly belonging to another, with notice that the latter contests the right of the former to receive or exact or

retain it, an action for money had and received lies to recover it back."

In *B. & O. R. Co. v. Burke and Herbert*, 102 Va. 643, 47 S. E. 824, Keith, P., delivering the opinion of this court, said:

"As between a promisor and promisee there is privity, and if the facts be such as to raise an implied promise upon the part of the defendant, if the defendant has money in his possession which in good conscience he ought to pay to the plaintiff, the law will imply a promise on the part of the defendant to do his duty and to pay the money; and this implied promise is as effectual to create privity between the parties as an express promise would be."

"These propositions, we think, are fundamental, and we shall cite but little authority in support of them."

In *Lawson's Ex'r v. Lawson*, 16 Grat. (57 Va.) 230, 80 Am. Dec. 702, above referred to, Lee, J., says:

"The action of indebitatus assumpsit for money had and received will lie whenever one has the money of another which he has no right to retain, but which *ex aquo et bono* he should pay over to that other. This action has of late years been greatly extended, because founded on principles of justice; and it now embraces all cases in which the plaintiff has equity and conscience on his side, and the defendant is bound by ties of natural justice and equity to refund the money. In such a case no express promise need be proved, because from such relation between the parties the law will imply a debt and give this action founded on the equity of the plaintiff's case, as it were upon a contract, quasi *ex contractu*, as the Roman law expresses it, and upon this debt founds the requisite undertaking to pay."

The case of *Booker v. Donohoe*, *supra*, is very much in point in consideration of the question of whether privity in fact is an essential in an action of assumpsit. That was an action of assumpsit by the duly elected clerk of Elizabeth county against one who had unlawfully assumed the duties of the office and collected and converted to his own use fees and emoluments thereof. There was no privity in fact between the *de facto* officer, the defendant, and the *de jure* officer, the plaintiff; third parties paid the money. In that case the court held:

"It seems to be a principle of natural justice as well as law that, where one person has injured another, or received compensation which in equity and good conscience belongs to another, he may be required by action to account to such other for the injury done him. * * * The legal fees and emoluments of an office are a part thereof, and belong to the rightful incumbent; and, where a person receives such fees and emoluments on the pretense of title to the office, the *de jure* officer may recover the profits of the office from him by an action of assumpsit for money had and received to his use."

It was held by the Court of King's Bench as early as 1725, in the case of *Attorney General v. Perry*, 2 Com. 481, as follows:

"Whenever a man receives money belonging to another without any reason, authority, or consideration, an action lies against the receiver as for money received to the other's use; and this as well where the money is received through mistake, under color and under an apprehension, though a mistaken apprehension, of having good authority to receive it, as where it is received by imposition, fraud, or deceit in the receiver."

In the case of *State v. Village of St. Johnsbury*, 59 Vt. 332, 10 Atl. 531, certain fines were paid by persons convicted in prosecutions under the liquor law to a justice of the peace of the village of St. Johnsbury, and thus passed into the village treasury. The state of Vermont claimed that under the law it was entitled to these fines, and sued the village for their recovery in an action of assumpsit. Here there was no privity in fact between plaintiff and defendant; third parties paid the money. The court held on this point, in a well-considered opinion:

"But it is said that assumpsit for money had and received will not lie, for that there is no privity between the state and the village, as the latter received from third persons, and had retained the money in good faith, under an adverse claim of right and ownership. But in order to maintain this action there need be no privity between the parties, nor any promise to pay, other than what arises and is implied from the fact that the defendant has money in his hands belonging to the plaintiff that he has no right conscientiously to retain. In such case the equitable principle on which the action is founded implies the promise. When the fact is found that the defendant has the plaintiff's money, if he can show neither legal nor equitable grounds for keeping it, the law creates the privity and the promise."

In the case of *Strough v. Board of Supervisors*, 119 N. Y. 212, 23 N. E. 553, a railroad company paid certain taxes to Jefferson county. Under the law these taxes should have been applied to the purchase of bonds of the town of Orleans issued to aid in the construction of the railroad, or to the purchase of other bonds to be held as a sinking fund for the redemption of said town bonds. The taxes in question were by mistake used for general county purposes. Strough, supervisor of the town of Orleans, instituted an action against the board of supervisors of the county of Jefferson to recover this money, in which a recovery was allowed. Here there was no privity in fact between the town and county; a third party paid the money. The court in its opinion said:

"The misappropriation of the taxes in question being conceded, there can, we think, be no doubt that an action lies against the county in behalf of the town of Orleans to recover back the money misappropriated, on the principle upon which the equitable action for money had and received is founded. * * * It [the county] ought in justice to restore it and make good to the town what it has lost by its unauthorized acts. To compel the performance of this duty, an action for money had and received is the appropriate remedy."

In *Bridges v. Supervisors of Sullivan Co.*, 92 N. Y. 570, property of a railroad company was assessed for taxes, 1874 to 1878, inclusive, in the county of Sullivan, and the taxes were paid to such county. A statute directed these taxes to be paid to the town of Liberty. The county refused to pay same over to the town. Bridges, supervisor of the town, brought action against the county to recover the money. Here was no privity between the town and county; a third party paid the money. The court said:

"The only question here is to whom 'ex æquo et bono' do the specific moneys levied from the railroad corporations for county taxes during the years named belong. We think that they unquestionably belong to the town. The county has simply failed to collect a sufficient sum to pay its county charges during the several years during which it has unlawfully appropriated the moneys of the town to its own uses. It should now refund them to the town, to whom the state gave them, and an action for money had and received is the appropriate remedy to accomplish this result."

In *Colusa County v. Glenn County*, 117 Cal. 434, 49 Pac. 457, Glenn county was formed out of a part of Colusa county. At the time of such formation there remained on the assessment roll of Colusa county taxes against property of a railroad company assessed while it was in Colusa county. A portion of these taxes were afterwards paid to Glenn county, whereas the whole of them should have been paid to Colusa county. The latter instituted action against Glenn county to recover such money. There was no privity here between the respective counties; a third party paid the money. A recovery was allowed, and the court said:

"There can be no question, therefore, that the county of Colusa had the right to collect from the railroad company the taxes which were levied upon that portion of the road which before the creation of a new county was within its limits; and Glenn county, having received a portion thereof, cannot legally retain it. * * * The county of Glenn, having received the money in question without any right, and not being entitled thereto, is liable upon an action for money had and received upon its implied promise to pay the same to the county of Colusa, which was entitled thereto."

In *City of Salem v. Marion County*, 25 Or. 449, 36 Pac. 163, certain taxes were paid by the taxpayers to the sheriff of Marion county. Under the law the taxes should have been paid to the street commissioner of the city of Salem. The city instituted action against the county to recover the taxes, which was allowed. Here there was no privity between the city and the county; third parties paid the money. The court said:

"The principle that an obligation rests upon all persons, natural and artificial, to do justice, so that, if a county obtain money or property of others without authority, the law, independent of any statute, will compel restitution or compensation, is not questioned. *Chapman v. County of Douglas*, 107 U. S. 348, 2 Sup. Ct. 62 [27 L. Ed. 378]. But it is claimed that there is no privity, statutory or contractual, between the county and city which would sustain an action for money had and received, and hence the county would not be justified in paying over the money in question to the city. As the street commissioner is an officer of the city, and as such authorized to collect said taxes, he is the agent of the city for their collection; and, whether collected in work or money, such work must be performed or money expended upon the streets, alleys, or bridges of the city for the benefit of its inhabitants."

In *Humboldt County v. Lander County*, 24 Nev. 461, 56 Pac. 228, certain trackage of a railroad company was claimed by both counties to be within their limits, and both counties assessed the property for taxation. The

railroad company paid the taxes to Lander county, and did not pay Humboldt county. The trackage was in fact in Humboldt county, but Lander county retained and refused to pay over the taxes to Humboldt county, hence the action by the latter against the former to recover them. The recovery was allowed. Here there was no privity between the counties; a third party paid the money. The court said:

"Where there is no privity, statutory or contractual, between a city and a county, where such county had collected money for taxes belonging to the city, an action to recover the same would be sustained, upon the principle that an obligation rests upon all persons, natural and artificial, to do justice, independent of any statute, so that, if the county obtain money or property of others without authority of the law, it will be compelled to make restitution. * * * While it might be claimed that these taxes were paid to Lander county under authority of law, yet the retention of the same, under the facts stipulated, was without authority of law, for it is shown that she had no right to tax the property in the first instance, and the statute authorizing the payment to her by the Central Pacific Railroad Company conferred no such right; hence it can be truly said that the assessment, collection, and retention of the money were without authority of law, as her attempted exercise of the right of assessment and collection was without authority of law."

In the instant case the taxes were erroneously assessed by the State Corporation Commission in the county of Norfolk, but under the statute such error in assessment could not be corrected after 30 days from such assessment. They were not so corrected. Hence the assessment, although erroneous, was final, and the railroad and terminal companies, so far as they were concerned, were required by law to pay the taxes in question to the county of Norfolk, as they did. Such payment was a valid payment under the statute law of the state, and the receipt of the county of Norfolk was a complete acquittance of the railroad companies of all further liability therefor. But the assessment in the county of Norfolk was in fact a mistaken one; the property being in fact within the limits of the city of Norfolk at the time of the assessment. The county was never, as a matter of right, entitled to such taxes. They of right belonged to the city at the time they were assessed and at the time they were paid. The county therefore cannot in equity and good conscience retain such taxes as against the city. Moreover, the city has no other remedy than to sue the county, since the said companies have received a full acquittance and discharge of their obligation for payment of the taxes in question by the payment which they made to the county; that is to say, there exists in the instant case the element of detriment to the plaintiff, as a consideration to support the action.

Counsel for the county of Norfolk cite in their brief and rely upon the following cases:

Burton v. Burton, 10 Leigh (37 Va.) 597, in which the Treasurer of the United States

paid money to the widow of a decedent instead of to his executor, the latter being the party alone entitled to receive it. In such case this court held that an action of assumpsit would not lie by the executor against the widow. Upon this subject Brooke, J., said:

"I think it well settled that, where two persons claim, each in his separate right, the same sum of money from a third party, and the third party pays it to one of the claimants, the other cannot recover it from him who receives it, in this or in any other form of action; for there is no privity between them. Whether he can recover it from the third party, who has rejected his claim and paid the money to his successful competitor, is another question, which does not belong to this case."

Tucker, P., on the same subject said:

"If the merits of this case were with the plaintiff, I should still be of opinion that the action could not be maintained. If the executor of the pensioner, and not his widow, was entitled to his unpaid pension, then the payment to the widow by the government was a payment in its own wrong, and the executor may still justly demand payment to himself from the proper department. He cannot demand of the widow to pay over to him what she has received; for that was not his money. His money is in the hands of the government. What she received, she received as her own, claiming title to it as her own; and, her claim being admitted and paid, she can never be compelled to refund. Mayor, etc., v. Judah, 5 Leigh (32 Va.) 305. And if the government cannot compel her to refund by direct action, it seems to follow that she cannot be indirectly compelled to refund, by being forced to pay over the amount to another claimant with pretensions adverse to her own. There is no privity between them, nor is there any ground on which to rest an implied contract. The reasoning of the court in Rogers v. Kelly, 2 Camp. 123, seems to me to be in point. The government and the widow cannot both be debtors of the executor. Now, if the payment was improperly made, the government is not discharged, and is still debtor to him. The widow therefore cannot be his debtor."

It will be observed that Judge Tucker directs attention to the fact that in that case the defendant was not paid and did not hold the money upon any right which could go upon or displace the original right of the plaintiff thereto; that is to say, the executor's claim against the government was not discharged or affected by the improper payment to the widow. The government was still debtor to the executor.

There are two aspects in which this case was correctly decided. First, the essential element of a consideration, in such a case a detriment to the plaintiff, from which alone the equity of the latter would arise, was absent; second, in such a case the facts shown expressly to exist, of two adverse claimants at the time the money was paid, under bona fide claims to the money dependent upon irreconcilably hostile rights thereto, not made hostile by any mistake or fraud, but so in their origin, which negatived any promise in fact and negatived also the existence of any duty upon which a promise might otherwise have been implied in law. It was a case in

which *ex aequo et bono* the facts expressly proved negatived the existence of any demand upon the law to imply a promise.

[6] The fiction of an implied promise will not be indulged in every case, but only where, in equity and good conscience, the duty to make such a promise exists. When the defendant has derived no right from the plaintiff, has not by mistake or fraud usurped or gotten the benefit of any original right of the plaintiff to the detriment or injury of the right of the latter, but relies upon a bona fide hostile claim of right, no such duty exists of the defendant to the plaintiff, and the law will not indulge the fiction of the existence of an implied promise of defendant to plaintiff; for that would in such case be in itself inequitable. See 4 Cyc. p. 325.

The latter distinguishing feature, in a line of cases similar to that of *Burton v. Burton*, in which the right to maintain the action of assumpsit is generally, although not universally, denied by the courts, is considered in the very able opinion of Chief Justice Hornblower in the case of *Sergeant v. Stryker*, 16 N. J. Law, 464, 32 Am. Dec. 404, cited in brief of counsel for appellee. On this subject he says:

"There must therefore be some principle running through the cases by which it can be known when *indebitatus assumpsit* will lie for money had and received and when it will not. The rule cannot be arbitrary and the creditor at liberty to look to his immediate debtor, or to some other person who has got his debtor's money in his hands, at his election. Lord Mansfield says, in *Moses v. McFerlan*, 2 Burr. 1009, 'that there are numberless instances in which this action lies, for money the defendant has received from a third person, upon a claim of title to it, in opposition to the plaintiff's right,' but he adds, 'and which the defendant had by law, authority to receive from such third person.' This is, no doubt, true, and I think all the cases relied upon are such as go upon the plaintiff's title to the specific fund, or where, the third person having lawfully paid over the money, the plaintiff has no remedy against him; and this, I think, will be found to be the true criterion in such cases."

In the conclusion of such opinion it is said:

"Stryker cannot maintain this suit against the defendant below; they have got what does not belong to them; but that is no wrong to him. His right to the reward at the hands of the sheriff is as perfect as ever it was, and if he has released it, it is his own fault or misfortune. I see nothing to prevent the sheriff from recovering the money he has paid the defendants, if in fact they did not retake the prisoner."

[6, 7] But mere hostility of claim by the defendant at the time the action is brought by the plaintiff, or even at the time the money is received by the defendant, is not in itself decisive of the question we have under consideration. The very vital distinction involved in the case of *Burton v. Burton*, *supra*, and in like cases in which the defendant receives the money from a third person, or holds it upon a claim of right in opposition to the plaintiff's right, where the recovery by the plaintiff has been properly allowed or

denied by the courts, is more clearly indicated in the case of *Sergeant v. Stryker*, supra; and that distinction is this: Where the defendant has received money from a third person by law or authority through some mistake or fraud, which but for the mistake or fraud would have vested the right to the money in the plaintiff, the plaintiff may recover; that is to say, the plaintiff may recover whenever, but for the mistake or fraud, he would have had unquestioned right to the money. Such cases rest upon the plaintiff's original right to the fund, which right has been lost to the plaintiff or impaired by the mistake or fraud. Where the defendant received the money by a right which is independent in its origin from the original right of the plaintiff and in no way goes upon or displaces the latter, the recovery is properly denied. In such case the express facts negative any possibility of a promise of defendant to pay plaintiff anything and equally negative any privity between their claims of right to the fund. Furthermore, no consideration exists to support the action.

Counsel for appellee cite also the following cases which contain the distinguishing features under consideration, namely: *Butterworth v. Gould*, 41 N. Y. 450; *Hathaway v. Homer*, 54 N. Y. 855; *Moore v. Moore*, 127 Mass. 22; *Cole v. Bates*, 186 Mass. 584, 72 N. E. 333.

Counsel for appellee take the position that the feature of "valid acquittance" which they emphasize in connection with their discussion of the foregoing cases cited and relied on by them is one of fundamental importance, and they claim that the instant case contains this feature, and hence should be ruled by the decision of this court in *Burton v. Burton*, supra, and like cases cited in their brief. For the reasons stated above, we think this position on the law of the case is well taken, but, applying such legal test, we come to a different conclusion of fact from that of counsel for appellee. It seems clear to us that in the instant case the payment of taxes made by the railroad and terminal companies to the county of Norfolk was in accordance with the statute law of the state, and the assessment made in accordance with such law; and hence such payment was "a discharge of the tax debts" of these railroad companies so far as the railroads were concerned. It released them from all further obligation to any one. After such payment the railroads did not owe the city of Norfolk anything. The latter was not in the position of having two debtors, the railroad company and the county of Norfolk. The original right of the appellant to the taxes in question was displaced by the mistake in the assessment, and the failure of its correction within the 30 days allowed by law. This failure was due to mistake of both appellant

and appellee existing at the time as to the true location of the property assessed. Thus the appellant's holding of the money supplants and rests upon the original right of the appellant which has been lost to the latter by the mistake aforesaid. Here the consideration exists from which the equity of the latter arises to support the action: that is to say, the instant case does not fall within the said line of cases cited and relied on by counsel for appellee.

[8] It will be noted that in all of the cases cited above in this opinion in which it was held that the action of assumpsit would lie, and as to which we give a brief statement of such cases, the initial payment was a discharge of the original debt, and the plaintiff had no remedy against any party with whom it was in privity in fact. We think the instant case falls within the latter line of authorities, among which is the decision of this court in the case of *Booker v. Donohoe*, supra, where the debts of those who paid fees to the de facto officers were discharged by such payment, and must be decided accordingly.

The two remaining cases cited and relied on by counsel for appellee of *Town of Rushville v. President of Town of Rushville*, 39 Ill. App. 503, and *City of Charleston v. Commissioners*, 52 Ill. App. 41, are upon their facts irreconcilable with the line of authorities we shall follow; but the decisions themselves seem to be placed by the opinions therein on the ground that, the initial payment being due to the error of the officer making the payment, the original obligation was not discharged, as well as upon the ground of lack of privity between plaintiff and defendant. The court seems to regard them as cases of payment by the officers receiving the money, and does not go behind the officers to the parties who paid the money and regard the latter as paying the money as most similar cases do.

Further, as pointed out by counsel for appellant, these two cases are not decisions of the court of final resort in Illinois.

A number of other authorities are cited by counsel for appellant, and criticisms of some of them are made by counsel for appellee, and a reply to such criticisms is made in a reply brief of counsel for appellant, in which counsel on both sides of the case have evidenced a very extensive examination of the very interesting and important question of law involved in the instant case, and the able presentation of the diverse views of opposing counsel has been of great assistance to this court. All of these authorities have been examined, but it is believed that a further discussion of them would unduly prolong this opinion without throwing any additional light on the point of law involved.

For the reasons given above, the judgment

complained of must be set aside, and the case remanded to the court below for further proceedings to be had therein not in conflict with this opinion.

Reversed.

(119 Va. 861)

WHEAT et al. v. WHEAT et al.

(Supreme Court of Appeals of Virginia. Sept. 11, 1916. Rehearing Denied Nov. 23, 1916.)

Appeal from Circuit Court, Bedford County. Nelson Sale, of Bedford City, and S. V. Kemp, of Lynchburg, for appellants. Don P. Halsey, of Lynchburg, and Landon Lowry, of Bedford City, for appellees.

PER CURIAM. Affirmed by divided court.

(173 N. C. 138)

COTTRELL et al. v. TOWN OF LENOIR.
(No. 475.)

(Supreme Court of North Carolina. March 14, 1917.)

1. CONSTITUTIONAL LAW — 63 — LEGISLATURE — POWER — DELEGATION.

The Legislature may provide that a statute shall not take effect or be in force until approved by the people at an election to be held for the purpose of ascertaining their will in respect thereto, hence Priv. Laws 1915, c. 202, amending the charter of the town of Lenoir, Priv. Laws 1909, c. 37, with respect to local improvements, and providing that it should not go into effect until adopted by a majority of the electors at an election held as prescribed, is valid, and is not effective until so adopted.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116.]

2. STATUTES — 21 — VALIDITY — MODE OF ENACTMENT.

Act of 1917, purporting to amend Priv. Laws 1915, c. 202, relating to public improvements in the town of Lenoir, and inserting therein the provisions of Pub. Laws 1915, c. 56, thus doing away with the necessity of an election before the act should go into effect, was not passed in accordance with Const. art. 2, § 14, providing that no law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three times in each house of the General Assembly and passed three several readings, which shall have been on three different days, and agreed to by each house, respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal. The amendment purported to give the town of Lenoir almost unlimited power to borrow money, issue bonds or notes, with interest, to be paid by the proceeds of the sale of local improvement bonds, or by an annual tax levy. Held, that the original act, which never became effective, because not adopted by the electors of the town, was passed in accordance with the constitutional provisions, and the amending act has no validity.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 18-27.]

Appeal from Superior Court, Caldwell County; Cline, Judge.

Action by J. L. Cottrell, a taxpayer and others against the Town of Lenoir. From a

judgment denying an injunction, plaintiffs appeal. Reversed.

The plaintiff sued on behalf of himself and all other taxpayers of the town of Lenoir, similarly situated, who will come in and make themselves parties. The case grows out of the construction and operation of certain legislation in regard to paving and improving the streets and sidewalks of said town, as contained in its charter (Private Laws of 1909, c. 37), Private Laws of 1915, c. 202, amendatory thereof, and an act passed at the present session of the General Assembly and ratified on January 9, 1917, and Public Laws of 1915, c. 56, entitled "An act relating to local improvements in municipalities" of the state. The original charter required the streets, bridges, and sidewalks of the town to be kept in repair in the manner and to the extent deemed best by the commissioners, who are vested with the power "to cause owners of lots to make and keep in good repair, at their own expense, sidewalks around their lots and to make rules, regulations and orders" for this purpose. If the owners, after notice, fail to construct sidewalks or repair the same, in such manner and out of such material as the commissioners may direct, then the latter may cause the same to be done, and apportion the cost thereof between the town and such lot owners "in such ratio" as the commissioners may consider to be just and reasonable, the part of the cost and expense assumed against each owner, on account of benefits received, to be a lien on his lot along, or in front of which, such sidewalk is laid, and to be collected as are taxes.

Private Laws of 1915, c. 202, amended the town charter by providing for laying out avenues, streets, alleys, blocks, and lots, and for establishing districts or sections of streets and sidewalks for the purpose of assessment for the permanent improvement of the same. The assessments on adjoining or abutting property for the cost of the improvements are made liens on such property. It requires that the town shall improve the street intersections and pay therefor out of its general fund, and, for the improvement of the streets it shall pay one-third of the cost and expense, and one-half of the cost of improving the sidewalks, also out of its general fund. The courthouse square is constituted a separate taxing district for the improvement of which the town pays one half and the abutting owners the other half. Provision is made for equalizing the assessments; for notice to the owners of the amounts assessed against each of them or their lots, and for payment of the same by the owner, and if not made, then for the collection of the same by the tax collector by sale. It is provided, further, that the town's share of the expense of all improvements made by contract or otherwise shall

be paid out of the general fund, and not otherwise. The last section of this statute provides that it shall not take effect, or be in force, until its provisions have been approved by a majority of the people at an election to be held as therein prescribed, at which the question shall be "for change of charter" or "against change of charter," and that, if a majority vote against the change of the charter, the statute shall be void.

The statute of 1917 amends chapter 202 of Private Laws of 1915, by striking out all the provisions as to the payment of the city's share of the cost and expense of improvement "out of the general fund," as they appear in article 1 of the act, and by changing the mode of paying the assessments against property, and by striking out all of article 3, which provides for the election. It then declares that:

"The provisions of sections twelve, fourteen, fifteen, sixteen and seventeen, of chapter fifty-six of the Public Laws of North Carolina, session of nineteen hundred and fifteen, be and they are hereby declared to be applicable to the said town of Lenoir as fully to all intents and purposes as though the said sections were set forth herein."

Section 12 of the Public Laws of 1915, c. 56, mentioned in the act of 1917, provides that the authorities of a town "may * * * by resolution authorize the treasurer to borrow money to the extent required to pay the cost of any such (local) improvement or to repay any money borrowed under this section with interest thereon," and "provide for the issue of notes or certificates of indebtedness of the municipality, or both, payable either on demand or at a fixed time, not more than 6 months from the date thereof and bearing interest not exceeding 6 per centum per annum," which may be sold publicly or privately, or pledged as security for temporary loans, as may be directed by resolution of the governing body, and, further, that "any temporary indebtedness, incurred" hereunder, and interest, "may be paid out of moneys raised by the issue and sale of local 'improvement * * * bonds,' or 'assessments bonds,' or both, to be issued and sold as hereinafter provided, or may be included in the annual tax levy." Section 15 authorizes the issuing of assessment bonds by the town to pay in advance the cost of the improvement to the amount of the assessment against abutting property, and further:

"All moneys derived from the collection of assessments upon which assessment bonds are predicated, collected after the passage of the resolution authorizing such bonds, shall be placed in a special fund, to be used only for the payment of the principal and interest of assessment bonds issued under this act; and if at the time of the annual tax levy for any year in such municipality it shall appear that such fund will be for any cause insufficient to meet the principal and interest of such bonds maturing in such year, the amount of the deficiency shall be included in such tax levy. The amount of the assessments for two or more improvements may be included in a single issue of assessment bonds."

Section 16 prescribes the form and mode of execution of the assessment bonds, with the date of payment, and it and section 17 thus provide:

The bonds "may be sold at public or private sale, but for not less than their par value. They shall recite that they are issued pursuant to the authority of this act and of the resolution authorizing the issuance thereof which shall be conclusive evidence of their validity, and of the regularity of their issuance. The full faith and credit of a municipality shall be pledged for the payment of the principal and interest of all of its local improvement bonds, assessment bonds, notes and other obligations issued under this act. For the purpose of paying such principal and interest the governing body shall have power to levy sufficient taxes upon all the taxable property in the municipality and to borrow money temporarily upon notes of the municipality in anticipation of taxes of the same or the succeeding fiscal year."

Section 2 and section 4 of chapter 56 of the Public Laws of 1915 read as follows:

"Sec. 2. This act shall apply to all municipalities. It shall not, however, repeal any special or local law or affect any proceedings under any special or local law, for the making of street, sidewalk or other improvements hereby authorized, or for the raising of funds therefor, but shall be deemed to be additional and independent legislation for such purposes and to provide an alternative method of procedure for such purposes, and to be a complete act, not subject to any limitation or restriction contained in any other public or private law or laws, except as herein otherwise provided."

"Sec. 4. Every municipality shall have power, by resolution of its governing body, upon petition made as provided in the next succeeding section, to cause local improvements to be made and to defray the expense of such improvements by local assessment, by general taxation, and by borrowing, as herein provided. No petition shall be necessary, however, for the ordering or making of private water, sewer and gas connections as hereinafter provided. Nor shall a petition be necessary for the making of sidewalk improvements in those municipalities in which by other law or laws sidewalk improvements are authorized to be made without petition."

It is admitted that Public Laws of 1915, c. 56, Private Laws of 1909, c. 37, and Private Laws of 1915, c. 202, were passed, as roll-call bills, in accordance with Const. art. 2, § 14, and that the act of 1917 was not so passed.

Plaintiff alleges in his complaint:

"(7) Since the passage of said act of January 9, 1917, the commissioners of the defendant town of Lenoir have ordered that the public square from its intersections with North, East, South, and West Main streets, in said town be permanently improved by paving same with concrete or other suitable material, in compliance with the provisions of said act of January 9, 1917, and have given notice in a newspaper published in the town of Lenoir of such order, as set forth in chapter 202, Private Laws of 1915, and have authorized the issuance of notes of said town to pay for the cost of said paving and advertising and offering to sell said notes to an amount not to exceed \$50,000, and have by ordinance provided for the levy of a tax for the payment of said notes."

"(8) Plaintiff is a citizen and taxpayer of said town, and complains as well for himself as for other taxpayers similarly situated, and is likewise a property owner in said town, having a lot which abuts upon the public square of said town and also on Mulberry street, and said com-

missioners now propose to pave said public square under the provisions of said chapter 202, Private Laws of 1915, as re-enacted by the act of January 9, 1917."

"(9) By the ordinance adopted by defendant town under color of the acts above mentioned, plaintiff, if required to comply therewith, will be obliged to lay out and expend large sums of money in payment for such paving, and will likewise be required to pay large sums of money as taxes for the payment of the notes that will be issued for the payment of the principal and interest due upon said notes so proposed to be issued for the payment thereof, and the bonds thereafter to be issued for the funding of said notes; that the total indebtedness of the said town, after the issuing of the said notes or bonds in the sum of \$50,000, will exceed the sum of 10 per cent. of the assessed taxable property within said town.

"Plaintiff further alleges that the said action of said board in ordering said improvement was not based upon a petition of the property owners abutting on said public square, as provided in chapter 56, Public Laws of 1915."

The allegations are admitted in the answer to be true.

The plaintiff alleges that the action of the defendant will be illegal for the following reasons:

"(a) Chapter 202, Private Laws 1915, was passed as a 'roll call bill,' and cannot be revived or re-enacted by one not passed in the same manner. (b) The levying of an assessment upon plaintiff's property to pay for the improvements contemplated by defendant on the public square or streets abutting his property, under the provisions of chapter 202, Private Laws 1915, as attempted to be revived by the act of January 9, 1917, is the levying of a tax by defendant town; and, since said act of January 9, 1917, was not passed as a 'roll call bill,' the said assessment is and will be invalid. (c) By reason of the act of January 9, 1917, not being a 'roll call bill' any tax levied to pay notes issued by said town for the payment of its portion of the costs of improvement, or the bonds to be issued for the retirement of said notes, is and will be unauthorized, illegal, and void. (e) That the proposed increase of municipal indebtedness of defendant in an additional sum of \$50,000 for the purposes hereinbefore set forth is for a special purpose, and will increase the limit of defendant's indebtedness beyond that fixed by section 2077 of the Revisal, and such indebtedness will therefore be unauthorized."

The prayer is:

"That defendant, town of Lenoir, be permanently enjoined and restrained from acting or attempting to act under the provisions of the said chapter 202, Private Laws of 1915, and from selling or attempting to sell any bonds or issuing any notes for the payment of obligations incurred for street paving, or from acting or attempting to act under the provisions of the act of January 9, 1917, and for general relief."

The judge, at the hearing, refused to grant the injunction, and plaintiff appealed.

S. A. Richardson, of Lenoir, for appellants. Squires & Whisnant, of Lenoir, for appellee.

WALKER, J. (after stating the facts as above). [1] The first questions are whether chapter 202 of the Private Laws of 1915 was in force when the act of 1917 was passed, and whether the last-named statute was properly passed and is a valid enactment for the purposes therein set forth. It appears from the above recital of the several statutes, or

the substance of them, that the provisions of chapter 202 were required to be submitted to the people for their approval or disapproval, and that it was not to have any force or effect until this was done, and a majority of the voters cast their ballots in favor of their adoption, and thereby authorized the change in the charter proposed to be made by them. It is not open to question now that the Legislature may provide that a statute shall not take effect or be in force until approved by the people at an election to be held for the purpose of ascertaining their will in respect thereto. That this can be done has been settled by numerous decisions of this court, whatever may be the rule in other jurisdictions. This question was fully considered by the court in *Manly v. City of Raleigh*, 57 N. C. 370 and the Legislature's power to pass such a statute was clearly demonstrated by Chief Justice Pearson in an exhaustive opinion, and it was said that *Thompson v. Floyd*, 41 N. C. 313, directly supports the conclusion reached by the court. In *Cain v. Commissioners*, 86 N. C. 8, at page 13, Chief Justice Smith says:

"It has not been seriously questioned that the Legislature may make an enactment to take effect only upon the happening of a contingent event; but it has been earnestly maintained that when the event is the expression of the popular will, ascertained by an election, it is in effect a transfer of legislative power to the voters. In reference to this distinction, *Redfield, O. J.*, in an elaborate opinion delivered in *State v. Parker*, 26 Vt. 357, says, that 'the distinction attempted between the contingency of a popular vote and other future contingencies is without all just foundation in sound policy and sound reasoning.' What differences may be found in the adjudications elsewhere, it is settled by the decision in *Manly v. Raleigh*, 57 N. C. 370, that such power may be exercised by the Legislature, and it is declared that 'when it is provided that a law shall not take effect unless a majority of the people vote it, or it is accepted by a corporation, the provision is, in effect a declaration that in the opinion of the Legislature the law is not expedient, unless it be so voted for or accepted.' This principle underlies all 'local option' legislation, and is fully recognized and established in this state" (citing *Caldwell v. Justices*, 57 N. C. 323).

The same learned judge said in *Evans v. Commissioners*, 89 N. C. 154 at p. 158:

"This provision leaves the Legislature free to confer upon municipal organizations the power to create debts and issue public securities in order to raise funds to meet those 'necessary expenses' when it may be deemed expedient, and the legislation may be made dependent on the result of a popular vote for its efficacy" (citing *Manly v. City of Raleigh*, supra; *Newson v. Farnheart*, 86 N. C. 391; *Hill v. Commissioners*, 67 N. C. 367).

There having been no election as provided for in chapter 202 of the Private Laws of 1915, that statute is not in force and has not been since its enactment, except for the purpose of holding an election, as therein required, to ascertain if the people approved it. A favorable vote of the people was the condition upon which its provisions should take effect, and this condition has not been com-

plied with. That act being out of the way, we come to the next question, Has the act of 1917 any validity?

[2] It was evidently intended to operate as a whole, as a scheme for making improvements in the town, and contracting debts, and levying taxes, when necessary, or expedient to execute the intention and purpose of the act. Authority is expressly given to do so, and the town authorities actually intend to contract a debt and to levy taxes. The act of 1917 incorporates certain sections of chapter 56 of Public Laws of 1915, which confer broad and almost unlimited power to borrow money, issue bonds or notes, with interest, to be paid by the proceeds of the sale of "local improvement bonds," or "assessment bonds," or by an annual tax levy. The fact that this indebtedness may, perhaps, be ultimately discharged from the sale or collection of assessment bonds does not change or alter its character as an independent indebtedness of the town. We so held in *City of Charlotte v. American Trust Co.*, 159 N. C. 388, 74 S. E. 1054. The act expressly provides that the governing body "may issue notes or certificates of indebtedness of the municipality." These obligations therefore are those of the town, however they may be secured by collaterals or paid at maturity. In the case just cited, it is said:

"The act directs the board of aldermen to issue bonds of the city and sell them. The use of the word 'bond,' ex vi termini, implies that the city is bound. As said by the United States Supreme Court in *Davenport v. County of Dodge*, 105 U. S. 237, 26 L. Ed. 1018, a 'bond implies an obligor bound to do what is agreed shall be done.' Also, in *Morrison v. Township of Bernards*, 36 N. J. Law, 219, Chief Justice Beasley, speaking of the force and effect of a direction in the statute that the township issue 'bonds,' says: 'A similar implication, but one of greater force, arises from the direction that bonds are to be given under the hands and seals of the commissioners, for an instrument of that kind cannot be created without the presence of an obligor; and, indeed, it seems like a solecism to say that the statute calls for the making of a bond, but that nobody is to be bound by it.' Not only that, but it is also held by the authorities that when the word 'bond' is used in connection with municipal obligations, designating what is commonly called 'municipal bonds' then this means negotiable bonds. This is expressly held in the case of *City of Austin v. Nalle* [85 Tex. 520] 22 S. W. 668, 960. See, also, *McCless v. Meekins*, 117 N. C. 34 [23 S. E. 99]; *City of Charlotte v. Shepard*, 122 N. C. 602 [29 S. E. 842]."

The act of 1917 is therefore clearly within the requirement of Const. art. 2, § 14, that:

"No law shall be passed to raise money on the credit of the state, or to pledge the faith of the state, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the state, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

The section was construed in *Cotton Mills v. Waxhaw*, 130 N. C. 293, 41 S. E. 488, where the court held:

"This section of the Constitution makes no distinction whatever between 'necessary expenses' and unnecessary or extraordinary expenses, and we have no power to create any such distinction by judicial construction. Such a distinction is made only in article 7, § 7, which is as follows: 'No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein.' We are therefore compelled to hold that no city or town can levy any tax or incur any debt for any purpose whatever, unless the act authorizing such tax or debt is passed in accordance with the provisions of article 2, § 14, of the Constitution. Therefore the charter of the town of Waxhaw, not having been so passed, confers no power of taxation."

The object in referring to certain sections of the Public Act of 1915 by their numbers was to incorporate them with the act of 1917 as a part of it, and to avoid the necessity of setting them out at full length or even extensively.

Our conclusion, therefore, is that chapter 202 of Private Laws of 1915 had never been in force and effect, and that the act of 1917 is within that class of statutes which are required to be read and passed in accordance with Const. art. 2, § 14; and, this not having been done, it is not valid. Its character as a valid or invalid statute was not affected by the fact that chapter 56 of the Public Laws of 1915 was passed in compliance with Const. art. 2, § 14. The result is that the town of Lenoir may fall back upon its original charter of 1909, or it may, and we are inclined to the opinion that it can, proceed under chapter 56 of the Public Laws of 1915, if it chooses, in making its local improvements, but it must comply with the provisions of that act in doing so. As chapter 202 of the Private Laws of 1915 has had no vitality except for the purpose above indicated, it is apparent that the cases cited by the defendant's counsel (*Robinson v. Goldsboro*, 122 N. C. 214, 30 S. E. 324; *Lutterloh v. Fayetteville*, 149 N. C. 66, 62 S. E. 758) have no application to the question. In those cases the original statutes were in full force and effect, in all their parts, and were not dependent for their operation upon any vote of the people or other condition. They were in force for all purposes designated in them from the day that they were ratified.

Counsel argued that the legislative will could not be defeated by the failure of the town officers to order and hold an election as required by the Private Act of 1915. This is not the question. The fact is that the election has never been held, and the Legislature had the power to declare, and did declare, that the act should have no force or effect until ratified by the people at the polls. If it be said that the Legislature could strike out the provision, as to the election, by the amendment of 1917, the answer is

that it would be then undertaking to confer anew an unconditional power to contract debts and levy taxes, which was not done by the Private Act of 1915, and the Act of 1917 for this reason should have been passed according to the requirements of Const. art. 2, § 14, and especially so, when it originally granted a very broad power of contracting debts and levying taxes by adopting the sections of Public Laws of 1915, c. 56, specified therein. We may also state that Public Laws of 1915, c. 56, not only authorizes the contracting of a debt, the issuing of notes and bonds and the levying of taxes, but by section 17 the full faith and credit of the town are pledged for the payment of all bonds, notes, and other obligations under the act. The amendment of 1917 created an absolute and unqualified power to tax and contract debts not given by the Private Act of 1915, which was a conditional one. Whether the town can proceed under Private Laws of 1915, c. 202, to order an election is not before us, as it has not done so heretofore, and the act is not in force without it.

In any view of the case we think the result we have reached is correct. There was error in refusing the injunction.

Error.

(173 N. C. 167)

HIPP v. FARRELL et al. (No. 98.)

(Supreme Court of North Carolina. March 21, 1917.)

1. APPEAL AND ERROR ⇨1062(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in action for personal injuries resulting from neglect to repair a bridge, evidence showed that highway commissioners were acting only in official capacity, and such bridge being upon a county line was under their control in conjunction with commissioners of another county, by provision of Revisal, § 2696, there was no prejudicial error to plaintiff in submitting to jury question of commissioners' personal liability, and the court might have charged that no such liability existed, since commissioners' duties were wholly for the public benefit, and the statute provided for no personal liability.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4212.]

2. OFFICERS ⇨114 — INDIVIDUAL LIABILITY FOR MISCONDUCT.

Public officers in performing official duties involving exercise of judgment and discretion are not personally liable for breach of such duties, unless acting corruptly or maliciously.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

3. OFFICERS ⇨114 — INDIVIDUAL LIABILITY FOR MISCONDUCT.

The individual liability of public officers for breach of duty should not attach when the duties are of a public nature, imposed entirely for public benefit, unless the statute specifically provides for such liability.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

4. OFFICERS ⇨114—INDIVIDUAL LIABILITY FOR MISCONDUCT—SUBORDINATE OFFICERS.

Subordinate officers having physical charge of public works may be liable for breach of duty which is the proximate cause of an injury,

whether duties are incident to their office or arise by contract, since they are really administrative agents.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

5. OFFICERS ⇨114 — INDIVIDUAL LIABILITY FOR MISCONDUCT—SPECIAL OR MINISTERIAL DUTIES.

Where public officers, though exercising governmental functions, are plainly charged with ministerial duties for individual benefit, or when the public duties imposed involve a special duty to individuals, they will be personally liable for breach of duties causing damage, unless statute clearly eliminates such liability.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

6. OFFICERS ⇨114 — INDIVIDUAL LIABILITY FOR MISCONDUCT—SPECIAL OR MINISTERIAL DUTIES.

This rule applies more generally to administrative officers receiving their fees from individuals, but such payment is not the entire test, and the application of the rule depends on the nature of the duties imposed, and the determining question is whether the office involve a special duty to individuals which has been breached to their injury.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

7. OFFICERS ⇨114 — INDIVIDUAL LIABILITY FOR MISCONDUCT—SPECIAL OR MINISTERIAL DUTIES.

These rules apply only to actions within course and scope of official duties, and not to acts done in excess of authority.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 187-192.]

Appeal from Superior Court, Lee County; Stacy, Judge.

Action by Lester B. Hipp against T. E. Farrell and others. Judgment for defendants, and plaintiff excepts and appeals. No error.

The action was to recover damages for physical injuries caused by the alleged negligence of defendants as individual members of the highway commission of Lee county, in failing to repair a certain bridge on the line of Lee and Chatham counties, and known as the Lockville bridge, and by reason of which plaintiff, driving a wagon over same, was caused to fall with his team some 15 feet, and thereby receive serious injuries. On denial of liability, issues were submitted to the jury as to negligent default and damages incident thereto, and on the issue as to negligence there was verdict for defendants.

The cause was before the court on a former appeal, and will be found reported in 169 N. C. 551, 86 S. E. 570.

Williams & Williams, of Sanford, and Clarkson & Tallafarro, of Charlotte, for appellant. Seawell & Milliken and Hoyle & Hoyle, all of Sanford, and R. H. Hayes, of Pittsboro, for appellees.

HOKE, J. On the former appeal, the cause was presented on demurrer of defendants, and it was thereby admitted, as alleged in the complaint, that defendants were men-

bers of the highway commission of Lee county; that Lockville bridge, constituting a part of the public highways of said county, was under the exclusive care and control of said defendants; that for 52 days prior to the occurrence and with "means and resources" sufficient to repair it, they had "negligently and carelessly" allowed said bridge to remain in an "unsafe and dangerous condition," by reason of which the injuries complained of were received, and, further, that full and formal notice had been given defendants of the condition of the bridge, at a meeting held in Sanford, October 6, 1914, prior to the injury which was received on November 17th following. It will be noted that these averments, admitted to be true by the demurrer, are very broad and inclusive in their terms, and, while they could have been construed as meaning that the default charged against defendants was in the performance of their public duties as highway commissioners and for the public benefit, they also permitted the inference that the defendants, as they might have done under the provisions of the act controlling in the matter (Laws 1911, c. 586), with or without an arrangement with the county commissioners, had taken personal charge of the upkeep and repair of the bridge, and were dealing with the same purely as administrative officials, likening their duties to that of overseer of public roads, who, under our decisions, may at times be held liable for negligent default in the performance of their duties. *Hathaway v. Hinton*, 46 N. C. 243. Under admissions thus capable of two constructions the court did not consider it proper to make final determination of the rights of the parties, but overruled the demurrer that the relevant facts might be more fully and definitely ascertained.

[1] This opinion having been certified down, a trial was had on appropriate issues wherein it appeared that this was a county line bridge, primarily under the control of the county commissioners in conjunction with the commissioners of the adjoining county (Revisal, § 2696); that the defendants had not undertaken the repair or upkeep of the bridge as a physical proposition, either under an arrangement with the county commissioners or in the exercise of any authority claimed by themselves, but their default, if any existed, was in a negligent performance of the duties imposed upon them by statute, as a governmental board having general charge and supervision of the highways of the county, defendants' evidence tending strongly to show that the roads in the county where they lately took charge were in bad condition; that the calls upon them for funds were exacting and general throughout the county, and that, while they received notice of the condition of the bridge, they then had no funds available for its proper repair; that they had been advised by a competent engi-

neer that the approach to the bridge should be of steel, and with this in view they had endeavored to arrange for temporary repairs by a reliable and competent contractor, but the bridge had fallen in before it could be done. Upon this evidence, there was no error, to plaintiff's prejudice certainly, in submitting the question of individual liability to the deliberations of the jury, and his honor might well have charged the jury that no such liability would attach.

[2] It is held in this state that public officers, in the performance of their official and governmental duties involving the exercise of judgment and discretion, may not be held liable as individuals for breach of such duty, unless they act corruptly and of malice. *Templeton v. Beard*, *Markham et al.*, 159 N. C. 63, 74 S. E. 735, 47 L. R. A. (N. S.) 1120; *Baker v. State*, 27 Ind. 485.

[3, 4] It is also the recognized principle here and the position is sustained by the great weight of authority elsewhere that, in case of duties plainly ministerial in character, the individual liability of such officers, for negligent breach of duty, should not attach where the duties are of a public nature, imposed entirely for the public benefit, unless the statute creating the office or imposing the duties makes provision for such liability, and this principle was approved and applied here in the case of *Hudson v. McArthur*, 152 N. C. 445, 67 S. E. 995, 28 L. R. A. (N. S.) 115, opinion by Associate Justice Manning, and is in accord with the great weight of authority in other jurisdictions. *McConnell v. Dewey*, 5 Neb. 385; *Bates v. Horner*, 65 Vt. 471, 27 Atl. 134, reported with full note by the editor in 22 L. R. A. 824; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169. The full application of this principle is apparently modified in case of subordinate officials having physical charge of public work and where a negligent breach of duty may be clearly recognized as the proximate cause of an injury to a claimant. In such instances, though at times technically officers, they can scarcely be considered as being in the exercise of governmental duties at all, but are rather administrative agents, and are held for breach of duty, the proximate cause of the injury, whether such duties are incident to the office they have undertaken or arise by virtue of a contract to perform them. Instances of this modification appear in *Hathaway v. Hinton*, 46 N. C. 243, heretofore cited, where a road overseer was held liable for negligent failure to repair a small bridge on the public highway, within his means, by reason of which a stage coach and horses, traveling the highway, had been injured, and *Adsit v. Brady*, 4 Hill, 630, 40 Am. Dec. 305, where the superintendent of a canal, charged with the duty, was held liable for negligent breach of such duty in failing to keep the canal free from physical obstruction likely to cause the injury which

resulted. *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713, may be referred to the same principle. True, a broader rule of individual liability is laid down in that case, but the element of liability, by reason of having taken physical charge of a canal, part of the public highway, under a contract to keep the same in proper repair, was also present. The modification here suggested is approved by us also in the case of *Kinsey v. Magistrates of Jones*, 53 N. C. 186, where it was held that the magistrates of a county, in the exercise of their duties as a governmental board, could not be held individually liable for the defective condition of roads and bridges, and Manly, Judge, delivering the opinion, said:

"The justices cannot be held responsible * * * for deficiencies in the public highways and bridges. They are charged with certain duties [concerning] them, but when these are performed their office ceases, and the overseers and contractors are responsible to the country and to citizens."

[5, 6] Again, it is the accepted rule that, when a public officer, though exercising governmental functions, is charged with an imperative and plainly ministerial duty for the benefit of an individual or when the public duty imposed involves also a special duty to the individual, he may be held personally liable to such individual for negligent breach, causing damage, unless the legislation applicable to and controlling the question gives clear indication that no such liability should attach. *Holt v. McLean*, 75 N. C. 347; *Gage v. Springer*, 211 Ill. 200, 71 N. E. 860, 103 Am. St. Rep. 191; *Cooley on Torts* (3d Ed.) p. 757. It has been said that this rule applies more generally to administrative officers who receive their fees from individuals for performing the services, as in the case of sheriffs in the execution of writs, etc., but this payment of fees is not all the test, and as a matter of fact, these administrative officers are now being more and more compensated by salary; the fees being paid into the public treasury. The application of the principle depends rather on the nature of the duty imposed. Is it a duty special to the individual or, although a public duty in some respects, does it involve also a special duty to an individual and which has been breached to his injury? In such case, an individual liability will, in general, attach unless, as stated, the legislation applicable otherwise provides. To this rule may be referred suits by individual claimants where a clerk, required to index docketed judgments, fails in his duty or a register of deeds negligently fails to properly record a mortgage and loss is sustained. Although these duties are in some respects public in their nature, they

involve also a duty special to the person injured, and in such case individual liability will generally attach.

The same principle was also present in the case of *Amy v. Barkholder et al.*, 78 U. S. 136, 20 L. Ed. 101, sometimes cited in support of a more exacting rule of liability. That was a suit by a creditor against the supervisors of a county in Iowa who had neglected or failed to levy a tax in obedience to a mandamus issued in the particular case. While the language of the opinion would certainly uphold a much more extended responsibility, the breach of duty was one special to the individual who obtained the judgment, and on these facts the claim was upheld. Recurring to the position that in these cases individual liability of officials does not attach, where the legislation applicable otherwise provides, an instance appears in our recent decision of *Fore v. Feimster et al.*, 171 N. C. 551, 88 S. E. 977. In that case it was held that, although the duty imposed was a ministerial one, and primarily for the benefit of individuals, persons furnishing material for a public building, liability did not attach to the individuals composing the board of county commissioners, for the reason that the duty imposed was in terms a corporate duty, and the legislation applicable to the subject gave clear indication that no liability should be enforced against the commissioners as individuals.

[7] It may be well to note that we speak throughout of the action of public officers within the course and scope of their official duties, and have in no way considered the effect of their conduct when they act in excess of authority and without warrant of law.

Applying these principles to the case before us, on the full disclosure of the facts, the court could well have charged that no cause of action had been established. While there is no general legislation protecting these defendants from personal liability as in the *Fore* and *Feimster* Case, the testimony all tends to show that said defendants had not taken any physical charge of the repairing of this bridge either by arrangement with the county commissioners or otherwise, but the breach of duty, if any existed, was in their failure to perform the public duties, involving the exercise of judgment and discretion, and, further, that these duties were of a public nature and imposed upon them entirely for the public benefit.

On careful consideration of the record, we find no error to plaintiff's prejudice, and the judgment on the verdict is affirmed.

No error.

(173 N. C. 236)

LEE v. MONTAGUE et al. (No. 258.)

(Supreme Court of North Carolina. March 28, 1917.)

1. WILLS §525 — DEVISE OF LAND TO BE EQUALLY DIVIDED—CONSTRUCTION.

A devise of land to be equally divided between two heirs contemplates an equal division according to value, and not by acreage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1129-1139.]

2. PARTITION §9(1)—AGREEMENT—UNEQUAL PARTITION—ACTION FOR DAMAGES—ALLEGATION AND PROOF.

The mother of cotenants having devised land to be equally divided between them, and they having made a voluntary partition, in an action by one for damages for unequal partition, it must be alleged and proved that the land conveyed to him is not equal in value to that conveyed by him.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 28-31.]

Appeal from Superior Court, Wake County; Bond, Judge.

Action by Paul H. Lee against Bettie L. Montague and husband. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action to recover the value of an alleged shortage of 81 acres of land in a voluntary partition between the plaintiff and the defendant as tenants in common, tried on the following agreed statement of facts:

The mother of the plaintiff and the feme defendant owned the land at the time of her death. She devised it to the plaintiff and the feme defendant to be equally divided between them. In 1907, December 18th, the plaintiff executed a deed to the feme defendant, and the feme defendant and her husband executed to the plaintiff a deed, each deed purported to sever the unity of possession as between them, as tenants in common, and to convey to the grantee in each deed the land covered by the boundaries thereof. Those deeds were promptly probated and registered. The boundaries of the tract in each deed were gotten from and in accordance with survey made by W. P. Massey, who was county surveyor of Wake county, but the land is all in Johnston county. The survey was made by said Massey by reason of a verbal agreement between the plaintiff and the feme defendant and her husband that he should survey the tract of land, and divide it as near as could be into two parts in accordance with the provisions of the will referred to.

There was no dispute as to the boundaries of the tract as an entirety. The surveyor made his survey, made his map, and reported the division in exact accord with the boundaries afterwards adopted by the two deeds. If there was any difference in the quantity, the feme defendant had no knowledge thereof. The feme defendant furnished no data,

and had nothing to do with the survey. The old deed for the whole tract was furnished to the surveyor by the plaintiff and the male defendant. The feme defendant had nothing to do with directing any part of the survey, further than to furnish from her mother's old papers the old survey above referred to.

The deed from the defendant to the plaintiff contained the exact boundaries which both parties intended at the time it was written that it should contain, and the deed from the plaintiff to the feme defendant contained the exact boundaries which both sides intended it should contain at the time it was written. They were executed and respectively delivered on December 18, 1907. Both deeds concluded the description as follows: "Containing 517 acres be the same more or less." Neither party discovered any error, if any had been made, and made no complaint about the division until October, 1911. Each party was given right to draw, and did draw, lots for the shares they were to have.

In October, 1911, the plaintiff, Paul H. Lee, sold to the Raleigh Real Estate & Trust Company the land which had been conveyed to him by deed made by the feme defendant in the division between the plaintiff and the defendant. In that sale the plaintiff sold to the said company the land, assuming the acreage to be as stated in the deed which had been made to him by the feme defendant and her husband. The description in this deed concluded: "Containing 517 acres be the same more or less."

It is admitted that before this suit was started, and before either party had discovered any error, if any was ever made, the feme defendant and her husband had sold the land conveyed to her by the deed from the plaintiff in said division.

In the fall of 1911 the Raleigh Real Estate & Trust Company had a survey made of the land which they had bought from the plaintiff, and upon the strength of that survey set up the contention that the land which had been conveyed to Paul H. Lee by the partition deed contained about 81 acres less than the quantity called for in the deed to said Lee from the feme defendant and her husband, and 40.5 acres less than an equal division of the entire acreage would have entitled him to, according to the contention of the plaintiff, and further that they had paid for 81 acres of land more than they got, and that the plaintiff, Paul H. Lee, from whom said company had bought the land, should refund to them the acreage value, which would amount to \$1,534, according to the contention of said company, between said Paul H. Lee and said Raleigh Real Estate & Trust Company. The feme defendant and her husband were in no way connected with the sale made by Lee, the plaintiff, to the Raleigh Real Estate & Trust Company. Without being sued by said Raleigh Real Estate & Trust Com-

pany, and accepting the survey made by said company as being correct, the plaintiff refunded in October, 1911, to said Raleigh Real Estate & Trust Company the amount claimed by them as representing the shortage under the contract between Lee and said company.

This action was begun by the issuance of a summons October 11, 1912. At the time of said partition the defendant was and has been ever since a feme covert.

After having refunded the alleged shortage claimed to said company, the plaintiff had some talk with the feme defendant in which intimation was made by him that there should be a readjustment of the matter. As to whether any actual demand on her was or was not made before the issuing of the summons is disputed. The defendants ever since the action was brought have denied liability. It is contended by the plaintiff that the survey made by Massey, surveyor, did not divide the land equally according to acreage. It is contended by the defendant that it was divided correctly according to acreage, but that in any event, whether that be true or not, it was so divided as that the part gotten by the plaintiff Lee represented half at least, if not more, in value. The plaintiff contends that that part allotted to Lee was not half in value of the entire tract at the time of the division. When the feme defendant sold her land the deed for same was promptly registered. The defendant Bettie L. Montague sold the land set apart to her by the division before she had ever heard any complaint about any alleged error. In January, 1908, the feme defendant made said sale.

His honor held that the plaintiff was not entitled to recover, and entered judgment accordingly, and the plaintiff excepted and appealed.

William B. Snow, of Raleigh, for appellant.
James H. Pou, of Raleigh, for appellees.

ALLEN, J. [1] The plaintiff and the defendant were tenants in common of the land devised to them by their mother, and equality of division and partition could only be had upon the basis of the value of the land, and not of the number of acres. Revisal, § 2491; Sanderson v. Bigham, 40 S. C. 501, 19 S. E. 71; Howard v. Howard, 19 Conn. 317.

[2] It follows, therefore, that there is no error in the judgment pronounced, as there is neither allegation nor proof that the land conveyed to the plaintiff by the defendant is not equal in value to the land conveyed to the defendant.

The authorities relied on by the plaintiff are not pertinent to the present inquiry, as they are cases in which the owner of the property directed a division to be made by the acreage, and not by value.

Affirmed.

(178 N. C. 188)

DARDEN v. MATTHEWS. (No. 223.)

(Supreme Court of North Carolina. March 21, 1917.)

1. WILLS § 476—CONSTRUCTION—WILL AND CODICIL.

A will and codicil should be construed as one instrument.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 997.]

2. WILLS § 616(1) — CONSTRUCTION — LIFE ESTATE WITH POWER TO SELL.

Under a will devising a life estate and a codicil conferring power of disposition, the devisee takes only a life estate with power to sell, and from the sale proceeds may retain only the value of his life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418, 1428-1430.]

Appeal from Superior Court, Sampson County; Lyon, Judge.

Controversy submitted without an action by J. T. Darden against D. E. Matthews. From an adverse judgment, plaintiff appeals. Reversed.

This is a controversy submitted without action.

Mary J. Darden, who was the owner of the land in controversy, died, without issue, leaving a will, which has been duly probated and recorded, the material parts of which are as follows:

"Second. I give and devise and bequeath to my beloved husband, J. T. Darden, all of my real and personal property, of every kind and description, to have, possess and use during his natural life, and upon his death, all of said real and personal property shall go to my husband's brother, J. M. Darden, if he shall then be living, and upon his death, to my grandchild, Thomas Carr Hollingsworth, in fee simple, forever; and if my husband, J. T. Darden, shall survive his brother, J. M. Darden, then upon the death of my husband, J. T. Darden, all of my real and personal property of every description, as aforesaid, shall go to and vest in my grandson, Thomas Carr Hollingsworth; and if my said grandson, Thomas Carr Hollingsworth, shall die without any issue of his body, said lands and property shall go to and vest in the children of Dr. J. H. Darden, namely, Henry Darden, Jimmie Darden, and Mary Bell, to be divided equally between them."

After the execution of said will, she added a codicil thereto, which has been duly probated and recorded as a part of the will, in which there is the following provision:

"First. I give and confer upon my said husband, J. T. Darden, full power and authority to sell and convey any part of the foregoing property, and to make title to the purchaser after my death."

The said J. T. Darden has agreed to sell to the defendant all of the lands and premises belonging to the said Margaret J. Darden, situate in Sampson county, and set out in said will, for the sum of \$5,200, and the defendant has agreed to purchase said premises and pay for the same, at the price above named, provided the plaintiff has authority, under said will, to convey to him a good and indefensible title to said lands.

In accordance with the contract and agreement referred to, the plaintiff has made, executed, and tendered to the defendant a deed to said lands in fee simple, with full covenants of warranty and seisin, and has demanded of the defendant the purchase price agreed upon. The defendant has refused to accept said deed, or to pay any part of the purchase price agreed upon, until said title shall have been passed upon by the courts; the defendant claiming that under the last will and testament of Margaret J. Darden, hereinbefore referred to, the plaintiff is without power to convey said lands to him in fee simple, as he has attempted to do in the deed above referred to. Judgment was rendered against the plaintiff, adjudging that he has no power to sell and convey said lands, and he excepted and appealed.

Butler & Herring, of Clinton, for appellant.

ALLEN, J. [1, 2] A codicil is a part of a will, but with the peculiar function annexed of expressing the testator's afterthought or amended intention. It should be construed with the will itself, and the two should be dealt with as one instrument (Shouler, Wills & Ex. vol. 1, § 487; Green v. Lane, 45 N. C. 113), and, when so considered, the land in controversy is devised to the plaintiff "during his natural life," with "full power and authority to sell and convey" it.

Language, annexed to a life estate, much less direct and explicit than that contained in the codicil, has been held to confer a general power of disposition. In Parks v. Robinson, 138 N. C. 269, 50 S. E. 649, the devise was to the wife during her natural life and "at her disposal"; in Chewning v. Mason, 158 N. C. 580, 74 S. E. 357, 39 L. R. A. (N. S.) 805, to "Martha Chewning, during her natural life, and then to dispose of as she sees proper"; in Satterthwaite v. Wilkinson, 91 S. E. 590, at this term, to George T. Tyson in fee with a limitation over in the event of his death, leaving neither wife nor children, but should he live to be 21 "to be at his own disposal"; and in each it was held that the first taker had the power to sell and convey in fee.

We are therefore of opinion that the plaintiff can sell and convey the land in controversy in fee to the defendant, but it does not follow that he owns the land in fee.

The court said, in Patrick v. Morehead, 85 N. C. 65, 39 Am. St. Rep. 684:

"It has been settled upon unquestionable authority that, if an estate be given by will to a person generally with a power of disposition or appointment, it carries the fee; but if it be given to one for life only, and there is annexed to it such a power, it does not enlarge his estate, but gives him only an estate for life."

And this was approved in Chewning v. Mason, 158 N. C. 580, 74 S. E. 357, 39 L. R. A. (N. S.) 805; Griffin v. Commander, 163 N. C.

282, 79 S. E. 499; Fellowes v. Durfey, 163 N. C. 311, 79 S. E. 621.

In Chewning v. Mason, *supra*, the distinction between property and the power to dispose of it, and the effect of annexing a power of disposition to a life estate, are stated as follows:

"There is a marked distinction between property and power. The estate devised to Mrs. Chewning is property; the power of disposal, a mere authority which she could exercise or not, in her discretion. She had a general power annexed to the life estate, which she derived from the testator under the will. If she had exercised the power by selling the land, the title of the purchasers would have been derived, not from her, who merely executed the power, but from the testator or the donor of the power. 'The appointer is merely an instrument; the appointee is in by the original deed. The appointee takes in the same manner as if his name had been inserted in the power, or as if the power and instrument executing the power had been expressed in that giving the power. He does not take from the donee, as his assignee.' 2 Wash. R. P. 320; 1 Sugden on Powers, 242; 2 Sugden on Powers, 22; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45 [11 Am. Dec. 389]. In the execution of a power there is no contract between the donee of the power and the appointee. The donee is the mere instrument by which the estate is passed from the donor to the appointee, and, when the appointment is made, the appointee at once takes the estate from the donor as if it had been conveyed directly to him.' Norfleet v. Hawkins, 93 N. C. 392. It does not follow, because she could sell and convey the land under the power, that she thereby became the owner in fee. * * * The doctrine was clearly expressed by Chancellor Kent: 'If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee.' 4 Kent, Com. 520; Jackson v. Robins, 16 Johns. (N. Y.) 537."

It follows therefore that the plaintiff owns a life estate in the land in controversy with the power to sell and convey, and that when he sells he is only entitled, out of the proceeds, to what belongs to him, the value of his life estate.

Reversed.

(173 N. C. 237)

KEZIAH et al. v. MEDLIN. (No. 410.)

(Supreme Court of North Carolina. March 28, 1917.)

WILLS § 608(3)—DEVISE OF REMAINDER TO BODILY HEIRS—STATUTE.

Under the rule in Shelley's Case, a devise to seven daughters for life "at the deaths of the daughters," to their "bodily heirs," created an estate in common in fee tail, which by Revision 1905, § 1578, is enlarged into a fee simple, and did not, by the words "at the deaths," create a contingent remainder.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1374, 1378.]

Appeal from Superior Court, Union County; Cline, Judge.

Controversy without action between Dora

C. Keziah and another and Samuel O. Medlin. Judgment for plaintiffs, and defendant appeals. Affirmed.

T. F. Limerick, of Monroe, for appellant. Stack & Parker, of Monroe, for appellees.

BROWN, J. The facts set out in the record are to the effect that plaintiffs contracted to sell defendant and defendant agreed to buy a fee-simple estate in the land devised to them by the will of their father. Defendant refused to comply with contract on the ground that feme plaintiffs did not have and could not convey a fee-simple interest in said shares of land. The only point involved is whether feme plaintiffs took a fee-simple estate under the will of their father.

In paragraph 1 of said will a tract of land is given for life to one of the sons. In paragraph 2 another tract is given for life to another son. In paragraph 3 the remainder of the realty is devised to the seven daughters, two of whom are the feme plaintiffs, for life. Paragraph 4 is as follows:

"I will and devise that all land bequeathed in paragraphs one, two and three (1, 2 and 3) of this my last will and testament for and during the natural lives of the parties named in said paragraphs one, two and three shall at the deaths of the said parties named in said paragraphs go to the bodily heirs of the parties whose names are given in said paragraphs one, two and three above."

His honor correctly held that the feme plaintiffs took an estate in fee under the will. In paragraph 3 the testator devises his lands to his seven daughters for life. The feme plaintiffs are two of his seven daughters mentioned by name in said paragraph.

The next paragraph provides that at the death of the said daughters, who are named in paragraph 3, the lands go to their bodily heirs, thus creating an estate in fee tail, which by the statute is enlarged into a fee simple. Revisal, § 1578. *Sessoms v. Sessoms*, 144 N. C. 121, 56 S. E. 687, *Jones v. Ragsdale*, 141 N. C. 200, 53 S. E. 842, and *Maynard v. Sears*, 157 N. C. 1, 72 S. E. 609, are directly in point.

It is immaterial that the devise is to the seven daughters for life, as by section 4 of the will the limitation over is to their bodily heirs, thus creating a tenancy in common in fee in the seven daughters. Upon the death of any one of the daughters, her share, although the land be undivided, would descend to her heirs. The limitation in the fourth clause of the will "at the deaths" of the several daughters does not create a contingent remainder.

In *Perry v. Hackney*, 142 N. C. 369, 55 S. E. 289, 115 Am. St. Rep. 741, 9 Ann. Cas. 244, the limitation was to the lawful heirs of her body (a granddaughter) after her death. It was held that the rule in *Shelley's Case* ap-

plied, and that the granddaughter took an estate in fee.

The case of *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217, cited in brief of appellant, is not in point. There the devise was to S. for life, and at her death to J. for life, and at his death to his children if he should have any living, and if he should leave no children, then to his brother; and it was held that the remainder devised to J. was a contingent remainder. This subject has been very recently considered in *McSwain v. Washburn*, 170 N. C. 363, 87 S. E. 97, and the rule adhered to that a limitation to M. for life and at her death to the heirs of her body vests in her a fee-simple estate under the rule in *Shelley's Case*.

Affirmed.

(173 N. C. 235)

ZIBLIN v. LONG. (No. 304.)

(Supreme Court of North Carolina. March 28, 1917.)

JURY \Rightarrow 25(8)—RIGHT TO JURY TRIAL—EXCEPTION—SUFFICIENCY.

A party is required not merely to point out the referee's findings of fact excepted to, but, to preserve his right to a trial by jury, must formulate the issues raised by the pleadings and present them with his demand for a trial by jury of such issues, whether or not there was a compulsory reference excepted to when made.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 166-168.]

Appeal from Superior Court, Pender County; Connor, Judge.

Action by C. H. Ziblin against T. H. Long. From a judgment on findings of referee for plaintiff after compulsory reference on appeal from a judgment of the clerk of the superior court for plaintiff, defendant appeals. Affirmed.

This action was begun before the clerk of the superior court of Pender for the purpose of establishing a disputed boundary line in the nature of processioning proceedings. The clerk gave judgment in favor of the plaintiff, and on appeal the case was transferred to the civil issue docket, where a compulsory reference was made, to which order both the plaintiff and defendant excepted, and demanded a jury trial upon the issues raised by the pleadings. On the coming in of the report of the referee at a subsequent term there were four findings of fact and four conclusions of law by the referee, all adverse to the defendant, who excepted to each, and also demanded a jury trial upon each finding of fact. The defendant did not, however, eliminate and present the issues of fact which he desired presented to the jury.

McClammy & Burgwin, of Wilmington, for appellant. C. E. McCullen, of Burgaw, and C. D. Weeks, of Wilmington, for appellee.

CLARK, C. J. This appeal presents the single question whether the court ruled cor-

rectly in refusing to submit the case to the jury upon defendant's exception to the report of the referee.

This case is almost identical on this point with *Ogden v. Land Co.*, 148 N. C. 443, 59 S. E. 1027, where it is said:

"As each exception was made, the defendants merely stated that, 'as to the matters and issues embraced in said finding, they and each of them demand a jury trial.' The defendants did not specify the particular fact controverted upon which they think an issue should be submitted to the jury, nor do they formally tender an issue upon each finding of fact against them to which they excepted."

In the same case the court further said that the appellant had waived the right to a trial by jury "by not pointing out the questions or issues of fact they raised by the exceptions, and presenting such issues as they deem necessary to cover all of the controverted facts," citing *Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427, which is the leading case on the subject, and *Simpson v. Scronce*, 152 N. C. 594, 67 S. E. 1060. In the present case, as in those, there was a compulsory reference, excepted to when made, but upon the coming in of the report the defendant merely excepted to each of the four findings of fact, and said: "Therefore the defendant demands a jury trial of the said finding of fact." It was held in *Driller Co. v. Worth*, supra, which has been often cited since (see Annotated Edition), that this was insufficient, and that it is a "reasonable requirement that the demand for a jury trial should be deemed waived if not made by specific exception and limited to the points upon which there has been a joinder in the pleadings"; that is, the appellant is required not merely to point out the findings of fact of the referee excepted to (which merely presents such findings for review by the judge and upon which the ruling of the judge is final, if there is any evidence), but the party excepting must go further, in order to preserve his right to a trial by jury, by formulating the issues raised by the pleadings and presenting them with his demand for a trial by jury of such issues. This the defendant did not do. Even when there is no compulsory reference, the appellant must formulate and tender issues.

The judgment of the court below is affirmed.

(173 N. C. 139)

VINSON, JONES & FINCH v. PUGH et al.
(No. 224.)

(Supreme Court of North Carolina, March 21, 1917.)

1. FRAUDS, STATUTE OF §117—UNDELIVERED DEED.

A deed fully describing the property, reciting the true consideration and intrusted to vendor's agent for delivery upon receiving the consideration, complies with the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 261.]

2. PRINCIPAL AND AGENT §124(3)—AGENT'S AUTHORITY—SALE OF TIMBER—EXTENDING TIME OF PAYMENT—JURY QUESTION.

A written agreement by a vendor's agent to deliver a deed of timber upon receiving payment within 30 days with conflicting evidence regarding his authority to make such agreement made it a jury question whether he gave an unauthorized extension of time for payment.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 724.]

3. LOGS AND LOGGING §3(15) — SALE OF STANDING TIMBER—PAYMENT—UNAUTHORIZED EXTENSION OF TIME.

If the purchasers of timber failed to pay pursuant to contract, relying upon an unauthorized extension of time by the vendor's agent, their failure to perform would prevent any recovery against the vendor for alleged breach.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 12; *Contracts*, Cent. Dig. §§ 890, 898.]

4. PRINCIPAL AND AGENT §193 — ACTING FOR BOTH PARTIES—JURY QUESTION.

In purchaser's action for breach of contract to convey timber, evidence that the vendor's agent received money from the purchaser for his services without defendant vendor's knowledge made a jury question whether such agent acted for both parties without vendor's knowledge or consent.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 721½-726.]

5. PRINCIPAL AND AGENT §157—AUTHORITY—CONTRACTS—ACTING FOR BOTH PARTIES.

Where an agent without his principal's consent also represents the adverse party his contracts are voidable at the principal's option, although fraud is not established.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 538.]

Appeal from Superior Court, Sampson County; Whedbee, Judge.

Action by Vinson, Jones & Finch against James H. Pugh and another. Judgment for plaintiffs, and defendant Pugh appeals. Reversed, and new trial ordered.

Civil action tried upon these issues:

"(1) What amount, if anything, is the plaintiff entitled to recover of the defendant J. Frank Wooten? Answer: \$100 with 6 per cent. interest from July 15, 1914.

"(2) Did the defendant J. H. Pugh contract and agree to sell and convey to the plaintiff the timber, rights, and privileges for the sum of \$6,000, as alleged in the complaint, upon the lands described in the complaint? Answer: Yes.

"(3) Did the defendant J. H. Pugh fail and refuse to comply with his said contract and agreement? Answer: Yes.

"(4) Did the plaintiff comply with their part of said agreement and tender the purchase price in accordance with said agreement? Answer: Yes.

"(5) What damages, if any, is plaintiff entitled to recover of defendant J. H. Pugh? Answer: \$2,000."

The defendant Pugh excepted to the issues submitted and tendered the following:

"(1) Was the defendant Wooten the duly authorized agent of his codefendant, Pugh, to make sale of the timber referred to in the complaint?

"(2) Was it agreed at the time of the execution of the timber deed that the plaintiff should have 30 days in which to pay for the same?

"(3) Was the \$250 referred to in the com-

plaint paid to the defendant Wooten without the knowledge or consent of the defendant Pugh?

"(4) Was said sum of \$250 paid to the defendant Wooten by the plaintiff for his services in procuring the execution of said timber deed from his uncle and codefendant, J. H. Pugh?"

His honor refused to submit either of said issues, and to this ruling the defendant Pugh excepted. In apt time said defendant moved to nonsuit, which motion was denied, and defendant excepted. The defendant Pugh appealed from the judgment rendered.

A. McL. Graham, of Clinton, for appellant.
Butler & Herring, of Clinton, for appellees.

BROWN, J. This action is brought to recover damages for breach of contract in the sale of timber. The plaintiffs allege that defendant Pugh contracted to sell and convey to them the standing timber on certain lands near the town of Clinton owned by defendant for the sum of \$8,000; that plaintiffs complied with the contract on their part, but defendant wrongfully refused to perform the contract on his part, to plaintiff's damage \$10,000.

The defendant denies that he entered into a valid contract to convey the timber to plaintiffs, and pleads the statute of frauds. The defendant further avers:

That he intrusted the sale of the timber to his nephew, J. Frank Wooten, the codefendant, who agreed to negotiate the sale of it at the best obtainable price; that "this defendant had full faith and confidence in the integrity of his said nephew, and thereupon directed the said J. Frank Wooten to seek a purchaser for said timber, and to submit to this defendant a reasonable price for the same; that the plaintiffs, having been advised that this defendant was willing to sell his timber, and being also aware of the fact that the said J. Frank Wooten was the nephew of this defendant, and that this defendant had confidence in him, approached the said Wooten, and made a proposition to him, under the terms of which the said Wooten, for a valuable consideration, obligated to secure the signature of this defendant to a deed conveying said timber to the plaintiffs; that this defendant had no knowledge whatever concerning the covinous and fraudulent contract made and entered into between the plaintiffs and the said J. Frank Wooten, and, notwithstanding this fact, and notwithstanding the fact that the plaintiffs knew that said timber was worth more than \$6,000, and notwithstanding the fact that both the plaintiffs and the said J. Frank Wooten knew that there were other parties in and around the town of Clinton who would have willingly paid more than \$6,000 for said timber, the said J. Frank Wooten, acting as the secret agent and attorney of the plaintiffs, falsely and fraudulently represented to this defendant that he had sold said timber to the plaintiffs for its full value, and at the highest figure that the market would afford."

The defendant further avers that, relying upon his said agent, he executed the deed and delivered same to him with instructions to deliver it at once upon payment in cash of the \$6,000 purchase price. Defendant denies that he gave his said agent any authority to take the deed with him to Jacksonville or to extend time of payment of the purchase money.

[1] It is contended that there is no valid

binding contract for the sale of the timber evidenced by any memorandum in writing signed by the defendant that will take the transaction out of the protection of the statute of frauds.

It is admitted that a deed was duly executed by defendant and deposited with the codefendant, Wooten, with instructions to deliver it according to agreement with plaintiffs upon payment of the purchase money. This deed recited the true consideration and contained a full description of the land upon which the timber stood, and in all respects contained the contract of the parties as originally made.

It has been held that, if a person who has made a parol agreement to sell land sign a deed therefor to the vendee, and deliver it in escrow, if the instrument contain the terms of the parol agreement substantially, including a recital of the consideration, it is a sufficient compliance with the statute of frauds.

Browne, in his work on the Statute of Frauds, says that this is opposed by the great weight of authority (page 483, § 354B), and to same effect are the notes to Halsell v. Renfrow, 50 L. Ed. 1032. It is admitted, however, that there is a sharp conflict between the authorities upon the question.

But this court has decided, along with other courts of respectability, that the undelivered deed under such circumstances will satisfy the statute. In Magee v. Blankenship there was a definite contract for an exchange of lands between the parties, and an undelivered deed was allowed as written evidence satisfying the requirements of the statute. 95 N. C. 563, citing Blacknall v. Parish, 59 N. C. 70, 78 Am. Dec. 239. Referring to this question in Flowe v. Hartwick, 167 N. C. 452, 83 S. E. 843, Mr. Justice Hoke says:

"While this has been said to be against the great weight of authority, * * * our own court, in Magee v. Blankenship, * * * seems to have approved the position."

The learned judge of the superior court properly followed the decisions of this court and denied the motion to nonsuit.

[2, 3] It is contended that the plaintiffs failed to pay cash for the timber, as they had contracted to do, and therefore failed to perform the contract upon their part. The plaintiffs contend that the time for payment of the purchase money was extended and offer in evidence the following paper writing:

"I, J. F. Wooten, having in my possession a certain timber deed executed by James H. Pugh to Vinson, Jones & Finch, left with me by said James H. Pugh, as his agent, do hereby agree to deliver said deed to said grantee at any time within thirty days from date hereof, upon their payment to me of the full sum of \$—, the purchase price agreed upon for said timber.

"This July 11, 1914.

J. F. Wooten.

"Attest: Henry A. Grady."

The evidence is conflicting upon this allegation, and it was for the purpose of finding the fact that issues were tendered by defend-

ant. We think the court should have submitted the issues, or some other suitable issues, so that the controverted fact might be determined.

If the jury should find that the terms of sale were cash, and that the defendant Wooten had no authority to change the terms and extend time for payment, then the plaintiffs did not perform the contract on their part and cannot recover.

[4] It is contended that the defendant Wooten was acting in bad faith towards his codefendant, and that, while acting as his agent, without his knowledge or consent, received \$250 from plaintiffs for his services in negotiating the sale of the timber. The third and fourth issues tendered by defendant present this question for the determination of the jury, and should have been submitted. These issues are distinctly raised by the pleadings, and there is evidence sufficient to require the submission of the matter to the jury.

There is evidence that Wooten was the agent of defendant Pugh in making the sale; that he had agreed to secure the best obtainable price; that there were others beside plaintiffs in and near Clinton who were willing to buy the timber at a much larger price; that the timber was sold shortly thereafter for \$8,000, and, according to plaintiffs' present contention, was worth much more. There is evidence that Wooten demanded of plaintiff \$500 for his service in the matter and received \$250. It is in evidence that defendant Pugh knew nothing whatever of this, and that he relied entirely on the judgment and fidelity of Wooten in negotiating the sale of the timber. It is contended that this \$250 was allowed as the expenses of inspecting the timber by a timber inspector. There is no evidence that the timber inspector received \$250 or any other sum from Wooten for his services.

[6] It is well settled that an agent may, with their full knowledge and consent, represent both parties to a contract, and his contracts under these circumstances bind each within the scope of his authority, but where the agent, without the full knowledge and consent of his principal, represents the adverse party in the transaction, his contracts relating thereto are voidable at the option of the principal. But an agent cannot serve the opposing party without the knowledge and consent of his principal, though he acts in good faith and no harm results to the principal. 2 Corp. Jur. 838, § 520; Truslow v. Bridge Co., 61 W. Va. 628, 57 S. E. 51; Winter v. Carey, 127 Mo. App. 601, 106 S. W. 539. It is not necessary that either principal should show injury to himself. Without showing such injury, he may avoid a contract made by a dual agent without his knowledge of such dual agency. Guthrie v. Chair Co., 71 W. Va. 383, 76 S. E. 795.

The payment of a secret commission or fee to an agent of another intrusted with the execution of a contract entitles the principal to avoid it. 2 Corp. Jur. 839, and notes. This rule is founded in sound public policy, and in referring to it it is said in Winter v. Carey, supra:

"The law recognizes that in general human nature is too weak to assume faithful service for an agent serving opposing parties without their knowledge and consent and has absolutely forbidden such dual position, and, if taken, the agent is denied any redress. Good faith on the agent's part and lack of harm to his principal will not prevent an application of the rule for it is founded on public policy, and is preventative rather than remedial."

In Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234, it is held that:

"A man cannot be the agent of both the buyer and seller in the same transaction without the intelligent consent of both parties. * * * All such transactions are voidable, and may be repudiated by the principal without proof of injury on his part."

In Donovan v. Camplon, 85 Fed. 73, 29 C. C. A. 33, Judge Sanborn well says:

"It is too well settled to admit of discussion that no sale where any substantial advantage has been taken can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when he was in reality the secret agent of the purchaser. It inaugurates so dangerous a conflict between duty and self-interest to allow the agent of a vendor to become interested as the purchaser, or the agent of a purchaser, in the subject-matter of his agency, that the law wisely and peremptorily prohibits it."

It is not necessary to establish fraud upon the part of the agent. The rule of law is a preventative remedy, and intended to prevent the possibility of fraud. It is not so much that fraud has been committed as that it might be committed that the law frowns upon dual agencies.

New trial.

(173 N. C. 229)

INTERNATIONAL HARVESTER CO. v. CARTER. (No. 284.)

(Supreme Court of North Carolina. March 28, 1917.)

PRINCIPAL AND AGENT — 156—AGENT'S AUTHORITY—SALES—REPRESENTATIONS.

Where an engine was sold by contract providing that no agent had the power to change the terms and that there were no representations other than those in contract, and the buyer, who would read and write, voluntarily signed the same without fraudulent inducement and with full opportunity to read, and after receiving the engine admitted satisfaction in writing, he cannot avoid payment of purchase money on the ground that seller's agent made false representations as to stump-pulling power of engine.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583-587.]

Appeal from Superior Court, Cumberland County; Winston, Judge.

Action by the International Harvester Company against Daniel Carter. Judgment for defendant, and plaintiff appeals. Error.

Cook & Cook and Sinclair, Dye & Ray, all of Fayetteville, and McIntyre, Lawrence & Proctor and McLean, Varser & McLean, all of Lumberton, for appellant. Robinson & Lyon, Oates & Herring, John G. Shaw, and V. C. Bullard, all of Fayetteville, for appellee.

CLARK, C. J. This is an action on certain notes for the balance due on an engine purchased by the defendant. The only defense involved is that of fraud alleged by defendant to have been practiced on him by plaintiff's agent, who sold defendant the engine, upon the written contract signed by the defendant, set out in the record. This contract describes the engine, with a stipulation against the order being countermanded, and providing that no agent had the power to change the contract or warranty, and providing for notice to be given if the engine should fail to work well, and that a man should then be sent by plaintiff, and that, if such agent could not make it work satisfactorily, then the purchaser should immediately return the engine, and the price paid should be immediately refunded. The answer does not allege that there was any fraud practiced by the defendant in inducing him to sign the contract and notes, but alleges oral misrepresentation by the agent as to the capacity of the engine to pull stumps. The defendant made no contention on the trial that he had complied with the requirement in the contract by giving notice of the defect, or that the plaintiff had failed to send a man in consequence of such notice to remedy the defect.

The plaintiff excepted to the following charge:

"The plaintiff contends that the contract upon its face, signed by the defendant, shows that no such representations (as to stump pulling) as claimed by defendant were made. That would be true, and you would be bound by that if this suit was upon the warranty, but as it is not a suit upon the warranty, but is a suit upon the fraud, if any was committed, then the plaintiff gets no benefit from anything that appears upon the face of the contract so far as the representations were concerned. It is not a suit upon the warranty, but suit based upon alleged fraud."

This was erroneous; for it eliminated the effect of the recital in the contract, which the defendant admits he signed, to the effect that no other representations than those contained in the contract were made, and that the agent had no authority to make other representations and allowed the jury to set aside the slip signed by Carter admitting his satisfaction with the engine.

The defendant could read and write and

was a man of intelligence, and there is no evidence that there was fraud and misrepresentations in procuring his signature to the contract or the satisfaction slip signed by him on which he noted in his own handwriting the words "except as to extension rims." Under such circumstances the purchaser, who has had full opportunity to read a written contract of purchase voluntarily signed by him without fraudulent inducement or device, cannot show that the vendor's agent by parol warranted the machine, or that it was not a secondhand machine, when, as in this case, it appears on the face of the contract that the parties understood that this was a secondhand machine, and that the agent was without authority to vary the written terms of the contract. *Machine Co. v. McClamrock*, 152 N. C. 405, 67 S. E. 991, which is on all fours as to the facts with this case.

In *Machine Co. v. Feezer*, 152 N. C. 516, 67 S. E. 1004, where the answer alleged fraud and misrepresentation by the vendor in making the contract of sale by false representations as to the weight and capacity of the machinery, the quality of work it would do, the amount of power it would require to properly run it, that these representations were falsely and fraudulently made, it was held proper to submit to the jury the question of fraud in the factum to set aside the written contract, but that is not the case here. The court erred in permitting the jury to consider as evidence of fraud the contention of the defendant that there were misrepresentations made by the agent as to the capacity of the engine for pulling stumps when there was no evidence of fraud in procuring the contract to be signed, in which contract there was an express stipulation that no agent had power to make any changes in the contract or warranty and requiring notice to be given if the engine should not come up to the terms of the contract, and such notice was not given, and opportunity not furnished to the vendor to examine into and correct the alleged defect if such there was.

The charge was a misconception of the scope of this defense, which does not rest upon fraud or misrepresentation in procuring the execution of the contract, but upon an alleged misrepresentation by the vendor's agent outside the contract, which contract was voluntarily signed by an intelligent man without any fraud in its procurement, and which upon its face stipulated against liability for any implied warranty or change of the stipulations in the contract.

Error.

(173 N. C. 213)

ALSTON et al. v. SAVAGE et al. (No. 251.)

(Supreme Court of North Carolina. March 28, 1917.)

1. SPECIFIC PERFORMANCE §120—EVIDENCE—ADMISSIBILITY.

In action by vendee under a contract by the life tenant to convey the land, evidence of a subsequent contract of the life tenant to convey to another, recorded prior to recording plaintiff's instrument, was admissible.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384-386.]

2. SPECIFIC PERFORMANCE §29(2) — CONTRACTS ENFORCEABLE—DEFINITENESS.

A contract to give a warranty deed to "a certain tract of land in Louisburg township now being advertised for sale" is not too indefinite for enforcement where the evidence shows that but one paper was published in the county, and that it carried an advertisement for the sale of specific lands, and that such lands were the only ones then advertised, since parol testimony was then admissible to identify the land.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 71-73, 75-82.]

3. SPECIFIC PERFORMANCE §13—DEFENSES—PRIOR REGISTERED CONTRACT.

Specific performance of a contract to convey land will not be decreed, where there is outstanding a prior recorded contract to convey.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32.]

Appeal from Superior Court, Franklin County; Bond. Judge.

Action by Walter M. Alston, administrator of Ellis Alston, deceased, and others against John A. Savage and others. Judgment for defendants, and plaintiffs appeal. No error.

This is an action by the heirs at law and the administrator of Ellis Alston under a contract to convey a certain tract of land dated April 1, 1909, at the price of \$1,250, of which \$190 was paid in cash. The contract was in writing, and signed by John A. Savage, and by him for "son John, Jr." The codefendant Brown claims under a contract to convey December 5, 1912, signed by John A. Savage and a deed in usual form by John A. Savage, Jr. The title to the land was in John A. Savage, Sr., for life, with remainder to John A. Savage, Jr., and F. L. Savage. At the time of the execution of the contract to Ellis Alston he paid \$190 on the purchase money and entered into possession, listing and paying taxes, which possession continued up to the bringing of this action. It is admitted that the \$190 was received by John A. Savage and deposited by him in bank to the credit of John A. Savage, Jr., but there is no evidence that the latter had drawn it out or accepted it or knew of it. The jury found upon issues submitted that John A. Savage, Jr., did not execute the contract with Ellis Alston, and that John A. Savage, Sr., had no authority as agent to execute said contract for his son, John A. Savage, Jr., and that the latter has not ratified the same, and that the contract of December 5, 1912, be-

tween John A. Savage, Sr., and Shelly Brown was made for value and in good faith, and was registered prior to the contract with Ellis Alston; that the plaintiffs cannot recover from John A. Savage, Jr., any damage for failure to convey the land described in the complaint, and that they are entitled to recover from John A. Savage, Sr., as damages for failure to convey 25 cents, and that the plaintiffs are not entitled to a deed from John A. Savage, Jr., John A. Savage, Sr., and Shelly T. Brown upon payment of the balance of the purchase money. The above findings were based upon competent evidence. Appeal by plaintiff.

White & Malone, of Louisburg, for appellants. W. M. Person, of Louisburg, for appellees Savage. W. H. Yarborough, Jr., and Ben T. Holden, both of Louisburg, for appellee Brown.

CLARK, C. J. [1] As to the first seven exceptions to the admission in evidence of the contract of Savage to Brown of December 5, 1912, they cannot be sustained.

It is conceded that the plaintiffs are entitled to the life interest of John A. Savage, Sr., unless the defendant Brown acquired that interest through the agreement made between Savage, Sr., and Brown of December 5, 1912, recorded December 18, 1912. The agreement of John A. Savage, Sr., to Ellis Alston was registered two days later, December 20, 1912.

[2] The plaintiffs contend, however, that the contract between Savage, Sr., and Brown to give a warranty deed to the latter to "a certain tract of land in Louisburg township now being advertised for sale" was too indefinite. It is in evidence that there was but one paper published at that time in Franklin county, and that that paper carried at the time an advertisement for the sale of the lands in controversy over the signature of John A. Savage, Sr., and that these were the only lands then being advertised for sale. This was sufficient to admit parol testimony to identify the land. *Fulcher v. Fulcher*, 122 N. C. 101, 29 S. E. 91. In *Phillips v. Hooker*, 62 N. C. 193, the memorandum "to make a deed for a house and lot north of Kinston" was held sufficient to be aided by a parol proof, it being admitted that the defendant owned but one house in the county. In *Spivey v. Grant*, 96 N. C. 214, 2 S. E. 45, the description was "one horse," and, the mortgagor having only one horse, it was held that the title passed. In *Lupton v. Lupton*, 117 N. C. 30, 23 S. E. 184, the assignment to widow for year's provisions was of "one-half of boat," and, it being proved that the husband had only one boat, this was held sufficient to pass the title. "Where lands can be definitely identified by the aid of parol evidence, a deed is not void for un-

certainty of description." Bachelor v. Norris, 166 N. C. 506, 82 S. E. 839. To same purport, Patton v. Sluder, 167 N. C. 500, 83 S. E. 818; Speed v. Perry, 167 N. C. 122, 83 S. E. 176. The contract between John A. Savage and Brown further identified the land by adding, "J. A. Savage, Jr., owns the land in fee simple and has a right to sell it and deed it." It was in evidence that there was an oral agreement between John A. Savage, Sr., and the administrator of Ellis Alston to sell the land at public auction, and that in pursuance of that agreement said Savage caused the notice, above referred to, to be published in the Franklin Times.

[3] The plaintiffs had no conveyance or contract to convey from either of the remaindermen. The contract by the life tenant to convey to Ellis Alston was registered after the contract to convey, executed by the life tenant to the defendant Brown, and specific performance could not be decreed. The only remaining question was as to damages against the life tenant for breach of his contract and as to the measure thereof, and under a correct charge by the court the jury have assessed these damages at 25 cents, possibly making allowance for rents and profits received by plaintiffs as against \$190 partial payment made by Ellis Alston.

No error.

(173 N. C. 178)

HICKMAN v. O. M. RUTLEDGE & CO.
(No. 173.)

(Supreme Court of North Carolina. March 21, 1917.)

1. MASTER AND SERVANT ⇨286(1)—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action by an employé for injuries while loading logs on a truck, case held for the jury on the issue of defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1001.]

2. MASTER AND SERVANT ⇨107(1)—DUTY OF SUPERINTENDENT.

Where a servant was loading logs on a truck by means of skid poles under the immediate supervision of the superintendent, it was the superintendent's duty to see that the skid poles were securely fastened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199, 212.]

3. MASTER AND SERVANT ⇨107(1)—INJURIES TO SERVANT—INJURY RESULTING FROM USE OF ORDINARY TOOLS.

The rule relieving the employer from liability for an injury resulting from the use of ordinary or simple tools had no application where a servant was injured while loading logs on a truck by means of two skid poles, round, and not flattened or fastened at either end, one end of each log being on the truck, the other end on the ground with a chain around the log attached to a mule, which pulled the log upon the truck while the servant and another, each at one end of the log, were guiding it up the skid poles, keeping it straight.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199, 212.]

4. MASTER AND SERVANT ⇨228(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

The servant, as a rule, does not assume risks arising out of the master's own negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660.]

5. MASTER AND SERVANT ⇨205(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Where the superintendent and the foreman were both present, supervising and directing plaintiff's work in loading logs on a truck by means of skid poles, plaintiff did not assume the risk of injury when an insecure skid pole rolled and caused a log to fall on him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547.]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by Eliza Hickman against O. M. Rutledge, trading as O. M. Rutledge & Co. From a judgment for plaintiff, defendant appeals. No error.

Civil action, tried upon these issues:

(1) Was plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff, by his own negligence, contribute to his injury? Answer: No.

(3) What damage is plaintiff entitled to recover? Answer: \$310.30.

From the judgment rendered, defendant appealed.

Rouse & Rouse, of Kinston, Dickinson & Land, of Goldsboro, Wm. T. Joyner, of Raleigh, and Jno. G. Anderson, of Snow Hill, for appellant. D. L. Ward, of Newbern, for appellee.

BROWN, J. [1] The motion to nonsuit was properly overruled. The evidence, taken in its most favorable light for plaintiff, as is proper upon such motions, tends to establish these facts: The plaintiff was employed by the defendant on August 7, 1915, and was engaged in loading logs on a truck by means of two skid poles, one end of the log on the truck and the other end on the ground, with a chain around the log attached to the harness of a mule, which pulled the logs upon the truck while he and another man, one at each end of the log, were guiding the log up the skid poles, keeping it straight. When the log got half way up the skid pole, it became crooked, and, as was his duty, plaintiff was trying to keep the log straight, and while he was trying to do this, so it would run up the skid pole evenly, the skid pole rolled and caused the log to fall on his leg and break it. The skid poles were round and not flattened at the ends, and were not secured to the truck by nails or spikes, as the evidence tends to prove was customary in order to prevent them from slipping off the truck or rolling over. The superintendent, Mills, was standing by directing the work. The skid poles were furnished and put in place by the foreman.

[2] These facts tend strongly to prove negligence upon the part of defendant. The

work was being done under the immediate supervision of the superintendent. It was his duty to see that the skid poles were securely fastened. Had the plaintiff undertaken to have prepared and fastened the poles himself a different case would be presented. *Brown v. Foundry Co.*, 170 N. C. 38, 86 S. E. 725.

[3] The rule which relieves an employer from liability for an injury resulting from the use of ordinary or simple tools has no application to the facts of this case. *Wright v. Thompson*, 171 N. C. 88, 87 S. E. 963. The method of loading the logs on the trucks by means of round poles not flattened or fastened at either end was not according to custom as well as the dictates of ordinary prudence.

[4] The defendant requested the court to charge the jury that:

"If the jury believe all of the evidence, they will find that the plaintiff assumed the risk of his employment, and particularly of the work in which he was engaged at the time of the accident, and they will answer the second issue 'Yes.'"

This prayer could not have been properly given under the evidence in this case. The servant, as a rule, does not assume risks arising out of the master's own negligence. The superintendent, Mr. Mills, was standing in a few feet of the plaintiff, directing the work, and the foreman, Thomas Moore, was also present. The foreman brought the skids there and put them at the place for use by the employes.

[5] The contention that plaintiff assumed the risk cannot be maintained in view of the fact that the superintendent and foreman were present both supervising and directing the work. In this respect the case is like *Smith v. Railroad*, 170 N. C. 185, 86 S. E. 1009, where it is said:

"But, in our opinion, defendant's position cannot be maintained, in view of the fact that the representative of the company, the foreman in charge and control, was present; that the platform was arranged and plaintiff put to work on it by his direction, and of the evidence tending to show that the plank prepared for the work was unfitted for its purpose and was insecurely placed."

There are no assignments of error directed to the evidence, and the charge is a very clear and correct summing up of the evidence as well as a correct statement of the law as settled by numerous decisions of this court.

No error.

(173 N. C. 195)

GULF STATES STEEL CO. v. FORD.
(No. 253.)

(Supreme Court of North Carolina. March 21, 1917.)

1. CORPORATIONS — 32(4) — CORPORATE EXISTENCE — PROOF — REPUTATION.

The existence of a corporation may be proved by reputation or as other facts are proved.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 110, 2086, 2087.]

2. CRIMINAL LAW — 567 — EVIDENCE — CORPORATE EXISTENCE.

In criminal proceedings a corporation's existence may be proved by evidence that it did business and was well known under its corporate name.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1276.]

3. DEPOSITIONS — 107(1) — ADMISSIBILITY — NECESSITY OF OBJECTION BEFORE TRIAL.

A deposition of a corporation's officer regarding the company's incorporation and the indorsement to it of a note will not be excluded upon an objection first made at the trial.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 309, 319; *Trial*, Cent. Dig. § 189.]

4. BILLS AND NOTES — 497(1) — ACTIONS — PRESUMPTIONS.

The holder of a note indorsed in blank presumably took it for value, without notice of outstanding equities.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675, 1677, 1678, 1686, 1687.]

5. BILLS AND NOTES — 497(1) — ACTIONS — PRESUMPTIONS — "HOLDER IN DUE COURSE."

Every holder of a note duly executed is prima facie a holder in due course under *Revisal* 1908, §§ 2201, 2208, defining holders in due course and making every holder prima facie a holder in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675, 1677, 1678, 1686, 1687.]

For other definitions, see *Words and Phrases*, First and Second Series, *Holder in Due Course*.]

6. BILLS AND NOTES — 497(1) — ACTIONS — ANSWER AS REBUTTING PRESUMPTIONS.

An answer denying plaintiff's ownership of the note sued upon does not rebut the presumption that he is a holder in due course, entitled to sue upon such note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1675, 1677, 1678, 1686, 1687.]

Appeal from Superior Court, Franklin County; Bond, Judge.

Action by the Gulf States Steel Company against E. S. Ford. Judgment for plaintiff, and defendant appeals. Affirmed.

Yarborough & Beamn, and Ben T. Holden, of Louisburg, for appellant. Wm. W. Boddie, of Louisburg, for appellee.

CLARK, C. J. The defendant executed his promissory note to the Hardware Company of Louisburg, N. C., who indorsed it to the plaintiff. The plaintiff alleged that it was a corporation doing business under the laws of the state of Alabama. In the answer the defendant admitted the execution and delivery of the note, but denied the incorporation of the plaintiff and the assignment to it of the note. On the trial the defendant introduced no evidence, but objected to the deposition of A. R. Forsyth, who testified that he was vice president and treasurer of the plaintiff; that it is a corporation under the laws of Delaware, with its principal offices at Birmingham, Ala., where it is engaged in mining coal and ores and manufacturing coke, pig iron, steel, nails, and wire, and that

the note sued on had been transferred to it by the payee, the Hardware Company, in payment of its account. The defendant objected to this evidence.

[1] The existence or nonexistence of a corporation is a fact and may be proved as other facts. In *Bank v. Carr*, 130 N. C. 479, 41 S. E. 876, a witness, in a deposition, testified that a certain bank was a corporation, and the court held that this was prima facie evidence of the fact. The existence of the corporation may be proved by reputation. 10 Cyc. 241. In *Railroad v. Saunders*, 48 N. C. 127, the court held that the organization of a corporation may be proved by a witness, who saw the alleged corporation acting as such.

[2] In a criminal action it is not necessary to produce the charter of a corporation, but it is sufficient to prove that it carried on business in the name set out in the indictment, and was well known by that designation. *State v. Grant*, 104 N. C. 910, 10 S. E. 554. In *Stanly v. Railroad*, 89 N. C. 332, it is held difficult to assign any good reason why a corporation suing or being sued should be designated by any other description than its corporate name, just as with a natural person; the only purpose in either case being to point out the party to the action. Here the note was indorsed to the plaintiff under its alleged corporate name, and the assignment and that the plaintiff was doing business under such corporate name are shown, and there is no evidence to the contrary.

[3] Besides this, the deposition was on file in the clerk's office, and there was no objection taken to the testimony of Forsyth until the trial. In *Morgan v. Fraternal Association*, 170 N. C. 81, 86 S. E. 975, where a deposition was open and on file before the trial on an objection to the deposition being taken for the first time on the trial, it was held that the objection could not be sustained—citing *Ivey v. Cotton Mills*, 143 N. C. 189, 197, 55 S. E. 613; *Bank v. Burgwyn*, 116 N. C. 122, 124, 21 S. E. 202. In *Carroll v. Hodges*, 98 N. C. 419, 4 S. E. 199, it was held that a deposition will not be quashed or rejected either in whole or in part on motion made for the first time at the trial, when it has been on file long enough before the trial for the objection to be made.

[4-6] The defendant admits the execution and delivery of the note to the Hardware Company. Its indorsement in blank is proven by the witness Allsbrook, and its transfer to the plaintiff in due course is proven by the deposition of Forsyth. The law presumes that the holder of a note indorsed in blank is its holder in due course; that he took it for value before maturity, and without notice of any equity; that he is the owner and has the right to bring suit to enforce collection. There is no evidence in this case to overcome these presumptions. Every holder is deemed a holder in due course, and upon the execu-

tion of the instrument being proven every holder is deemed prima facie a holder in due course. *Pell's Revisal*, §§ 2201, 2208; *Manufacturing Co. v. Summers*, 143 N. C. 102, 109, 55 S. E. 522. Such prima facie case is not rebutted by a denial in the answer of the ownership of the plaintiff. *Causey v. Snow*, 120 N. C. 279, 28 S. E. 775.

No error.

(173 N. C. 117)

DOVER LUMBER CO. v. BOARD OF
COM'RS OF MOSLEY CREEK DRAIN-
AGE DIST. et al. (No. 175.)

(Supreme Court of North Carolina.
February Term, 1917.)

Concurring opinion. For majority opinion, see 91 S. E. 714.

ALLEN, J. (concurring). Standing timber is real property for the purpose of devolution and transfer, but the owner of the timber does not own the soil. He has merely the right to the support of the soil for his timber during his term, and has no right to cut ditches at pleasure, and if so, it would not seem that he could impose this burden on the owner of the soil. Nor are the assessments based on the valuation of the property, as taxes are, but on the amount of benefit to the property assessed. "The foundation of the right to levy assessments is the particular benefit received by the land assessed," and "there can be no assessment in excess of the benefit received" or "where there is no benefit." 9 R. C. L. 953. "The benefit must be certain." 9 R. C. L. 954. This last principle seems to have been violated by the assessors, as it is not within the bounds of probability that the gum timber of the plaintiff could be benefited by the proposed drainage in the amount of \$9,962.50, the assessment laid on the plaintiff's timber, during five years, to which time its right to cut is limited.

A brief summary of parts of the drainage act (Pub. Laws 1909, c. 442) also demonstrates, I think, that the assessment of timber was not within the contemplation of the General Assembly.

Section 1: The drainage districts are formed "for the purpose of draining and reclaiming wet, swamp or overflowed lands." This shows that the main purpose of the act is agricultural. The owner of the timber has no wet, swamp or overflowed lands to be drained or reclaimed. He owns nothing except the timber.

Section 2: The petition for the establishment of a district may be filed by a majority of the resident landowners, or by the owners of three-fifths of the land. Suppose four nonresidents own all the land in the proposed district, and they sell different parts of the timber to five nonresidents. Could these five file a petition against the will of those

who own the soil, or could they, by refusing to join in the petition, prevent the other four, who own the soil, from the possibility of establishing a district. If they are landowners within the meaning of the statute, they have this right.

Section 12: In making assessments the appraisers must consider "degree of wetness" of land, "its proximity to the ditch," and "the fertility of the soil." "In determining the amount of benefit it will receive by the construction of the ditch." "It" evidently refers to "soil."

Section 19: The three drainage commissioners are to be appointed from those receiving the vote of a majority of the owners of land. If there are four owners of the soil and five owners of timber, can the five elect the commissioners? They can if they are owners of land within the meaning of the statute.

Section 31: The assessments are against "the several tracts of land." Is a timber holding ever referred to as a tract of land? The amount shall be assessed against "the several tracts of land" according to "the benefit received." Does gum timber receive any appreciable benefit within five years?

Section 32 provides for bond issue for construction of the improvement.

Section 34: These bonds are to be paid in ten annual installments out of the assessments, which "shall constitute the first and paramount lien, second only to county and state taxes." If the standing timber is assessable separate from the land, and if the assessment is a lien on the timber, the owner of the bonds can restrain the cutting of the timber until the bonds are paid, and if the term for cutting is less than ten years, as in this case, the owner of the timber would lose all of it as he could not cut within the ten years, because to permit him to do so would decrease the security of the bondholder, and the timber not cut within that time would belong to the owner of the soil.

Section 37: This act is "to promote the leveeing, ditching, draining and reclamation of wet and overflowed lands." The owner of the timber has no "wet and overflowed lands."

It is urged, however, that if this construction prevails, it will enable the owner of the land to sell his timber, thereby depreciating the value of his land, and that this will have the effect of decreasing his assessment and of increasing the assessment of his neighbors; but this position is upon the erroneous idea that the assessments are based on values, and not benefits.

I think no instance can be found of the establishment of a drainage district, except for the purpose of reclaiming lands for cultivation, and as the timber must be cut and removed before the proposed improvement

is complete, the sale of the timber with a limited time for its removal would rather increase the value of the land than decrease it for the purpose of the act, which is for cultivation.

(173 N. C. 161)

OLD et al. v. RICHMOND CEDAR WORKS.
(No. 26.)

(Supreme Court of North Carolina. March 21, 1917.)

1. DEEDS \Leftrightarrow 5—VENDOR AND PURCHASER \Leftrightarrow 3(1)—NATURE OF INSTRUMENT.

An instrument, acknowledging an indebtedness, and binding the party executing it, his heirs, executors, and assigns to make to the creditor good and complete title to certain land, was neither a conveyance nor a contract to convey land then owned; the instrument itself showing that the title was then in others, and providing that it should be void when the indebtedness should be paid.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 7-9; Vendor and Purchaser, Cent. Dig. § 3.]

2. PAYMENT \Leftrightarrow 66(1)—PRESUMPTION OF PAYMENT—LAPSE OF TIME.

A presumption of payment arises from a long lapse of time.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176, 177.]

3. ESTOPPEL \Leftrightarrow 45—AFTER-ACQUIRED TITLE—REBUTTER—ESTOPPEL.

The distinction between an estoppel passing after-acquired title, which may exist without a covenant of warranty, and a rebutter, destroying the right of action of the heirs of the grantors to the after-acquired estate, which is dependent upon a warranty, is recognized in North Carolina.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112.]

4. ESTOPPEL \Leftrightarrow 45—AFTER-ACQUIRED TITLE—ESTOPPEL AND REBUTTER.

If the deed of the ancestors of plaintiffs, suing to recover land, being with warranty, had the effect to destroy by rebutter the right of action of plaintiffs as to the after-acquired title, or to pass the after-acquired estate to the grantee and vest title in him by estoppel, plaintiffs cannot recover, although defendant is neither a party nor a privy to the deed of plaintiffs' ancestors, because of the rule that the burden is on plaintiffs to prove title in themselves, and in one case there is no right of action, and in the other there is no title in plaintiffs.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 112.]

Appeal from Superior Court, Camden County; Whedbee, Judge.

Action by Samuel F. Old and others against the Richmond Cedar Works. From a judgment of nonsuit plaintiffs appeal. Affirmed.

This is an action to recover a lot of land known as lot No. 7 of the New Lebanon estate, the plaintiffs being the heirs of Hollowell Old and Wiley McPherson. The plaintiffs claim under three chains of title:

(1) A grant from the state and a connected chain of title to Richard Morris, and a deed from Richard Morris to the ancestor of the plaintiffs, dated June 3, 1812, purporting to convey a one-sixteenth interest in the estate.

In this chain of title is the deed referred to in *Weston v. Lumber Co.*, 169 N. C. 403, 86 S. E. 363.

(2) A grant from the state and a connected chain of title to Samuel Payne and a deed from Payne to the ancestor of the plaintiffs, dated June 2, 1815, purporting to convey a one thirty-second interest in said estate. In this chain of title is the paper relied on by the plaintiffs to show title in Payne, the grantor of the plaintiffs' ancestor, which reads as follows:

"I Benjamine Jones of Camden State of North Carolina being justly indebted to Samuel Paine, of Richmond Virginia, in a certain sum of money by bond, bearing date July, 1802 & being disposed to secure & pay the same, do hereby grant, bargain & sell to him Two full Sixteenths of the New Lebanon Estate, being the same that Charles Grice bought under execution against me, and the other is held now by Little in Edenton, And I hereby bind myself my heirs, exors and assigns, to make to said Paine in his heirs exors, and assigns, good & complete titles to said two Sixteenths of said New Lebanon Estate, as soon as possible, but on this condition, that if I pay to said Paine, on or before the First day of January, 1807, the sum of Three Thousand Dollars, which sum is to be endorsed on my Bond to him, Then the above to be Void.

"In witness whereof I have hereunto set my hand & seal this twenty sixth day of June 1805.

"The word 'exors' in the 8th line & the word then the above to be void, was inserted (?) in the original before signed.

"B. Jones. [Seal]."

(3) A grant from the state and a connected chain of title to Exum Newby and a deed from Newby to the ancestor of the plaintiffs, dated June 17, 1815, purporting to convey a one thirty-second interest.

The defendant contends that the deed from Isaac Lamb, sheriff, to Richard Morris, one of the links in the first chain of title, is void, and that the paper set forth as a part of the Payne title is neither a conveyance nor a contract to convey, and that therefore these two chains of title must be eliminated. The defendant then offered in evidence a deed from the ancestor of the plaintiffs to Samuel Weston, dated June 10, 1812, conveying to said Weston and his heirs one thirty-second of said estate, and containing a general warranty.

The defendant contends that as the ancestor of the plaintiffs had no title at the time of the conveyance to Weston with warranty, this deed operates as a rebutter and destroys the right of action of the plaintiffs under the deed from Newby subsequently acquired.

The plaintiffs also offered in evidence the partition proceeding of the New Lebanon estate showing, among other things, that three-fourths of a share (a share being one-sixteenth of the whole) was allotted to McPherson and Old of the timber part of the land, and that lot No. 1 of the untimbered part, consisting of 400 acres, was allotted to Mills and Josiah Riddick, and then offered in evidence a connected chain of title from Mills and Josiah Riddick to the defendant.

No evidence was introduced tending to

prove from whom Mills and Josiah Riddick acquired title nor as to the extent of their estate.

There was no evidence that the plaintiffs had ever been in possession of the land or had paid taxes thereon or had exercised ownership or claimed any interest therein for 100 years.

At the close of the evidence his honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

Aydlett & Simpson and W. A. Worth, all of Elizabeth City, W. I. Halstead, of South Mills, and J. Kenyon Wilson, of Elizabeth City, for appellants. D. H. Tillitt, of Camden, W. W. Starke, of Norfolk, Va., Winston & Biggs, of Raleigh, and Ward & Thompson, of Elizabeth City, for appellee.

ALLEN, J. (after stating the facts as above). The plaintiffs claim the land in controversy as the heirs of Hollowell Old and Wiley McPherson, and as no possession has been shown in the plaintiffs or in those under whom they claim, they must rely on a connected chain of title from the state, or on an estoppel growing out of the proceedings for the partition of the New Lebanon estate.

The Morris title, relied on by the plaintiffs, may be eliminated at once, as one of the links in this chain of title is the deed from Isaac Lamb, sheriff, to Richard Morris, which was declared invalid by the unanimous opinion of the court in *Weston v. Lumber Co.*, 169 N. C. 403, 86 S. E. 363, and no additional facts appear which would cause us to change the conclusion then reached.

[1, 2] We are also of opinion that the ancestors of the plaintiffs acquired no title from Payne, because the paper relied on to show title in Payne is neither a conveyance nor a contract to convey land then owned. The paper is an acknowledgment of an indebtedness of \$3,000 to Samuel Payne, and an agreement to convey two-sixteenths of the Lebanon estate as security as soon as possible, and as the paper shows itself that the title was then in others, this must mean that he would convey when he acquired the title, and the paper also provides that it shall be void when the indebtedness is paid, and there is no evidence that the maker of the paper ever acquired the title, or that the indebtedness has not been paid, and the presumption of payment arises from the long lapse of time.

[3] This, therefore, leaves for consideration the Newby title, and as to that, the plaintiffs have shown a connected chain of title from the state ending with the deed from Newby to their ancestors in 1815, and upon this title they may maintain this action, unless the after-acquired title is in Weston, or the right of action has been lost, by reason of the fact that their ancestors, when they had no title, conveyed to Samuel Wes-

ton in 1812 with warranty the same interest in the Lebanon estate conveyed in the deed by Newby of 1815, under which the plaintiffs claim. The defendant contends that the deed of 1812, with warranty, operates to destroy the right of action of the heirs of the grantors to the after-acquired estate by rebutter, or that it has the effect of passing the title to this estate to the grantee by estoppel. The distinction between an estoppel which may exist without a covenant of warranty and a rebutter which is dependent upon a warranty (*Weeks v. Wilkins*, 139 N. C. 217, 51 S. E. 909), while questioned in some jurisdictions, has been recognized and established with us since the case of *Taylor v. Shufford*, 11 N. C. 127, 15 Am. Dec. 512, in which Henderson, J., said:

"The estoppel arises entirely out of the affirmations of matters of fact made in the deed. He [counsel for defendant] has confounded estoppels and rebutters; things essentially different in their nature, although frequently producing the same results. A rebutter operates on the right of action to the estate. It operates as to strangers, as well as between parties and privies, which is a consequence flowing from its operation on the right to the estate. An estoppel operates entirely as to facts; its effect is to conclude the parties from making, and of course proving, the facts to be otherwise than they are stated or acknowledged to be in deed or other transaction out of which the estoppel arises. My collateral ancestor deprives me of my estate, and makes a feoffment in fee to a stranger, with warranty, and dies; the warranty descends on me as his heir (and this is done under such circumstances as that it does not amount to what is called a warranty commencing by disseisin). In any controversy which I may have with any one in regard to the lands, after the warranty has descended on me, this feoffment and warranty will bar my right of action to the estate."

This authority has been frequently approved, notably in *Southerland v. Stout*, 68 N. C. 448; *Bell v. Adams*, 81 N. C. 122; *Weeks v. Wilkins*, 139 N. C. 217, 51 S. E. 909.

The authorities are also to the effect that where there is a covenant of warranty, the deed not only destroys the right of action in the grantor and his heirs to the after-acquired estate by rebutter, but that it also passes the title to the grantee by estoppel by warranty. Mr. Mordecai in his instructive and valuable *Law Lectures*, vol. 2. p. 858, says:

"I shall take 'Estoppel by Warranty' to mean the effect which such covenants have in passing, so to speak, any title to the land which the bargainor in a deed may acquire after the execution of the deed; and 'Rebutter by Warranty' to mean the effect which such modern covenants have in barring, estopping, or rebutting the heirs of the covenantor should they assert title to the land conveyed by the covenanting ancestor."

The language in *Wellborn v. Finley*, 52 N. C. 237, is "transfers the estate"; in *Hallyburton v. Slagle*, 130 N. C. 487, 41 S. E. 877, that the after-acquired title "inures to her benefit" (the grantee in the first deed); in *Buchanan v. Harrington*, 141 N. C. 41, 53 S. E. 478, that the after-acquired title

"would, by way of estoppel or rebutter, inure to the use and benefit of the defendant, and thereby vest one-half of the entire estate in him"; and in *Cooley v. Lee*, 170 N. C. 22, 86 S. E. 720, that the after-acquired estate "should inure to the benefit of her grantee and pass this interest to him by way of 'estoppel or rebuttal.'"

[4] If, therefore, the deed of the ancestors of the plaintiffs, being with warranty, has the effect of destroying the right of action of the heirs as to the after-acquired title by rebutter, or of passing this estate to the grantee and vesting the title in him by estoppel, in either event the plaintiffs cannot recover against the defendant, although it is neither a party nor a privy to the deed of 1812, because of the rule that the burden is on the plaintiffs to prove title in themselves, and in one case there is no right of action, and in the other there is no title in the plaintiffs, as it has vested in the grantee in the deed with warranty.

Note that we are dealing with a claim by the heir, and with a deed which purports to convey the land, and not with one conveying the right, title, and interest of the grantor, as to which a different rule prevails. *Lumber Co. v. Price*, 144 N. C. 53, 56 S. E. 684; *Coble v. Barringer*, 171 N. C. 448, 88 S. E. 518, L. R. A. 1916E, 901.

There is also authority for the position that a deed without warranty, which purports to convey the land passes an after-acquired title to the grantee, but it is not necessary to decide that question, as there is a warranty in the deed before us.

In *Eddleman v. Carpenter*, 52 N. C. 618, in which it does not appear there was a warranty, the court says, "Afterwards, in 1538, when he acquired title by the deed of Abernathy to him, the 'estoppel was fed,' so as by the act of law to vest the title in Carpenter, in the same manner as if Eddleman had owned the land in 1832;" in *Benick v. Bowman*, 56 N. C. 315, that a similar deed "took effect [as to after-acquired title] so as to pass the title of the property by way of estoppel;" and in *Hallyburton v. Slagle*, 132 N. C. 950, 41 S. E. 877, "when by his deed the grantor conveys without any of the usual covenants of title, or when by the form or nature of the conveyance, he affirms, either expressly or impliedly, that he has a good and perfect title to the land, though, in fact, he has a defective or imperfect title, and he subsequently acquires a good title thereto, such after-acquired title will inure to the benefit of his grantee by estoppel. *Van Renselaer v. Kearney*, 11 How. 297 [13 L. Ed. 703]; *Ryan v. U. S.*, 136 U. S. 68, [10 Sup. Ct. 913, 34 L. Ed. 447] 11 Am. & Eng. Enc. (2d Ed.) 403; *Hagensick v. Castor*, 53 Neb. 495 [73 N. W. 932]; *French v. Spencer*, 21 How. 240 [16 L. Ed. 97]."

It is also held that a deed which purports

to convey the land transfers the estate as by a fine (Wellborn v. Finley, 52 N. C. 237); that under our registration acts all deeds are put on the same footing as a feoffment (Bryan v. Eason, 147 N. C. 292, 61 S. E. 71); and Mr. Rawle in his work on Covenants, § 243, in discussing the effect of an estoppel by deed without warranty, says:

"Now it must be carefully observed that by the common law there were two classes of cases in which an estate thus actually passes by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine, or a common recovery. Such was their solemnity and high character that they always passed an actual estate, by right or by wrong, and, as against the feoffer or consor and his heirs, not only divested them of what they then had, but of every estate which they might thereafter by possibility acquire, and this doctrine has been applied in modern times. The second was where the assurance was by lease, under which, it will be remembered, estates could take effect in futuro; and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties."

If this position is sound—and we would be inclined to so hold if the question was before us—if there was no warranty the heirs of the grantor could not recover the land under title claimed by descent as against a stranger, for the reason that the after-acquired title would pass to the grantor in the deed by estoppel, and as the heirs would not be the owners of the after-acquired title, they could not recover on it. It follows, as the ancestor of the plaintiffs had no title at the time of the conveyance to Weston in 1812 with full covenant of warranty, and as this had the effect by way of rebutter of extinguishing the right of action of their heirs under the after-acquired title of 1815, or of passing this title to the grantee in the deed of 1812 by estoppel, the plaintiffs cannot maintain their action under the Newby title, and they must rely upon the proceeding in partition as an estoppel on the defendant.

When we come to consider the effect of the partition proceeding we are confronted by the fact that the plaintiffs have failed to show any estate of inheritance in their ancestors at the time the proceeding was instituted, nor have they shown that Mills and Josiah Riddick, under whom the defendant claims, had an estate of inheritance, and in the absence of proof of these facts the decision in *Weston v. Lumber Company*, 162 N. C. 165, 77 S. E. 430, Ann. Cas. 1915A, 931, and *Weston v. Lumber Company*, 169 N. C. 390, 86 S. E. 363, in which the same partition proceeding was considered, and in which it was held that it did not operate to estop the parties from denying that the several tenants in common had an estate in fee, is conclusive against the plaintiffs. We are therefore of opinion that there was no error in the judgment of his honor dismissing the action at the close of the evidence.

Affirmed.

(178 N. C. 197)

DOWELL v. CITY OF RALEIGH. (No. 254.)
(Supreme Court of North Carolina. March 21, 1917.)

1. MUNICIPAL CORPORATIONS §813(8) —
TORTS—DEFECTS IN STREETS—OTHER DEFECTS.

Defects in defendant municipal corporation's street, other than defect which caused the injury, may be considered to prove the particular defect or the defendant's notice thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1734.]

2. DEATH §11—ACTION FOR CAUSING —
NATURE OF RIGHT.

Rights of action for wrongful death being created by statute, the beneficiaries take under the statute and not through the deceased.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 10, 15.]

3. EVIDENCE §236(1)—ACCIDENT — ADMIS-
SIONS OF DECEDENT PRIOR TO.

In action for death by wrongful act, deceased's statements prior to accident as to condition of his vehicle, are inadmissible on defendant's behalf, since plaintiff takes under the statute and is not bound by such statements.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 876, 881.]

4. MUNICIPAL CORPORATIONS §788(1)—DE-
FECTS IN STREET—NECESSITY OF NOTICE.

A city is not liable for injuries caused by street defects, unless it knew of, or by ordinary diligence might have discovered, the defects.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1641, 1646, 1652.]

Appeal from Superior Court, Wake County; Connor, Judge.

Action by Willard L. Dowell against the City of Raleigh. Judgment for defendant, and plaintiff appeals. Reversed, and new trial ordered.

This is a civil action and was brought for the recovery of damages for the wrongful death of the plaintiff's intestate, alleged to have been caused by the defendant's negligence, in failing to keep one of its streets in a reasonably safe condition. It appears that on the morning of March 22, 1914, R. L. Johnson, plaintiff's intestate, was driving along South street in the city of Raleigh, in a milk wagon drawn by horse; that the kingbolt was broken, and the body of the wagon was detached and fell, and Johnson, who was then sitting in the wagon, was thrown through the glass front of his wagon to the ground. He was taken up in an unconscious condition and in a few moments thereafter died. There was evidence, on the part of the plaintiff, that in South street at the point where the wagon fell to the ground there were three ditches, or excavations, across the street on the south side thereof, not far apart, and that when a vehicle ran into and across the ditches, or excavations, the front wheels would enter one about the time the rear wheels entered another; that this caused very violent and successive jerks of the wagon; that the first excavation to the south was from six to eight inches in

depth; the second excavation from eight to ten inches in depth, and a third, at the place where the wagon body fell to the ground, was from eight to ten inches in depth. On the morning in question, the street was covered with a light snow, which had been blown into the ditches and excavations, completely covering the same and leaving the street, to all appearances, safe for travel. There was also evidence tending to show that South street was one of the much-traveled streets of the city and that, at other points in the street there were holes and excavations which rendered the same unsafe. There was a policeman's call box near the holes or excavations where Johnson was killed which required policemen of the city to come to the place at short intervals of time. The defendant denied all negligence, and introduced evidence tending to show that the holes in question were of slight depth, and that the street at this particular place was in a reasonably safe condition for travel. The usual issues in actions for negligence were submitted to the jury. The judge instructed the jury in part as follows:

"You will exclude from your consideration any and all testimony as to the condition of South street or any part of it, other than the place where it is admitted that the wagon fell, for notwithstanding that the street may have been in bad condition elsewhere, and that the defendant may have been negligent as to the condition elsewhere, that would not make the defendant liable to the plaintiff in this case. So your inquiry will be, first, what was the condition of the street immediately at the point at which the wagon fell? Were there defects in the street? Were these defects such as to render passage over the street unsafe?"

In this connection, it may be stated that there was evidence that South street was in worse condition at other places than it was at the place where the intestate's injuries were received.

The jury answered the first issue "No"; that is, that there was no negligence. Judgment was entered for the defendant, and plaintiff appealed.

Douglass & Douglass and R. N. Simms, all of Raleigh, for appellants.

WALKER, J. (after stating the facts as above). [1] There are two questions to be considered in this case:

1. As to the condition of the street at places other than the one where the accident occurred. The court admitted the proof, or rather it seems to have been let in without any objection. It may be that, in its present form, it was not competent, as it extends to the entire length of the street and is not restricted to that part of it near the place where the intestate was killed. We find this stated in one of the authorities:

"For the purpose of proving or disproving negligence with respect to the particular defect or obstruction which caused the injury, evidence of similar defects, obstructions, or conditions existing at other places, or of like conditions, ob-

structions, or methods in other cities is ordinarily inadmissible. But evidence of similar defects, obstructions, or conditions in the immediate vicinity under like conditions is admissible as tending to show the existence of the particular defect or obstruction, or to fix constructive notice thereof on the municipality. Thus such evidence is generally held admissible where the accident or injury occurs on a sidewalk of uniform construction and material for considerable length, and the other defects or condition offered in evidence were in the same walk and vicinity."

Nor does it appear to what extent the other portions of the street were defective, nor whether the alleged defects were near to or remote from the one in question. We need not pass upon the admissibility of this evidence because there was no objection to it, and therefore express no opinion in regard to it. But plaintiff excepted to the instruction of the court relating to it, and we must ascertain if the benefit of it was taken away from him by the charge. The learned judge was right in stating that a defect at any other place in the street would not create a liability, unless they found that, by reason of defendant's negligence, there was a defect at the place where intestate was thrown from the wagon, and that his death was proximately caused by it, but the language of the court went beyond this, as we think, and excluded the evidence from the consideration of the jury. It is likely that it was not so intended, but that is the fair construction of it.

[2, 3] 2. The declaration of the intestate as to the condition of the wagon was incompetent. It was not a declaration against interest, as at that time he had no interest to serve or disserve. He had no cause of action himself, as his death was instantaneous, nor did he even have any interest in this cause of action. It is one not known to the common law, but created by the statute, and the beneficiaries take, not by any inheritance or succession from him, but solely because they are named in the statute as the recipients of the fund recovered for the death caused by the defendant's negligent or wrongful act. The cause of action never arose until the death of the intestate, and then not to him but to those who are designated by the statute to take the fund recovered. They acquire the right by the statute alone, and not because of any privity with the intestate, for none such exists between them, in any proper sense of that term. This is well settled by our decisions. *Baker v. Railroad Co.*, 91 N. C. 308; *Taylor v. Cranberry Co.*, 94 N. C. 528; *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997; *Killian v. Railroad Co.*, 128 N. C. 261, 38 S. E. 873; *Hartness v. Pharr*, 133 N. C. 571, 45 S. E. 901, 98 Am. St. Rep. 725; *Bolick v. Railroad Co.*, 138 N. C. 371, 50 S. E. 689; *Gulledge v. Railroad Co.*, 147 N. C. 234, 60 S. E. 1134; *Hall v. Railroad Co.*, 146 N. C. 345, 59 S. E. 879; *Bennett v. Railroad Co.*, 159 N. C. 345, 74 S. E. 883; *Broadnax v. Broadnax*, 160 N. C. 432, 76 S.

E. 216, 42 L. R. A. (N. S.) 725; Hood v. Telegraph Co., 162 N. C. 92, 77 S. E. 1094; Hartis v. Electric Railway Co., 162 N. C. 236, 78 S. E. 184, Ann. Cas. 1915A, 811. In Hood v. Telegraph Co., supra, the court said:

"The right of action for wrongful death, being conferred by statute at death, never belonged to the deceased, and the recovery is not assets in the usual acceptance of the term."

And in Hartness v. Pharr, supra, we said:

"Whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him, and this is so although the personal representative may be designated as the person to bring the action. * * * The latter does not derive any right, title, or authority from his intestate, but sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative, he may perhaps be liable on his bond for its proper administration."

This passage was quoted recently with approval in Broadnax v. Broadnax, supra, as was the following from Baker v. Railroad Co., 91 N. C. 310:

"The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it when recovered solely for the use of those who are entitled under the statute."

Our statute prescribes the method of paying out the fund, but the latter is free from the claims of legatees and creditors. The beneficiaries derive their right, therefore, as we have said, not from the intestate, but under the statute. These views are sustained by other courts, which hold that the cause of action created by statute for death caused by negligence is independent of any right of action the deceased may have had, or would have had if he had survived the injury. C. & O. R. R. Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Dennick v. C. R. Co., 103 U. S. 11, 26 L. Ed. 439; I. C. R. Co. v. Barron, 15 Wall. 90, 18 L. Ed. 591. Upon the subject of admissions or declarations of the deceased before or after the accident which caused his death, Tiffany, on Death by Wrongful Act (2d Ed.) § 194, says:

"The declarations of the deceased, although made under such circumstances as would, upon an indictment for homicide, render them admissible as dying declarations, are inadmissible on that ground. Whether the declarations of the deceased are admissible in favor of the plaintiff will depend upon whether they were made under such circumstances as to form part of the *res gestæ*. It would seem that such declarations, if not admissible as part of the *res gestæ*, are not admissible in favor of the defendant as admissions, since the plaintiff in such case does not claim in the right of the deceased, but upon a new cause of action."

This is the prevailing opinion, though he admits that there are some cases to the con-

trary, but when they are examined, it will be found that they rest upon the principle, or are largely influenced by it, that the declarations, by reason of the fact that they were made at the very time of the injury, or of their being concomitant therewith in some degree, and explanatory thereof, became *par rei gestæ*. The following cases treat them as inadmissible: Ohio & M. R. Co. v. Hammersley, 28 Ind. 371; Johnston v. Oregon, etc., R. Co., 23 Or. 94, 31 Pac. 283; Louisville, etc., R. Co. v. Berry, 9 Ind. App. 63, 35 N. E. 565, 36 N. E. 646; Id., 2 Ind. App. 427, 28 N. E. 714; L. & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. 737, 6 Am. St. Rep. 840; Fitzgerald v. Town of Weston, 52 Wis. 354, 9 N. W. 13. In the case last cited, the court held that where the widow brought an action to recover for the death of her husband which was alleged to have been caused by defendant's negligence, any declarations she had made during the life of her husband after the accident were competent only to contradict her, as a witness at the trial for herself, but were not competent, as declarations against interest, even against herself as plaintiff in the action, to be used as substantive testimony and the court said:

"Nor do we think they were admissible as being made by a party in interest, within the meaning of the rule. When the plaintiff made these declarations, she had no interest in the cause of action against the town by reason of the injury to her husband, caused by a defective highway. It is only in consequence of his death, subsequent to such declarations, that she has the right of action under the statute. But, as we understand the rule, the declarations, to be admissible, must be against the interest of the person making them at the time when they were made. 1 Greenl. Ev. 147."

And to the same effect is L., etc., R. Co. v. Berry, supra, 9 Ind. App. 63, 35 N. E. 566:

"In the case at bar the injury sued for was originally and primarily inflicted upon the appellee, and no part of the damages described in the complaint and awarded by the jury could have been recovered by the deceased had he survived the injury. Mayhew v. Burns, 103 Ind. 328, 2 N. E. 798. His services during his minority belonged to the appellee, as his lawful right, and it was not within the power of the deceased son to have legally defeated this right. Consequently, upon the clearest principles of law, the admissions of the deceased could not bind the appellee. As bearing somewhat upon this question, see Insurance Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; Lawson, Rights, Rem. & Pr. § 1108. Appellant assails the correctness of the statement above quoted, in so far as it states 'that the admissions of the deceased could not bind the appellee,' and insists that the authorities cited do not sustain it. The assault is not well founded. The word 'admission' is here used in the sense of a declaration against interest. As in the nature of things it was not possible for the deceased to have any interest in the subject-matter of this controversy, his declaration could not admit away a right he did not possess."

The court held that the evidence was competent as part of the *res gestæ*, and could be considered therefore on the motion to re-

verse upon the evidence—a very different question. In *Hartis v. Electric Railway Co.*, 162 N. C. 236, 78 S. E. 164, Ann. Cas. 1915A, 811, a deposition taken in a suit by the injured party was permitted to be read in a subsequent action by his administrator after his death, but this was allowed upon the ground that the questions under investigation in the two suits were substantially the same, and there had been full opportunity to cross-examine in the first case, and that the administrator was plaintiff in both actions. The principle now applied in this case was fully recognized there.

We conclude, therefore, that the court should not have admitted the declaration against plaintiff's objection.

[4] But the city cannot be held liable unless it had, or should have had, notice of the defect, if one existed. "The governing authorities of a town are charged with the duty of keeping their streets and sidewalks, drains, culverts, etc., in a reasonably safe condition; and their duty does not end at all with putting them in a safe and sound condition originally, but they are required to keep them so to the extent that this can be accomplished by proper and reasonable care and continuing supervision. Code, § 3803; *Bunch v. Edenton*, 90 N. C. 431; *Russell v. Monroe*, 116 N. C. 720, 21 S. E. 550, 47 Am. St. Rep. 823. The town, however, is not held to warrant that the condition of its streets, etc., shall be at all times absolutely safe. It is only responsible for negligent breach of duty, and, to establish such responsibility, it is not sufficient to show that a defect existed and an injury has been caused thereby. It must be further shown that the officers of the town 'knew,' or by ordinary diligence might have discovered, the defect, and the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. It will be observed that actual notice of a dangerous condition or defective structure is not required, but notice may be implied from circumstances, and will be imputed to the town if its officers could have discovered the defect by the exercise of proper diligence." *Fitzgerald v. Concord*, 140 N. C. 110, 52 S. E. 309 (citing and quoting 1 Sh. & Redf. Neg. § 369).

Before a case of actionable negligence is made out, the jury must find that there was a dangerous defect in the street; that it was there by reason of defendant's negligence, or its failure to repair, after actual or constructive notice of it; that it—and not the defective wagon, if the latter was defective—was the proximate cause of the intestate's death, the burden being on the plaintiff to show negligence and on the defendant as to any contributory negligence.

There will be a new trial for the error above indicated.

New trial.

(173 N. C. 206)

In re STONE. (No. 249.)

(Supreme Court of North Carolina. March 23, 1917.)

1. DEATH ~~§~~31(1)—FEDERAL EMPLOYERS' LIABILITY ACT—RIGHT TO RECOVER.

Federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. 1913, § 8657) § 1, creates three classes, and if there is a widow, husband, or children, all other persons are excluded from recovery, and if there is none of such class, and there are parents, all other persons are excluded, and if there are none of the first two classes, next of kin dependent upon the employé can recover, but if next of kin are not dependent, there can be no recovery.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 46.]

2. APPEAL AND ERROR ~~§~~223—FEDERAL EMPLOYERS' LIABILITY ACT—RIGHT TO RECOVER—PRESERVATION OF EXCEPTIONS.

In action under federal Employers' Liability Act for death of servant, if recovery by next of kin be enlarged by wrongful inclusion of one not dependent, the objection must be raised at trial by proper exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1338-1342, 1344, 1346-1350.]

3. DEATH ~~§~~101—FEDERAL EMPLOYERS' LIABILITY ACT — AMOUNT OF RECOVERY BY CLASSES.

Since the federal Employers' Liability Act merely provides the order in which classes of relatives of the deceased workman can recover, the portion of recovery by each class is governed by the state statute.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 132-139.]

4. DEATH ~~§~~101—FEDERAL EMPLOYERS' LIABILITY ACT.

In action for death of servant brought under federal Employers' Liability Act, amount allotted to various heirs is of no consequence to employer, unless it increases total recovery.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 132-139.]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Wake County; Bond, Judge.

In the matter of the accounting of Carey Stone, as guardian of Thomas S. Stone, an infant on the application of Emmett P. Stone, uncle of Thomas S. Stone. From the decree rendered, the guardian appeals. Affirmed.

This proceeding was begun before the clerk whose decision was affirmed in the superior court upon appeal. It is admitted that the deceased was killed while employed by the Seaboard Air Line Railroad Company in interstate commerce and left a widow 31 years old and one son 11 years old, and that the net amount received by her as administratrix of her husband after payment of attorney's fees was \$9,750, and that they are both dependent and are the sole beneficiaries. It is agreed that property owned by either, if any, shall not be considered in passing on this question; that both are in good health; that the boy lives with his mother; and that their relations to each other are such as usually prevail between mother and minor

son. It is admitted that the money received was paid by compromise to the administrator without action, and that the decedent had taken care of his wife and child. Upon these facts the counsel for the widow moved the court to submit to the jury issues as to the relative rights of herself and her child in the fund or to refer it to a referee to ascertain the amount due each. The court refused to do this, and affirmed the order of the clerk to divide the fund in accordance with our statute of distributions, allotting to the widow one-third and the child two-thirds, and directed that the widow should give an administration bond in the sum of \$13,000, being double the amount of the \$6,500 allotted to the child. From such judgment she excepted and appealed.

Douglass & Douglass, of Raleigh, for appellant. Moses N. Ams and Winston & Biggs, all of Raleigh, for infant.

CLARK, C. J. The net sum received by the administratrix under the compromise and settlement with the railroad company stands on the same basis as if it had been recovered by action. The sole question presented, therefore, is whether the compensation for wrongful death of an employé while engaged in interstate commerce, already ascertained and determined, is, on the facts of this case, to be apportioned according to our statute of distributions. The federal Employers' Liability Act provides that the action shall be brought by the personal representative of the deceased employé—

"for the benefit (1) of the surviving widow, or husband and children of such employé; and, if none, then (2) of such employé's parents; and if none, then (3) of the next of kin dependent upon said employé."

[1, 2] The federal statute therefore creates three classes, which are separate and distinct from the other. If there is any member of the first class, the other two are excluded. If there is none of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision "dependent upon such employé" (Allen, J., *Dooley v. Railroad*, 163 N. C. 454, 79 S. E. 970, L. R. A. 1916E, 185), then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery. If the recovery by "next of kin" should be enlarged by the wrongful inclusion of one not "dependent," that question must be raised at the trial by proper exceptions. *Railroad v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

[3] The federal Employers' Liability Act declares who shall take in case of wrongful death, but leaves it as a matter of law how much and what proportion each shall take in its class, except when the state act requires that the apportionment must be made in the verdict as in *Railroad v. McGinnis*,

228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, under the Texas Act. The federal statute makes no provision for the apportionment of the fund, and therefore the state statute controls. The source of the recovery is the United States statute, and that indicates only the different classes of the beneficiaries, and the manner of ascertaining the amount due. But when the amount and class are ascertained, the sum paid or recovered must be distributed in that class according to the requirement of the state law. In this case there being a widow and a child, the amount is to be divided between them according to our statute, two-thirds to the child and one-third to the widow. That matter is regulated by the state statute of distribution. *Railroad v. White*, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252.

It is true, as contended by the appellant's brief, that the classification of beneficiaries under the federal act must govern when it differs from the state act, but within the class entitled the federal act applies only so far as to restrict recovery in the third class to those who suffer some pecuniary loss, while under the state statute this is not so. When as here, the parties are in the same class, there being no conflict between the state and federal statute, the latter is silent, and the state statute controls the distribution.

In *Broadnax v. Broadnax*, 160 N. C. 432, 76 S. E. 216, 42 L. R. A. (N. S.) 725, the court held that the amount of recovery for wrongful death must, under Revisal, §§ 59 60, "be disposed of as provided for the distribution of personal property in case of intestacy and that it cannot be applied either in payment of debts nor can any part thereof be allotted to the widow on her year's support," and to the same purport *Neill v. Wilson*, 146 N. C. 242, 59 S. E. 674, but this does not exempt the share of the distributee from being liable to his creditors.

In *Hartness v. Pharr*, 133 N. C. 566, 45 S. E. 901, 98 Am. St. Rep. 725, it was held that where a person domiciled in another state is killed in this state and his administrator sues here the funds recovered must be distributed according to our statute although prior administration had been taken out in the state of his domicile, citing *Dennick v. Railroad*, 103 U. S. 11, 26 L. Ed. 439; *McDonald v. McDonald*, 96 Ky. 209, 28 S. W. 482, 49 Am. St. Rep. 289; *Nelson v. Railroad*, 88 Va. 971, 14 S. E. 838, 15 L. R. A. 533; *Morris v. Railroad*, 65 Iowa, 727, 23 N. W. 143, 54 Am. Rep. 39, and other cases. The reason is that the fund having been recovered in our jurisdiction, and not being assets for payment of debts, must be distributed according to our statute in such cases.

In *Kenney v. Railroad*, 167 N. C. 14, 82 S. E. 968, Ann. Cas. 1916E, 450, it was held that the meaning of the words "next of kin" in the federal Employers' Liability Act is,

dependent upon the state law regulating inheritances. This was affirmed on writ of error (*Railroad v. Kenney*, 240 U. S. 489, 36 Sup. Ct. 458, 60 L. Ed. 762, citing *Blagge v. Balch*, 162 U. S. at page 464, 16 Sup. Ct. at page 859, 40 L. Ed. 1039), that Congress intended that the "next of kin" should be determined "according to the statutes of distribution of the respective states of the domicile of the original sufferers," holding, further, that whether the next of kin occupied a dependent relation which would have entitled them to recover was foreclosed by the finding of the jury, as it is in this case by the adjustment of the amount by the parties in lieu of a verdict.

In regard to the cases relied on by the appellants *McGinnis v. Railroad*, 228 U. S. 173, 33 Sup. Ct. 426, 57 L. Ed. 785, presented a question whether, the recovery being limited to dependent relatives, a surviving child who was not dependent upon the decedent could recover anything. That is not the case here, where the amount is determined and the only question is as to the apportionment between the child and dependent widow. The same question as to making an allowance in the verdict arises in *Railroad v. Holbrook*, 235 U. S. 629, 35 Sup. Ct. 143, 59 L. Ed. 392.

In *Railroad v. White*, 238 U. S. 508, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252, it was held that the omission from the federal statute of the apportionment required by Lord Campbell's Act (and in only a few of the American states) indicated:

"The intention of Congress to follow the practice in most of the American states of not requiring such apportionment, and that where it was alleged that next of kin not dependent, and therefore not entitled to recover, were included and had thus swelled the amount of the recovery, the question of their exclusion, or rather wrongful inclusion, should be raised in an appropriate manner under the practice of the court in which the trial was had" (citing *Railroad v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159).

No question of that kind (which could concern the Railroad Company only) arises here, as the amount was settled by compromise, and both the widow and her son are entitled to recover in the first class.

In *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638, it was held that the state statute could not defeat the right of the widow, though childless, from recovery, because she is expressly embraced in the preferred class under the federal statute.

In *Railroad v. Leslie*, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478, it was held that a recovery under the federal statute would not be reversed on writ of error because the jury was not required to specify in its verdict the amount awarded on account of each distinct liability, where such verdict is in accordance with local practice. It was otherwise in the *McGinnis* Case, *supra*, for in

Texas it was held that the failure of the jury to apportion the damages assessed was error. *Tiffany on Death by Wrongful Act*, § 89.

[4] It is well settled that the amount allotted to each party entitled is of no concern to the defendant unless such allotment increased the amount of the total recovery. In this case, the amount being settled by agreement, the defendant is not concerned, and the sole question is as to the distribution which must be determined by the state statute of distribution. In apportionment states—Maryland, Texas and Virginia which substantially follow Lord Campbell's Act—the recovery should be apportioned by the jury or other appropriate tribunal. But in nonapportionment states, like North Carolina and probably all the other states not above named, while such fund must be distributed among the beneficiaries designated by the federal statute, yet the amount going to each distributee (if belonging to the class entitled to recover and dependent) must be disbursed according to our statute of distributions.

Upon the facts in this case the judgment was entirely correct, and must be affirmed.

WALKER and ALLEN, JJ., dissent.

(173 N. C. 755)

STATE v. ROGERS. (No. 241.)

(Supreme Court of North Carolina. March 28, 1917.)

CRIMINAL LAW § 656(2), 898 — TRIAL — REMARKS OF COURT — CURE OF ERROR.

In prosecution for cruelty to animals, it was prejudicial error for the court, during examination of defendant, to say, "Answer yes or no, and don't be dodging;" and such error cannot be cured by subsequent admonition, however often repeated, and however strong, not to regard the word "dodging."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1525, 2118-2121.]

Appeal from Superior Court, Wake County; Bond, Judge.

Shepard Rogers was convicted of cruelty to animals, and he appeals. Reversed, and new trial ordered.

R. N. Simms, of Raleigh, J. G. Mills, of Wake Forest, and Armistead Jones & Son, of Raleigh, for appellant. The Attorney General and R. H. Sykes, of Durham, for the State.

WALKER, J. Indictment for cruelty to animals, two mules, the property of Samuel Rogers. We are compelled to grant a new trial because of a remark of the judge to the defendant while testifying as a witness for himself. The cruelty alleged was in not feeding the mules properly or sufficiently. On cross-examination of the defendant, he was directed by the court to answer the questions concisely "and not be dodging," and de-

fendant excepted to the use of the words "and not be dodging." The judge then, and afterwards, in his charge, explained to the jury that he did not intend to reflect upon the witness, and, if he used the word "dodging," that they should not consider it. The judge further stated that:

"The witness had been cautioned before to make direct answers to the solicitor's questions, instead of making a detailed statement about matters not responsive to the questions, and remarked that the court could not take a whole week to try this case, and then asked the witness to listen to the questions and give direct answers to them, if he could."

The defendant again excepted. The court also told the jury that, when he used the word "dodging," he meant no reflection upon the witness; but he spoke to him as he did because, "instead of answering the question, he was talking about something else." Defendant again excepted.

The use of the word, especially when it was addressed by the court to the witness, while testifying for himself, was calculated, though not intended, to seriously disparage him, and in its usual and ordinary meaning, even though used or intended in a different sense, was a reflection upon him. It clearly implied that he was trying to evade telling the truth, if it did not, in its correct sense and as popularly understood, mean more. The learned judge, always fair and just in his rulings and conduct of a case, did all that could possibly be done, after using the word, to undo, or neutralize, the harm that it caused to the defendant, and if the case turned upon the explanation alone, we would not hesitate to overrule the exception, for it was explicit and ample, provided it was something that could be explained away or retracted. But we do not think it was of that character. It is difficult, if not impossible, to remove the prejudice created by such a remark from the bench. It obviously impeached the witness, as it imputed that he was trying not to tell the truth, if he could help it, or in other words, that he was "dodging" the truth, which would be strong evidence of his guilt, because, if he was innocent, the truth could not hurt him. The impression thus made on the jury against the defendant could not be eradicated by any explanation, or even a withdrawal of the word. In *State v. Cook*, 182 N. C. 586, 77 S. E. 759, indictment for murder, the expression of the judge was:

"What difference does it make if Pittman was advancing on him with a stick? That would not give him the right to kill Ben Coley."

This was held to be an expression of opinion, under the statute, and that it could not well be recalled so as to remove the prejudice caused by it. The court then said:

"While the statute refers in terms to the charge, it has always been the accepted construction that it applies to any such expression of opinion by the judge in the hearing of the jury at any time during the trial. *Pell's Revision*, § 535; *Park v. Exum*, 156 N. C. 228 [72 S. E. 309]; *Withers v. Lane*, 144 N. C.

184 [56 S. E. 855]; *State v. Dick*, 60 N. C. 440 [86 Am. Dec. 439]. The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added, 'But the court has no right, nor has it the inclination, to express an opinion about the case;' but the forbidden impression had already been made, and as to the vital portion of prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose. *State v. Dick*, supra; *State v. Caveness*, 78 N. C. 484. In *State v. Dick*, the court held: 'Any remark made by a judge, on the trial of an issue by a jury, from which the jury may infer what his opinion is, as to the sufficiency or insufficiency of the evidence, or any part of it pertinent to the issue, is error, and the error is not corrected by his telling the jury that it is their exclusive province to determine on the sufficiency or insufficiency of evidence, and that they are not bound by his opinion in regard thereto.'

We said in *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855, regarding an intimation of opinion by the judge upon the evidence adverse to one of the parties:

"This may be done by his manner or peculiar emphasis, or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again, the same result will follow the use of language or a form of expression calculated to impair the credit which might otherwise and under normal conditions be given by the jury to the testimony of one of the parties. *State v. Dancy*, 78 N. C. 437; *State v. Jones*, 67 N. C. 285. It can make no difference in what way the opinion of the judge is conveyed to the jury, whether directly or indirectly. The act forbids an intimation of his opinion in any and every form, the intent of the law being that each of the parties shall have an equal and a fair chance before the jury."

And Judge Nash, construing the statute in *Nash v. Morton*, 48 N. C. 3, said:

"We all know how earnestly, in general, juries seek to ascertain the opinion of the judge [who is] trying the cause upon the controverted facts, and how willing they are to shift their responsibility from themselves to the court. The governing object of the act was to guard against such results, and to throw upon the jurors themselves the responsibility of responding to the facts of the case. Nor is it proper for a judge to lead the jury to their conclusions on the facts."

The general result is that the defendant has been made to carry a greater burden during the trial than the law imposed upon him. As again said in the *Withers Case*:

"The books disclose the fact that able and upright judges have sometimes overstepped the limit fixed by the law; but as often as it has been done this court has enforced the injunction of the statute and restored the injured party to the fair and equal opportunity before the jury which had been lost by reason of the transgression, however innocent it may have been; and we must do as our predecessors have done in like cases. Our view that the charge violated the statute is sustained by the cases already cited, to which the following may be added: *State v. Bailey*, 60 N. C. 137; *State v. Thomas*, 29 N. C. 381; *State v. Presley*, 35 N. C. 494; *State v. Rogers*, 93 N. C. 625; *State v. Dick*, 60 N. C. 440 [86 Am. Dec. 439]; *Reel v. Reel*, 9 N. C. 63; *Reiger v. Davis*, 67 N. C. 185; *State v. Davis*, 15 N. C. 612; *Sprinkle v. Foote*, 71 N. C. 411; *Powell v. Railroad*, 68 N. C. 395."

The error is one of the unguarded slips, or casualties, which may happen to the fairest, most impartial, and most circumspect in the progress of a trial on the circuit. "When once committed, however," said Judge Manly, "it is irrevocable, and the prisoner was entitled to have his case tried by another jury." *State v. Dick*, supra. Chief Justice Taylor used similar language in *Reel v. Reel*, supra: "We are not unaware," said that able and learned judge, "of the difficulty of concealing all indication of the conviction wrought on the human mind throughout a long and complicated cause, but the law has spoken and we must obey." It may be that all prejudice was removed from the jury box by the judge's full and careful explanation, but we cannot know that this is true. It is not because we are sure that harm was actually done, and continued to have its effect upon the jury even after the caution given by the judge, but it is because it may have prejudiced the defendant, that another trial is ordered. We commend the earnest effort of the judge to eradicate the harmful word, which we know was accidentally and unintentionally used, without at the time realizing its meaning or injurious effect.

New trial.

(173 N. C. 695)

MIZELL v. NORFOLK SOUTHERN R. CO.
(Nos. 11, 12.)

(Supreme Court of North Carolina. Feb. 21, 1917.)

Appeal from Superior Court, Washington County; Whedbee, Judge.

Separate actions by Mrs. Adel Mizell and by her son against the Norfolk Southern Railroad Company. Judgments for plaintiffs, and defendant appeals. No error.

This is an action in which the plaintiff recovered \$75 damages because of the unreasonable delay of the defendant in transporting her as a passenger from Hoke station to Plymouth, and on account of the failure of the defendant to supply her with sufficient and proper accommodations while in its station at Mackeys Ferry, in which she was detained several hours.

Small, MacLean, Bragaw & Rodman, of Washington, N. C., for appellant. Ward & Grimes, of Washington, N. C., for appellees.

PER CURIAM. There was ample evidence to sustain the verdict in favor of the plaintiff and the judgment of nonsuit was properly overruled.

We have examined the other exceptions, and find nothing in them which would justify a new trial or which require discussion.

The son of the plaintiff, about eight years of age, accompanied the plaintiff at the time of her injury, and he instituted an action in which he recovered \$25, and, as the same questions arise, the same disposition is made of the appeal in the action in which he is the plaintiff.

No error.

(173 N. C. 711)

WORTH CO. v. INTERNATIONAL SUGAR FEED No. 2 CO. (No. 283.)

(Supreme Court of North Carolina. March 28, 1917.)

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by the Worth Company against the International Sugar Feed No. 2 Company, in which the Bank of Commerce & Trust Company intervened as claimant of the attached property. Judgment for plaintiff, and intervener appeals. Affirmed.

Civil action, tried upon these issues:

(1) What amount, if any, is plaintiff entitled to recover of defendant feed company? Answer: \$106.50, with interest.

(2) Is the intervener, Bank of Commerce & Trust Company, owner of the proceeds of the draft offered in evidence, and entitled to possession of same? Answer: No.

From the judgment rendered the intervener appealed.

Jno. D. Bellamy & Son and Emmett Bellamy, all of Wilmington, for appellant. J. O. Carr and Rountree & Davis, all of Wilmington, for appellee.

PER CURIAM. This case was before us at last term. 90 S. E. 295. The questions of law involved are fully discussed in the opinion of the court. A new trial was directed. The second issue was properly submitted, and there is sufficient evidence to support the verdict. The case appears to have been tried in full accord with our opinion.

No error.

(106 S. C. 478)

TRUE v. CUDD. (No. 9633.)

(Supreme Court of South Carolina. March 8, 1917.)

1. HUSBAND AND WIFE \Leftrightarrow 235(2) — **AGENCY—QUESTION FOR JURY.**

In an action for money alleged to have been loaned by plaintiff through her husband to the defendant whether the plaintiff's husband was manager of defendant's store at the time of the loans, and not plaintiff's agent, held for the jury.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 589, 850, 982.]

2. PRINCIPAL AND AGENT \Leftrightarrow 20(1) — **EVIDENCE OF AGENCY—ADMISSIBILITY.**

In an action for money alleged to have been loaned by plaintiff through her husband to the defendant, an advertisement showing that the husband was manager of defendant's store in 1911 was competent as proof of a circumstance to be taken with the further circumstance that he was in the store in 1910 when the loans were made, to prove that he was manager in 1910.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 37.]

3. EVIDENCE \Leftrightarrow 248(2) — **DECLARATIONS OF HUSBAND AS BINDING ON WIFE.**

In an action for money alleged to have been loaned by plaintiff through her husband to the defendant, declarations made by plaintiff's husband in another case to which plaintiff was not a party that plaintiff was the owner of defendant's business, were not binding on plaintiff or competent to prove that she was the owner of the business in the absence of authority given her husband to speak for her.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 954.]

4. TRIAL \Leftrightarrow 194(11) — **INSTRUCTIONS.**

In an action for money alleged to have been loaned by plaintiff through her husband to the defendant, a charge that plaintiff was not bound by declarations of her husband in another suit, admitted to discredit the husband's testimony, was a charge to disregard incompetent testimony, and not a charge on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 458-460.]

5. HUSBAND AND WIFE \Leftrightarrow 25(2) — ACTS OF HUSBAND BINDING ON WIFE.

Where plaintiff through her husband loaned money to defendant, the fact that the husband gave it to defendant as an investment in his store, and not as a loan, would not bind plaintiff, unless she authorized her husband to act for her.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 149.]

6. HUSBAND AND WIFE \Leftrightarrow 25(6)—AGENCY—EVIDENCE—SUFFICIENCY.

In an action for money alleged to have been loaned by plaintiff through her husband to the defendant, evidence held not to show the relationship of principal and agent between plaintiff and her husband respecting the money placed in the husband's hands to be given to defendant.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 527.]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. L. Glenn, Special Judge.

Action by Puella L. True against J. N. Cudd. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant's fifth request to charge is as follows:

"(5) That a person has no right to make another person his debtor without the consent of such other person, and if a stranger pays the debt of another person, without any solicitation on his part and without taking any assignment of the obligation which he paid, then such stranger is not entitled to recover."

The court gave same, modified as follows:

"That I find, gentlemen of the jury, has been decided to be the law of this state. I think the case is dated exactly 100 years ago, Mr. Carson, and is correct. But in that connection I would say that that principle of law does not prevent one from buying a claim against another. In other words, Mr. Foreman, it is none of my business, because the law says in that case it would be an intermeddling to be going around and buying your debts; but if one of the counsel here had a claim, either an account or a note, against you, I would have a perfect right in law to go and buy that note and buy that account, and I would hold it against you just as counsel would. In other words, that principle of law announced here that if a man pays a debt of another without any solicitation on his part and without taking an assignment of the obligation, such stranger is not entitled to recover, that is, I could not get a cause of action against you by intermeddling in your business, volunteering to pay something that was doubtful, anything of that kind. But any man has a right to buy a claim against another man, to pay money for him; in that sense of the word, he has a right. I see Mr. Carson has limited this, without taking an assignment of the obligation."

Carson & Boyd, of Spartanburg, for appellant. Lyles & Daniel, of Spartanburg, for respondent.

GAGE, J. The plaintiff sued the defendant for \$789.94 money loaned to him. She alleged in brief that the defendant had a store, and had her husband for manager, and she loaned the defendant through her husband for the business of the store the said

sum of money, in differing amounts and at different times.

The defendant alleged a totally different story. He admits that he acquired the store at the bankrupt sale of S. E. True & Co. in August, 1910, and that he continued to conduct the business as S. E. True & Co., and sometimes as True's department store; but the defendant alleged that prior to the bankrupt sale he made an agreement with S. E. True, whereby True would soon after the bankrupt sale organize a company to take over the business and relieve the defendant; that defendant was to "finance" the repurchase for \$1,500; that the money so paid by the plaintiff "was a part of the purchase price at the bankrupt sale," and "was accepted by the defendant as part of the consideration of the contract between the defendant and S. E. True"; that True continued to be about the store until 1911 without any employment by defendant; that the plaintiff well knew of the aforesaid plan of her husband.

There is no allegation that True's plan to take over the store ever came to fruit; nor is there any allegation or proof that Cudd ever ceased to own the store. He testified he owned it from August, 1910, on. Betwixt these two tales the jury was constituted to judge, and it found for the plaintiff.

The defendant has appealed from the judgment upon five grounds; these have each been argued, and each will be separately examined. The payments hereinbefore referred to were made in the months of August, September, and October, 1910, as is herein-after particularly set out. At the trial, the plaintiff offered in evidence, and it was received, an advertisement made by the defendant July, 1911, in which it was recited "that S. E. True had resigned his position as manager of True's department store." The defendant objected to the testimony because "all these matters are dated 1910." The inference and argument is that, because True was manager in 1911, there is no reason to conclude he was manager in 1910.

[1] The defendant does not pretend that S. E. True was ever owner or part owner of the store after the defendant bought the bankrupt stock, and that though S. E. True used \$908.44 of his wife's money in it; but the answer admits he was "about the store" in 1910, and the admission is that Cudd owned the store after August, 1910. In what capacity was S. E. True there? Cudd testified: "I didn't consider True manager; he was there looking after the business." The advertisement in July, 1911, recited that he had resigned as manager. If True was "about the store" from August, 1910, and his resignation as manager was announced in July, 1911, it was for the jury to infer whether he was there in 1910 as a hanger on, or as manager for the defendant.

[2] It would have been perfectly competent to prove, other than by the advertisement, that True was in fact manager in January, 1911, and to rest upon that circumstance and the further circumstance that he was in the store in 1910 to prove that he occupied the same relationship to the store when he was there in 1910, as he confessedly occupied in 1911. The advertisement did no more, and it was relevant and competent. Of the four cases cited by the appellant, two of them involved the competency of an agent's declaration; one of them involved the power of railroad officer to bind his principle by an admission after the event; in one of them the issue was whether a bulletin order was printed in time-tables of years previous to 1891, and it was held that a time-table of 1891 was not competent to show the fact. None of those cases are determinative of this case.

[3] The second exception is to the charge, and partly upon the ground it was on the facts. Cudd had been sued in a magistrate's court in 1911 by one Stanford, and apparently for the price of goods sold to this same store. In that action True is said to have testified that the store belonged to his wife, the plaintiff here, and that she alone had put any money in it; that Cudd had an interest in the store, but had put no money in it, and only guaranteed the bills. The court allowed that testimony to discredit True's testimony in the instant action, but charged the jury that as Mrs. True was not a party to that case, she was not bound by anything done in it. The defendant excepts to the limitation put on the testimony. The court was clearly right; that which S. E. True said outside of the instant case is a declaration. Such a declaration was not competent testimony in the instant action to prove that Mrs. True was owner of the business; and if it was not offered for that purpose it had no relevancy, except to contradict S. E. True, and it was allowed for that.

A married woman's rights would have no sort of security if she was bound by her husband's declarations, unless she set him to speak for her. The declarations, if he made them, put S. E. True in a discreditable attitude, but they did not touch the wife's integrity. It is suggested by the appellant, however, that S. E. True was representing Mrs. True in the Stanford suit. There is no evidence of that. It is true Mrs. True did testify that "Mr. True has represented me all the while in these matters"; but the witness was plainly referring to the money she loaned to the store through S. E. True. She was not questioned about S. E. True's testimony in the Stanford Case.

[4] She distinctly testified that she loaned the money to the store, and she did not know who owned the store, but that she did not. The charge had no sort of approach to the facts. In *State v. Mitchell*, 56 S. C. 524, 35 S. E. 210, the court did tell a jury it might

throw out some of the competent testimony where there were contradictions in the testimony, and that of course was held to be error. But the court here told the jury not to consider incompetent testimony. The cases have no likeness to one another. The court declined to charge the jury:

"That if the plaintiff in this action acted through her husband as her agent in the transactions involved in this controversy, then she is bound by all the facts of which her husband had notice or knowledge."

The third exception challenges the refusal. Standing alone, unrelated to the case as made by the testimony, the proposition is sound. Applied to the testimony, it is irrelevant, and therefore unsound. What facts at issue in this controversy did S. E. True have knowledge of?

[5, 6] The issue tried was: Did Mrs. True lend the money to the store, or invest it in the store as owner? If S. E. True knew she was owner and not creditor, that would not bind her unless she authorized him to act for her. She did not put the money in his hands to use as he thought best; there is no such testimony. There is no testimony to create the relationship of principal and agent betwixt the plaintiff and S. E. True, except the testimony that she gave the money to S. E. True to pay the store's debts. The testimony does not suggest any other sort of agency, directly or indirectly. Cudd's testimony shows he alone owned the business, and he does not connect Mrs. True with it in the least. Mrs. True must have said or done something which constituted S. E. True her agent. Her testimony is:

"It was represented to me by Mr. True that it was an emergency requiring that \$500 check and some additional money \$50 in cash, to complete the purchase price, inasmuch as the bank had loaned \$18,000. That was my understanding of it. And they were unable to secure more money, therefore the \$550 was needed. In addition to the \$550, I had the \$50 paid in cash. I gave it to Mr. True with the understanding that it was to serve as part of the purchase price of the stock of goods. I understood that Mr. Cudd was purchasing the stock of goods."

The last sentence explains what she meant by "purchase price." It is plain S. E. True's agency was a very limited one, to take the money from Mrs. True, and let it help pay for the stock which "Mr. Cudd was purchasing." The court fully charged the jury about Mr. True's power as Mr. Cudd's agent to take the money and bind Cudd for its payment; and to that there is no exception.

The fourth exception is to the court's refusal to grant a new trial. The grounds of the motion were the same as those made here, and which we have considered.

Finally, there is an exception because after the court had allowed the fifth request, the court proceeded to further discuss the subject-matter of the request, and erred in what was then said. Let the request and the alleged modification be reported. What the court then said is manifestly correct; that is

not denied. Its relevancy to the issue that was in hand is denied.

The testimony put in issue five items paid by Mrs. True, to wit:

Aug. 4, 1910—Money advanced by check \$500 and cash \$50.....	\$550 00
Aug. 27, 1910—Money advanced by check for merchandise bought of R. S. Oglesby & Co., Lynchburg, Va.	350 00
Aug. 28, 1910—Money advanced to pay A. G. Blotcky Advertising Company for advertising bankruptcy sale	100 00
Oct. 5, 1910—Money advanced for payment of merchandise bought of A. Simon, of New York.....	86 00
Sept. 6, 1910—Money advanced for payment to E. H. De Camp for advertising for store.....	12 00

The matter now up has, counsel admits, no relevancy to the first item, but to the other four. The plaintiff testified that when she paid the Oglesby item "it was directly a loan to the business." The three other items aggregating only \$196 were all debts due by the store; and the court fully charged the jury about S. E. True's power to bind Cudd by his management of the business, and by his payment of these items with plaintiff's money. All these four payments were referable to that power, and not to any supposed volunteering of Mrs. True to pay Cudd's debts. We think, therefore, the request had doubtful relevancy, and the modification had also doubtful relevancy.

The judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 501.)

SAINÉ v. HERTZOG. (No. 9639.)

(Supreme Court of South Carolina. March 15, 1917.)

1. CONTINUANCE ⇨49 — COSTS — CONSTRUCTION OF ORDER.

An order granting a continuance provided costs be paid within 20 days is complied with where payment is made immediately upon the court's confirmation of the clerk's taxation.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 143-145.]

2. LANDLORD AND TENANT ⇨120(1)—EVICTION—NATURE OF RIGHT.

Under a rental agreement for a period agreeable to the landlord, the tenant must vacate when requested.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 416-421, 425, 432.]

3. LANDLORD AND TENANT ⇨180(6) — EVICTION—INSTRUCTION.

An instruction that plaintiff tenant cannot recover for defendant landlord's locking her out of her room if she agreed to vacate is erroneous, because allowing eviction without notice and before removal of the tenant's goods.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 729.]

4. LANDLORD AND TENANT ⇨120(1)—EVICTION—LANDLORD'S RIGHT.

The manner and time in which landlord may terminate a lease is not dependent upon his tenant's reputation for chastity.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 416-421, 425, 432.]

5. LANDLORD AND TENANT ⇨180(5)—EVICTION—DAMAGES.

One thousand dollars damages, reduced by the trial court to \$500, held not excessive where plaintiff tenant was wrongfully ejected by her landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 728.]

Appeal from Common Pleas Circuit Court of Spartanburg County; J. Lyle Glenn, Special Judge.

Action by Olivia M. Saine against J. P. Hertzog. Judgment for plaintiff, and defendant appeals. Affirmed.

J. C. Otts, of Spartanburg, for appellant. Gwynn & Hannon, of Spartanburg, for respondent.

GAGE, J. Action for tort. Verdict for \$1,000 "actual damages." Reduced by the court to \$500. Appeal by the defendant.

The plaintiff was a nurse, and took lodging at the defendant's apartment. She alleged that the defendant wrongfully put her out. The defendant alleged the woman surrendered the room by agreement with him.

There are seven exceptions; but the appellant's counsel has argued them under four heads. Let these heads, found at folios 4 to 7 of appellant's argument, be reported.

The circumstances of the case are these: The testimony of both parties tends to prove that plaintiff took lodging at the defendant's apartment house on January 24th. The rent of the room was \$10 per month, payable at the end of each month. The rent was paid on February 24th and on March 24th. From this point the parties differ in their testimony. The defendant testified that on Saturday, the 28th of March, he asked the plaintiff to vacate the room; that she answered that would suit her, and she would move out the next day, or on Monday; that he saw her the next day, which was Sunday, and saw her no more until April 24th; that he constantly watched for her in order to see her, but could not meet her; that he waited until Saturday, April 11th; that he had heard a great many reports; that on that day he did not consider her due any rent; that on April 11th he changed the locks on the door; (on cross-examination) that the plaintiff was a tenant of his on April 24th "in so far as she had charge of the room, and she had her stuff in it"; that plaintiff paid him \$10 on April 24th, when she moved her belongings out. The defendant also testified on cross-examination that he got rid of the plaintiff because her reputation for chastity was not good; that he had "seen her stepping up

close to men and stepping on their toes; there are a lot of little ways hard to explain and still you can catch on." The plaintiff testified that around the 28th of March the defendant did ask for the room; that she did not tell the defendant on what day she would give up the room, but she was going soon; that she did not intend to leave until her month was up, and she had two weeks; that she left the city on April 11th and went into the country to spend the day; that she returned in the evening and found her door locked; that she asked for the key, and was told by the negro porter she could not get in; that she then went to a hotel; that she tried next morning, and several times thereafter, to see Mr. Hertzog, but could not get an interview with him; that she finally saw him on April 24th and paid the rent, \$10, and moved her belongings.

[1] 1. We are of the opinion that the court rightly construed the order made by Judge Efrd on plaintiff's motion for continuance. That order was made at the May term. The court granted the continuance, and made this order:

"The above matter comes before me on a motion to continue the case on plaintiff's motion. On consideration of the affidavits submitted, it is ordered that on the payment of cost within 20 days from the rising of the court said case be continued until the July term; otherwise that it be dismissed with costs.

"C. M. Efrd, Presiding Judge.

"May 31st, 1915."

The clerk taxed the costs on the heels of adjournment, but the plaintiff excepted to the taxation. The issue of a rightful taxation was decided at the instant trial, and the clerk was sustained, and the costs were immediately paid.

The direction of Judge Efrd was to pay, of course, the costs prescribed by statute. That could not be known until the circuit court had adjudged the question on appeal from the clerk's taxation. That done, the costs were paid. The order did not contemplate the payment of illegal costs at the peril of a dismissal of the action. It is beside the question that the taxation of costs turned out to be correct.

[2, 3] The court modified two of the defendant's ten requests. They were the fourth and the tenth. The modification in each instance consisted in an omission of a part of the request. And such action of the court is the grievance now to be considered. The fourth request dealt with the law of the contract of rental. It embodied three postulates, of which the first is not in issue. The others are:

"(2) If you find that at the time the rental agreement was made it was for such time only as was agreeable to the defendant landlord, it was the plaintiff's duty to vacate the rooms when requested to; (3) or, if you find that, when requested to vacate the room, she agreed to do so, the plaintiff *cannot recover*."

The numerals and italics have been supplied.

The second postulate was manifestly sound, and was allowed. The third postulate is as manifestly unsound; it assumes that, even though the woman agreed to vacate, the man was excusable in what he did to secure her vacation.

Such a charge would be equivalent to instructing the jury that the defendant had the legal right to put a lock on the plaintiff's room and bar her out in the way she described while her belongings were in it, for the reasons that moved him, and without notice to her.

[4] 3. The tenth request dealt with the manner of ejectment. It also had two distinct postulates:

"(1) If the defendant did this (put the lock on the door) in a reasonable and *legal way*, and for the protection of his house, and that he had reasonable grounds for so acting, the plaintiff cannot recover; (2) and in so doing (putting the lock on the door) the defendant had the right to *act* upon the reputation of the plaintiff."

The numerals and italics are supplied.

The first postulate was allowed; and well might it have been; for, if the defendant preceded in a legal way, he did not do an illegal act.

The second postulate was not allowed, and the appellant's counsel stated at the bar that such disallowance made "the vital question" in the case.

We think the circuit court was clearly right. The chief wrong the plaintiff has complained of is the way in which the defendant ejected her. The landlord had the right and in a proper way to terminate the tenancy with or without cause, whether the tenant was of good or of ill repute. But he had not the right to use one method to terminate the tenancy in the one case, and another method to terminate the tenancy in the other case. Granting that the plaintiff was of ill repute, that fact did not warrant the defendant to eject her before her term was out, without notice to her. So that the reputation of the plaintiff had no legal relationship to the act which the defendant was charged to have done, and which the jury found he did do.

[5] 4. The fourth and last issue set out by the appellant is that no actual damage to the plaintiff was proven; and, as the verdict was alone for "actual damage," the verdict must go. If the plaintiff did not consent to give up the room on March 28th, then she had the legal right to occupy it up to April 24th; and if the defendant, on the 11th of April, intending to do so, and without the plaintiff's knowledge and without notice to her and against her will locked her out, then he violated her rights, which is another way of saying the defendant committed a legal wrong against the plaintiff.

The plaintiff sued for compensatory, sometimes called actual, damages, and for exemplary damages. There was no special damage alleged or proven. The jury gave actual damages in express words, and by implication in

the light of the charge excluded exemplary damages.

The appellant's contention is that, although the plaintiff may have been entitled to actual damages, yet by the proof these were only nominal, a pepper corn; and that appears as a matter of law. The damages awarded, and now standing at \$500, are surely more than nominal. So the issue is: Was the jury restricted, under the case before stated, to award nominal damages?

The appellant argues that a recovery for mental anguish is not allowable unless there concur with it physical hurt. And that seems to be so. But this is not a case of mental anguish. The woman was put out of her room, as the jury found, by constructive force, and without right; and while she had to go to a hotel and pay board there for some days, yet the essence of her action lies in the circumstance that her right was trampled upon.

In such a case the legal scales may not be too nicely and too artificially adjusted. Their draw and their correction ought in most cases to be left to a jury and to the trial court. *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387, 38 L. Ed. 224; *Bennett v. Railroad*, 98 S. C. 55, 79 S. E. 710, and cases therein cited.

In the instant case the court lent willing ear to the defendant's plea that the verdict was excessive, and reduced it by one-half.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(106 S. C. 511)

BLASSINGAME v. GREENVILLE COUNTY.
(No. 9641.)

(Supreme Court of South Carolina. March 16, 1917.)

APPEAL AND ERROR ¶110—DECISIONS REVIEWABLE—GRANT OF NEW TRIAL.

An order granting a new trial based upon questions of fact and where the Supreme Court cannot render an absolute judgment is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 740-748.]

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by J. T. Blassingame against Greenville County. From an order granting plaintiff a new trial, defendant appeals. Appeal dismissed.

W. G. Sirrine, of Greenville, for appellant. B. A. Morgan and Cothran, Dean & Cothran, all of Greenville, for respondent.

HYDRICK, J. This appeal is from an order granting a new trial on the ground that the verdict found for plaintiff was insufficient. The order was based upon consideration of the evidence and involved questions of fact. It also appears that this is not a case

in which this court can give judgment absolute upon the right of the appellant. Therefore the order is not appealable. *Daughtry v. Railroad Co.*, 92 S. C. 361, 75 S. E. 553.

Appeal dismissed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(106 S. C. 534)

In re COLEMAN et al.

In re WALLACE et al.

(No. 9649.)

(Supreme Court of South Carolina. March 22, 1917.)

1. EXECUTORS AND ADMINISTRATORS ¶111(1)
—EMPLOYMENT OF ATTORNEYS.

Executors having already employed a large force of legal talent may not, without necessity being shown, employ more attorneys and make their compensation a charge on the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 448, 449, 458, 459, 461.]

2. EXECUTORS AND ADMINISTRATORS ¶111(6)
—COMPENSATION OF ATTORNEYS.

The criterion for fixing fee of attorneys employed by executors is not the amount of the estate, but the benefits derived and the labor, learning, and skill involved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 456.]

3. APPEAL AND ERROR ¶879—PARTIES ENTITLED TO ALLEGE ERROR.

Only those appealing can question correctness of the decree allowing attorney's fee to be paid from decedent's estate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3581-3583.]

Appeal from Common Pleas Circuit Court of Union County; Mendel L. Smith, Judge.

On application by William Coleman and another, executors of Ann E. Rice, deceased, for final settlement and discharge, Wallace and Barron and George S. Mower petitioned for allowance of attorney's fees. An allowance was made by the circuit court on appeal from the probate court, and S. M. Rice and others appeal. Reversed in part, and affirmed in part.

McDonald & McDonald, of Winnsboro, and J. P. K. Bryan, of Charleston, for appellants. F. Barron Grier, of Greenwood, Hunt, Hunt & Hunter, of Newberry, and Shand & Shand, of Columbia, for respondents.

WATTS, J. Miss Ann E. Rice died, leaving her last will and testament, to which she had added a codicil. She left as executors thereof William Coleman and F. M. Farr. When an application was made by them for a final settlement and discharge, Wallace and Barron and Mower filed their petition for counsel fees, and asking that the same be allowed them for services alleged to have been rendered the executors under contract made with them as executors of said will. The petitions were heard in the probate court for Union county, and the probate court dis-

allowed the fee of Mower, and allowed Wallace and Barron a fee of \$5,000. From this decree an appeal was taken to the circuit court by Mr. Mower, by the executors of Miss Rice's will, and by the appellants herein. After hearing this appeal, Judge Smith rendered his decree, affirming the decree of the probate court as to the fee allowed Wallace and Barron, but modified it as to the fee claimed by Mower, and decreed that Mower should be paid a fee of \$2,000. From the decree Spencer M. Rice, Thomas A. Rice, James G. Rice, Ida N. Perrin, Lizzie R. Wolling, Agnes R. Peake, Kittle R. Elliott, R. B. Rawls, C. T. Rawls, Susannah R. Carter, James Macfie, Wade H. Macfie, Reuben Rice Macfie, Spencer M. Macfie, Agnes Anderson, and Mary J. Clarke by 18 exceptions duly filed question the correctness of the circuit court's decree, and ask reversal of the same. Miss Rice died, leaving of force her last will and testament and a codicil thereto, which was duly admitted to probate in common form on September 1, 1908, in the office of the probate court for Union county; the will was dated July 20, 1906, and the codicil February, 1908. On November 4, 1909, the appellants here filed their petition in the probate court for Union county, praying that the executors thereof, William Coleman and F. M. Farr, be required to prove the alleged codicil of Miss Rice in solemn form, and on the same day an order was by the court for that purpose, which was duly served. On November 23, 1909, the executors filed their petition, asking that they be required to prove both the will and codicil in due and solemn form of law.

The attorneys of record for the executors, as appears from the petition, were Shand & Shand, of Columbia, S. C., Johnstone & Cromer, of Newberry, S. C., and S. Means Beaty, of Union, S. C. The record shows that the only persons who answered the petition of the executors were the appellants herein, who contested the validity of the codicil, and Mrs. Evelline S. Rice and Mrs. Agnes Jeter, who appeared by their attorneys, Wallace & Barron, who insisted that both will and codicil were good and valid instruments. Mrs. Victoria S. Coleman, represented by Mower & Bynum, of Newberry, and Sawyer, Townsend & Townsend, of Union, S. C., answered and attacked the validity both of the will and codicil. The case was heard and decided in the probate court, and an appeal taken therefrom to the court of common pleas.

The record shows that the case was never heard in the circuit court, but that the litigation was compromised by the parties in interest to the litigation, and not by the executors. The record shows conclusively, and there is not a particle of evidence to the contrary, that during the whole litigation in the probate court and in the court of common pleas up to the time of the compromise there is nothing to show or disclose the fact that

Wallace & Barron represented the executors or any one else other than the parties whom they filed answers for. The only other litigation in the matter other than the proceedings in the probate court and appeal to the circuit court therefrom was a proceeding by the appellants herein in the court of common pleas for an injunction to restrain the executors from selling the real estate.

The matter was heard by Judge Sease, who refused the same; an appeal was taken to the Supreme Court, and judgment affirmed. So the whole litigation, up to the time of the compromise, was this: Injunction matter before Judge Sease, and appeal therefrom to the Supreme Court, and hearing in that court; the litigation over the will and codicil in the probate court; appeal therefrom to the circuit court; and a compromise before hearing in that court between the parties. For this litigation what do the executors pay their lawyers? Mr. Shand was paid \$5,000, and before that time had been paid \$500. Mr. Johnstone was paid \$5,500. Mr. Beaty was paid \$600, and it appears Mr. Wallace was paid \$65. The appellants do not question or make any objection to these payments. All parties agree that they were proper.

The records disclose the facts that the respondents sent in their bills and made claim for services rendered in the litigation to some of the legatees, which claims were disputed and not paid. The record shows that the lawyers employed unquestionably by the executors, Shand & Shand, Johnstone & Cromer, and Beaty, as well as the lawyers whose claims are disputed by the appellants, Wallace & Barron and Mower, are all capable lawyers of mental vigor and legal learning, energetic, and of integrity and strength, and any two of them could have handled the estate with consummate ability and skill, and could have done everything that was necessary for the legal settlement of the same.

[1] The executors had the right to employ such legal talent as they approved of, but they do not have the right to employ an unnecessary number of lawyers and pay them with the estate's funds. When a number of lawyers are employed it is incumbent on the executors to show the necessity for employing such an extraordinary number to be paid a high price by the estate. We cannot see in any view of the case if the executors had employed Shand & Shand, Johnstone & Cromer, and Beaty why they wanted additional counsel, unless they intended to pay them out of their own pockets and not mulct the estate. Our view is the same about Wallace & Barron and Mower; if the executors employed them, then there would have been no necessity for the employment of the others.

[2] The estate of the deceased looks large on paper and by the appraise bill, but the amount of the estate is not the criterion by which a lawyer's fee should be fixed. It is

from the benefits derived from the lawyer's talent and the labor, learning, and skill involved and displayed in the management of the necessary litigation and the avoidance of litigation that is unprofitable. We cannot see how the payment of the \$11,665 to the attorneys employed whose employment by the executors is not disputed and which payment is acquiesced in by the appellants, is not a sufficient and liberal compensation for services rendered on the litigation; to allow more would be too great a tax and burden on the estate, and make it potential for an executor by the employing of a number of high-priced lawyers to eat up any estate.

The appellants are not seeking to deprive the petitioners of the payment of their reasonable and legitimate fees, but deny that they should contribute thereto for any unnecessary additional legal talent. A number of the parties interested did not appeal from the decree of the probate court; only the appellants here and the executors. From the decree of Judge Smith the executors did not appeal, neither did any of the parties interested, except the appellants here. We have not attempted to treat the exceptions to Judge Smith's decree separately, but generally to pass upon the points involved. Under our view of the case the exceptions should be sustained as far as the appellants are concerned. This court will not sanction the payment of further attorney's fees by the executors out of the estate of Miss Rice, deceased, so as to make the interests of the appellants in any manner to contribute thereto; to do so would be to allow excessive and exorbitant compensation by the estate for services rendered by attorneys employed by the executors when there was no necessity for the employment of so many.

The amount allowed by consent of all parties amply compensates for all services rendered by all of the attorneys to the executors. But Judge Smith by his decree allowed a fee of \$5,000 to Wallace & Barron, and a fee of \$2,000 to Mr. Mower, and ordering it to be paid out of the estate funds of Miss Ann E. Rice. No one appealed from this decree except the appellants named herein. That being the case, all are precluded from raising any question as to the correctness of Judge Smith's decree, except the appellants. *Shell v. Young*, 32 S. C. 472, 11 S. E. 299.

It seems to us, therefore, that so much of the judgment of the circuit judge as requires that any part of the appellants' share in the estate of Miss Rice should contribute to the payment of the fees fixed of Wallace & Barron and Mower should be reversed, and the other parties to the suit, having failed to appeal, that they are concluded by the acquiescence in the decree of the circuit court, and the judgment as to them should be affirmed, and such is the judgment of this court.

Judgment reversed as to the appellants, and otherwise affirmed.

GARY, C. J., and HYDRICK, FRASER, and GAGE, JJ., concur.

(106 S. C. 544)

ADAMS v. JACKSON et al. (No. 9651.)
(Supreme Court of South Carolina. March 22, 1917.)

1. APPEAL AND ERROR \S 460(2)—NOTICE OF APPEAL—EFFECT—SUPERSEDEAS.

Notice given in due time of intention to appeal from an order striking out defendant's answer and rendering judgment against her did not operate as a supersedeas and stay further proceedings thereon, and the entry of judgment by the clerk after the notice of appeal had been brought to his attention and filed was not improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224, 2246.]

2. APPEAL AND ERROR \S 123—RIGHT—ENTRY OF JUDGMENT AS PREREQUISITE.

Appeal cannot be taken to the Supreme Court until entry of judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 875-881.]

3. PLEADING \S 121(1)—DENIAL OF ALLEGATIONS OF COMPLAINT.

The answer of defendant denying knowledge or information sufficient to form a belief as to the allegations in specific paragraphs of the complaint put in issue the allegations in the paragraphs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 245.]

4. PLEADING \S 358, 359—STRIKING ANSWER—FRIVOLITY OR FALSITY.

If upon an inspection of the pleadings it manifestly appears that the answer is sham or frivolous, the trial court can strike it and give judgment; if upon an examination of the pleadings it appears from them without extraneous outside evidence, such as affidavits, that the answer is false, it can be stricken and judgment rendered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1096-1101, 1120-1128.]

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Richland County; Mendel L. Smith, Judge.

Action by Amanda M. Adams against Thomas P. Jackson and D. E. Lindsay. From an order striking defendant Lindsay's answer as sham and irrelevant, and granting judgment in favor of plaintiff, and from an order dismissing defendant Lindsay's application for an order requiring the clerk to cancel entry of the judgment against her, defendants appeal. Judgment reversed.

Lyles & Lyles, of Columbia, for appellants. Frank G. Tompkins and W. D. Barnett, both of Columbia, for respondent.

WATTS, J. There are two appeals in this case, one from an order of Hon. T. J. Mauldin striking out the answer of D. Eliza Lindsay as sham and irrelevant and granting judgment in favor of the plaintiff. The sec-

ond appeal is from an order of Hon. M. L. Smith dismissing the application of defendant D. Eliza Lindsay for an order requiring the clerk of the court to cancel the entry of a certain judgment against her in favor of the plaintiff in this same cause.

[1] In the last appeal the defendant complains that the judge was in error in not holding that, inasmuch as notice of intention to appeal was given in proper time from the order of Judge Mauldin striking out the answer of the defendant and rendering judgment against her in favor of the plaintiff, this operated as a supersedeas and stayed further proceedings thereon, and his honor should have held that the entry of judgment by the clerk of the court after the notice of appeal had been brought to his attention and filed in the cause was without authority of law. There is no merit in this contention. His honor gave judgment, and it was the duty of the clerk to enter up the judgment, and if defendant felt aggrieved, defendant could appeal after entry of judgment.

[2] An appeal will not lie to this court until entry of judgment. Even in a criminal case the sentence must be imposed as the judgment of the court before defendant can appeal to this court. These exceptions are overruled.

The exceptions to the order of his honor Judge Mauldin are six in number. All are overruled as being without merit except exception 4, which is:

"Because it was error for his honor to hold that the first defense pleaded in defendant's answer was sham, and error for him to strike out the same on that ground."

[3] In the third paragraph of defendant's answer defendant uses the following:

"She denies that she has knowledge or information sufficient to form a belief as to the allegations contained in fourth, fifth, and sixth paragraphs of the complaint."

This puts in issue the allegations contained in these paragraphs and entitled the defendant to a jury trial on these issues. It may work a hardship in some cases, but it would work a worse hardship in a number of cases and impede the administration of justice to strike out as sham, irrelevant, and false an answer upon affidavits submitted to the presiding judge.

It has been held by this court that the hearing of facts in a case by submission of affidavits is an unsatisfactory manner of determining the issues in the case. This is a law case, the plaintiff makes her complaint, the defendants make answer thereto, and the issues thus raised must be tried by a jury.

[4] If upon an inspection of the pleadings it manifestly appears that the answer is sham and frivolous, the court can strike it out and give judgment; if upon an examination of the pleadings it appears from the pleadings without extraneous outside evidence such as affidavits that it is false, then

the answer can be stricken out as false and judgment rendered by the court. But where the complaint and answer put in issue facts to be determined in the case that are material allegations alleged in the complaint and denied in the answer, these issues must be tried in the manner provided for by law, and not by affidavits submitted to the judge for his determination of questions of fact.

This exception is sustained, and judgment reversed.

GARY, C. J., and FRASER, J., concur. HYDRICK, J., concurs in the result. GAGE, J., dissents.

(106 S. C. 514)

METZ et al. v. METZ et al. (No. 9647.)

(Supreme Court of South Carolina. March 17, 1917.)

1. APPEAL AND ERROR ⇨78(6)—FINAL JUDGMENT—ORDER FOR NEW TRIAL.

The jury's first finding, that the land sought to be partitioned was not included in the deed under which plaintiffs claim, being conclusive against their right, the order denying, as regards such finding, their motion to set aside the findings, was a final judgment as regards appeal by them, though setting aside the second finding that the deed was not delivered, and granting a new trial as to such question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 477.]

2. EVIDENCE ⇨472(9)—OPINION—MATTER IN ISSUE.

As to the issue whether a certain tract was within the description of the deed, witnesses may not answer yes or no, but only describe the land and point it out on the plat.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2192.]

3. PARTITION ⇨63(2)—EVIDENCE.

The will alleged in the complaint for partition and set up in the answer as the source of defendants' title is admissible in evidence.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 184.]

4. ADVERSE POSSESSION ⇨57—EVIDENCE.

Deeds executed by a father to his children of parts of the land subsequently claimed by them to have been included in his prior deed to them tend to show the character of his possession, continued for more than 30 years after the prior deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 277, 278, 655, 667, 687.]

5. DEEDS ⇨200—DELIVERY—EVIDENCE.

Deeds executed by a father to his children of parts of land claimed to have been included in a prior deed by him to them have a bearing on the question whether the prior deed was delivered.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601.]

6. APPEAL AND ERROR ⇨204(2)—REVIEW—OBJECTION BELOW.

Objection that conversations admitted in evidence were not made in the presence of the parties, not being made below, is not available on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1260, 1261, 1280; Trial, Cent. Dig. § 172.]

7. APPEAL AND ERROR ¶991 — REVIEW — FACTS.

The facts bearing on the legal issue of title claimed by defendants in partition and submitted to the jury cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8896-8899, 3912, 3913.]

8. DEEDS ¶110—CONSTRUCTION.

The construction of a deed is a question of law for the court.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 255, 293; Trial, Cent. Dig. § 328.]

9. TRIAL ¶191(4)—CHARGE ON FACTS.

The construction of a deed being a question of law for the court, it is not a charge on the facts for it to hold it ambiguous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 427.]

10. BOUNDARIES ¶11—DESCRIPTION — ADJOINING LANDS.

The call of a deed for boundary on the south "by S. and others" is not filled by only one adjacent proprietor besides S.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 92-94.]

Appeal from Common Pleas Circuit Court of Richland County; Mendel L. Smith, Judge.

Action by James S. Metz and others against Daisy A. Metz and others. From an adverse judgment, plaintiffs appeal. Affirmed and dismissed.

Plaintiffs claimed that a tract, afterwards shown by a plot to contain 869½ acres, was included in the deed under which they claimed, executed by their father, Elijah C. Metz, in 1882, and describing the land conveyed as:

"All that piece, parcel, plantation or tract of land situate, lying and being in the county of Lexington * * * on waters of Hollingshead and Hill creeks, containing 550 acres, more or less, bounded by lands of Rachel C. Rauch on the east and Saul Shealy on the north, Paul Lowman on the west and south by Jesse M. Shealy and others."

Elijah C. Metz, who died in 1914, and left a will made in 1911, executed in 1903 deeds to plaintiffs of lands included in the platted tract.

Hunter A. Gibbes, of Columbia, for appellants. John J. McMahan and Cooper & Cooper, all of Columbia, for respondents.

FRASER, J. Elijah C. Metz was, at the time of his death, in possession of about 200 acres of land. He left surviving him five children. The plaintiffs, four of them, brought this action for partition, setting up a deed signed by Elijah C. Metz, in 1882, to his five children, the plaintiffs and the defendant Daisy A. Metz. Daisy A. Metz, one of the defendants, was his daughter, and Jacob Metz and Oliver Metz were her children. The defendants set up title in themselves and Jesse U. Metz, under the will of Elijah C. Metz. The defendants denied that the "home place" of 200 acres was included in the deed of 1882, but that, even if it was included, the deed was never delivered and the title did not pass under that deed. The case has

been treated throughout as an equity case, and issues were framed for a jury, as follows: (1) Is the property, sought to be conveyed by the will of Elijah C. Metz, a part of the property embraced and described in the deed executed by Elijah C. Metz, dated September 4, 1882, recorded in the office of the clerk of Lexington county, in deed Book DD, at pages 517 and 518? (2) Was the said deed, dated September 4, 1882, delivered? To both of these questions the jury answered, "No." A motion was made by plaintiffs to set aside the verdict. The trial judge set aside the answer as to the second question and ordered a new trial, as to the question. As to the first question, he refused to set it aside. From the refusal to set aside the verdict as to the first question, the plaintiffs appealed.

[1] Ordinarily, an order granting a new trial, unless for error of law, is not appealable; but in this case the plaintiffs claimed under the deed of 1882, and the defendant, under the will of Elijah C. Metz. The only contest as to the will was that the testator did not own property because he had conveyed it by the deed of 1882. If the deed of 1882 did not include the home place, then the plaintiffs' case fails, and, when a judgment based upon that verdict is rendered, the plaintiffs' case fails, and it makes no difference, so far as this case is concerned, whether the deed was delivered or not. If that judgment is affirmed, the judgment appealed from is a final determination of the case.

There are 19 exceptions, but they may be grouped under six questions:

[2] I. Was it competent to ask witnesses, "Was the home place within the description of the deed?" The presiding judge told the witnesses they could describe the land and point it out on the plat, but they could not answer yes or no, as that was a question for the jury. In this there was no error, but the witnesses answered the question, anyway, and it was not stricken out. The exceptions that raise this question cannot be sustained.

[3-5] II. Were the will and separate deeds of E. C. Metz to his children admissible? They were. The will was alleged in the complaint and set up in the answer as the source of defendants' title. The defendants set up title in themselves under the will of Elijah C. Metz. Elijah C. Metz had been in possession of the land more than 30 years. These deeds tended to show the character of the possession of Elijah C. Metz, and also had a bearing on the second question, as to the delivery of the deed and the acquiescence of the plaintiffs in their father's ownership.

[6] III. The conversations testified to were in the presence of the plaintiff and affected the question in the same way. It is not

clear from the record that the plaintiffs were present at one of the conversations, but there was no objection on that ground.

[7] IV. The appellants claim that this is an equity case and this court can pass on the facts. The defendants claimed title; that raised a purely legal issue that should first have been tried by a jury. See *Capell v. Moses*, 36 S. C. 559, 15 S. E. 711. This is a leading case and cited in many cases since. No question has been raised as to the form of trial. It is sufficient to say that this court has no jurisdiction to review the facts.

V. The appellant claims that a verdict should have been directed and set aside when rendered. There was abundant evidence to carry the case to the jury and to sustain its finding.

[8-10] VI. The appellant complains that the presiding judge held that there was an ambiguity. The construction of a deed is a question of law for the court, and not a charge on the facts. Even with the plat the adjacent proprietors were uncertain. The plat called for Shealy and Lowman. There is nothing to show where Shealy's land stops and Lowman's land begins. The deed says "south by Jesse M. Shealy and others." Only one adjacent proprietor besides Shealy would not have filled the description. The only other adjacent proprietor was the land of the grantor.

The judgment in accordance with the verdict is affirmed, and the complaint dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(106 S. C. 472)

NORWOOD NAT. BANK v. PIEDMONT PUB. CO. et al. (No. 9590.)

(Supreme Court of South Carolina. Feb. 28, 1917.)

1. BILLS AND NOTES — 243 — INDORSEMENT BEFORE DELIVERY — LIABILITY.

Under Negotiable Instruments Act 1914 (28 St. at Large, p. 678) §§ 63, 64, a person signing a note in blank before delivery is liable as indorser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 549, 552, 553.]

2. BILLS AND NOTES — 405 — "PRESENTMENT AND DEMAND" — SUFFICIENCY.

Possession by the payee bank of a note payable at its office constitutes a sufficient "presentment and demand."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1064-1066, 1068-1070.

For other definitions, see Words and Phrases, First and Second Series, Demand; Presentment.]

3. BILLS AND NOTES — 416 — NOTICE OF DISHONOR — SUFFICIENCY.

Negotiable Instruments Law, § 103, regulating notice of dishonor, is complied with where an extension of time for payment was refused one indorser, and notices mailed to reach both

indorsers in the usual course on the day after maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1164-1172, 1174-1177.]

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by the Norwood National Bank against the Piedmont Publishing Company, George R. Koester, and Lewis W. Parker. Judgment for defendants, and plaintiff appeals. Reversed, and judgment ordered for plaintiff.

McCullough, Martin & Blythe, of Greenville, for appellant. Oscar Mauldin and Cothran, Dean & Cothran, all of Greenville, for respondents.

WATTS, J. This was an action by plaintiff against the defendants on a promissory note. After issue joined the cause was tried before Judge Mauldin and a jury at the summer term of court for Greenville county, 1916. At the trial it was announced that the defendant Lewis W. Parker had died, and by agreement and under the order of the court W. H. Parker and Hamlin Beattie, his executors, were made parties defendant in his stead. It was further agreed that, in the event the plaintiff recovered in the action, the plaintiff's attorney's fees were to be fixed at \$25. At the close of all the testimony in the case, both plaintiff and defendants moved for a directed verdict in their behalf. His honor, the presiding judge, refused the motion for a directed verdict made in behalf of the plaintiff, and granted that of the defendants, and directed a verdict in their favor. After entry of judgment plaintiff appealed, and by 16 exceptions imputes error on the part of his honor.

Exceptions 1 and 2 complain of error in excluding certain evidence offered by the plaintiff. Exceptions 3, 4, 5, 6, 7, and 8 complain of error in directing a verdict in favor of the defendants. Exceptions 9, 10, 11, 12, and 13 complain of error in not directing a verdict in favor of the plaintiff. Exception 14 complains of error on the part of his honor in his construction of the allegations of the plaintiff's complaint, and exceptions 15 and 16 complain of error in not allowing motion to amend the complaint.

We will not attempt to discuss the exceptions separately. The undisputed evidence in the case shows that the defendant Piedmont Publishing Company borrowed from the plaintiff \$5,000 upon a note for that amount, signed on the back by Koester and Parker. This note was renewed from time to time. The last renewal was dated November 4, 1914; each time being signed upon the back thereof before being presented by the defendants to the plaintiff. The note by its terms fell due on February 2, 1915, and was not paid. It was presented for payment at

proper place, and a credit made thereon for \$410.97, the amount in deposit to the credit of the defendant Publishing Company. The cashier of the bank took the matter up with Koester, and by understanding with him placed a further credit on the note for \$60. About noon on February 3, 1915, Koester, who was president and editor of the Publishing Company, as well as signer on the back of note, and who understood the situation fully, went to the bank and asked that the note be renewed on the same terms and with the same signers as before. This was declined, but a proposition made by the bank, which was not accepted and carried out by the defendants; but Koester discussed the situation with Parker, explaining the financial situation of the Publishing Company and its inability to pay this note. On the afternoon of this same day, February 3, 1915, between 3 o'clock and 6 o'clock, the note was duly protested, and notice of presentment and dishonor, postage prepaid, was duly mailed to both of the defendants Koester and Parker.

The evidence shows that both defendants had their mail delivered to their rented boxes in the post office, and in the usual course of delivery such delivery would be made within 45 minutes after mailing; that is, between 3:45 o'clock and 6:45 o'clock in the afternoon of February 3, 1915. At the trial the plaintiff established these facts by proof. The judge directed a verdict in favor of the defendants, upon the ground that they were indorsers, and had not been notified of the protest and dishonor of the note as the law requires. He put it on the ground that in one paragraph the complaint says that—"so and so made a certain note and alleges that the other defendants indorsed the note. As I see it, the complaint is a proceeding upon the theory of maker and indorser. I am going to direct a verdict in this case in favor of the two defendants L. W. Parker and George R. Koester, upon the grounds stated."

Under the allegations of the complaint the plaintiff had the right to show that the defendants had written their names on the back of the note and indorsed the same, either as makers or indorsers. The mere fact that the complaint used the words or alleged that the defendants "indorsed" the note did not bind them by their pleadings to an allegation that the defendants were sued as "indorsers" of the note only. This would be putting a very contracted technical construction on the pleadings, and work a hardship and palpable injustice in the case. There is no other inference but that, under the undisputed evidence in this case, the defendants were makers of the note, and not indorsers. It was shown that the original note and series of renewal notes, as well as the note sued on, were signed by Koester and Parker before the notes were presented to the bank. The undisputed evidence is that the note sued on

was signed by Koester and Parker before it was presented and accepted by the bank. This made them both makers, and not indorsers. *McLaughlin v. Braddy*, 63 S. C. 433, 41 S. E. 523, 90 Am. St. Rep. 681; *American Agricultural Co. v. Heaton*, 104 S. C. 44, 88 S. E. 296. This being the case, his honor was in error in directing a verdict for the defendants, and in not directing a verdict for the plaintiff as asked for, and in accordance with the principle announced by this court in *Pee Dee Naval Stores Co. v. Hamer*, 92 S. C. 426, 75 S. E. 695.

It is the judgment of this court that the judgment of the circuit court be reversed, and the case remanded to the circuit court, with instructions to the clerk of the court of common pleas for Greenville county to enter up judgment in favor of the plaintiff against the defendants for the sum of \$5,000 and interest thereon at the rate of 7 per cent. per annum from the maturity of the note, to wit, February 4, 1915, and \$25 attorney's fees, and \$1.25 notary's fees, less \$470.97, paid February 3, 1915, thereon.

Judgment reversed, and case remanded.

GARY, C. J., and FRASER, and GAGE, JJ., concur in result.

HYDRICK, J. [1] I concur in the result, but dissent from the conclusion that Koester and Parker were makers of the note. Under sections 63 and 64 of the Negotiable Instruments Act (28 St. at Large, p. 668) they were indorsers. The language of the act is too plain to doubt it. The effect of the act is to change the rule of our previous decisions in cases like this, under which they would have been held to be makers. The same effect has been given it in every other jurisdiction in which the question has arisen. See cases cited in respondents' brief.

[2, 3] The contention of respondents that they were released as indorsers because the note was not presented for payment and payment demanded on the day it was due is untenable. It was owned by and in possession of the plaintiff bank at which it was payable, and was there ready to be surrendered on payment. That was sufficient presentment and demand. *Bank v. Flagg*, 1 Hill, 177. 7 Cyc. 996. The evidence is susceptible of but one reasonable inference, and that is that verbal and written notice of dishonor was given to the indorsers in compliance with the provisions of section 103 of the act.

For these reasons I concur in the judgment that plaintiff's motion for a directed verdict should have been granted.

GARY, C. J., and FRASER, J., concur.

On Petition for Rehearing.

PER CURIAM. Petition dismissed.

(106 S. C. 541)

SKUDOWITZ v. BASHA et al. (No. 9650.)

(Supreme Court of South Carolina. March 22, 1917. On Petition to Revoke Stay of Remittur, April 16, 1917.)

1. SALES \Leftrightarrow 355(2)—ACTIONS FOR PRICE—EVIDENCE.

In an action on open account for the price of ladies' dresses sold and delivered, defendants' evidence that the goods were defective in material and workmanship was admissible under the general denial to disprove plaintiff's allegation of value, not being an affirmative defense by way of confession and avoidance, but going to disprove a material allegation of the complaint.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1026.]

2. SALES \Leftrightarrow 355(2)—ACTION FOR PRICE—EVIDENCE.

In an action on open account for goods sold and delivered, evidence that defendants had attempted to rescind the contract by returning part of the goods and tendering payment for the part retained was inadmissible under the general denial; the matter being new, constituting an affirmative defense.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1026.]

3. PLEADING \Leftrightarrow 237(1)—AMENDMENT DURING TRIAL.

The trial court had power to allow amendment of the answer to conform to the facts adduced on trial, even though it might have been necessary to withdraw the case from the jury and continue it to prevent prejudice to plaintiff.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 603.]

4. PLEADING \Leftrightarrow 236(5)—AMENDMENT DURING TRIAL—ABUSE OF DISCRETION.

The refusal to allow defendants to amend their answer to conform to the facts adduced on trial was not an abuse of the trial court's discretion, especially where, if the evidence was offered merely to reduce the amount of plaintiff's recovery as the value of the goods, the amendment was unnecessary to support it, and where, if the evidence was to defeat plaintiff's cause of action entirely under the claim that the sale had been rescinded, there was no showing by defendants of surprise; that they intended to make the defense and believed their answer sufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 601, 605.]

Appeal from Common Pleas Circuit Court of Charleston County; Edward McIver, Special Judge.

Action by I. B. Skudowitz against F. N. Basha and others. From a judgment for plaintiff, defendants appeal. Reversed.

Logan & Grace, of Charleston, for appellants. Mordecai & Gadsden & Rutledge and Legge & Allan, all of Charleston, for respondent.

HYDRICK, J. This is an action on open account for goods (ladies' dresses) sold and delivered to defendants. Plaintiff alleged that the goods were reasonably worth \$290, and that defendants were indebted to him in that amount for them. The answer was a general denial. At the trial defendants offered to prove that the goods were defective in material and workmanship. The evidence

was excluded as inadmissible under the general denial. Defendants then asked leave to amend their answer to conform to the facts adduced. The motion was refused, and a verdict was directed for plaintiff for the full amount sued for.

[1] The evidence offered was clearly admissible under the general denial to disprove plaintiff's allegation of value. It was not an affirmative defense, by way of confession and avoidance, but went to disprove a material allegation of the complaint. *Lyles v. Bolles*, 8 S. C. 258; *McElwee v. Hutchinson*, 10 S. C. 436; *Pom. Rem. § 673 et seq.* The case of *Derry v. Holman*, 27 S. C. 621, 2 S. E. 841, relied upon by respondent, is not in point, because that was an action on a note, which *prima facie* imports a consideration, and it was properly held that failure of consideration was new matter, which could not be proved under a general denial. *Pom. Rem. § 709.*

[2] In this view of the case, it is, perhaps, unnecessary to consider the assignment of error in refusing defendants' motion to amend, except in so far as the evidence offered tended also to prove that defendants had attempted to rescind the contract by returning part of the goods and tendering payment for the part retained. This, of course, was new matter, constituting an affirmative defense, evidence of which was inadmissible under the general denial; and therefore, if defendants intended to rely upon that defense, they could not have done so, without amending their answer.

While amendments are largely in the discretion of the trial court, that discretion should not be arbitrarily exercised, either in granting or refusing such motions, but it should be exercised so as to prevent surprise and promote justice, especially since the court may impose "such terms as may be proper," and ordinarily thereby provide against unjust consequences.

[3] It is not clear whether the amendment was refused because the trial judge thought he had no power to allow it, or because he did not think its allowance would be a proper exercise of his discretion. In response to the motion he merely said: "I cannot allow an amendment at this time." It is needless to cite authority to show that the court had power to allow the amendment at that stage of the trial, even though it might have been necessary to withdraw the case from the jury and continue it, to prevent prejudice to the opposite party. *Koennecke v. Railway*, 101 S. C. 86, 85 S. E. 374.

[4] If, on the other hand, it was refused in the exercise of the court's discretion, we are not prepared to say that it was so clearly an erroneous exercise of discretion as to warrant the interference of this court, especially as defendants did not make it clear to the court what amendment they wanted, whether it was merely to the extent neces-

sary to let in the evidence offered to reduce the amount that plaintiff might recover as the value of the goods, or to defeat his action entirely under the claim that the sale had been rescinded. If the former, it was unnecessary, as we have said; if the latter, it may have been properly refused at that stage of the trial, in the absence of any showing by defendants of surprise; that is, that they really intended to make that defense, and honestly believed their answer sufficient to admit evidence to support it.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

On Petition to Reverse Stay of Remittitur.

PER CURIAM. It follows of course from the reversal of the judgment in a case like this that a new trial is to be had. The stay of the remittitur is revoked.

(106 S. C. 519)

BROWN v. GOLIGHTLY. (No. 9648.)
(Supreme Court of South Carolina. March 19, 1917.)

1. WITNESSES \S 159(8) — **COMPETENCY — TRANSACTIONS WITH PERSONS SINCE DECEASED.**

Where plaintiff sued to recover an undivided one-half of deceased's property, alleging oral contract on his part to will her such property, her testimony was incompetent to prove the contract under Code Civ. Proc. 1912, \S 438, rendering a party incompetent to testify as to a transaction with a person since deceased in an action against the heir of such person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 675.]

2. FRAUDS, STATUTE OF \S 75 — **CONTRACTS ENFORCEABLE.**

An alleged oral contract by a person since deceased to will property to the plaintiff is void as within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. \S 132.]

3. SPECIFIC PERFORMANCE \S 121(7) — **CONTRACTS ENFORCEABLE.**

To enforce a contract whereby a person contracts to dispose of real estate by will, the same principle is applied and the same proof is necessary as when he contracts to convey title by deed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. $\S\S$ 391-393.]

Gary, C. J., dissenting.

Appeal from Common Pleas Circuit Court of Spartanburg County; Mandel L. Smith, Judge.

Suit by Geneva Brown against Julia Golightly. From a decree for plaintiff, defendant appeals. Reversed, and complaint dismissed.

The decree in the trial court was as follows:

This action was commenced on the 22d day of May, 1911, to have the plaintiff adjudged the owner in fee of the land described in the complaint, for the specific enforcement of the contract which is alleged to be the source of the plaintiff's interest, and for the sale thereof in partition.

It is alleged in the complaint, in substance,

that the parents of the plaintiff, who was then a minor, entered into a contract for and in her behalf with one William Golightly, the owner of the land described in the complaint, in which it was agreed that, if the parents of the plaintiff would permit her to live with the said William Golightly and his wife until the death of the latter, or until the plaintiff had arrived at the age of 21 years, so that she might work for them, and, if necessary, assist in caring for them, then, in consideration thereof, the said William Golightly would at his death leave the plaintiff a one-half interest in the said land, and that, in accordance with the terms of the said contract, the custody of the plaintiff was surrendered to the said Golightly, and the plaintiff and her parents have fully and faithfully performed all the conditions imposed upon them by said contract, and that she remained with the said William Golightly until after the death of his wife; that on the 6th day of April, 1911, William Golightly died, and, in violation of his said contract, failed to leave the plaintiff a one-half interest in said land; that the defendant Julia Golightly is the widow of the said William Golightly, the defendant Miles Golightly is his brother, the defendant Missouri Golightly Burke is his sister, and the defendants William Golightly and Missouri Golightly Alley are his nephew and niece, respectively; that these parties are in possession thereof and withhold the same from the plaintiff; wherefore the plaintiff asks that she be adjudged the owner of a one-half interest in said land; that the contract in question be specifically enforced; that the said land be ordered sold in partition; and that the defendants account for the plaintiff's share of the rents and profits.

The defendants, with the exception of the defendant Julia Golightly, answered the complaint and set up a general denial, with the admission of some of the allegations of the complaint, and relied upon the statute of frauds.

The case was referred to the master, with the power to determine all issues of law and fact. In his report the master determines every issue substantially in favor of the plaintiff. His conclusion of law, amply supported by the authorities, and forcibly presented with a clear and concise statement, are that it was unnecessary for the contract in question to contain a specific description of the land in question, as it related to "all" of the lands owned by the said William Golightly; that a reasonable compensation for the services rendered was not an exclusive remedy for the plaintiff; that the courts will sustain and enforce contracts made for a minor's benefit, especially where the performance has resulted; and that the statute of frauds is not applicable, the plaintiff having performed her part of the contract.

The master likewise makes a very strong statement of his conclusion with regard to the facts of the case. He reports: "That the contract was made as alleged in the complaint. This is clearly established by the testimony of the plaintiff, William Jeter, Evelyn Brown, and Harvey Cureton. There is no testimony to the contrary." Again: "That the plaintiff faithfully performed and carried out her part of the contract. She left her own home and went to William Golightly and his wife, Riney (first wife), and remained with them until the latter's death, whereupon she was returned by William to her father's home, a period of nine years. She gave them her entire attention, helped to do any and every thing that was to be done about the house or in the field, attended Riney when sick, and through the year of her last illness was the only one there to help or care for these old people, devoted her life to them, and was thereby deprived of all opportunity of going to school, except about two months. William admitted after Riney's death that the contract had been faithfully performed by the plaintiff, and that, in accordance with

the contract, she would get one-half of his property at his death. The testimony is all one way in support of the finding; there is none in conflict with it." Again: "The services contracted for and rendered by the plaintiff were of such a peculiar and personal character that it would be impossible to establish by pecuniary standard, and it was not the intention of the parties that they should be so measured. They consisted of housework, fieldwork, personal care, attention, and nursing, self-sacrifice, constant companionship and delicate service, by a niece, which money could not buy—things that cannot be estimated in dollars and cents."

The master therefore recommended that the relief demanded by the plaintiff be granted, which report was confirmed by the circuit court and a decree embodying these views and conclusion was duly filed.

Thereafter, upon the petition and affidavits presented to the court by the defendant Julia Golightly, the cause was reopened, this defendant, who was in default in the original proceeding, was allowed to answer, and the cause was recommitted to the master, with power to hear and determine all issues. The defendant answered the complaint, setting up a general denial, and, by way of defense to the action, alleged that the said William Golightly died leaving a will under which she is the sole heir and devisee, and that the premises described in the complaint were peaceably held by her under the will, and that neither the plaintiff nor her codefendants have any interest in said premises, and asked that she be adjudged the sole owner thereof.

In his second report the master adheres to his conclusions on the law of the case, but with regard to the facts he reports: "I have entirely changed my views since the introduction of the testimony produced by the witnesses for the defendant Julia Golightly at the second reference. While some of the testimony must be ruled out as incompetent, there is enough of evidence from the mouth of respectable white people that the plaintiff was entirely incapable of performing such services as were contemplated by the contract between her parents and William and Riney Golightly." He therefore recommends that the defendant Julia Golightly be adjudged the sole owner of said lands under the will of her husband, and that the decree of the court heretofore announced be thus modified.

In its consideration of the cause the court will, of course, be confined to such questions as are presented by the exceptions to the master's report. The first report being adverse to the contention of the defendants, numerous exceptions were filed by them, except the defendant Julia Golightly, who was in default, to the conclusion of the master on the law and the facts of the case. This report was confirmed by the circuit court. Those defendants have no further interest in the case, as they are excluded from all interest in the land in question under the will of William Golightly, under which Julia Golightly now claims; and they have filed no exception to the second report so holding. In the second report the master expressly states that he adheres to his former conclusion on the law of the case; and to this conclusion neither party files an exception. Being empowered to report his findings of the fact and conclusion of law, he had necessarily to pass upon all questions relating to the competency of testimony involved. The law of the case, in all its phases, must therefore be regarded as settled, so far as this inquiry is concerned.

The sole question presented for the determination of the court is whether the master was in error when he concluded that the "plaintiff was entirely incapable of performing such services as were contemplated by the contract between her parents and William and Riney Golightly."

There is not a word of testimony offered by the defendant Julia Golightly at the second reference which in any manner assails the existence of the contract in question, or in any way impeaches any of its terms and conditions. This being true, the conclusion follows that the testimony which warranted the master in finding in his first report that the contract was "clearly established" is still, as a matter of fact, capable of supporting a similar conclusion.

There is absolutely no testimony produced at the second reference which even tends to show that the plaintiff did not enter into the service of William Golightly and his wife, Riney, at the time indicated and required by the contract, or that she did not remain there till the death of William Golightly's first wife, Riney, which event, under the express terms of the contract, terminated her duty to remain. On the contrary, the witness H. J. Israel testified, "I don't think she left the place before the first wife died," and the witness Lewis Gray said, "She was there till the death of Riney." These witnesses, as well as George Adair, Mrs. Mary Israel, H. J. Greer, W. H. Dempsey, Dexter Shippey, and Dr. R. A. Turner, testify that the plaintiff was in the home of William Golightly, and utter not one word inconsistent with her stay during the entire time contemplated by the contract as testified to by the plaintiff's witnesses. It is also equally obvious that there is not a word of testimony offered at the second reference that the parties "contemplated" a contract different from that established by the testimony at the first reference. The evidentiary force of testimony at the second reference, in its last analysis, is to show that the plaintiff did not perform because she did not have the "capacity," but there is not the slightest word adduced to show that the parties did know with regard to such services as she had the capacity to perform, or that the contract contemplated service beyond her capacity. The new testimony that was competent seems to have been directed to a quantum meruit, a principle having no application to this contract, which, as the master found in his first report, did not call for measure by active services. The contract was "that she would be turned over to William and Riney, to live with them, and, if necessary, to help take care of them, till she, Riney, died." It is unquestionable that she was turned over to them, that she did remain with them till Riney died, and there is no testimony in opposition to the finding of the first report that she gave them her entire attention, devoted her life to them, cared for Riney when sick and in her last illness, and helped around the house and field, and William afterwards, after Riney's death, admitted that the contract had been fully performed by plaintiff. Excluding irrelevant and incompetent testimony—and in this connection all objection offered by the plaintiff's attorney to testimony at the second reference on the ground that such declarations were self-serving must be sustained—the testimony of the defendant's witnesses at the reference can be condensed to almost a sentence, each without the slightest injustice thereto. The witness Adair says: "I saw the girl around there; she was a little child when she first came there, Geneva Brown." Mrs. Israel testifies: "She was very small when she went there. In my judgment, she wasn't capable of taking care of the old people. She wasn't grown when she left." H. J. Israel says: "She was a very small child when she went there to live with William. She couldn't look after anybody." H. J. Greer says: "I suppose she was seven years old; wouldn't think she was capable of taking care of old folks." Lewis Gray testifies: "Suppose she was five years old when she went to William. She couldn't take care of nobody when she went there; they had to take care of her." W. H. Dempsey says: "The child was very small when I saw her; she wasn't big

enough to take care of anybody." Dr. R. A. Turner says: "I remember seeing one little girl around there. I suppose it was a seven-year old child." Dexter Shippey testifies: "I think Geneva would have been a care to them, rather than a help." These extracts probably present the testimony in its strongest phases against the plaintiff, but it will be noticed that the observation of incapacity relates almost entirely to the time when plaintiff "first went" to the service of William Golightly and his infirm wife, when "she was very small," "seven years old." It will be noted from all the testimony in the case that plaintiff was some seven or eight years old when contract was made, and that she remained under it for nine years. She was therefore capable of much activity and energy during that period, and it would not be rational to measure her capacity throughout it by her capacity at the beginning of it. There is no testimony that William and Riney Golightly were misled as to the child's capacity, or that there was anything abnormal about her, or that she developed an incapacity; nothing of a substantial nature to support the second conclusion of the master, modifying his first finding, which was the correct one, in the judgment of the court, "that plaintiff faithfully performed and carried out her part of the contract." It matters not what her age or capacity may have been at the time the contract was made; the testimony being that William and Riney Golightly asked that the contract relate to the plaintiff. No one better than themselves knew their own condition and needs. They were familiar with the age, experience, and capacity of the plaintiff at the time, and certainly the parents, with whom the contract was made for her, also knew all the surrounding conditions. All the parties, therefore, must be presumed, with this knowledge, to have contracted with regard to that service which the plaintiff was reasonably capacitated to perform at the time of the contract, and to her probable increase in efficiency and value as her age and experience progressed. If this be true, then the testimony adduced at the second reference should not have the legal effect of altering or destroying the valid contract between the parties.

Applying to the testimony in this case the degree of proof declared to be essential in the establishment of the contract to make mutual wills in the case of *Dicks v. Cassels*, 100 S. C. 341, 84 S. E. 878, and the rule announced in *Wilson v. Gordon*, 73 S. C. 160, 53 S. E. 79, that the agreement must be defined and certain, established by evidence clear and convincing, the conclusion reached by the master in his first report is fully warranted, and there is nothing in the subsequent reference to support an interference with it, so far as the rights of the plaintiff are concerned. The contract stands clearly established as alleged in the complaint. Defendant's argument as to nudum pactum has been fully considered, the testimony relied upon in support of it has been referred to, and the conclusion stated. The law upon the subject seems to be clear.

In the case of *Gee v. Hicks*, Rich. Eq. Cas. 15, where a boy sixteen years old was brought up from Mississippi to South Carolina by his mother, who was induced to do so by the promise to pay the boy \$3,000 when of age, the court held that the promise was based upon sufficient consideration, was nudum pactum, or within the statute of frauds, Judge O'Neill, for the court, saying: "It is perfectly clear that, to constitute a consideration sufficient to support an executory contract, it need not be an exact quid pro quo. Anything which is to benefit the party making the promise, and which he could not otherwise obtain, or which puts the party to whom the promise is made, to any trouble, inconvenience or loss, will prevent the contract from being nudum pactum. * * * If he [the minor] performs his part of the contract, he has

a perfect legal right to demand the performance of the other part from the other party."

6 Ruling Case Law, 678, thus states the rule: "Where a party contracts for a performance of an act which will afford him a pleasure, gratify his ambition, please his fancy, his estimate of the value should be left undisturbed, unless there is indeed evidence of fraud. There is in such case absolutely no rule by which the court can be guided if once they depart from the value fixed by the promiser."

This action is amply sustained by the principles announced in case of *Fogle v. St. Michael Church*, 48 S. C. 86, 26 S. E. 99. In this case the plaintiff was induced to leave her home and abide with a woman who was the deviser of the defendant, in order that the latter might have her companionship and society. In consideration and by the way of inducement to the consent of the plaintiff to this arrangement, she was promised to devise and legacy of one-half of all this woman's estate, real and personal. Upon the death of the deviser, she left her whole estate to the defendant. The suit was brought to enforce the contract. In discussing the question, the court, at pages 90 and 91 of 48 S. O., at page 101 of 26 S. E., says: " * * * The case of *McKeegan v. O'Neill*, 22 S. C. 454, shows that such an action as is alleged in the complaint is equitable in its nature, and that the court, in the exercise of its equitable powers, will enforce specific performance thereof. The case of *Gary v. James*, 4 Desaus. 185, decides that, when the court adjudges specific performance of the contract like the one alleged in the complaint, the effect of such judgment is to take precedence of the devises and legacies mentioned in the will. This principle is sustained by *Beach on Contracts*, § 917, in which the author says: 'An agreement to make a disposition of property by will may be enforced by requiring those to whom the property descended or was devised to convey in accordance with the terms of the agreement.'"

In the case of *Holley v. Anness*, 41 S. C. 354, 19 S. E. 648, and *Marthinson v. McCutchen*, 84 S. C. 256, 66 S. E. 120, it is held that the specific performance of an agreement is not an absolute right, but rests in the sound discretion of the court. The conclusion reached by me in this cause is so strongly supported by the competent testimony adduced that I feel that judicial action on this basis should be favorable to contention of the plaintiff. It is highly probable that the weakness and infirmity of William Golightly's ripe old age during the closing years of his life yielded to the care and devotion of his second wife, Julia, which was the subject of commendation and notice of some of the witnesses, estranged him from the performance of his duty and original purpose, and that the breach of his legal duty to the plaintiff was obscured by his recognition of what he conceived a higher one than Julia.

Wherefore it is ordered, adjudged, and decreed that, under the contract between William Golightly and the parents of the plaintiff in her behalf, the said William Golightly was bound to leave to the plaintiff a one-half undivided interest in fee in the lot of land described in the complaint, and that the plaintiff is the owner in fee of a one-half undivided interest therein, and that the defendant Julia Golightly is the owner of the other half interest therein.

It is further ordered, adjudged, and decreed that the defendant Julia Golightly do, within ten days after written notice of the filing of this decree, execute in proper form, to be approved by the clerk of this court, and deliver to him for the plaintiff a deed conveying in a fee simple an undivided one-half interest in the said lot of land, and that the same be recorded in the office of the register of mesne conveyance of said county.

It is further ordered, adjudged, and decreed

that the said lot of land be divided into lots by a surveyor, to be appointed by the master, of such size, relative location, and dimensions as shall appear to the master most advantageous to the interest of all parties, due notice being given to them of such division as shall be adopted by the master, and that said land, thus divided, be sold as required by law by the master of Spartanburg county on the regular salesday in November, 1916, or some subsequent salesday, the terms of said sale to be one-half cash, balance on credit of one year, with interest at 7 per cent. per annum from day of sale, secured by bond of purchaser and mortgage of the premises purchased, with leave to pay all cash, purchaser to pay for papers and recording, and to be let into possession upon presentation of master's deed; should the purchaser fail to comply with bid, then the premises so purchased to be sold on the next subsequent salesday at the risk of the defaulting purchaser; that the proceeds of the sale, after the payments of the costs and disbursements of the action, be paid to the plaintiff and to Julia Golightly, or to their attorneys, in equal share; that the taxes on the land for the year to be paid by Julia Golightly, she being in the enjoyment of the property.

Should the said two parties, or their attorneys, agree in writing to a partition in kind of the property instead of a sale thereof, prior to the day of sale, the master will carry the agreement into effect by executing to each of them a conveyance in fee of the portion so agreed upon for each of them, respectively, in which event there will, of course, be no sale, and the cost and expense of the action will be borne equally by them, the amount for which each is liable to stand as a lien upon his or her portion of the land till paid, such lien to be enforced by application to the court in this cause.

The land involved in this action is described in the complaint as follows: "All of that lot of land in said county and state lying one mile west of the city of Spartanburg, beginning at a rock in street John Williams' corner, or on his line, running thence to said street S. $9\frac{1}{4}^{\circ}$ E. 7.14 to a rock, S. Bobo's corner; thence S. $19\frac{1}{4}^{\circ}$ W. to rock, Golightly's corner; thence N. 89° W. 6.71; thence along Williams' line N. $\frac{1}{4}^{\circ}$ E. 8.35 to the beginning corner—containing 5.40 acres, more or less, as per survey made and plat executed by Sams, surveyor, on or about October, 1879, and then bounded by lands of Farley, Bobo, Williams, and others, a record of which is in Book PP, page 406, office R. M. O. of said county." As hereinbefore directed, the land will be resurveyed and platted by the surveyor to be appointed by the master.

It has been agreed by the counsel that the copies of lost or mislaid records in the cause accompany this decree, stand substituted for such originals, and it be so ordered. Ordered and adjudged further that the report of the master, except so far as the same is in conflict with the conclusion herein announced, be confirmed.

John Gary Evans, of Spartanburg, for appellant. Stranyarne Wilson, of Richmond, for respondent.

WATTS, J. This is an appeal from a decree of his honor Judge Smith made at the summer term of the court, 1916, for Spartanburg county. The decree fully sets out the facts of the case and the points and issue and will be reported. To this decree the defendant excepts, and by 16 exceptions alleges error and asks that the same be reversed.

[1, 2] We think the decree should be reversed, as there was not such an agreement or contract proven as would require the de-

ceased to make a will giving the plaintiff a part of his real estate after his death or such an agreement or contract made between the parties as would justify the court in decreeing specific performance. The attempt is to enforce an agreement or contract as to real property, and there is not a particle of written evidence in any form to support the contention of the plaintiff, and no claim on her part that there is any such evidence. Her contention is supported by parol testimony alone.

In the case here the testimony of the plaintiff is clearly incompetent to establish any contract with the deceased under section 438 (Code Civ. Proc.), and such a contract is not binding under the statute of frauds unless in writing and signed by the party to be charged therewith. No such contract can be established by parol evidence alone; there must be some writing in the case to take it out of the statute of frauds.

Excluding the evidence of plaintiff under section 438 of the Code and the absence of any written evidence to in any way establish the agreement or contract as contended for by the plaintiff, there is an entire failure to establish the contract, and plaintiff's case fails fully. The alleged contract is void under the statute of frauds, and there is not a single decision of this court in this class of cases that contemplated abrogating the statute of frauds.

[3] In order to enforce a contract whereby a party contracts to dispose of real estate by will, the same principles apply and the same proof is necessary as when he contracts to convey title by deed. Under all of the evidence in the case and a careful examination of the same and all the circumstances in the case there is no evidence to sustain the finding of the circuit court; under the decisions of this court in McAulay v. McAulay, 96 S. C. 86, 79 S. E. 785, Dicks v. Cassels, 100 S. C. 348, 84 S. E. 878, and Kerr v. Kennedy, 90 S. E. 177, it is laid down that, in order to enforce specific performance in cases of this character in a court of equity, the contract must be reasonable, clear, definite, and certain and established by strong, clear, and convincing evidence and for a valuable consideration; in this case the plaintiff has utterly failed to establish this requirement.

Judgment reversed, and complaint dismissed.

FRASER and GAGE, JJ., concur.

GARY, C. J., dissents for the reasons stated in the decree of his honor the circuit judge, which will be reported.

HYDRICK, J. I concur in the result on the ground that the evidence fails to establish the agreement alleged in the complaint by that measure of proof required by law in such cases. It is not sufficiently clear, definite, and certain. Only two witnesses testi-

fied to the making of the agreement and its terms. They were the plaintiff and her father, both interested—the one legally; the other morally. Two other witnesses testified to declarations of William Golightly, and they differ from each other. To one he said "he would take the child, and at their [his and his wife's] death the child was to get one-half of the property"; to the other, "if she stayed till his wife died, she would get half that they had." In neither was there any reference to a contract to make a will. He may have merely expressed his intention to provide for the child in his will.

I think the testimony of plaintiff was competent. She did not testify to any transaction or communication between herself and deceased, but only to one between her father and deceased in her presence. *Sloan v. Hunter*, 56 S. C. 385, 34 S. E. 658, 76 Am. St. Rep. 551.

I am not prepared to assent to the proposition that in no case will the court decree performance of a contract to devise land where it rests in parol and is proved only by parol evidence. The decision of that point is not necessary to the decision of this case. But if part performance of a parol contract to convey land will take a case out of the statute of frauds, why would not part performance of a contract to devise land have the same effect?

(106 S. C. 500)

BRADFORD v. YORK COUNTY.
(No. 9638.)

(Supreme Court of South Carolina. March 15, 1917.)

Appeal from Common Pleas Circuit Court of York County; I. W. Bowman, Judge.

Separate actions by Z. V. Bradford, by John Thompson, by F. J. Blankenship, and by Earle B. Roach against York County. Orders sustaining demurrers, and defendant appeals. Reversed and remanded.

Wilson & Wilson and Oran S. Crawford, all of Rock Hill, for appellant. J. S. Brice, of York, and Dunlap, Dunlap & Hollis, of Rock Hill, for respondents.

FRASER, J. These cases were tried along with the case of *Joseph H. Sanders v. York County*, 91 S. E. 305, and are determined by the judgment in that case.

The orders sustaining the demurrers are overruled, and the cases are remanded for trial.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(146 Ga. 620)

CENTRAL OF GEORGIA RY. CO. v. YESBIK. (No. 311.)

(Supreme Court of Georgia. March 19, 1917.)

(Syllabus by the Court.)

1. COURTS §207(2)—**SUPREME COURT—JURISDICTION—CERTIORARI.**

Under the constitutional amendment of 1916 (see Acts 1916, p. 19) the power of the Supreme Court in certiorari extends to all cases decided by the Court of Appeals.

2. CERTIORARI §1—**SCOPE OF REMEDY—DECISIONS OF COURT OF APPEALS.**

In the light of the constitutional history of the origin and purpose of the creation of the Court of Appeals and the amendment to the Constitution adopted in 1916, defining the jurisdiction of the Supreme Court and of the Court of Appeals, and giving to the former court power by certiorari or otherwise to review the decisions of the latter court, this power should not be so carelessly exercised as to have the effect of prolonging litigation by converting the Court of Appeals into an intermediate court, so as to burden the docket of this court with cases intended by the constitution, under ordinary circumstances, to be reviewed by the Court of Appeals and to be controlled by the judgment of that court. Accordingly great caution will be exercised, and the writ issued only in cases involving questions of great public concern and in matters of gravity and importance.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 1.]

3. CERTIORARI §15—**SCOPE OF REMEDY—COURT OF APPEALS—SUBJECT-MATTER.**

A proper case for the grant of the writ is presented where the question involved is the effect of the act of Congress known as the Carmack Amendment to the Hepburn Act (Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 595 [U. S. Comp. St. 1913, § 8592]) on a state statute giving a cause of action against the last of several connecting carriers for damage to goods transported, where the initial carrier received the goods as "in good order," as applied to an interstate shipment of freight.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 23-27.]

Application for *Certiorari* from Supreme Court to Court of Appeals.

Action by Joe Yesbik against the Central of Georgia Railroad Company. From a judgment of the Court of Appeals (91 S. E. 274) reversing a judgment for defendant, defendant brings certiorari. *Certiorari* granted.

Pottle & Hofmayer, of Albany, for plaintiff in error. **John Henry Pool**, of Albany, for defendant in error.

EVANS, P. J. [1, 2] In 1916 the Constitution of this state was amended by giving to the Supreme Court the right to review judgments rendered by the Court of Appeals. An application has been presented to this court for the grant of a writ of certiorari to the Court of Appeals; and in passing thereon it is well to advert to the constitutional history and policy of this state with respect to the powers and jurisdiction of the Supreme Court and of the Court of Appeals. The Supreme Court of Georgia was organized in 1846 under the act of the General Assembly approved December 10, 1845 (Acts 1845, p. 18), for the correction of errors in judgments rendered in the superior courts of this state. By the Constitution of 1877 a writ of error was allowed to a certain class of city courts. With the multiplication of city courts and the increase of judicial circuits it was found necessary to increase the number of judges of the Supreme Court from three to six. The Supreme Court with the additional judges being unable to hear and properly de-

termine the volume of business before the Supreme Court, a constitutional amendment was adopted in 1906 creating the Court of Appeals (Const. art. 6, § 2, par. 9). By that amendment the Supreme Court and the Court of Appeals were courts of review, each final in their respective jurisdictions, but the latter was bound to follow the decisions of the former. With the growth of the state in material progress and in population the dockets of both courts of review became clogged on account of the large number of cases depending in each. To meet this situation the number of judges in the Court of Appeals was increased to six, and in 1916 the Constitution was so amended as to enlarge the jurisdiction of that court both as to subject-matter and to courts over the judgment of which power to review was given. Jurisdiction over certain subject-matters hitherto exclusively vesting in the Supreme Court was given to the Court of Appeals. The cleavage of jurisdiction between the two courts of review was clearly drawn, and within its jurisdiction the Court of Appeals was designed to be a court of last resort. The jurisdiction of the Supreme Court and the Court of Appeals is not concurrent, but exclusive in the particular sphere of each. As a means of securing concordance in decision it is provided that the decisions of the Supreme Court shall bind the Court of Appeals as precedents, and the Court of Appeals was empowered to certify to the Supreme Court any question upon which it desired instruction, and was bound by the instruction on the question certified. In addition to these precautions for uniformity of decision, after defining the jurisdiction of the Supreme Court, the constitutional amendment of 1916 provided that:

"It shall also be competent for the Supreme Court to require, by certiorari or otherwise, any case to be certified to the Supreme Court from the Court of Appeals for review and determination, with the same power and authority as if the case had been carried by writ of error to the Supreme Court." See Acts 1916, p. 19.

This provision was manifestly intended to vest in this court a comprehensive power, extending to the review of any decision pronounced by the Court of Appeals; but, when considered in connection with the whole constitutional scheme of two reviewing courts, and in the light of the history of the two courts, it is manifest that a careless exercise of the power would defeat the very purpose of the institution of the Court of Appeals. So exercised, it would be but the prolongation of litigation by the interposition of an intermediate court and might burden the dockets of this court with cases which the framers of the constitutional amendment intended ordinarily to terminate in the Court of Appeals. This court, therefore, should be chary of action in respect to certiorari, and should not require by certiorari any case to be certified from the Court of Appeals for review and determination unless it involves

gravity and importance. It was not intended that in every case a complaining party should have more than one right of review.

Act Cong. March 3, 1891, c. 517, 26 Stat. 826, establishing the Circuit Court of Appeals, contains in the sixth section (U. S. Comp. St. 1913, § 1217) language substantially similar to that of the amendment of 1916 in making provision for a revision by the Supreme Court of the United States, by certiorari or otherwise, of any case made final in the Circuit Court of Appeals. The Supreme Court of the United States has acted with great caution in granting writs of certiorari. It has granted the writ where the case involved questions of great public concern or matters of gravity and importance (*Lau Ow Bew*, 141 U. S. 583, 12 Sup. Ct. 43, 35 L. Ed. 868), where there is a conflict between a state Supreme Court and the Circuit Court of Appeals as to large property rights (*Forsyth v. Hammond*, 166 U. S. 514, 17 Sup. Ct. 865, 41 L. Ed. 1095), where the decision would seriously affect the administration of justice (*Re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385, 41 L. Ed. 782), and in similar instances. That court has refused to grant the writ where the question was involved whether it was settled law in a particular state that certain judgments of dismissal operated as a bar to a second suit, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case. In *re Woods*, 143 U. S. 202, 12 Sup. Ct. 417, 36 L. Ed. 125. The constitutional amendment of 1916 is so coincident in verbiage with the provision in the act of Congress for review by certiorari of decisions of the Circuit Court of Appeals by the Supreme Court of the United States that we may indulge the thought that it was modeled by its framers on the act of Congress of 1891. At all events the striking similarity in phraseology and the desirability of uniformity in construction impel us to follow, so far as the same may be applicable to our system of procedure, the construction placed on this language in the act of Congress by the Supreme Court of the United States.

[3] The application for certiorari involves the question whether or not a statutory action under section 2752 of the Civil Code of 1910 against the last of several connecting carriers in an interstate shipment of freight is prohibited by the act of Congress of June 29, 1906, known as the Carmack Amendment to the Hepburn Act. The Court of Appeals decided that such statutory action was not prohibited by the Carmack Amendment. Under the Constitution as amended in 1916 the Court of Appeals has exclusive jurisdiction to review the judgment of the trial court in this form of action. Naturally, therefore, where there is no exact precedent in the decisions of this court, the public and the profession

must look to the Court of Appeals for guidance in bringing actions of this character. It is important that the court which has the power to establish precedents binding on both courts should determine at the first opportunity a question of this kind, so as to avoid any possible conflict between state and federal statutes. Furthermore, as the decision of the Court of Appeals presents a federal question, it would seem that before any writ of error would lie from the Supreme Court of the United States application must first be made to this court for writ of certiorari. *Bacon v. Texas*, 163 U. S. 207, 16 Sup. Ct. 1023, 41 L. Ed. 132; *Sullivan v. Texas*, 207 U. S. 416, 28 Sup. Ct. 215, 52 L. Ed. 274. Such application is not to be regarded as a merely perfunctory proceeding. On the other hand, where there is doubt as to the correctness of the decision, the writ of certiorari should be granted, that the whole question may be maturely considered and decided on full argument.

Certiorari granted. All the Justices concur, except FISH, C. J., absent on account of sickness.

(19 Ga. App. 485)

LEDBETTER v. GIBBS. (No. 7797.)

(Court of Appeals of Georgia, Division No. 1.
March 16, 1917.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT §164(6)—DEFECTIVE CONDITION OF PREMISES—LIABILITY FOR INJURY TO TENANT.

A landlord is not liable for injuries sustained by the tenant's wife because of the defective condition of certain steps, unless it be shown that the landlord had notice of the defective condition of the steps, and failed to repair within a reasonable time. *Civ. Code 1910, § 3694; Ocean Steamship Co. v. Hamilton*, 112 Ga. 901, 38 S. E. 204; *Roach v. Le Gree*, 18 Ga. App. 250, 89 S. E. 167.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 641.]

2. LANDLORD AND TENANT §168(1)—INJURY TO TENANT—LIABILITY—CONTRIBUTORY NEGLIGENCE—STATUTE.

When rented premises become out of repair it is the duty of the tenant to abstain from the use of that part of the premises, the use of which is attended with danger. It is his duty to use ordinary care; and if by the use of such care the consequences even of the defendant's negligence could have been avoided, he cannot recover. *Section 4426, Civ. Code 1910; Ball v. Walsh*, 137 Ga. 350, 73 S. E. 585; *Stack v. Harris*, 111 Ga. 149, 36 S. E. 615; *Donehoe v. Crane*, 141 Ga. 224, 80 S. E. 712; *Alexander v. Owen*, 18 Ga. App. 328, 89 S. E. 437.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 642, 643, 680.]

3. LANDLORD AND TENANT §164(6)—CONDITION OF PREMISES—NOTICE—ISSUES.

The notice to the landlord as testified to by the tenant was not such notice under the law as would call the landlord's attention to any defects in the steps which caused the plaintiff's alleged injury in May; and the court did not err in confining the jury to the issues raised as

to the alleged injury of December, occasioned by the alleged defective condition of the porch.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 641.]

4. NEW TRIAL §7—GROUNDS.

The issues were fully and fairly submitted to the jury, and upon the questions of fact the jury found against the plaintiff. This verdict having the approval of the court, and there being no errors of law in the charge of the court or in the admission of evidence, the court did not err in overruling the motion for new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 18.]

Error from City Court of Savannah; *Davis Freeman*, Judge.

Action by L. I. Ledbetter against O. M. Gibbs. Judgment for defendant, and plaintiff brings error. Affirmed.

Robt. L. Colding, of Savannah, for plaintiff in error. U. H. McLaws and Adams & Adams, all of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 494)

McCARTY et al. v. KEYS. (No. 8032.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §1005(2)—QUESTION OF FACT—VERDICT—SUFFICIENCY OF EVIDENCE.

There being evidence to sustain the verdict, this court cannot disturb the finding of the jury by overruling the refusal of the trial judge to grant a new trial upon the ground that the verdict was contrary to evidence or without evidence to support it. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209; *Stricklin & Co. v. Crawley*, 1 Ga. App. 139, 58 S. E. 215; *Charles v. Brooker*, 1 Ga. App. 219, 58 S. E. 218; *Daughtry v. S. Ry.*, 1 Ga. App. 393, 58 S. E. 230; *Edge v. Thomas*, 9 Ga. App. 559, 71 S. E. 875.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3880-3876.]

2. APPEAL AND ERROR §684(2)—RECORD—CONTINUANCE.

The motion for a new trial does not show that a motion for a continuance was made by the defendant, nor what the six absent witnesses would have testified to, except that they would have corroborated the six other witnesses who had already testified in his behalf; and therefore no error appears in the failure to discontinue the trial of the case and grant a continuance thereon. *Wiggins v. State*, 101 Ga. 502, 29 S. E. 26 (1); *Moon v. Wright*, 12 Ga. App. 659, 78 S. E. 141.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2883.]

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action between W. S. McCarty and others and Fred Keys. Judgment for the latter, and the former bring error. Affirmed.

Geo. G. Glenn, of Dalton, for plaintiffs in error. M. C. Tarver and W. O. Martin, both of Dalton, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 449)

PORTER v. STATE. (No. 7961.)
(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW ¶59(5)—**DEGREE OF CRIME—"PRINCIPALS"—DRIVING AUTOMOBILE WITHOUT OWNER'S CONSENT.**

All who procure, counsel, command, aid, or abet the commission of a misdemeanor are treated by the law as principal offenders; and under an indictment for driving an automobile of another without the consent of the owner, a passenger who cranks the car up and tells another to drive it, and knows that it is being driven without the owner's consent, in violation of law, may be convicted. Accordingly, in this case the court did not err in charging the jury as follows: "I charge you further, that if this defendant entered into an understanding or agreement with another or with others to take this car, and under that agreement they took it and drove it without the consent and without the authority of the owner, he would be guilty. It does not make any difference whether he actually drove the car himself or not; but if he was present and aided or abetted or directed or procured another to run it, then the other's act would be his, and he would be liable, although he didn't actually operate the car himself; but if he procured another to run it, or operate it, then the other's act would become his act and both would be jointly liable as principals in this case."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 81.]

For other definitions, see Words and Phrases, First and Second Series, Principals.]

Error from City Court of Madison; K. S. Anderson, Judge.

Will Porter was convicted of driving an automobile of another without the owner's consent, and he brings error. Affirmed.

Williford & Lambert, of Madison, for plaintiff in error. A. G. Foster, Sol., of Madison, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 447)

JOHNSON v. STATE. (No. 7931.)
(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW ¶941(1), 1160—**NEW TRIAL—CUMULATIVE EVIDENCE—APPEAL—REVIEW.**

The evidence as to the guilt of the accused was conflicting, but the jury trying the case were properly instructed by the court, and returned a verdict of guilty. The newly discov-

ered evidence was cumulative in its character, and the trial judge having approved the verdict, and there being some evidence to authorize the conviction, this court will not disturb the judgment overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2323, 2330, 3064.]

Error from Superior Court, Spalding County; W. E. H. Searcy, Jr., Judge.

P. A. Johnson was convicted, and he brings error. Affirmed.

W. H. Connor and B. F. McKnight, both of Griffin, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 453)

SOUTHERN RY. CO. v. SOUTHERN COTTON OIL CO. (No. 7646.)

(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)

(Syllabus by the Court.)

1. CARRIERS ¶194—**FREIGHT CHARGES—LIABILITY OF CONSIGNOR.**

Where a common carrier accepts goods for transportation without prepayment of charges, agreeing to collect the charges from the consignee, and the consignee fails to pay them, the consignor is still liable therefor to the carrier. Jelks v. Philadelphia & Reading Railway Co., 14 Ga. App. 96, 80 S. E. 216.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870-872.]

2. CARRIERS ¶196—**FREIGHT CHARGES—LIABILITY OF CONSIGNOR—ESTOPPEL.**

A railroad company, which, through mistake or negligence, has failed to collect from a consignee the charges due for transportation, is not estopped from recovering them from the consignor, merely because of failure to sue therefor until after the consignee (who by agreement with the consignor is liable for the freight) has become insolvent. Central of Georgia Railway Co. v. Eatonton Lumber Co., 14 Ga. App. 302, 80 S. E. 725(3).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 879-887.]

3. RULING ON CERTIORARI.

The judge of the superior court erred in overruling the certiorari.

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action by the Southern Railway Company against the Southern Cotton Oil Company. Judgment for defendant, and plaintiff brings error. Reversed.

Harris, Harris & Witman, W. B. Birch, P. F. Brock, and Mallary & Wimberly, all of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston and Harry S. Strozler, all of Macon, for defendant in error.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 450)

LOTT v. STATE. (No. 8013.)(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)*(Syllabus by the Court.)***CRIMINAL LAW §998 — VERDICT AND SENTENCE—MOTION TO VACATE.**

The court did not err in refusing to entertain the motion to vacate the verdict and sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2549.]

Error from Superior Court, Coffee County; J. T. Summerrall, Judge.

Cora Lott petitioned for the vacation of a verdict and sentence. From the court's refusal to entertain the petition, she brings error. Affirmed.

W. C. Bryan and Lankford & Moore, all of Douglas, for plaintiff in error. M. D. Dickerson, Sol. Gen., and McDonald & Willingham, all of Douglas, for the State.

LUKE, J. Cora Lott was tried on an indictment charging her with murder, and, as asserted by her in her motion for a new trial and in her bill of exceptions filed in this court (Lott v. State, 18 Ga. App. 747, 90 S. E. 727), the jury convicted her of the offense of voluntary manslaughter. The conviction was sustained by this court. The record shows that she was tried and convicted at the February term, 1916, of the superior court of Coffee county. Subsequently (December 1, 1916) she presented a petition to the judge of the superior court, alleging that the jury failed to convict her of any offense; that the "verdict of the jury was in the following language, to wit: 'We, the jury, find the defendant guilty of voluntary manslaughter, this 11th day of February, 1916. E. E. Newbern, Foreman.'" Upon this statement at a subsequent term of the court the defendant sought to vacate the verdict and sentence. Her petition is clearly without merit, and the court committed no error in refusing to entertain it.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 477)

WILLIAMS BROS. & POWERS CO. et al. v. MADDOX-RUCKER CO.
(No. 7756.)(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)*(Syllabus by the Court.)***1. ADMISSION OF EVIDENCE.**

The admission in evidence of the contract sued upon was not erroneous for any of the reasons assigned.

2. EVIDENCE §222(8)—ADMISSIBILITY—ADMISSION.

The letter of the defendants to the plaintiff was in the nature of an admission and was prop-

erly admitted in evidence, notwithstanding it was written after the alleged breach of the contract sued upon.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 794.]

3. REMARKS OF COURT.

Under the facts of the case the statement of the judge to counsel in the presence of the jury, complained of in the third ground of the amendment to the motion for a new trial, was not error.

4. APPEAL AND ERROR §758(3)—MOTION FOR NEW TRIAL—CONSIDERATION.

The seventh ground of the amendment to the motion for a new trial complains of an excerpt from the charge of the court; and yet in the brief of counsel for the plaintiff in error it is stated that "the court erred in not charging the jury as set out in seventh ground of amended motion." In such a conflict between the ground of the motion and the contentions of counsel for the plaintiff in error this court is unable to intelligently consider this ground of the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3093.]

5. APPEAL AND ERROR §1078(6)—GROUNDS OF MOTION FOR NEW TRIAL—ABANDONMENT.

The other special grounds of the motion for a new trial are not argued in the brief of counsel for the plaintiff in error, and consequently are treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261.]

6. RULING ON MOTION FOR NEW TRIAL.

The verdict was supported by the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Greenville; H. H. Revill, Judge.

Action by the Maddox-Rucker Company against the Williams Bros. & Powers Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

N. F. Culpepper and J. R. Terrell, both of Greenville, for plaintiffs in error. McLaughlin & Jones, of Greenville, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 490)

CENTRAL OF GEORGIA RY. v. O'NEILL MFG. CO. (No. 7699.)(Court of Appeals of Georgia, Division No. 2.
March 16, 1917.)*(Syllabus by the Court.)***1. CARRIERS §35—RATE OF FREIGHT—RECOVERY OF DIFFERENCE.**

The freight charges for the transportation of an interstate shipment are fixed by the schedules and joint tariffs then in effect, and filed and posted in accordance with Act Cong. June 29, 1906, known as the "Hepburn Act" (Act June 29, 1906, c. 3591, 34 Stat. 584); and though a common carrier, by mistake or otherwise, delivers goods upon the payment of a lower rate than that stated in the tariffs, it may thereafter demand and recover of the consignee (who has adopted the carrier's contract of affreightment with the shipper) the difference between the amount of freight charges actually

paid to the transportation company and the amount due upon the basis of the correct rate for the service rendered via the route selected by the consignee and specified in the bill of lading by the shipper. Upon the refusal of the consignee to pay such undercharge the transportation company may maintain and recover in an action therefor. *Georgia R. R. v. Creety*, 5 Ga. App. 424, 63 S. E. 528; *Central of Georgia Ry. Co. v. Curtis*, 14 Ga. App. 716, 82 S. E. 318; *L. & N. Ry. Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665; *Seaboard Air Line Ry. v. Luke*, 19 Ga. App. 100, 90 S. E. 1041; *S. F. & W. Ry. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995; *Barnes on Interstate Transportation*, 194, 195.

(a) Attention is directed to ruling 286 (f) May 10, 1910, of the Interstate Commerce Commission, as shown in Conference Rulings No. 6, p. 91; *Watkins on Shippers and Carriers* (2d Ed.) 882; *Ludowici Celadon Co. v. Missouri Pac. Ry. Co.*, 22 Interst. Com. Com'n Rep. 588.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 94.]

2. RULING ON CERTIORARI.

The undisputed evidence demanded a finding for the plaintiff (the plaintiff in error here), and the judge of the superior court erred in overruling the certiorari.

Error from Superior Court, Floyd County; *Moses Wright*, Judge.

Action by the Central of Georgia Railway Company against the O'Neill Manufacturing Company. Judgment for defendant, and plaintiff brings error. Reversed.

Maddox & Doyal, of Rome, for plaintiff in error. *Denny & Wright*, of Rome, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 495)

MORRIS v. SOUTHERN RY. CO. (No. 8243.)

(Court of Appeals of Georgia, Division No. 2.
March 18, 1917.)

(Syllabus by the Court.)

1. CARRIERS § 177(4) — LOSS OR DAMAGE — LIABILITY—INITIAL CARRIER.

It is now settled by the ruling of the Supreme Court of the United States in the case of *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, that the remedy of one whose property has been lost or damaged in the course of interstate transportation is not confined exclusively to the initial carrier. The decisions in *Southern Ry. Co. v. Savage*, 18 Ga. App. 489, 89 S. E. 634, and *Southern Ry. Co. v. Bennett*, 17 Ga. App. 162, 86 S. E. 418, holding that the remedy against the initial carrier is exclusive, and relied upon by the defendant in error, were expressly overruled by the decision of this court in *Central of Georgia Ry. Co. v. Waxelbaum*, 18 Ga. App. 489, 89 S. E. 635. See, also, *Cincinnati, Hamilton & Dayton Ry. Co. v. Quincey*, 19 Ga. App. 167 (91 S. E. 220).

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 791-803.]

2. DISMISSAL OF SUIT.

The court erred in sustaining the demurrer to the petition, and in dismissing the suit.

Error from Superior Court, Fulton County; *Geo. L. Bell*, Judge.

Suit by *S. L. Morris* against the Southern Railway Company. Judgment for defendant, sustaining the demurrer to the petition and dismissing the suit, and plaintiff brings error. Reversed.

W. W. Gaines and *Hewlett, Dennis & Whitman*, all of Atlanta, for plaintiff in error. *McDaniel & Black* and *Edgar A. Neely*, all of Atlanta, for defendant in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 449)

KENNEDY v. STATE. (No. 7951.)

(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)

(Syllabus by the Court.)

CRIMINAL LAW § 935(2) — NEW TRIAL — GROUNDS—VARIANCE.

In *Heard v. State*, 4 Ga. App. 572, 61 S. E. 1055, it is held: "An accusation of trespass, in which the defendant is charged with passing over the lands of another after being forbidden by the owner, in violation of Penal Code, § 220 [Pen. Code 1910, § 217], is insufficient to withstand a timely definite special demurrer, where the only description of the lands trespassed upon is 'a certain field the cultivated land of [the prosecutor] at the time being held under a contract of purchase,' though previous statements in the accusation locate the land as being in the county of the prosecution. In such an accusation the description of the land should be definite." In the instant case the indictment for criminal trespass is under section 216 (2) of the Penal Code of 1910, and sufficiently describes the land, and in such manner as to make the descriptive terms thereof a material allegation in the indictment, from which a certain dwelling house is alleged to have been removed by the defendant without authority and against the will of the prosecutor. The evidence, while showing the removal of a dwelling house by the defendant from land belonging to the prosecutor and located in the county of the prosecution, does not show that the house was taken from the particular land described in the indictment. The evidence, therefore, does not sustain the allegations of the indictment in this respect, and the defendant should have been granted a new trial. Moreover, the case against the defendant is a doubtful one, under the decision in *Shrouder v. State*, 121 Ga. 617, 49 S. E. 702.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2193, 2194, 2298.]

Error from Superior Court, Evans County; *W. W. Sheppard*, Judge.

D. K. Kennedy was convicted of criminal trespass, and he brings error. Reversed.

W. G. Warnell and *Wade H. Brewton*, both of Claxton, for plaintiff in error. *W. F. Slater*, Sol. Gen., of Eldora, and *P. M. Anderson*, of Claxton, for the State.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 448)

HUNT v. STATE. (No. 7948.)(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)*(Syllabus by the Court.)***1. SUNDAY — VIOLATION OF SUNDAY LAW — QUESTION FOR JURY — "NECESSITY."**

Upon the trial of one charged with a violation of section 416 of the Penal Code of 1910, it was not error for the court to refuse to charge the jury: "If you believe from the evidence that this defendant was the proprietor of the Dempsey barber shop in this county, and that between the 20th day of July, 1915, and the 16th day of April, 1916, he, at said barber shop, by himself or agents, furnished shaves and haircuts to the guests of the Dempsey Hotel and others on the Sabbath, it would be a question of fact for you to determine whether, under all the circumstances of the case, the furnishing by the defendant of such was a work of necessity or charity. The word 'necessity,' as used in the statute, means not a physical and absolute necessity, but a moral fitness or propriety of the work and labor done, under the circumstances of each particular case." *McCain v. State*, 2 Ga. App. 389, 58 S. E. 550.

[Ed. Note.—For other cases, see *Sunday*, Cent. Dig. § 4.

For other definitions, see *Words and Phrases*, First and Second Series, *Necessity*.]

2. FORMER DECISION—MODIFICATION.

On review this court refuses to overrule or modify the decision of this court in *McCain v. State*, 2 Ga. App. 389, 58 S. E. 550.

3. RULING ON MOTION FOR NEW TRIAL.

The verdict having been demanded by the evidence, and the assignments of error being without merit, the court did not err in overruling the motion for a new trial.

Error from City Court of Macon; Du Pont Guerry, Judge.

L. B. Hunt was convicted of violating the Sabbath Day, and he brings error. Affirmed.

W. A. McClellan, of Macon, for plaintiff in error. John P. Ross, Sol. Gen., Will Gunn, Sol., and W. D. McNeil, all of Macon, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 470)

TERRY v. CITY OF GREENSBORO. (No. 8005.)(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)*(Syllabus by the Court.)***1. MUNICIPAL CORPORATIONS — §641 — DISCRETION OF TRIAL COURT—RULING ON MOTION FOR CONTINUANCE.**

Motions for continuance are left to the sound discretion of the court; and where, in a recorder's court, on the call of the case of one charged with the violation of a municipal ordinance, the defendant made a motion for a continuance, on the ground that he had been recently arrested, and the court then offered to procure the attendance of any witnesses he might need, and he replied that he had no special witnesses that he could name, the refusal of the

court to continue the case was not an abuse of discretion.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1411.]

2. OVERRULING PETITION FOR CERTIORARI.

Upon the petition for certiorari and the answer thereto the court did not err in overruling the certiorari.

Error from Superior Court, Greene County; J. B. Park, Judge.

Edgar Terry was charged with violation of an ordinance of the City of Greensboro, his motion for a continuance was refused, and he brings error. Affirmed.

J. G. Faust, of Greensboro, for plaintiff in error. Noel P. Park, of Greensboro, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 489)

BELCHER v. STATE. (No. 7821.)(Court of Appeals of Georgia, Division No. 1.
March 13, 1917.)*(Syllabus by the Court.)***1. INDICTMENT AND INFORMATION — §130 — OFFENSES—JOINDER.**

Offenses differing from each other may be included in the same indictment, provided they are of the same nature and differ only in degree. *Hoskins v. State*, 11 Ga. 92; *Gilbert v. State*, 65 Ga. 449; *Tooke v. State*, 4 Ga. App. 495, 61 S. E. 917.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 419-423.]

2. INDICTMENT AND INFORMATION — §130 — OFFENSES—JOINDER OF COUNTS.

The offense of willfully and maliciously attempting to destroy or injure a dwelling house or storehouse, etc., with dynamite or other explosive substance (Pen. Code, 1910, § 787), and the offense of having in "possession in the day or nighttime any engine, machine, jimmy, tool, false key, pick lock, bit, nippers, nitroglycerine, dynamite cap, dynamite, or other explosive, fuse, steel wedges, drills, tap pins, or other implements or things adapted, designed, or commonly used for the commission of burglary, larceny, safe cracking, or other crime, with the intent to use or employ or allow the same to be used or employed in the commission of a crime, or knowing that the same are intended to be so used" (Acts 1910, p. 136; Park's Pen. Code, § 183 [a]), are not such kindred crimes that the two offenses may be joined in the same indictment.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 419-423.]

3. INDICTMENT AND INFORMATION — §130 — JOINDER OF COUNTS—DEMURRER.

Where in the same indictment the grand jury, in one count, charged the defendant with a violation of section 787 of the Penal Code of 1910, supra, and in another count charged him with the crime defined in the act of 1910, supra, there was a misjoinder of counts, and the court erred in failing to sustain a proper demurrer thereto.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 419-423.]

Error from Superior Court, Dougherty County; E. E. Cox, Judge.

W. J. Belcher was indicted for crime, and from the judgment overruling his demurrer he brings error. Reversed.

Perry & Williamson, of Sylvester, and Pot-
tle & Hofmayer, of Albany, for plaintiff in
error. R. C. Bell, Sol. Gen., of Cairo, F. A.
Hooper & Son, of Atlanta, and H. A. Pea-
cock and Cruger Westbrook, both of Albany,
for the State.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 559)

CITY OF ROME v. REESE. (No. 7621.)
(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 417(3)—MUNICIPAL CORPORATIONS \S 126—COMMISSION FORM OF GOVERNMENT—ABOLITION OF OFFICE—RECOMMENDATION.

The act of the General Assembly of Georgia, approved August 4, 1914 (Acts 1914, p. 1140), providing for a commission form of government for the city of Rome, is mandatory in requiring for the abolition of an existing municipal office, a recommendation of the first commissioner, and that all votes taken thereon shall be by "aye" or "no," and shall so appear on the minutes of the commission; and where the minutes not only fail to show such a recommendation, but also fail to set forth the "aye" and "no" vote as prescribed, parol evidence of such recommendation and vote is not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1875; Municipal Corporations, Cent. Dig. \S 298-300.]

2. MUNICIPAL CORPORATIONS \S 165—ABOLITION OF OFFICE—ACQUIESCENCE—EVIDENCE.

The evidence did not require a finding by the jury that the plaintiff had acquiesced in the attempted abolition of his office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 373, 374.]

(Additional Syllabus by Editorial Staff.)

3. MUNICIPAL CORPORATIONS \S 105—"ORDINANCE"—"RESOLUTION"—DISTINCTION.

The distinction between an ordinance and a resolution is usually considered to be that, while a "resolution" deals with matters of special or temporary character, an "ordinance" prescribes some permanent rule of government.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 223, 224.]

For other definitions, see Words and Phrases, First and Second Series, Ordinance; Resolution.]

4. WORDS AND PHRASES—"ACQUIESCENCE."

"Acquiescence" is where a person knows or ought to know that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Acquiescence.]

5. MUNICIPAL CORPORATIONS \S 162(5)—OFFICERS—COMPENSATION.

If the abolition of plaintiff's existing municipal office, by the succeeding city commission,

was invalid, and plaintiff in good faith was willing to perform its duties, he was entitled to its emoluments.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 384.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Suit by G. S. Reese against the City of Rome. Judgment for plaintiff, and defendant brings error. Affirmed.

Reese was elected, on the first Monday in April, 1914, by the mayor and council of the city of Rome, as tax receiver for the term of two years. The General Assembly, by an act approved August 4, 1914, provided for that city a commission form of government, to consist of five commissioners. Acts 1914, p. 1140. When these commissioners assumed the duties of their office on the first Monday in April, 1915, Reese had served one year of his term of office as tax receiver. The day after the commissioners went into office, April 6, 1915, they attempted to abolish the office of tax receiver, thereby depriving the incumbent of the emoluments thereof; and on August 21, 1915, he brought suit against the city of Rome for compensation alleged to be due him as tax receiver for that year. The act of 1914, supra, section 3, provides that the commission "shall have the right to abolish any office, under the charter * * * upon the recommendation of the first commissioner." By section 7 it is provided that those holding office at the time the act becomes effective shall hold for the remainder of the terms for which they were elected, unless the office is sooner abolished by the commissioners under the authority given by the act. By section 9 the commissioners are required to "keep minutes of their proceedings," and to "record all their actions thereon," and it is provided that "all votes taken shall be by 'aye' and 'no,' and shall appear on the minutes." On the minutes of the commission of April 6, 1915, appears the following:

"Present, Hon. W. M. Gannon, first commissioner, A. B. Arrington, F. V. Holbrook, J. P. Jones. On motion of Commissioner Arrington, the office of tax receiver was abolished."

This suit is based upon the contention that the office of tax receiver was not legally abolished, and therefore that the plaintiff had not been legally ousted as the incumbent thereof, under the terms of the power granted by the General Assembly in the act referred to.

Max Meyerhardt, of Rome, for plaintiff in error. Barry Wright, of Rome, for defendant in error.

JENKINS, J. (after stating the facts as above). 1. From the above it will appear that the minutes of the commission did not conform to the statutory requirements laid down by the General Assembly. The Legis-

lature has seen fit to declare, in express terms, how any municipal action by this commission shall be taken, and to provide that the minutes must show a compliance with the requirements thus laid down. If such legislation be mandatory, any action on their part, not in substantial accordance therewith, is null and void. 28 Cyc. 333. To abolish an office or remove an incumbent, statutory requirements should be strictly followed. 2 Dillon on Municipal Corp. § 468.

[3] The abolition of a municipal office should be accomplished by ordinance or resolution. 28 Cyc. 349 (9). The distinction between an ordinance and a resolution is usually considered to be that, while a resolution deals with matters of special or temporary character, an ordinance prescribes some permanent rule of government. Under the act with which we are here concerned, however, in either case, the requirements we have set forth are applicable.

[1] The decisions of the various jurisdictions are not in entire accord as to whether a statutory provision requiring the record by aye and no vote of municipal action is mandatory or merely directory; but we find the strong weight of authority, especially in the later and what we deem the better considered cases, to uphold the doctrine that such a requirement is mandatory and constitutes an essential element in supporting the validity of the ordinance or resolution. In *Shinall v. City of Cartersville*, 144 Ga. 219, 87 S. E. 290, Presiding Justice Evans uses the following language:

"The city of Cartersville is acting under what is popularly known as a commission form of government. Its legislative functions are performed by three commissioners, and the manner in which they shall act in this respect is prescribed with great definiteness in the sixteenth section of the charter of 1911. * * * The commissioners are without power to take any municipal action which requires municipal sanction, except as provided expressly or impliedly in the charter."

We have no doubt that the Legislature, after conferring large and far-reaching powers and duties upon the commissioners of the city of Rome, had an essential and important purpose in prescribing that all of their actions should be taken by aye and no vote, which should in all cases be recorded in that way upon the minutes. This purpose was doubtless, in part, at least, to impress each member of the commission with his individual responsibility and to compel each to bear his share thereof by means of a permanent record of his action, incapable of dispute. We cannot hold such a requirement to be nonessential and merely directory in its nature, for if the purpose indicated was in part the Legislature's intent, such purpose is not one of form, but of substance, which might theoretically affect the actual result of its action. Were such provision intended merely to render more certain what particular procedure had in fact been taken,

then the rule might be otherwise, and it might properly come within the reasoning of Judge Broyles in the case of *Moore v. City of Thomasville*, 17 Ga. App. 285, 86 S. E. 641, relating to provisions requiring that ordinances shall be signed by the mayor.

In *J. Steckert v. City of East Saginaw*, 22 Mich. 104, the rule announced is as follows:

"A * * * charter * * * which requires that the vote of a city council, in certain cases, shall be entered at large on their minutes, is designed to accomplish an important public purpose; it cannot be regarded as immaterial, nor its observance dispensed with. The record of a vote that it 'was adopted unanimously on call,' the names of those voting not otherwise appearing than by the statement of those present at the opening of the session, is not a compliance with the statute. Neither the spirit nor the purpose of the act can be satisfied without entries on the minutes, showing who voted on each resolution embraced within the terms of the act, and how the vote of each was cast; in other words, the ayes and noes on each resolution must be entered at large on the minutes."

In the case of *O'Neill v. Tyler*, 3 N. D. 48, 53 N. W. 434, the court said:

"Section 13 of the charter of the city of Fargo, as amended in 1881, provides 'that upon the passage of all ordinances the yeas and nays shall be entered upon the record of the city council.' This provision is mandatory, and it appearing that an ordinance * * * was adopted in violation of said provision, and that upon its passage by the council the yeas and nays were not entered upon the record, held, that said ordinance was not legally adopted, and hence never became a valid ordinance."

In *Preston v. City of Cedar Rapids*, 95 Iowa, 76, 63 N. W. 579, Justice Kinne, speaking for the court, said:

"It does not appear, nor is it claimed, that the charter of defendant city requires that upon the passage of an ordinance the yeas and nays shall be called and recorded. Rule 18 adopted by said city, and which was offered in evidence by it, provides that 'all votes taken on the adoption of ordinances shall be taken by yeas and nays, each member upon his name being called, unless for special reasons he be excused by the council, shall declare openly and without debate his assent or dissent to the question.' The record before us shows all of the aldermen voted for the adoption of this ordinance. Inasmuch as there was no statute or rule requiring that the yeas and nays be recorded, we do not think that the ordinance can be successfully assailed because no record was made of the vote. It is true the record does not show that the yeas and nays were called, but it does show that all of the aldermen voted for the ordinance. Under such circumstances, we may well presume that the ordinance was adopted or passed in the manner required by the rule."

In *Brophy v. Hyatt*, 10 Colo. 223, 15 Pac. 399, it was held that:

"Any mode by which the vote of each member is clearly and definitely ascertained for the purposes of the record is sufficient."

In *Town of Olin v. Meyers*, 55 Iowa, 210, 7 N. W. 509, it was said:

"If the yeas and nays were not required to be called and recorded we might presume that a majority of the members voted for the ordinance, as was done in *Brewster v. City of Davenport*, 51 Iowa, 427, 1 N. W. 737. But upon the passage of an ordinance no such presumption can be indulged, because the record

must affirmatively show that the yeas and nays were called. They must be recorded. Counsel for appellee insists that this omission was a mere irregularity, which did not affect the validity of the ordinance. It appears to us that the above provision * * * is mandatory, and that its observance is necessary to give validity to the ordinances of a municipal corporation. Dillon on Municipal Corporations, vol. 1, § 229."

It is contended, however, on the part of the city, that the court erred in excluding parol evidence offered for the purpose of showing that the commissioners, in the attempted abolition of this office, substantially complied with the requirements of the act. Testimony of the secretary of the commission was offered to the effect that the abolition of the office was in fact upon the recommendation of the first commissioner, and that a yeas and nays vote was had thereon, but that he, the secretary, failed to so state on the minutes. This court is of the opinion that the ruling of the trial judge in rejecting this testimony was in accordance with law. As will be seen from what we have already said, it is our opinion that the requirement of the Legislature, that the minutes must show the recommendation of the first commissioner and the yeas and nays vote taken thereon, is as much mandatory as the requirements that such recommendation must be first made, and that the vote thereon be taken in the mode prescribed. In the case of *Owens v. City of Dalton*, 144 Ga. 656, 87 S. E. 913, our Supreme Court held that when a motion or resolution is adopted by a municipal council, but imperfectly recorded by the clerk, the same council has authority, by resolution made thereafter, to require the clerk to correct the minutes so as to make them speak the truth; but it is recognized in that case that such action reforming the resolution does not relate back so as to affect any intervening right which has arisen to a third person. While it may be true that the duty of actually setting forth the proceedings of the commission devolved upon its secretary, still the requirement of the law making such record obligatory is mandatory not upon the official named, but upon the commission itself; and the proper remedy, in order to obviate the failure of such compliance, lay in its promptly taking the necessary steps to reform its record of such proceeding, without which it would not be allowed to show by parol evidence that its minutes did not speak the whole truth. Indeed, this identical question was passed upon by the Supreme Court of Indiana in the case of *City of Logansport v. Crockett*, 64 Ind. 319, in which it was held:

"The yeas and nays must, in like manner, be taken and entered of record on the adoption of a resolution by the common council, fixing the salary of the city attorney. * * * Parol evidence is inadmissible to prove the yeas and nays on the adoption of a resolution by the common council of a city, removing the city attorney; the record, or a duly authenticated copy thereof, being the only competent evidence of such

fact. * * * Where the city clerk has failed to keep the record the yeas and nays upon the adoption of a resolution by the common council, the proper remedy is for the common council to cause a nunc pro tunc entry of the yeas and nays to be made."

The Code of Georgia, § 5803, provides as follows:

"Exemplifications of the records and minutes of municipal corporations of this state, when certified by the clerks or keepers of such records, under seal, shall be admitted in evidence under the same rules and regulations as exemplifications of the records of the courts of record of this state."

We think the rule of the Indiana court is sound, and that, in a case of this sort and for the purpose there intended, the admission of the minutes themselves, or the prescribed authenticated copy of such record, is the only competent method of proving the resolution. A decision by the Supreme Court of New York, found in *Re Widening Carlton St.*, 16 Hun, 497, likewise holds, in a case similar to this, that such proof cannot be supplied by evidence alunde.

[2] 2. It is insisted that the plaintiff acquiesced in the abolition of the office and therefore is not entitled to recover in this suit. There is no merit in this contention. The plaintiff testified as follows:

"I was tax receiver of the city of Rome. I was not present when the city commissioners undertook to abolish my office, on April 6, 1915. I was at my desk. My fiscal year began the first of April. Mr. McCrary came in after the meeting and told me he was sorry, but that they had ousted me, had abolished my office. He is clerk or secretary of the commission. Since that time, and for the balance of my term, I was willing, ready, and able to perform the duties of my office. I was elected for two years, and had served part of my time on the second year; had no notice of the abolishment of the office, or anything of the kind. I was elected from the first Monday in April, 1914, for two years. I was there serving and had received some returns on that year. The commissioners had a meeting in the afternoon on Monday or Tuesday. I think it was the 6th day of April. From the 6th day of April, 1915, until this day I have never offered my services to the city of Rome. I have not performed any services for the city of Rome since the 6th day of April, 1915. I have done nothing since that time in the shape of getting in taxes or anything of that kind. I did not perform any services for the city, because I was notified my office was abolished. I thought at that time it was. I received no written notice, but I know when a man tells me a plain thing. The only notice I received was a verbal notice from Mr. McCrary. As a matter of fact the next morning they employed Mr. Jenkins to take charge of the duties I was performing. I went up there the next morning and I told him, I says, 'Tom, since they have gotten rid of me, I had rather see you here than anybody.' I says, 'Anything in the world I can show you, I will be glad to do it.'"

[4] Acquiescence is where a person knows, or ought to know, that he is entitled to enforce his right or to impeach a transaction, and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right. Acquiescence and waiver are generally questions for the jury, and we think it was properly such

in this case. In the case of *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420, Justice Swayne said:

"There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known."

[5] 3. If the abolition of the municipal office was invalid and the incumbent in good faith was willing to perform the duties of the office, it follows that he is entitled to its emoluments. The verdict is not contrary to law, and, being supported by the evidence, the trial judge did not err in refusing to grant a new trial.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 507)

LOUISVILLE & N. R. CO. v. TATE.
(No. 7959.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

CARRIERS ~~64~~45—CERTIORARI ~~65~~57—CONTINUANCE ~~66~~7—PETITION AND ANSWER.

Allegations in a petition for certiorari which are not verified by the answer cannot be considered. From the answer to the certiorari in this case it does not appear that the trial court abused its discretion in refusing a continuance. There was evidence to support the verdict; and the judge of the superior court did not err in overruling the certiorari.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 120, 123-128; Certiorari, Cent. Dig. § 145; Continuance, Cent. Dig. §§ 17, 18.]

Error from Superior Court, Pickens County; H. L. Patterson, Judge.

Action by the Louisville & Nashville Railroad Company for the use of, etc., against F. C. Tate, with set-off by defendant. Judgment for defendant, and plaintiff brings error. Affirmed.

D. W. Blair, of Marietta, Jno. S. Wood, of Canton, and Tye, Peeples & Tye, of Atlanta, for plaintiff in error. F. C. Tate and Roscoe Pickett, both of Jasper, for defendant in error.

WADE, C. J. Allegations in a petition for certiorari which are not verified by the answer cannot be considered. From the answer of the magistrate in this case it does not appear that the trial court abused its discretion in refusing a continuance. The defendant pleaded a set-off, and it does not appear that there was a definite agreement between the parties for the dismissal of the case at the trial term, whereby the plaintiff was prevented from making preparation for trial. The magistrate says in his answer:

"Attorney for plaintiff asked for a continuance, and the court told him that he would have to make showing for a continuance. He (Jno. S. Wood) being sworn, said that he had failed

to reach a settlement with defendant and had not prepared his case either. Neither had he any witnesses. The court asked him if he had had his witnesses subpoenaed, to which he answered, 'No,' and the court then asked him if he did not bring the appeal, and he answered, 'He did.' The court asked him if he had not had 30 days in which to bring his witnesses to court and have his case prepared, and he answered he had, but thought he would reach an agreement."

It is further distinctly stated in the answer that the court had no knowledge of any agreement between the parties to dismiss the case, though at a previous term "plaintiff's attorney stated that he would endeavor to have the case settled," and nowhere does it appear from the answer that the defendant admitted having made any agreement to dismiss.

Though the evidence of the defendant that he had sold certain peaches for \$1 a basket "f. o. b. cars Jasper, Georgia," which he was compelled to sell on the local market at 80 cents and 75 cents per basket, because of the failure of the plaintiff to furnish a properly equipped car for the transportation of the fruit, is apparently somewhat in conflict with his further testimony that "he was selling at \$1 per basket f. o. b. here at packing shed," his definite testimony, undisputed, was that he lost the difference in price between 75 and 80 cents and \$1 per basket, for which last price he had sold the peaches, provided the railroad company had furnished suitable cars for their shipment. We may assume that the testimony that the defendant was "selling \$1 per basket here at packing shed" was intended to mean "f. o. b. cars at packing shed," and at all events we cannot say, in view of the testimony as to a definite and specific loss, that the verdict was unsupported by the evidence.

The judge of the superior court did not err in overruling the certiorari.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 597)

PATE v. INSURANCE CO. OF VIRGINIA.
(No. 7871.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)

(Syllabus by the Court.)

1. INSURANCE ~~68~~583(1) — CONSTRUCTION OF POLICY—BENEFICIARY—WIDOW.

Ordinarily, a policy of insurance upon the life of a married man, where no person is named therein as the beneficiary, is not payable to his wife, but is payable to the executor or administrator of his estate. Where, however, the provisions of the policy can be so construed as to raise a fair inference that it was the intention of the parties to the contract that the amount due under the policy upon the death of the insured should be paid to the wife, she has a right

of action against the company, upon its refusal to pay her the amount due at his death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1459, 1460, 1466, 1485.]

2. DISMISSAL OF ACTION.

The court erred in dismissing the action, on general demurrer.

Error from City Court of Columbus; G. Y. Tigner, Judge.

Action by Mrs. Ruth Pate against the Insurance Company of Virginia. Judgment for defendant, and plaintiff brings error. Reversed.

Ed Wohlwender and Hatcher & Hatcher, both of Columbus, for plaintiff in error. J. L. Willis, of Columbus, for defendant in error.

BROYLES, P. J. Mrs. Ruth Pate brought an action upon two insurance policies issued by the Life Insurance Company of Virginia to Carl L. Pate, her husband. The defendant filed demurrers, both general and special, to the petition as amended. The court sustained the demurrers and dismissed the petition, and the plaintiff excepted. No beneficiary was named in the policies declared upon, but Mrs. Pate alleged that under the terms of the policies she, as the wife of the insured, was virtually made the beneficiary. Her petition as amended showed that no administrator had been appointed for the estate of her husband, that no administration upon his estate was necessary, and that no other person beside herself was claiming to be the beneficiary under the policies. The general demurrer interposed was, in substance, that no cause of action was in the wife, and that, as no beneficiary had been named in the policies, the personal representative of the insured was the only person who could bring suit upon the policies.

[1] Ordinarily, where no person is named as the beneficiary in a policy of life insurance, upon the death of the insured the amount of the policy is payable to his estate. *Boyden v. Massachusetts Masonic Life Ass'n*, 167 Mass. 242, 45 N. E. 735. It has been held by the Supreme Court of this state that:

"A stipulation in a policy of life insurance that payment of the amount of the policy to any relative of the insured belonging to a designated class will discharge the company from liability is valid, but such a stipulation does not have the effect to make the person actually receiving the money * * * the beneficiary of the policy. It is merely an appointment, by the parties to the contract, of a person who may collect the amount due under the policy for the benefit of the person ultimately entitled thereto." *Ogletree v. Hutchinson*, 126 Ga. 454, 55 S. E. 179(2).

In *Providence Savings Bank v. Vadnais*, 26 R. I. 122, 58 Atl. 454, the Supreme Court of Rhode Island ruled that no one person of a designated class has an exclusive right to recover the amount of the policy, and consequently no one of them has an attachable interest in the insurance funds. A similar

ruling was made in *Lewis v. Metropolitan Life Ins. Co.*, 178 Mass. 52, 59 N. E. 439, 86 Am. St. Rep. 463, where it was held that a son could not recover the amount due under such a policy, and that a suit could be maintained only by the personal representative of the insured. It does not appear, however, that in any of these cases there was a provision in the policy itself that the insurance company agreed to pay the amount due under the policy to any one person of a designated class.

In the policies in the case at bar such an agreement to pay by the company can be clearly arrived at by construing the provisions of the policies most strongly (as they must be construed) against the company. The policies provide that:

"The Life Insurance Company of Virginia, in consideration of the weekly premium stated in the schedule below, which it is agreed shall be paid in advance to the company, or to its authorized representative, on or before every Monday during the continuance of this contract, agrees to pay at its home office in the city of Richmond, Va., in accordance with the provisions of article third on the second page hereof, two hundred and fifty dollars within twenty-four hours after acceptance at its home office of satisfactory proofs of the death of the insured, named below, during the continuance of this policy."

"Article third" of the policy, referred to, is as follows:

"*Facility of Payment.*—The company may make any payment provided for in this policy, to husband or wife, or any relative by blood, or lawful beneficiary or connection by marriage of the insured, or to any other person who may appear to be equitably entitled to the same, by reason of having incurred expense on behalf of the insured for his or her burial, or for any other purpose; and the production by the company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them, shall be conclusive evidence that such benefits have been paid to the persons entitled thereto, and that all claims under this policy have been fully satisfied."

Construing these two provisions of the policies together, and most strongly in favor of the insured, it would seem that the company had agreed to pay the amount due under the policies to any one person of the various classes designated in article third of the policies. As was held in the *Ogletree Case*, supra, the payment of the amounts due under the policies to the widow of the insured would be conclusive proof that they were paid to the person entitled to receive them, and that all claims under the policies had been fully satisfied, and consequently we see no necessity in forcing the widow to go to the trouble and expense of having the estate of her deceased husband administered upon solely for the purpose of protecting the company from any other possible claimants of the fund, when it will be absolutely protected by its payment to her as the wife of the insured, especially when she alleges in her petition that there was no administration upon her husband's estate, and that none

was necessary, and that no other person was claiming to be the beneficiary under the policies sued upon, and all of these allegations were in effect admitted as being true by the demurrer. It will be noted that article third of the policies, quoted above, in specifying the various classes to whom the company may make payment, does not mention either the executor or the administrator of the estate of the insured. Nowhere in the policies does it appear that it was the intention of the parties that the amount of the policies should be paid only to the estate of the insured.

[2] In our judgment the plaintiff has a right of action against the insurance company, and the court erred in dismissing her petition, on general demurrer. The case of *Brown v. Mutual Life Ins. Co.*, 146 Ga. 123, 90 S. E. 856, is clearly distinguished by its facts from this case.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 616)

MERRITT v. STATE. (No. 8409.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. HOMICIDE \S 90 — ASSAULT WITH INTENT TO MURDER — DEADLY CHARACTER OF WEAPON.

The deadly character of the weapon used in making an assault may be inferred from the nature and effect of the wound inflicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 119.]

2. HOMICIDE \S 90—ASSAULT WITH INTENT TO MURDER—ELEMENTS.

On the trial of one accused of the offense of assault with intent to murder, the court should instruct the jury in effect that not only must all the essential elements necessary to constitute a case of murder, except the death of the party assaulted, be shown, but that in addition it must appear that the assault was made with a weapon likely to produce death, and with the specific intent to take human life.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 119.]

3. HOMICIDE \S 341—HARMLESS ERROR—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

If the charge given be otherwise correct, the mere failure to inform the jury that the assault must have been committed with a weapon likely to produce death is not necessarily reversible error. The evidence in support of the verdict is well-nigh conclusive, and this court cannot interfere.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721.]

Error from Superior Court, Coffee County; J. I. Summerall, Judge.

Robert Merritt, Jr., was convicted of assault with intent to murder, his motion for new trial was denied, and he brings error. Affirmed.

D. E. Griffin and J. H. Dodgen, both of Fitzgerald, for plaintiff in error. M. D. Dickerson, Sol. Gen., of Douglas, for the State.

GEORGE, J. Robert Merritt, Jr., was convicted of assault with intent to murder. He made a motion for a new trial on the usual general grounds and on two special grounds.

[1, 2] 1, 2. The charge of the court in submitting to the jury the law of assault with intent to murder is correct with one exception. The judge failed to inform the jury that, in order to warrant a conviction of the offense of assault with intent to murder, it must appear that the assault was made with a deadly weapon. Generally the jury should be specifically instructed, in a case of this character, that in order to warrant a conviction it must appear that the assault was made under such circumstances that, had death ensued to the party assaulted, the offense would have amounted to murder, and it must further appear that the assault was made with a deadly weapon and with the specific intent to take the life of the party alleged to have been assaulted. The omission in this case specifically to inform the jury that the state must show that the weapon named in the indictment was one likely to produce death, or deadly in character, will not require a reversal. The defense made by the accused was that the prosecutor (the person alleged to have been assaulted) was not cut by him at all. He claimed that the prosecutor was cut by some one else in a general difficulty. The evidence for the state clearly and almost conclusively shows that he did in fact cut the prosecutor with a knife, as alleged in the indictment. The prosecutor was stabbed in the neck and cut upon the arm. From 50 to 60 stitches were necessary in order to close his wounds. He was actually confined in the hospital for 11 days immediately following the infliction of the injuries upon him. The indictment alleged that the knife was a weapon likely to produce death. The court expressly informed the jury that the burden was upon the state to establish beyond a reasonable doubt the truth of every material allegation made in the indictment. He informed the jury that the evidence must show, in order to warrant a conviction of the accused, that the assault was made upon the prosecutor, as charged in the indictment, with the deliberate intent to kill the prosecutor. The charge as a whole is fair and impartial, and we do not think that the mere omission of the court, under the particular facts of this case, to inform the jury that the weapon employed must have been one likely to produce death was error; certainly it was not such harmful error as would require the grant of a new trial.

[3] 3. The evidence establishes beyond question that the accused participated in an

unprovoked and wholly unauthorized assault upon the prosecutor. In the assault the father of the accused likewise participated. Both were armed with knives. But for the timely interference of bystanders the death of the prosecutor would likely have resulted. The trial judge gave to the accused the benefit of every contention raised by his statement, or authorized by the evidence. He charged the law of assault with intent to murder, the law of stabbing, the law of assault and battery, and upon the principles of justification. The jury found the defendant (as indeed they must have found, as conscientious jurors) guilty of the offense of assault with intent to murder. No error appears in this case, and the motion for new trial was properly denied.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 555)

ATLANTA NORTHERN RY. CO. v. GOODE.
(No. 8090.)

(Court of Appeals of Georgia. Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

CARRIERS — 339—PERSONAL INJURY—EVIDENCE—PROXIMATE CAUSE.

From the plaintiff's testimony it appears that the proximate cause of the injury to her on alighting from the defendant's railway car was her miscalculation as to the distance from the step of the car to the ground, and not the alleged negligence of the defendant; and the evidence did not authorize the verdict against the defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1353.]

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Action by Lula Goode against the Atlanta Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Colquitt & Conyers, of Atlanta, for plaintiff in error. N. A. Morris, Geo. D. Anderson, and J. G. Roberts, all of Marietta, for defendant in error.

LUKE, J. The plaintiff's petition, omitting certain parts which the court, on demurrer, struck by an order to which no exception was taken alleges, in substance, that the defendant carries passengers for hire from Marietta to Atlanta; that in May, 1914, the plaintiff boarded one of the defendant's cars in the city of Marietta for the purpose of going to Butlers, a station about one mile away, and paid the conductor the regular five cents fare, and at the time of paying her fare notified him that she wanted to get off at Butlers, but when the car arrived at Butlers it barely came to a stop, and she did not and could not get off the car; that she proceeded to the end of the car and

called the conductor's attention to the fact that she had notified him that she wanted to get off at Butlers, and he stated that he was sorry he had not let her get off at Butlers; that he stopped the car and notified her to get off where he had stopped it; that when he told her to get off the car she undertook to obey his command and went down to the last step, and stepped to the ground, lowering one foot first with the other on the last step; that the distance from the lower step to the ground was nearly four feet, but she did not realize this fact until she had stepped to the ground; that, the distance being so great and further than she anticipated, when she stepped it severely jolted, jarred, shocked, and injured her (her injuries being fully set out); that she availed herself of the best opportunity afforded her by the defendant to alight from the car when she was told to get off; that she did not realize that there was danger incident to getting off at that place on account of the distance from the lower step to the ground and the unsuitable place to alight from the car; that she was free from fault or negligence, and her injuries were due to the negligence of the defendant. The petition alleges:

That the defendant was negligent in failing to stop the car at Butlers a sufficient length of time for her to alight from it in safety; that "it was the duty of the defendant, after it carried plaintiff by said Butlers station, to run the car back to said station and stop and give her reasonable opportunity to alight from the same in safety; said defendant negligently failed to do this; said defendant and its conductor in charge of said car willfully, wantonly, and negligently ordered plaintiff to leave the car at a place that was unsafe and unsuitable for her to alight from the same; said defendant negligently, carelessly, and wantonly caused plaintiff to alight from said car at an unsafe place, at a place they knew, and plaintiff did not know, was unsuited and unsafe for passengers to get off of said car; the distance from the lower step of the car to the ground was about four feet: the ground where she was ordered to alight from said car and where she did alight from said car was rough and unballasted; there was no platform or station at this point."

The evidence of the plaintiff is, in substance, as follows: That she paid her fare to Butlers and notified the conductor that she wanted to get off there; that she could not get off at Butlers, and, after she had been carried by, she told the conductor that he had carried her by where she wanted to get off, and he immediately stopped the car and told her to get off there; that she went to the rear of the car and did not notice whether she could get off on either the right or the left hand side of the car, but chose the left hand side to get off; that the conductor was in the car, apparently taking up tickets; the ground, just below the step, where they told her to get off was "kinder" rocky and rough; that when she got off she thought that there was something in her right side "tore loose some way or give way," and made her feel extremely nervous as if

about to faint, and she suffered pains in her back and right side; that she was in bed for some time, and continued to suffer; that the car stopped at Butlers about one minute and remained standing about one minute, and then went on. She testified further:

"I did not ask the conductor to take me any further. I did not ask him to move the car. The only thing I stated was what I detailed yesterday, that I wanted to get off at Butlers, and then in response to that he rang the car down. There are several stations between Butlers and Fair Oaks, I think; I suppose there are. I did not ask the conductor to carry me on and put me on another car and bring me back." "When I stepped off from that bottom step to the ground, it did not look to be as far as it really was. It did not look to me so far but what I thought I could step it. I misjudged the distance. It was so much farther than I expected. There is nothing the matter with my eyesight. All I know, I thought I could step it all right, and when I made the step it was further than I thought it was. The distance from the step down was farther than I thought it was. It did not look to me as far as it was. It was a clear day. After I told the conductor that I wanted to get off at Butlers he stopped the car right there. I do not know whether that signal was in response to what I told him or not. He stopped the car at once. He did not go to the back platform with me at all. Where the car stopped for me to get off it was standing still. It remained standing while both my sister and I got off. I was ahead of my sister. It was broad open daylight. I could see where I had to step. There wasn't anything to keep me from seeing. Being able to see where I was stepping and to where I was going to step, I proceeded then to step off of the car while it was standing perfectly still. I looked, but I did not think it was as far as what it was to the ground. I could see, of course. My estimate of the distance was not exactly correct. I just selected which side to get off on when I walked back there. I did not look out on the right-hand side to see what kind of place was over there. I selected the left-hand side to get off, without anybody telling me which side to get off on."

The plaintiff was 34 years old. The jury found in favor of the plaintiff, and the defendant filed its motion for a new trial upon the general grounds, which was overruled; and error is assigned on that judgment.

The testimony of the plaintiff is clear that her miscalculation as to the distance from the step of the car to the ground, and not negligence of the defendant, was the proximate cause of her injury. The evidence did not authorize a verdict in favor of the plaintiff, and the court erred in overruling the motion for a new trial.

Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 531)

CITY OF ATLANTA v. THURMAN.
(No. 7911.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §762(1) — OBSTRUCTION OF STREET—LIABILITY.

A municipal corporation is liable for the negligent conduct of the county chain gang in

placing an obstruction upon one of the city's sidewalks without protecting such obstruction by barrier, rope, notice, or other warning, where the chain gang is engaged in the performance of a duty required of the municipality, at the direction, and with the knowledge and consent, and under the express grant, of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1605.]

2. TRIAL §259(1)—INSTRUCTIONS—REQUEST.

Where the charge given to the jury covers in general terms the law applicable to the contentions of the party, more specific instructions, if desired, should be made the subject of a timely written request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 648, 650.]

3. NEW TRIAL §18—AMENDMENT OF PLEADING—OBJECTION.

The improper allowance of an amendment to a petition cannot properly be made a ground of a motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 24-29.]

4. DAMAGES §158(1) — MUNICIPAL CORPORATIONS §813(3)—OBSTRUCTION IN STREET—ACTION FOR INJURY—ISSUES AND EVIDENCE.

The evidence to which objection was made was properly admitted, under the pleadings in this case; the verdict is supported by the evidence, and there was no error in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441, 443, 444; Municipal Corporations, Cent. Dig. § 1728.]

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by I. B. Thurman against the City of Atlanta. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Mayson and S. D. Hewlett, both of Atlanta, for plaintiff in error. W. A. Sims, of Atlanta, for defendant in error.

GEORGE, J. [1] A petition against the city of Atlanta alleged, that the plaintiff was walking, at night, along one of the sidewalks in that city, when he stumbled and fell over some sacks of coal which had been placed on the sidewalk by the city; that a steam roller belonging to the city was used in the paving of the street adjacent to the sidewalk, and the sacks of coal were placed upon the sidewalk to be used in operating the steam roller; that the county authorities, employing a chain gang, were doing the work for the city, with the knowledge and consent, and under the express grant, of the city; that in the performance of this work the county authorities were exercising a governmental function for and on behalf of the city; that the city had delegated to the county authorities the right to repair the said street, and in so doing it made the county chain gang a part of its own system of government; and that the sacks of coal were actually left upon the sidewalk by some one of the county's employes. The city was alleged to be negligent in placing the sacks of coal on the sidewalk and in the shadow of the steam roller, and in failing to guard the same with ropes or lights, or

by other notice or warning. There was no demurrer to the petition. The evidence disclosed that the city, by resolution, had requested the county authorities to do the work on the street where the plaintiff received his injury. The city was actually assisting the convicts in making the repairs to the street, and for that purpose furnished one of its steam rollers in the operation of which the coal, which is alleged to have been negligently placed on the sidewalk, was required. The court charged the jury that:

"If the county employes were engaged in this work for the city, and under the direction of the city, they would be, so far as this plaintiff is concerned, servants of the city."

This charge is alleged to be error, and the city contends that:

"If the county employes left sacks of coal upon the sidewalk in a negligent manner, the city of Atlanta would not be liable for this negligence."

An additional charge given by the court upon the trial of the case, and containing substantially the same instruction, is also made the ground of complaint, and upon the ground already stated.

We think the evidence introduced by the plaintiff in support of the allegations of his petition required these instructions to the jury. A municipal corporation is liable for the negligent acts of county employes engaged in the performance of a duty required of the municipal corporation, where the employes are working under and by virtue of instructions issued by the municipality. In legal contemplation the act of the county employes was the act of the defendant, and it cannot escape liability on the ground that it did not have notice that the sacks of coal had been negligently placed upon the sidewalk, as alleged in the petition, and that it was therefore under no legal duty to protect and guard the same by rope or light, or by any other notice or warning. *City of Atlanta v. Williams*, 15 Ga. App. 654, 84 S. E. 139; *Rome v. Davis*, 9 Ga. App. 62, 70 S. E. 594; *Jones v. City of Atlanta*, 142 Ga. 151, 82 S. E. 540 (2).

[2] 2. Grounds 5, 6, and 7 of the motion for a new trial complain of the failure to give in charge to the jury certain principles of law. These charges are to the effect that, if damages are traceable to an act of negligence, but are not its legal or material consequences, or if other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote and contingent to be the basis of a recovery. The court charged the jury generally that before the city could be held liable, it must appear that the city was negligent in the respect charged in the petition, and that it must further appear that its negligence was the proximate cause of plaintiff's injury. This general statement of the rule, under the facts of this case, was sufficient. If more specific instructions were desired by the city

they should have been the subject of a timely written request.

[3, 4] 3. The witness Coggin, for the plaintiff, was allowed to testify as follows:

"I found some coal lying on the sidewalk behind one of the wagons. It was so dark I stumbled over it myself on looking for it."

This testimony was objected to on the ground that it was irrelevant and immaterial on any issue involved in the case. The testimony of the witness referred to the same sacks of coal over which plaintiff is alleged to have fallen, and related to the conditions existing on the night of the plaintiff's injury. The evidence was both material and relevant. It was essential for the plaintiff to show, not only the presence of the coal on the sidewalk, but that upon the night of his injury he could not, in the exercise of ordinary caution, see the obstruction. This issue was submitted to the jury, and if this evidence was objectionable upon any ground, it is certainly neither irrelevant nor immaterial.

The witness Dr. Green, for the plaintiff, testified, over objection, as follows:

"There was a good deal of twisted condition of the muscles, and also some in the region of the kidneys, and he had some trouble with his kidneys, and I gave him some medicine and also some liniment."

The ground of objection to this testimony was that it injected into the case an element of damage of which the defendant did not have notice. The petition as amended alleged the following injuries: Plaintiff's spine was wrenched and sprained; one of his ribs was fractured and dislocated on his right side; the sacrum bone on the right side was torn loose from the backbone; the muscles of his back and shoulders were wrenched and sprained, and, by reason of the injuries to his spine, back, and side, he suffered a partial stroke of paralysis; he has suffered excruciating pain "through his entire body since said injuries." One item of damage is expense incurred for doctor's bills and medicines. While no direct injury to the kidneys is alleged in the petition, we are of the opinion that the evidence was properly admitted. The probable effects of an injury may properly be admitted in evidence, and a symptom of the injuries alleged to have been sustained by the plaintiff may be shown. The testimony objected to is in part directly in support of specific injuries alleged in the petition, and if a part thereof referred to an injury not specifically pleaded, this fact would not be a sufficient reason for the rejection of the entire evidence. Dr. Green was further allowed to testify that:

"There was a dislocation there where the backbone joins the sacrum—the lower part of the backbone, right in the center."

This testimony was objected to upon the ground that the original petition did not allege such injury. An amendment was offered and allowed, alleging this specific injury. Counsel for the city objected to the amendment, on the ground that it enlarged

the injuries described beyond the allegations of the notice served upon the city under section 910 of the Civil Code of 1910. It was admitted by counsel for the city that the notice required by this Code section had been given the city, and it is insisted that the description of the injuries in the notice served upon the city is not sufficient to include the particular injury set out in the amendment. We cannot consider the assignment of error upon the ruling of the court in allowing this amendment, for two reasons: (1) The notice served on the city, under section 910 of the Civil Code of 1910, is not attached to the petition, and does not appear in the record. It may have been broad enough to cover this identical injury. (2) The amendment was allowed April 18, 1916, and no exceptions pendente lite were taken to the order allowing it. The final bill of exceptions was presented and certified on October 5, 1916. The improper allowance of an amendment to a petition cannot properly be made a ground of the motion for a new trial. We cite only the cases of *Bullock & Co. v. Cordele Sash, Door & Lumber Co.*, 114 Ga. 627, 40 S. E. 734 (1-2), and *Hammond v. George et al.*, 116 Ga. 792, 43 S. E. 53 (3). The original petition was demurrable because it did not allege that the notice required by section 910, *supra*, had been given. Since there was no demurrer to the petition, and since counsel for the city admit that the notice required by the Code section was served upon the city, there is no merit in the objection to the evidence. The amendment was allowed, and is a part of the pleadings in this case, and the plaintiff had the right to prove by any legal evidence the injury alleged in the amendment. This case was fairly and ably tried, and the verdict finding for the plaintiff has the approval of the trial court. The evidence supports the verdict, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

WADE, O. J., and LUKE, J., concur.

(19 Ga. App. 554)

JOHNSON v. SPENCE. (No. 8053.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. LIBEL AND SLANDER \S 18, 33—ACTIONABLE WORDS—INJURY TO TRADE—SPECIAL DAMAGES.

"One who conducts a general farming business is included in a proper interpretation of that division of Civil Code 1910, § 4433, which declares that slander may consist in charges made in regard to another 'in reference to his trade, office, or profession, calculated to injure him therein,' and that in such a case it is not essential to show special damage in order to support the action." *Spence v. Johnson*, 142 Ga. 267(2), 82 S. E. 646, Ann. Cas. 1916A, 1195.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 1-9, 112, 277.]

2. EXCESSIVE DAMAGES.

The verdict is not excessive, and is supported by the evidence.

Error from Superior Court, Warren County; B. F. Walker, Judge.

Action by E. R. Spence against J. L. C. Johnson. Judgment for plaintiff, and defendant appeals. Affirmed.

M. L. Felts and E. P. Davis, both of Warrenton, for plaintiff in error. L. D. McGreggor, of Warrenton, for defendant in error.

GEORGE, J. [1, 2] This case was before the Supreme Court at the March term, 1914 (*Spence v. Johnson*, 142 Ga. 267, 82 S. E. 646, Ann. Cas. 1916A, 1195), and it was there held that the petition was sufficient to withstand a demurrer except in one particular noted. Upon the trial of the case the plaintiff proved his case as alleged, and this fact is not controverted by the defendant, the present plaintiff in error. In the brief of counsel for the plaintiff in error this statement occurs:

"Mr. Spence proved his case as he alleged it. * * * Taking the case as made and the law as it is, we concede that the evidence was sufficient to carry the case against Johnson for a nominal amount and to recover costs, but we say that the large verdict of \$400 is excessive and should be set aside and a new trial granted."

The motion for new trial is based only upon this ground and the usual general grounds.

Judgment affirmed.

WADE, O. J., and LUKE, J., concur.

(19 Ga. App. 442)

BENNETT v. STATE. (No. 7893.)

(Court of Appeals of Georgia, Division No. 1.
March 18, 1917.)

(Syllabus by the Court.)

1. HOMICIDE \S 300(7)—INSTRUCTION—SELF-DEFENSE—PROVOCATION—EVIDENCE.

In a prosecution for homicide, where the evidence for the state makes a case of murder, and the evidence for the defendant, including his statement to the court and jury, a case of self-defense, and where neither the evidence nor his statement tends to show that he provoked the difficulty and brought upon himself the necessity to kill the deceased, it is error to charge the jury as follows: "To constitute justifiable homicide, the slayer must not have brought upon himself the necessity to kill the deceased. If a person provoke a difficulty by his own fault and bring upon himself the necessity to kill another person, such killing would not be justifiable homicide. If one provokes a difficulty and makes no effort to decline it, but kills his adversary in the contest, it is not justifiable homicide."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 622.]

2. HOMICIDE \S 112(2)—INSTRUCTION—JUSTIFIABLE HOMICIDE.

The last sentence in the charge quoted in the foregoing headnote, to wit, "if one provokes a difficulty and makes no effort to decline it, but kills his adversary in the contest, it is not justifiable homicide," considered in connection

with the context, is not error, and would not in this case require the grant of a new trial if there were evidence to warrant the whole charge upon this subject, a portion only of which is quoted in the first headnote. In a proper case the sentence here quoted should be qualified by a further statement to the effect that, if a person provokes a difficulty and the provocation amounts to no more than a mere trespass, it would not put him in the wrong in resisting or defending himself against a felonious attack on account of such provocation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 146.]

3. TRIAL ERROR.

Except as indicated above, the trial was free from error.

(Additional Syllabus by Editorial Staff.)

4. HOMICIDE § 110 — SELF-DEFENSE — "SERIOUS INJURY" — STATUTE.

Under Penal Code 1910, § 72, relating to killing in defense, where it appears that serious injury was intended to person, property, or family of person killing, the "serious injury" must be an injury which in its nature or effect is traveling to a felony.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 140-142.]

Error from Superior Court, Montgomery County; E. D. Graham, Judge.

D. J. Bennett was convicted of voluntary manslaughter, and he brings error. Reversed.

J. B. Geiger, of Mt. Vernon, A. C. Saffold, of Alamo, and Eschol Graham, of McRae, for plaintiff in error. W. A. Wooten, Sol. Gen., of Eastman, for the State.

GEORGE, J. The plaintiff in error was indicted for the offense of murder, and was found guilty of voluntary manslaughter. The case is before this court on exceptions to a judgment denying a motion for a new trial. The killing was the result of a dispute over the possession of a cow and a calf claimed both by the deceased and by his daughter, the wife of the defendant. The deceased went to the home of the defendant for the purpose of carrying away the cow and calf. The wife of the defendant protested, and an altercation ensued, during which the defendant shot and killed the deceased. The evidence for the state shows a killing without legal justification, while the evidence for the defendant is to the effect that the cow and calf were being taken by force, against the consent of the wife of the defendant, and that at the time of the homicide the deceased was attempting to kill the defendant by shooting him with a pistol. On this point the evidence for the state is in sharp conflict with the evidence for the defendant and the defendant's statement. Considering the testimony for the state, if the defendant provoked the difficulty resulting in the homicide, he immediately followed the provocation given by taking the life of the deceased, the deceased made no effort whatever to resent any provocation offered him by the defendant, and under no view of the state's case was there any necessity for the killing by the defendant. On

this point the evidence of the only eyewitness introduced by the state is as follows:

"I told David John [the defendant] two or three times to put the gun down, and he threw the gun up on me and said: 'You take another step, damn you, I'll shoot you.' I didn't have a thing in the world in my hand at that time. David John made about two more steps toward me, and I told him to stop. Mr. Fountain [the deceased] stopped, and by the time he turned to him that way David John shot him. * * * Mr. Fountain was not doing a thing when David John shot him, and didn't have anything in his hand but the whip he was driving the cows with. Mr. Fountain never said anything to David John before David John shot him. David John was about 15 or 20 steps from Mr. Fountain when he shot him."

Considering the evidence for the defendant, together with his statement, he provoked no difficulty whatever; the deceased persisted in carrying away the cow and calf; the defendant's wife called for the gun for the purpose of killing the cow, in order to prevent her father from carrying it away; the defendant did not wish his wife to have the gun, and picked it up himself. As to what occurred after he picked up the gun, one of the witnesses sworn in his behalf (whose evidence fairly illustrates the whole of the testimony in his behalf upon the point) testified as follows:

"He commenced backing from Mr. Sharpe [the witness for the state], and Mr. Sharpe was going on after David John with his knife in his hand. * * * I didn't understand anything, that was said between Mr. Sharpe and David John. David John went clear around the cowpen to the fence before he stopped, and I didn't hear him say anything to Mr. Sharpe until he stopped, and then he said to Mr. Sharpe not to come any further or put his hands on him; if he did he would kill him. At this time Mr. Fountain was on the outside of the fence and outside of the field, right even with them. * * * When David John told Mr. Sharpe to stop and not to put his hands on him, if he did he would kill him, Mr. Fountain said: 'Get out of the way! I'll fix the God damn son of a bitch!' And Mr. Fountain threw up his pistol with both hands this way (indicating), and then David John shot him. David John swung the gun around before he shot. As soon as Mr. Fountain spoke and cursed, the gun fired, and I thought all of them shot. I thought Mr. Fountain shot too."

On this point the defendant's statement at the trial was as follows:

"I said 'Mr. Sharpe, if you come any further with that knife, I will kill you.' * * * I heard a stick break—seemed like it was right behind me. Just as I spoke to Mr. Sharpe, Mr. Fountain said: 'Move out of the way! I'll fix the God damn son of a bitch!' As I looked around, he was presenting a pistol. Looked like I could have stuck my finger down the barrel of it. I was scared. * * * I knew that Mr. Fountain would kill me. * * * I threw my eyes on him and pulled the gun that way."

[1] From the foregoing it is apparent that the only difficulty provoked, from the standpoint of the state, was the difficulty commenced by the defendant, and which culminated in the unlawful killing of the deceased at a time when the deceased was offering absolutely no resistance to the defendant.

From the standpoint of the defendant, he was acting, throughout the transaction, in self-defense. The charge quoted above in the first headnote is wholly unwarranted by the facts in the case. Though abstractly correct, a charge not warranted by the evidence should not be given; and this particular charge was harmful to the defendant, under the facts of the case. *Teasley v. State*, 104 Ga. 738-742, 30 S. E. 938; *Rooks v. State*, 119 Ga. 431, 46 S. E. 631; *Strickland v. State*, 8 Ga. App. 421, 69 S. E. 313(4).

[2] 2. As stated above, the sentence from the charge of the court quoted in the second headnote, considered as an abstract proposition, was not error in this case. Generally, if one provoke a difficulty, he does not thereby necessarily lose the right to defend himself. Where a battery with a weapon likely to produce death was being committed by the deceased upon the slayer when the mortal blow was given, the fact that he provoked the battery by the use of opprobrious words would not put the slayer in the wrong for resisting it so far as was necessary to his defense. *Boatright v. State*, 89 Ga. 140, 15 S. E. 21(1).

"One who provokes a difficulty may yet defend himself against violence on the part of the one provoked, if the violence be disproportionate to the seriousness of the provocation or greater in degree than the law recognizes as justifiable under the circumstances." *Sams v. State*, 124 Ga. 25, 52 S. E. 18.

In the case last cited it was said:

"Undoubtedly, if one provoke a difficulty, and the person provoked resent an affront offered in such a manner and to such an extent as the law recognizes as reasonable and justifiable, the other party to the difficulty would not be justified in repelling by force an assault for which he was directly responsible. Thus, if A. draw a knife and advance in a threatening manner upon B., the fact that B., upon such provocation, drew a pistol and fired upon A., would not justify A. in killing or wounding B. But if the resentment of the party provoked is disproportionate to the seriousness of the provocation, the same rule would not apply. It must be such resentment as a reasonable man would indulge; and, if it surpass that, the other party, even though he may have provoked the difficulty, would have the right to defend himself against threatened injury."

The language used by the trial judge both preceding and following the sentence from the charge quoted in the headnote states an abstractly correct principle of law. However, for the reasons stated in the first part of this opinion, we do not think that the giving of this abstract principle to the jury was in this case authorized by any of the evidence, or by the defendant's statement.

[3, 4] 3. Since this case must be retried, we have carefully examined the other assignments of error. None of them are meritori-

ous. It is true that the trial judge, in charging section 72 of the Penal Code of 1910, instructed the jury that the "serious injury" referred to in that section meant a felony. This, under the decision in *Freeney v. State*, 129 Ga. 759, 59 S. E. 788 (4), was error. The able trial judge, in overruling the motion for new trial, admits his error. We agree with him, however, that, under the facts of this case, the error was entirely harmless. Indeed, the opinion in the *Freeney Case* recognizes that the "serious injury" must be grave in its character and consequences. The decision in *Nix v. State*, 120 Ga. 163, 47 S. E. 516, is authority for the proposition that:

"A case might arise where a trespass upon property would be of such grave nature as to amount to a serious injury within the meaning of this section [§ 72]; in other words, that a trespass in its nature, gravity, and consequences would be such that the law might authorize the taking of human life to prevent its commission. But such a condition of affairs would be of rare occurrence in the transaction of human affairs, and certainly would not arise out of one of the ordinary and everyday quarrels about property rights."

The record in this case discloses an ordinary and everyday quarrel about property rights, and, moreover, about the rights of members of the same family. In the *Crawford Case*, 90 Ga. 710, 17 S. E. 631, 35 Am. St. Rep. 242, the "serious injury" referred to in section 72 of the Penal Code is declared to have "no application where the property attacked or invaded is so inconsiderable that the injury intended is not serious but slight." To the same effect is *Pound v. State*, 43 Ga. 88 (4, 5), where it is pointed out that the property on which the injury was intended or might accrue must be at the dwelling; "the household goods, so to speak, are regarded with peculiar sanctity in the protection of the law." This dictum is doubted in the *Crawford Case*, supra, but is expressly approved in the *Freeney Case*, supra. The serious injury referred to in this section of the Code must be an injury which in its nature, character, or effect "is traveling to a felony." A killing to prevent a taking of slight moment or importance cannot be justified, though the taking may technically amount to robbery. When the specific defense relied upon by the defendant in the case at bar is considered, the charge of the court was as favorable to him as the facts warranted.

For the reasons stated in the opinion, the court erred in overruling the motion for new trial.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 472)

FARKAS et al. v. S. COHN & SON.
(No. 7614.)

(Court of Appeals of Georgia, Division No. 2.
March 15, 1917. Rehearing Denied
March 27, 1917.)

(*Syllabus by the Court.*)

1. CONTRACTS — 9(1)—ACTION FOR BREACH—PETITION.

The court did not err in overruling the motion to dismiss the petition.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 10-15, 17, 19, 20.]

2. APPEAL AND ERROR — 1078(6)—BRIEF — ABANDONMENT.

The first ground of the amendment to the motion for a new trial is not referred to in the brief of counsel for the plaintiff in error, and is therefore treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4261.]

3. EXCLUSION OF EVIDENCE.

The court did not err in excluding the testimony set out in the second ground of the amendment to the motion for a new trial; there being no plea of "no partnership" filed by the defendant.

4. EVIDENCE — 488 — OPINION EVIDENCE — RENTAL VALUE.

The refusal of the court to repel the evidence set out in the third, fourth, fifth, and sixth grounds of the amendment to the motion for a new trial was not erroneous. Although the several witnesses were not shown to have been expert real estate men, their evidence was admissible for what it was worth on the subject of the rental value of the store in question, with and without a "glass front," notwithstanding they mentioned no particular kind of glass front.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2273.]

5. TRIAL — 257—FAILURE TO CHARGE.

The assignment of error based upon the court's refusal of a written request to give certain instructions to the jury, cannot be considered, as it is not alleged that the request was presented to the court before the jury had retired to consider of their verdict. Civ. Code 1910, § 6084.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 642-645.]

6. APPEAL AND ERROR — 1067 — HARMLESS ERROR—INSTRUCTION.

Under the facts of the case, including the amount of the verdict, even if the court, in the absence of a timely written request, erred in failing to charge section 4398 of the Civil Code of 1910, as to the duty of an injured person to lessen damages, the error was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4229.]

7. SUFFICIENCY OF EVIDENCE.

The verdict was supported by the evidence.

Error from City Court of Albany; Clayton Jones, Judge.

Suit by S. Cohn & Son against Mack Farkas and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Leonard Farkas, of Albany, for plaintiffs in error.

BROYLES, P. J. [1] S. Cohn & Son brought suit for damages for the alleged breach of a written contract. The petition alleged, in substance, that under the terms

of the contract the plaintiff was to pay the defendant Farkas for the rent of a certain storehouse in the city of Albany, Ga., \$60 per month for a period of three years, and in consideration of such payment Farkas was to put in a new "glass front" to the building, without any cost to the plaintiff, and that he had failed and refused to carry out this part of the contract, thereby damaging the plaintiffs in the sum of \$1,000. A copy of the contract was attached as an exhibit to the petition. The material parts of the contract, so far as this action is concerned, are as follows:

"The party of the first part hereby leases unto the parties of the second part * * * for a period of three years, beginning July 1, 1913, and expiring with July 1, 1916, * * * one brick storehouse and lot and building on lot in rear thereof on Broad street, in the city of Albany, said state and county, said storehouse being No. 237 North Broad street. The said party of the first part hereby agrees to do all the necessary repairing on said property, for its protection, during the term of this lease, and said party of the first part further agrees, as a part of the consideration of this lease, to put in a new glass front to the said building, all of which is to be done without cost to the said parties of the second part. The consideration of this lease contract is the assumption of repairs and improvements above mentioned by the party of the first part, and the payment of sixty dollars per month as rental, which sum is to be paid by the parties of the second part, their heirs and assigns, on the first day of each month, beginning July 1, 1913, and continuing on the first day of each month thereafter during the three years of this lease."

On the trial an oral motion to dismiss the petition was made on the ground that it failed to set out a cause of action, in that the contract was too vague and uncertain to be enforced. The motion was overruled, and there were exceptions pendente lite to this ruling, upon which is assigned error in the final bill of exceptions. That part of the contract which stipulates that the defendant Farkas is to "put in a new glass front to the storehouse," when considered alone, is rather vague and indefinite. A well-known principle of law, however, is that in construing any part of a contract, the whole contract must be considered. *Tillman v. Webb*, 17 Ga. App. 620, 87 S. E. 904. In our opinion it is inferable from the entire contract that it meant that Farkas was to put in an ordinary, usual "glass front," or "show window," in the front of the building, for the purpose of displaying goods, similar to "glass fronts" in other stores in that locality in the city of Albany. That this is the proper construction of the contract is, we think, shown by the testimony adduced both for the plaintiff and the defendants. Witnesses on both sides testified clearly and definitely as to the difference in rental values generally, in the vicinity of the storehouse in question, of such buildings with and without "glass fronts." The expression "glass front" was apparently not too vague and indefinite for these business men of the city of Albany to know exactly

what was meant thereby, and it is a legitimate inference from this evidence that the parties to the contract in question understood what kind of "glass front" was called for therein. Thus construed, the contract is not too uncertain to be the basis of a suit for the breach thereof, and the petition was not subject to general demurrer. The oral motion to dismiss the petition was of the nature of such a demurrer, and the court did not err in overruling it.

[2-7] It is not necessary to elaborate what is said in the headnotes as to other questions. The court did not err in overruling the motion for a new trial.

Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 500)

ALLEN v. GERSHON & RUSKIN.
(No. 7805.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 977(4)—DISCRETION OF TRIAL COURT—GRANTING NEW TRIAL.

The verdict, although not without evidence to support it, was not demanded by the evidence; and therefore the discretion of the trial judge in granting a first new trial will not be interfered with, even if the specific ground set out in his order was not a sufficient ground for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863.]

Error from City Court of Carrollton; Jas. Beall, Judge.

Action by W. M. Allen against Gershon & Ruskin. Judgment for plaintiff, and from an order granting a first new trial, he brings error. Affirmed.

Smith, Reese & Smith, of Carrollton, for plaintiff in error. Boykin & Robinson, of Carrollton, for defendant in error.

GEORGE, J. The order of the trial judge granting a first new trial in this case is as follows:

"The within motion for new trial having been submitted to me by counsel on both sides, without argument, and after a careful consideration of the case, I am convinced that it was error to admit the testimony of the witness W. L. Gray as follows: 'Mr. Ruskin told me that he could not employ me, because he had the Allen boys hired,' without stating what Allen boys, or stating whether the plaintiff was one of the Allen boys referred to or not. I am of opinion that this was mistrial [material?] error authorizing a new trial. Wherefore it is considered, ordered, and adjudged that a new trial of said case be, and the same is hereby ordered."

The verdict obtained by the plaintiff was not demanded by the evidence, although it is not without evidence to support it. Even if the admission of the testimony recited in the foregoing order was not error, the discretion of the court in granting a first new

trial will not be disturbed. Civil Code of 1910, § 6204; Cox v. Grady, 132 Ga. 368, 64 S. E. 262.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 607)

CHISLON v. STATE. (No. 8374.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 814(10)—TRIAL—CHARGE UPON CONFESSION—EVIDENCE.

Where on the trial of a criminal case the evidence fails to show a confession of guilt by the accused, it is error to charge on the law of confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979.]

2. OTHER ASSIGNMENTS OF ERROR.

The assignments of error on other instructions of the court are, so far as insisted upon in the brief of counsel, without merit.

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW \S 516—EVIDENCE—"CONFESSION OF GUILT."

Where defendant, after his arrest on a charge of larceny from the person, asked the prosecutor not to prosecute him, and said to him: "If I will pay you your money back will you prosecute me?" there was no "confession of guilt," which is an acknowledgment in express terms by a party in a criminal case of the crime charged or of facts which of themselves constitute the crime charged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1139-1145.

For other definitions, see Words and Phrases, First and Second Series, Confession.]

4. CRIMINAL LAW \S 826—TRIAL—INSTRUCTION—CIRCUMSTANTIAL EVIDENCE.

Where the case did not depend entirely upon circumstantial evidence, it was not error to fail to charge the rule thereon contained in Pen. Code 1910, § 1010, in the absence of a timely written request to do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2008.]

Error from City Court of Dublin; R. D. Flynt, Judge.

Ed Chislon was convicted of larceny from the person, his motion for new trial was overruled, and he brings error. Reversed.

W. A. Dampier, of Dublin, for plaintiff in error. S. P. New, Sol. of Dublin, for the State.

GEORGE, J. [1] 1. The plaintiff in error was tried on an accusation in the city court of Dublin, charging him with the offense of larceny from the person. A verdict of guilty was returned, and his motion for new trial was overruled. During the trial the judge gave in charge to the jury the sections of the Penal Code relating to confessions of guilt; and this is assigned as error on the ground that it was not authorized by any evidence in the case. The exception is well taken, and, on the authority of Thomas v.

State, 143 Ga. 268 (3), 84 S. E. 587, Dumas v. State, 63 Ga. 601 (5), and Knight v. State, 114 Ga. 48, 51, 39 S. E. 928, 88 Am. St. Rep. 17, the judgment refusing a new trial must be reversed on that account.

[3] The court probably treated as a confession of guilt the statement to the prosecutor, made by the accused at the time of his arrest. After his arrest, he engaged in conversation with the prosecutor, and asked the prosecutor not to prosecute him. During the conversation he directed this inquiry to the prosecutor: "If I will pay you your money back, will you prosecute me?" In Thomas v. State, supra, it is said:

"A confession of guilt is an acknowledgment in express terms, by a party in a criminal case, of the crime charged, or of facts which of themselves constitute the crime charged."

In that case the defendant, who was tried and convicted of the offense of murder, said, while in jail awaiting trial, that they had put her and her brother, Joseph Jackson, and Bolzy Watkins, in jail, but they had turned her brother loose, and it looked like they ought to turn her loose, that "he knows as much about it as us do; he is into it as much as us, and looks like they ought to turn me loose." Moreover, the codefendant, Bolzy Watkins, made in the presence of the defendant a direct confession, detailing the part taken in the commission of the homicide by himself, the brother of the defendant, and by the defendant herself. She did not contradict any statement made by the codefendant in her presence, directly implicating her in the commission of the offense. The Supreme Court there ruled that no confession of guilt by the accused had been shown by the evidence, and that it was error to charge on the law of confessions. It is useless to multiply authority. The proposition made by the accused to pay the prosecutor the amount of money alleged to have been taken from his person on condition that the case against him be dismissed is in no view an acknowledgment in express terms of the crime charged, or of facts which of themselves constitute the crime charged. At most, this statement is an incriminating admission, to be considered along with the other circumstances in the case.

[2] 2. The remaining assignments of error upon the charge of the court are without merit.

[4] The case does not depend entirely upon circumstantial evidence, and it was therefore not error to fail to charge the rule contained in section 1010 of the Penal Code of 1910, in the absence of a timely written request so to do. If upon another trial of this case the accused desires a charge upon the law of circumstantial evidence, the court should comply with a proper and timely request by giving the law as embraced in that code section. Much of the evidence in the case is purely circumstantial, and for this

reason the court should not decline, upon request made, to give in charge the law embraced in that section. Inasmuch as the case is to be retried, we do not discuss the evidence.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 463)

SOUTHERN RY. CO. v. WILLIAMS.

(No. 7904.)

(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)

(Syllabus by the Court.)

1. CARRIERS \Leftrightarrow 347(11) — ALIGHTING FROM TRAIN—CONTRIBUTORY NEGLIGENCE—NEGLIGENCE—QUESTION FOR JURY.

It is not, as a matter of law, negligence to alight from a moving train at or near a station at which it is the duty of the railroad company to bring the train to a stop, unless it appears that the danger attending the attempt to alight is so great as to be obvious to any person of common prudence and ordinary intelligence. The facts alleged in the petition in this case do not take it out of the general rule that negligence is a question for the jury. Accordingly, the court did not err in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1355, 1356, 1391-1393, 1402.]

2. CARRIERS \Leftrightarrow 318(1)—PERSONAL INJURY—EVIDENCE—PROXIMATE CAUSE.

While the plaintiff may not have been negligent as a matter of law in attempting to alight from a moving train, yet, under the evidence, the negligence of the defendant was not the proximate cause of his injury, and its motion for a new trial should have been granted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307, 1308.]

Error from City Court of Baxley; A. V. Sellers, Judge.

Action by J. M. Williams against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The plaintiff was a passenger on the defendant's train from Brunswick to Baxley. There was a large crowd to get off the train at Baxley. He was riding at the rear end of the coach. When the train stopped at Baxley the passengers for that station were in front of him, except his companion, Herndon. It was necessary for them to alight from the front end of the car. When about a third of the distance from the rear end of the coach an employé of the railway company, whom the plaintiff took to be a flagman, stopped him and his companion and asked if a certain passenger who then appeared to be asleep did not "belong to get off" at Baxley, to which the plaintiff replied in the affirmative, and the employé requested him and his companion to assist in waking the passenger. This they did, and while they were still engaged in their efforts to arouse the sleeping passenger, the train moved off. The plaintiff said to his companion, "If we

are going to get off here we had better do it," and started at a rapid rate to the front end of the car, and went to the steps for the purpose of getting off. His companion got off first, but they attempted to alight from the train at practically the same time. Before attempting to alight from the train the plaintiff was able to observe, in the fairly adequate light of the night, that the ground at the point where he attempted to alight appeared smooth and clear of obstructions, and he thought that he could get off safely. The train had not moved far from the point where it had stopped, and there was nothing to indicate that he could not safely alight. While he was in the act of stepping from the train, the rapidity of its movement, its speed being increased, or a sudden jerk of the engine pulling it away from the station caused him to fall violently to the ground. The character and extent of his injuries need not be here stated, because it is conceded by the defendant that:

"If the plaintiff was entitled to recover at all he was entitled to recover the amount of the verdict rendered."

The specific negligence alleged in the petition is: (1) That the defendant's agents and officers had full knowledge that the plaintiff was upon the train and expected to alight at Baxley, his proper place of destination, and did not stop the train long enough to enable him to alight safely; (2) that the defendant's agents caused the train to move forward and gain a rapid speed while he was in the act of alighting from it; and (3) that they caused the train to be jerked forward while he was in the act of alighting from it, so that he was thrown violently against the ground and injured. The defendant filed a general demurrer to the petition, which was overruled, and, after the verdict in favor of the plaintiff, made a motion for new trial upon the general grounds only. The defendant railway company alleges error in the overruling of its demurrer to the petition and in the refusal of the trial court to grant its motion for a new trial.

The testimony of the plaintiff, who alone appeared as a witness upon the trial, in so far as material on the question for decision here, will be found in the opinion.

J. B. Moore and W. W. Bennett, both of Baxley, and Bennet, Twitty & Reese, of Brunswick, for plaintiff in error. Padgett & Watson, of Baxley, for defendant in error.

GEORGE, J. (after stating the facts as above). Relatively to the question for decision here, the true doctrine is enunciated in 3 Thomp. Neg. p. 344, as follows:

"It may be affirmed, on the one hand, that when a train stops at a station to which the company contracts to carry a passenger, the company is liable if reasonable time to leave is not afforded and the passenger is injured in an attempt to leave after it has started and while in motion, if he does not, in getting off, incur a

danger obvious to the mind of a reasonable man; and on the other hand that, although the company has failed in its duty of stopping the train at the station for a reasonable time to allow the passenger to alight, yet if he attempts to do so after the train has acquired such a rapid motion as to make it obvious to a man acting reasonably under the same circumstances, that an attempt to alight would be attended with danger, he cannot make the negligence of the company a ground for recovering damages from it in case he is hurt, but his hurt will be imputed to his own negligence as the proximate cause of it."

To the same effect is 3 Hutchinson on Carriers (3d Ed.) § 1179 et seq. The doctrine stated by these text-writers has been approved by the Supreme Court of this state in *Turley v. Railway Co.*, 127 Ga. 594, 56 S. E. 748, 8 L. R. A. (N. S.) 695, and in *L. & N. R. R. Co. v. Edmondson*, 128 Ga. 478, 480, 481, 57 S. E. 877. In the case of *Bailey v. Ga. & Florida Ry. Co.*, 144 Ga. 139, 86 S. E. 326, and in many earlier cases decided by the Supreme Court of Georgia, the rule is applied. In the *Turley Case*, supra, Justice Beck, speaking for the court, refers to the decision in the case of *Simmons v. Seaboard Air-Line Railway*, 120 Ga. 225, 47 S. E. 570, 1 Ann. Cas. 777, and says "if that decision conflicts with rulings made in this case, it must yield to older decisions, by whose rulings we are controlled," and refers to the case of *Suber v. G., C. & N. Ry. Co.*, 96 Ga. 42, 23 S. E. 387.

The opinion in the *Simmons Case*, supra, written by Mr. Justice Lamar, recognizes that "it is ordinarily a question for the jury to determine whether it is negligence, barring a recovery, for a passenger to step from a moving train." He points out that such conduct has in several instances been held "not to prevent a recovery where the passenger was injured as the result of a sudden or negligent jerk given the train while he was in the act of alighting," and he cites the cases of *Atlanta Railway Co. v. Randall*, 117 Ga. 165, 43 S. E. 412; *Central Railroad v. Whitehead*, 74 Ga. 453; *Walters v. Collins Park R. Co.*, 95 Ga. 519, 20 S. E. 497; *Poole v. Georgia R. Co.*, 89 Ga. 320, 15 S. E. 321; *Central R. Co. v. McKinney*, 118 Ga. 537, 45 S. E. 430; *Suber v. Georgia, C. & N. R. Co.*, 96 Ga. 43, 23 S. E. 387; *Augusta South. Ry. Co. v. Snider*, 118 Ga. 146, 44 S. E. 1005. He says, however, that:

"In all these cases * * * the mere fact that the passenger may not have been guilty of negligence was not the basis of his right to recover. Even if he was free from fault in stepping from the moving train, that did not make the company liable. It had also to appear that the carrier was guilty of negligence, and that negligence must have been shown to be the cause—the proximate cause—of the injury. *Hardwick v. Georgia R. Co.*, 85 Ga. 509 [11 S. E. 832]. Here the company was bound to announce the station. Its failure so to do might have given rise to a cause of action in favor of the plaintiff for the loss of time, inconvenience, labor of traveling back, expenses, and all proximate damages consequent on his being carried past his destination. *Watson v. Ga. Pacific Railway Co.*, 81 Ga. 476 [7 S. E. 854]. If the petition is construed most favorably for the

pleader, and to mean, not that the plaintiff saw the conductor, but that the conductor saw the passenger attempting to alight from the moving train, it was an act of negligence to signal the engineer forward. The conductor had no right to add to the danger, or to increase the peril of one leaving a train under the circumstances alleged in the petition. And if the plaintiff had been injured as a result of a jerk so caused, and the plaintiff then or thereafter had no opportunity to avoid the consequences of the alleged negligent signaling, the company would have been liable, in view of the other facts stated."

The conclusion reached by the learned Justice is that "the petition claims no damage and sets out no cause of action by reason of the failure to announce the station, nor on account of the signal to go forward," but that when the plaintiff was attempting to get off the moving train, a "jerk, not alleged to be negligent, and to be expected as usual, precipitated him upon the ground to his injury." It was there ruled that the proximate cause of the plaintiff's injury was not the negligence of the railroad company in failing to stop at the proper destination of the plaintiff, and that since the petition did not allege any act of negligence on the part of the railroad company in the operation of its train, the plaintiff's injury resulted from his own negligence.

While the reasoning in the *Simmons Case*, supra, has been criticized by the Supreme Court, it is proper to observe that in no case decided by that court, so far as we know, except in the case of *Bailey v. Ga. Ry. Co.*, 144 Ga. 139, 86 S. E. 326, has a recovery been allowed a passenger on substantially the same facts, except where some act of negligence in the operation of the train was shown, which the jury were authorized to find to be the proximate cause of the injury.

[1] The general doctrine that it is not, as a matter of law, negligence to attempt to alight from a moving train at or near a station at which it is the duty of the railroad company to bring its train to a stop, unless it appears that the danger attending the attempt to alight is so great as to be obvious to any person of common prudence and ordinary intelligence, is established beyond question, both by the decided cases in this state and upon general authority.

[2] Something more is necessary in order to fix liability on the railroad company. The passenger may not be negligent in attempting to step from a moving train, where the railroad company has violated its duty to stop its train at the proper destination of the passenger, or where the train has not stopped a sufficient length of time to enable the passenger to alight. Excusing him from any imputation of negligence, he must allege some act of negligence in the operation of the train at the time of the infliction of the injury, which produced, as the prime or proximate cause, his injury. The act of negligence committed by the railroad company in failing to stop its train a sufficient length

of time to enable the passenger to alight is not, without more, the proximate cause of a physical injury to the passenger in attempting to step from the moving train. The *Simmons Case* was followed in Ga., *C. & N. Ry. Co. v. Hutchins*, 121 Ga. 317, 48 S. E. 939, and in Ill., *Adm'x. v. L. & N. Ry. Co.*, 124 Ga. 243, 52 S. E. 851, 3 L. R. A. (N. S.) 432. The case of *Bailey v. Ga. & Fla. Railway*, 144 Ga. 139, 86 S. E. 326, supra, apparently goes further than any previous case decided by the Supreme Court of this state. In that case it was held to be error to grant a nonsuit where the evidence disclosed that, at the time the passenger undertook to alight from the moving train, it was "moving along slowly," and was not going fast enough to be obviously dangerous, although no act of negligence in the operation of the train at the time of the infliction of the injury upon the plaintiff was alleged in the petition or shown by the evidence. Chief Justice Fish concurred specially in this ruling, upon the ground that, while the railway company had demurred to the petition and had filed exceptions pendente lite to the overruling of its demurrer, it had failed to file a cross-bill of exceptions, and that the judgment overruling the demurrer must be treated by the Supreme Court as a final adjudication that the petition set forth a cause of action, and, inasmuch as the allegations of the petition were supported by the evidence, the grant of a nonsuit was error. The Chief Justice said that "the petition did not set forth a cause of action, and the court should not have overruled the general demurrer," and he based his conclusion upon previous decisions of the Supreme Court in a number of cases, including the *Simmons Case*, supra.

The Court of Appeals has apparently followed the general doctrine announced in the *Suber Case*, supra. See especially *Pierce v. Ga. Railroad & Banking Co.*, 9 Ga. App. 666, 72 S. E. 66; *Southern Ry. Co. v. Parham*, 10 Ga. App. 531, 73 S. E. 763 (1); *Evans v. Southern Ry. Co.*, 12 Ga. App. 319, 77 S. E. 197. It is to be especially noted, however, that in each of these cases, as well as in the *Suber Case*, it appeared that there was some negligent act, or negligent omission to act, by the railroad company in the operation of the train, after the company had failed in its duty to stop the train at the proper destination of the passenger, or had failed to stop the train at such destination for a sufficient length of time to enable the passenger to alight. In the *Evans Case*, supra, it is instructive to note that Judge Russell uses this significant language (12 Ga. App. 325, 77 S. E. 199):

"According to the allegations of the petition the plaintiff thought he could alight in safety, and no reason appears why, ordinarily, he could not have done so. Under the circumstances as related by him, however, the train began to increase its speed just as he stepped from the bottom step of the car. This may be found by

the jury to be the main contributing cause of his injury, the prime negligence which, in connection with the negligence of the company in not stopping the train although it knew that the station was his destination, caused the injury of which he complains."

A clear and concise statement of the doctrine of liability in cases of this character is found in the decision of this court in *Gosnell v. Central of Ga. Ry. Co.*, 17 Ga. App. 67, 86 S. E. 90 (2), where it was said:

"In case of a jerk or sudden start by which one alighting from a train is thrown to the ground, it will be presumed that there was a negligent act in the operation of the train; and where one alights from a moving train by the order of the conductor, the consequences chargeable to the conduct of the conductor will be imputed to the company itself. In this case there was no negligent act in the operation of the train, and there was no negligent order on the part of the conductor to the plaintiff, which caused the plaintiff to fall or induced him to assume the obvious risk of alighting from a moving train, but he voluntarily undertook the risk himself."

Our conclusion of the matter is this: Although a passenger may not have been negligent, in attempting to step from a moving train, yet before there can be liability on the part of the carrier there must be negligence on its part, and such negligence must be the proximate cause of the injury. In the absence of negligence on the part of the carrier in the operation of the train, or on the part of its servants in control thereof in directing, requesting, or permitting the passenger to attempt to alight from the train while in motion, its antecedent negligence in merely failing to stop its train, or in merely failing to stop the train long enough for the passenger to alight, cannot rightly be regarded as the proximate cause of an injury such as was received under the circumstances appearing in this case. The real underlying reason upon which the decision in the *Simmons Case*, supra, is based is that, while a jerk was alleged, it was not alleged to be a negligent jerk, or a sudden jerk, but was only what was to be expected. The conclusion reached in that case, on the facts there stated, may be erroneous, and in our opinion is erroneous under *Gosnell v. Cent. R. Co.*, supra; but the reasoning employed by Justice Lamar seems to us to be essentially sound.

The petition in the case at bar, as amended, set forth a cause of action. No witness was called except the plaintiff, and upon his testimony the case rested. He said that before attempting to get off the train that he observed the situation as best he could. It was tolerably light. The lay of the land looked all right to him. It looked smooth enough. There were no obstructions. It looked like he could get off in safety. In his exact language:

"The reason I fell was because the train was—that is, I think was the reason, I know it was—the train was moving too fast for me to get off safely. It was moving faster than I thought it was. I don't know the distance the train had moved. It hadn't moved very far. I made no observation to ascertain how fast it was moving, nothing special, no more than it hadn't been started but a very short time, and from that time I didn't think was one of the reasons, and then I saw—I thought I saw—I could get off safely."

He admitted that his companion, who preceded him from the train, partially fell in stepping from the train catching himself on one hand. The plaintiff, however, was in the act of stepping from the train and was too far gone to recover himself, at the time he observed his companion in the act of falling. He did not testify that the train suddenly increased its speed, or that there was any perceptible increase in its speed, nor does he testify that a jerk, jolt, or jar of the train occurred at the time when he undertook to step from the coach. On the contrary, his testimony shows that the train moved off in the usual and ordinary manner, and completely rebuts the presumption against the railroad company. Construing the plaintiff's testimony most strongly against him, it is evident that the proximate cause of his injury was his negligence in miscalculating the speed of the train, or that the injury was the result of a mere accident. It is true that the railroad company was negligent, but its negligence consisted merely in failing to stop its train a sufficient length of time to enable the plaintiff to alight, and this negligence, known to the plaintiff, was not the proximate cause of his injury. It cannot be held in this case that an implied invitation was given to the plaintiff by the unnamed employé of the railroad company to attempt to alight from the train while in motion. So far as the evidence discloses, this employé was nothing more than a brakeman or a flagman, and it does not appear that he had or exercised any control whatever over the movement or management of the train. The plaintiff himself does not intimate that he was induced even remotely by the silence of this employé to attempt to leave the train while in motion. The evidence failed to sustain the vital allegation in the declaration, to wit, that at the time the plaintiff undertook to alight from the moving train, the company negligently increased the speed of the train, or negligently caused the train to be suddenly jerked, jolted, or jarred. The court, therefore, erred in overruling the defendant's motion for a new trial.

Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 521)

RUSH v. SOUTHERN RY. CO. (No. 7659.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

*(Syllabus by the Court.)*1. **MASTER AND SERVANT** ⇨258(19) — **PETITION—DEMURRER.**

The petition did not set forth a cause of action, and was properly stricken on general demurrer.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 834.]

*(Additional Syllabus by Editorial Staff.)*2. **EVIDENCE** ⇨80(2) — **PRESUMPTIONS—LAW OF OTHER STATES.**

Where the petition alleged that plaintiff's injury occurred in South Carolina, and no statute of that state was pleaded, the legal presumption is that the common law as to master and servant prevails there, and the rights of the parties must be determined thereby.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 101.]

3. **MASTER AND SERVANT** ⇨265(14) — **INJURY TO SERVANT—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE.**

In railroad servant's action for injury, governed by the common law, the burden was on him to show himself free from negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 893, 908.]

4. **MASTER AND SERVANT** ⇨227(1) — **INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

Under the rules of the common law, contributory negligence would defeat a servant's action for injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 668.]

5. **MASTER AND SERVANT** ⇨265(2) — **BURDEN OF PROOF—NEGLIGENCE.**

Under the common law, the burden was on the servant to show that the master was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 878, 895, 896.]

6. **MASTER AND SERVANT** ⇨159 — **COMMON LAW—FELLOW SERVANT.**

Under the common law, if the negligence causing injury to a servant was that of a fellow-servant, there could be no recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 318-325.]

7. **MASTER AND SERVANT** ⇨203(1) — **ASSUMPTION OF RISK—RECOVERY.**

Under the common law, if injury to a servant resulted from one of the ordinary and usual risks of his employment, there could be no recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 538-540, 542, 543.]

8. **MASTER AND SERVANT** ⇨236(7) — **INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

Where a railroad carpenter was ordered to go into a box car on a cloudy day, that condition would require of him some additional precautions, in the exercise of ordinary care, before attempting to carry a heavy sack of cement out of the car.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 730.]

9. **MASTER AND SERVANT** ⇨217(3) — **INJURY TO SERVANT—ASSUMPTION OF RISK.**

A railroad carpenter, required by his foreman to go into a box car on cloudy day to bring out a sack of cement, assumed the risk of tripping over a pair of scales, not improperly on

the floor of the car; his means of knowing the condition being equal to that of the master.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 576.]

10. **MASTER AND SERVANT** ⇨189(1) — **INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANT.**

Where a railroad carpenter was directed by his foreman to go into box car on cloudy day to bring out a sack of cement, without warning him of scales on floor of car over which he tripped, the foreman, engaged with plaintiff in a common duty owing to the master, was a fellow servant for whose negligence there was no recovery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 427-430.]

Error from City Court of Richmond County; J. C. C. Black, Jr., Judge.

Action by James Rush against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Henry C. Roney, of Augusta, for plaintiff in error. Cumming & Harper and Bryan Cumming, all of Augusta, for defendant in error.

GEORGE, J. [1] The plaintiff alleged that he was an employé working for the defendant railway company in the state of South Carolina at the time of his injury. There is no allegation to the effect that he was engaged in interstate commerce, nor do the facts in the petition bring the case within the application of the federal Employers' Liability Act (Act Cong. April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]). His general employment was that of a carpenter, but he was required also to do other work at the direction of his foreman, and his foreman directed him to go into a box car and bring from the car a bag of cement, to be used in the general work in which the plaintiff was engaged. The plaintiff had not been in this box car on the day of his injury, but there is no allegation that there was anything unusual or peculiar about the car. He entered the car by the middle door, and, because it was a cloudy day, the car inside was very dark; he saw the cement bags piled in the far end of the car but could see no more; he went to the cement and picked up a bag, and, as he turned to come out, his feet became entangled in a large pair of scales, and he was thrown to the floor by reason thereof, and received the injuries set forth in his petition. He alleged that on account of the darkness of the car he did not see the scales, that he was not advised that the car contained anything except cement, and that he would have safely performed the duty required of him had it not been for the presence of the scales in the car. He bases his right to recover upon the theory that the defendant had not provided him a reasonably safe place in which to work and had failed to notify him of the presence of the scales in the car. A general demurrer to the

petition was sustained by the trial court, and the plaintiff excepted.

[2] The petition alleging that the injury occurred within the state of South Carolina, and no statute of that state being pleaded, the legal presumption is that the common law governing the relations of master and servant prevailed at the place where this injury occurred, and the rights of the parties must be determined by the common law. *Southern Railway Co. v. Cunningham*, 123 Ga. 90, 50 S. E. 979 (1). So far as the decision in the case of *Southern Ry. Co. v. Diseker*, 13 Ga. App. 799, 81 S. E. 269, conflicts with what is here held, it is not in harmony with decisions of the Supreme Court and other decisions of this court.

[3-7] The burden is upon the plaintiff to show himself free from negligence; for contributory negligence, under the rules of the common law, would defeat his recovery. Further, the burden is upon the plaintiff, under the rules of the common law, to show that the defendant was negligent. If the negligence was that of a fellow servant there could be no recovery, or if the injury resulted from one of the ordinary and usual risks of employment there could be no recovery at common law.

[8] It is by no means clear that the plaintiff himself was free from fault or negligence. He had been working in the open, and entered the car, always more or less dark, upon a cloudy day, and, without taking any precautions, proceeded to the rear end of the car for the bag of cement. There was in fact a large pair of scales on the floor of the car, and under usual conditions any ordinarily prudent person would have discovered the presence of the scales. According to the petition the plaintiff himself would have observed the scales, but for the lack of sufficient light within the car. The only reason given for the unusual darkness within the car is that the day was cloudy, and such a condition itself would seem sufficient to require of the plaintiff some additional precautions, in the exercise of ordinary care, before attempting to carry the heavy sack of cement out of the car.

[9] It does not appear that the defendant was negligent. It was under no duty to arrange the cement in the car in any particular fashion, nor in any particular part of the car. It was not improper that such a thing as a pair of scales should have been in the car. The accident which befell the plaintiff, if not the result of his negligence, might properly be classified as a risk of his employment. Certainly it is a risk of the employment that the servant, who is required to carry a heavy load, may stumble over some article not improperly in the place

where he is required to work. His means of knowing the condition of the car upon the occasion of his injury were equal to those of the master. Ordinarily, and under usual conditions, there would have been no danger in entering the car and carrying out the cement. The clouds of the heavens cut off from the car the ordinary and natural supply of light, and the plaintiff entered the car with full knowledge of these existing conditions.

[10] There is not a line in the petition to indicate that the foreman under whom the plaintiff was working occupied any other relation than that of a fellow servant to him. Both the plaintiff and the foreman were engaged in a common duty owing to the master, and the foreman, under the facts alleged in this petition, must be considered as the fellow servant of the plaintiff. The ground of negligence alleged against the defendant in failing to warn the plaintiff of the presence of the scales within the car is based upon the failure of the foreman, his fellow servant, to so advise him. If this negligence be the cause of plaintiff's injury, he cannot recover, because his petition is proceeding under the rules of the common law, in so far as the same govern the relations of master and servant. His injury, however, was due to the presence of the scales in the car, combined with the darkness therein caused by the intense cloudiness of the day. The master presumably was at a distant point when the clouds spread over the sky, and the plaintiff himself was upon the ground, knew the conditions, and must be held to have assumed the risks ordinarily incident to the particular work required of him at that time. Certainly the failure to warn him of the presence of the scales must be considered negligence of his fellow servant, the foreman, no one else being present. The plaintiff was not free from fault; he seems to have assumed the risk incident to the work in hand; the place where he was at work was in no sense a permanent one, and the only negligence charged in the petition is the failure of the master to advise him of the presence of the scales, the condition as to light in the car being considered. The petition expressly complains that the failure to give the warning was chargeable to the foreman, a fellow servant engaged in the same work with the plaintiff, and under the control of a common master, and who, so far as the facts stated in the petition show, had no more authority in the premises than the plaintiff himself. The court did not err in sustaining the demurrer. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 551)

YOUNG v. ANDERSON et al. (No. 8048.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

**1. EXECUTORS AND ADMINISTRATORS — 193—
RIGHTS OF SURVIVING WIFE—MAINTENANCE
—OBJECTION—BURDEN OF PROOF.**

On the trial of an issue formed by objections of adult children of a decedent to a return of appraisers, setting apart a year's support to the widow, the burden of proof is on the objectors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 708-712.]

**2. EXECUTORS AND ADMINISTRATORS — 193—
ALLOWANCE TO WIDOW—CHARGE—EVIDENCE.**

The exceptions to the charge of the court are without merit. The verdict is authorized by the evidence, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 708-712.]

(Additional Syllabus by Editorial Staff.)

3. TRIAL — 25(4)—RIGHT TO OPEN AND CLOSE.

On the trial of an issue formed by objections to the amount set apart as a year's support to the widow of a decedent, the objectors, having the burden of proof, had the right to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 47, 60-75.]

**4. EXECUTORS AND ADMINISTRATORS — 193—
WIDOW'S ALLOWANCE FOR MAINTENANCE—
DETERMINATION OF AMOUNT.**

In determining the amount to be set apart as a year's support to the widow of a decedent, the jury's estimate must be made according to the circumstances of the family previous to the decedent's death, on consideration of special circumstances occurring during such year, including the widow's physical disability arising from her attention to decedent in his last illness, her need of medicine, etc., and the solvency of the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 708-712.]

Error from Superior Court, Bibb County;
H. A. Mathews, Judge.

Application by Mrs. E. O. Young to the court of ordinary to have assigned to her a year's support from the estate of her deceased husband, T. E. Young, wherein R. L. Anderson, administrator, and others, objected to the appraisers' report. From a judgment of the superior court, on appeal from the court of ordinary, reducing the amount allowed, and from the denial of her motion for new trial, applicant brings error. Affirmed.

L. D. Moore, of Macon, for plaintiff in error. Minter Wimberly and Jesse Harris, both of Macon, for defendants in error.

GEORGE, J. Mrs. Young, plaintiff in error, made application to the Bibb court of ordinary to have assigned to her a year's support from the estate of her husband, T. E. Young. Appraisers were appointed, and a return made setting aside for the support and maintenance of the widow certain household and kitchen furniture and \$2,000 in

money, whereupon the children of the deceased husband filed objections to the report of the appraisers, alleging that the amount set apart was excessive. The issue was passed upon by the ordinary and an appeal taken to the superior court. Upon the trial in the superior court, the jury reduced the amount allowed for the year's support to \$1,020.83, and the applicant made a motion for new trial, which was refused, and she excepts.

[1, 3] The general grounds of the motion for new trial are without merit. The evidence is sufficient to support the verdict of the jury. Special exception is taken to the ruling of the court in allowing the objectors the right to open and conclude the case. The record discloses, however, that Mrs. Young, the applicant for a year's support, had the opening and concluding arguments in the case; but she insists that she obtained this right by failure to offer evidence, and that in order to obtain this privilege she was legally compelled to waive the important right to offer evidence upon the trial of the case. As a matter of fact, the only witness sworn by the objectors was the applicant, Mrs. Young, and upon her evidence alone the case was decided by the jury. She did therefore have the benefit of her own evidence, and her counsel opened and concluded the argument of the case. On the legal question made, the decisions somewhat conflict. In *Cheney v. Cheney*, 73 Ga. 66, the Supreme Court held that the applicant was entitled to open and conclude the case, but the objections were there filed by the personal representative of the estate. In *Lee v. English & Co. et al.*, 107 Ga. 152, 33 S. E. 39, the Supreme Court ruled that the objectors had the right to open and conclude the argument. There the objectors were certain creditors of the decedent, and the court distinguished the ruling in the *Cheney Case*, supra, upon the ground that the application for a year's support in that case was resisted by the personal representative of the estate, who was also one of the distributees of the estate. Attention was there called to the case of *Robson v. Harris*, 82 Ga. 154, 7 S. E. 926, where the objector was a creditor, and where it was held that the burden was upon such objector, and that he therefore had the right to open and conclude the argument. It is insisted in the case at bar that the objectors were heirs at law of the intestate, and that they occupied the same relation to the estate as the administrator, and that the applicant was entitled to open and conclude. The case of *Jones v. Cooner*, 142 Ga. 127, 82 S. E. 445 (1), seems to decide the precise question here involved. In the case last cited objections were filed by an assignee of adult children of the decedent to the return of appraisers setting aside a year's support to the widow and minor children, and it is expressly ruled that the burden of proof is on the objecting assignee. We conclude that the court rightly ruled that the

objectors should open and conclude the case. This conclusion seems to be demanded, both upon reason and authority.

[2] 2. The second ground of the amended motion excepts to the charge of the court, in which the jury are instructed that:

"It was their duty to determine whether or not the objection filed is good; in other words, whether or not the report is correct."

This exception is without merit, since the court, in very clear language, in the charge expressly instructed the jury that the report of the appraisers fixing the amount of the support to be allowed the applicant was prima facie correct, and the burden was upon the objectors to show that the amount found by the appraisers was in fact excessive.

[4] Neither was it error in the court to charge the jury as follows:

"The question is simply what is a reasonable amount to be set aside out of the estate to maintain her in the same manner in which she was maintained, according to her circumstances and standing in life."

Counsel insists that, the evidence disclosing the physical disability of the applicant brought on by attention given the decedent in his last illness, this charge was error because it too much restricted the jury in determining the question of a proper allowance to be made to the widow as a year's support. Physical disability brought on by attention to the decedent in his last illness should be considered by the jury; but the rule by which the allowance is to be determined remains the same, and this estimate must be made according to the circumstances and standing of the family, previous to the death of its head, and in making it the solvency of the estate is to be kept in view. *Cheney v. Cheney*, supra. The charge of the court excepted to stated the correct rule of law applicable to the issues in the case, and, indeed, is in the almost exact verbiage of the section of the Code providing for a year's support to the widow and minor children of a decedent. Special circumstances occurring and existing during the first year after the death of the head of the family, and illustrating the amount necessary for the support of the widow, should be considered by the jury. We do not mean to hold otherwise. But, while these special circumstances should be taken into consideration, the estimate of the proper allowance to be made to the widow must finally be determined according to the circumstances and standing of the family previous to the death of the husband; due regard being had to the solvency of the estate. If the circumstances of the decedent, and the standing of his family during his lifetime, were such as to warrant reasonable medical attention to the wife, in the event such were necessary, if such medical services are required by the widow during the year following the death of the husband, the same should be considered in fixing the amount to

be allowed her as a year's support. The whole amount allowed her should be sufficient to support and maintain her, including necessary medical service, in keeping with the circumstances and standing of the family previous to the death of the husband; due regard being had to the solvency of the estate. None of the reasons assigned by the plaintiff in error authorize this court to set aside the verdict of the jury which, the size of the estate being considered, is ample under the evidence in this record for the support and maintenance of plaintiff in error. The verdict has had the approval of the trial court, and his judgment denying the new trial is affirmed.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 510)

GRAY v. RAY. (No. 8067.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 193—ALLOWANCE TO WIDOW—OBJECTION TO APPRAISERS' RETURN—BURDEN OF PROOF.

On the trial of an issue formed by objections filed by a creditor of a decedent to the return of appraisers setting apart a year's support to the widow and minor children, the burden of proof is on the objector. *Lee v. English & Co. et al.*, 107 Ga. 152, 33 S. E. 39; *Jones v. Cooner*, 142 Ga. 127, 82 S. E. 445 (1); *Young v. Anderson, Adm'r, et al.*, 91 S. E. 900, this day decided.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 708-712.]

2. EXECUTORS AND ADMINISTRATORS \S 193—ALLOWANCE TO WIDOW—OBJECTION TO APPRAISERS' RETURN—BURDEN OF PROOF.

On the trial of such an issue, the following charge to the jury was error: "You have nothing on the face of this earth to do with any judgment of any court in the world; this is a new proceeding, and it is for you to pass on, regardless of what has been done with it anywhere else." The report of the appraisers, which in this case had the approval of the ordinary, was prima facie correct, and the burden was upon the objector to overcome this presumption by evidence. *Robson, Trustee, v. Harris*, 82 Ga. 153, 7 S. E. 926; *Lee v. English & Co. et al.*, 107 Ga. 154, 155, 33 S. E. 39. The charge quoted is error because the judge did not anywhere in his charge refer to the report of the appraisers, and entirely failed to instruct the jury that such report was prima facie correct. The jury could not have understood this charge to refer to anything other than the report of the appraisers.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 708-712.]

3. APPEAL AND ERROR \S 1046(5)—HARMLESS ERROR—REMARK OF TRIAL COURT.

On the trial of such issue, the objector offered in evidence a certain mortgage note, executed by the decedent during his lifetime, and counsel for the applicant conceded that the mortgage note was relevant for the purpose of showing that the objector was a creditor of the estate, but contended that it did not appear to be a purchase-money mortgage and was not in fact a purchase-money mortgage; to which the

court replied: "The law means to pay for the property, to pay the purchase money; and, if you can go around it, that doesn't mean anything." This statement was made in the presence of the jury, and we think it was prejudicial to the rights of the applicant, and tended to unduly influence the jury in arriving at their verdict. This harmful error was hardly remedied by subsequent statements made by the court in again referring to the evidence, or in the charge to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4134.]

4. RULING ON MOTION FOR NEW TRIAL.

Except as herein indicated, the trial was free from error. For the reasons stated, the trial court erred in overruling the motion for new trial made by the widow of the decedent.

Error from Superior Court, Hart County; J. N. Worley, Judge.

Objection by C. P. Ray, a creditor of a decedent, to the return of appraisers setting apart a year's support to Julia A. Gray, the widow, and the minor children. Judgment for the objector, and the widow brings error. Reversed.

A. G. & Julian McCurry and Walter L. Hodges, all of Hartwell, for plaintiff in error. Jas. H. & Parke Skelton, of Hartwell, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 620)

TRIMBLE v. CITY OF ATLANTA. (No. 8441.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

DISORDERLY CONDUCT — CONVICTION — EVIDENCE.

The evidence did not authorize a conviction by the recorder's court on the charge of disorderly conduct, and the judge of the superior court erred in overruling the certiorari.

[Ed. Note.—For other cases, see Disorderly Conduct, Cent. Dig. §§ 16, 17.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

W. N. Trimble was convicted in the recorder's court of the offense of disorderly conduct under an ordinance of the City of Atlanta, and he brings error. Reversed.

Ralph McClelland, of Atlanta, for plaintiff in error. J. L. Mayson and S. D. Hewlett, both of Atlanta, for defendant in error.

LUKE, J. The evidence upon which the defendant was convicted of the offense of disorderly conduct, under an ordinance of the city of Atlanta, is as follows:

"E. L. Jett, sworn in behalf of the city, testifies as follows: That he was assistant chief of police for the city of Atlanta; that on Saturday night, on the corner of Alabama and Broad streets, he arrested W. N. Trimble, and that all he saw W. N. Trimble do was that he seemed to have hold of the conductor, who was

an employé of the Georgia Railway & Power Company; that he did not see him hollering or doing any other acts that might be termed as disorderly.

"L. Q. Meaders, sworn in behalf of the city, testified as follows: That he saw the defendant have hold of the hand of an employé of the Georgia Railway & Power Company on Saturday night, September 31st; that it was near the corner of Broad and Alabama streets; that the defendant, W. N. Trimble, was standing behind the man he was holding by the hand; he saw W. N. Trimble committing no other act of disorder, other than holding the man's hand as stated above. He further testified that he does not know whether the man was making any effort to release his hand from the hold of W. N. Trimble or not.

"W. N. Trimble, the defendant made the following statement in his defense: 'On last Saturday night, when I was arrested, I was down town, and there was a crowd around me of several thousand people. It was the night of the street car strike. I am not a street car striker, nor have I ever worked for the Georgia Railway & Power Company, whose men were out on a strike. If I touched the gentleman, as these men have stated, I did it unknowingly. The crowd was pushing and pulling, and I was simply trying to get out of the crowd, and it is possible that I might have touched this man in my effort to get out, but I was not disorderly, and had no intention of taking hold of any one.'"

It will be noted that the conductor whose hand the defendant is alleged to have held at the time he is charged with the offense was not offered as a witness. It cannot be said that this defendant committed any acts which would make the offense of disorderly conduct. Merely holding hands is not necessarily disorderly conduct. The evidence was not sufficient to support a conviction, and the judge of the superior court should have sustained the certiorari.

Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 545)

WILSON v. GRAND LODGE BROTHERS AND SISTERS OF LOVE. (No. 7960.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

INSURANCE — §818(1), 819(1)—FRATERNAL INSURANCE—ACTION FOR BENEFIT—ADMISSION OF EVIDENCE—SUFFICIENCY OF EVIDENCE.

The objection to the evidence is without merit, and the evidence authorized the verdict. There was no error in overruling the certiorari and in refusing a new trial in this case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2003, 2006.]

Error from Superior Court, Morgan County; J. B. Park, Judge.

Action by Jesse Wilson against the Grand Lodge Brothers and Sisters of Love. Judgment for defendant, certiorari overruled, new trial denied, and plaintiff brings error. Affirmed.

M. C. Few, of Madison, for plaintiff in error. Williford & Lambert, of Madison, for defendant in error.

GEORGE, J. Wilson brought suit in a justice court against the Grand Lodge Brothers and Sisters of Love, a mutual benefit association, upon a certificate of life insurance, and claimed that he was entitled to the benefit of the certificate. The certificate was originally issued to Isabella Tripp and was payable "to Maria Tripp, the legal beneficiary of Isabella Tripp." The plaintiff and Isabella Tripp were married in January, 1915, and she died in the following May. When they married, she was a member of the local lodge of Brothers and Sisters of Love, located at Shady Dale, Ga. She held a policy of insurance issued by the defendant, payable as hereinbefore stated. That policy had been surrendered to the company on request of the company, and a new policy was to be issued. The old policy was recalled by the company for the sole purpose of having a by-law of the Grand Lodge printed on it, and no other change was to be made. The new policy was returned to the secretary of the local lodge, in accordance with the custom of the Grand Lodge, with the beneficiary left blank. The plaintiff testified that the insured had the right to direct the secretary of the local lodge to insert the name of any beneficiary named by her, and that on the return of the new policy his wife saw the president of the local lodge and directed that the plaintiff's name be inserted as beneficiary in the certificate of insurance. It was admitted by the defendant that the insured had the right to have the secretary of the local lodge insert the name of the beneficiary in the certificate at her direction, but the president of the local lodge, in his evidence, denied that the insured saw him and directed that the name of the plaintiff be inserted as the beneficiary in the policy. On the contrary, he testified that the policy was delivered by him to a friend of the insured, at her direction, with a blank left for the name of the beneficiary. This occurred just before her death. After her death, the plaintiff obtained the policy, and when the president again saw the policy it had the name of the plaintiff inserted as beneficiary. The plaintiff testified that he did not know who caused his name to be inserted in the policy.

Section 9 of the by-laws of the defendant was introduced in evidence, and is as follows:

"Each member is required to have the name of their legal beneficiary written plainly on their policy, and in case they fail to do so it is left to the supreme grand president, after hearing the evidence in the case, to choose the beneficiary."

It was admitted by both parties that the original policy, recalled by the company, was payable to the sister of the insured, Maria, and Maria Tripp testified that she and her sister were both members of the local lodge, at Shady Dale, and that when they joined the local lodge, by agreement of each, the other was made the beneficiary in the certificates

of insurance issued to the two sisters. Both the policies issued to Maria and Isabella Tripp were recalled by the company for the sole purpose hereinbefore stated, and at the time of the death of the sister, then the wife of the plaintiff, the beneficiaries in each of the new certificates were in blank. After the death of Isabella, in order to determine to whom the benefit provided in the certificate should be paid, the supreme grand president heard evidence in the case, as provided in section 9 of the by-laws, and determined that the benefit was payable to Maria Tripp. Upon the trial of the case the plaintiff himself introduced the original certificate of insurance for the sole purpose of showing the practice of the defendant to allow the insured to insert, through the secretary of the local lodge, the name of the chosen beneficiary. The defendant offered this original certificate for all purposes, and the plaintiff complains that the court erred in allowing it in evidence when offered by the defendant, for the reason that it appeared that it had been surrendered to and canceled by the defendant. The evidence for the defendant further showed that the new certificate had to be accepted by the insured, and that the insured did not accept it.

It is insisted by the plaintiff that the certificate in force at the time of the death of his wife was payable to her legal beneficiary, but it does not appear that the husband was the legal beneficiary of the insured. The evidence does not disclose whether the insured died testate or intestate, nor whether she left surviving her a child or children. It is contended by the plaintiff that the wife intended to name him as the beneficiary in the policy, and so instructed the president of the local lodge. This was disputed by the defendant, and the evidence was in sharp conflict. The evidence on this issue seems to preponderate in favor of the contentions of the defendant. The jury found the issue in favor of the defendant. The plaintiff presented his petition for certiorari to the judge of the superior court, and the certiorari was duly sanctioned. The magistrate answered, setting up substantially the foregoing facts. On the plaintiff's petition and the answer of the magistrate the court determined the issues against the plaintiff, and he excepted.

There was no error in admitting in evidence the original certificate of insurance, and the evidence authorized the jury to find the issues of fact against the plaintiff. The case is largely controlled by *Smith v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n*, 138 Ga. 717, 76 S. E. 44. The judge did not err in overruling the certiorari and in denying plaintiff a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 566)

ELLIS v. DUDLEY. (No. 7641.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)*(Syllabus by the Court.)***BILLS AND NOTES — 315—EQUITIES—STATUTE
—INTERMEDIATE ASSIGNEE—"ASSIGNOR."**

The provision of the Code of this state that nonnegotiable choses in action are taken "subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable" (Civ. Code 1910, § 3653), permits the debtor to set up equities subsisting between the original contracting parties, but has no application to equities in favor of the debtor against an intermediate assignee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 751, 753, 756-759, 764, 768-769, 864.

For other definitions, see Words and Phrases, First and Second Series, Assignor.]

Error from City Court of Americus; W. M. Harper, Judge.

Suit by G. R. Ellis against A. W. Smith, as receiver of the Americus National Bank. Continued after the receiver's death against N. M. Dudley, receiver. Judgment for defendant on directed verdict, motion for new trial overruled, and plaintiff brings error. Reversed.

G. R. Ellis filed a suit against A. W. Smith, as receiver of the Americus National Bank, returnable to the March term, 1915, of the city court of Americus, alleging that a receiver was appointed for the assets of the Americus National Bank on February 3, 1914, at which time J. S. Bolton & Bro., a partnership composed of J. S. Bolton and J. F. Bolton, had on deposit in that bank, subject to check, the sum of \$4,206.72; that there were no outstanding checks drawn against the deposit, and that Bolton & Bro. were not indebted to the bank in any manner whatever at the time of the appointment of the receiver, and no right of set-off against them or either of them existed in favor of the bank; that after the appointment of the receiver, to wit, on March 10, 1914, Bolton & Bro., for value, sold, conveyed, transferred, and assigned the said deposit account to Mrs. Josey V. Warlick who on March 27, 1914, sold, transferred, and assigned the same to the plaintiff; that the plaintiff was at the time of bringing the suit the owner and holder of the deposit account, and that he was not indebted to the Americus National Bank in any sum whatever; that on November 15, 1914, a dividend of 10 per cent. that had been declared was due to be paid to the deposit creditors of the bank; that the written transfers mentioned had been placed in the hands of the receiver; that the plaintiff was entitled to have the said dividend of 10 per cent. on the said deposit account, amounting to \$420.67, paid to him, and that the said A. W. Smith, as receiver, refused to pay the same, and was therefore

indebted to the plaintiff in said sum, with interest thereon since November 15, 1914, when the dividend became due and payable. Copies of the transfers referred to were attached to the plaintiff's petition. The record shows that A. W. Smith died, and N. M. Dudley was appointed receiver of the Americus National Bank, and made a party in this cause.

The defendant answered, admitting the appointment of the receiver, but, for want of information, neither admitted nor denied the other allegations of the petition, and demanded proof; and for plea set up that Mrs. Josey V. Warlick, to whom (as appeared from the allegations in the plaintiff's petition) the deposit account of J. S. Bolton & Bro. at one time belonged, was at that time largely indebted to the Americus National Bank in a sum greater than the deposit account, and that she was insolvent and unable to pay her indebtedness, and any transfer or assignment by her to the plaintiff was detrimental to the defendant, and was not a legal transfer and assignment as against the rights of the defendant. At the trial of the case the written transfers from Bolton & Bro. to Josey V. Warlick, and from Josey V. Warlick to G. R. Ellis, were introduced in evidence. The plaintiff testified that before taking the transfer from Mrs. Warlick he had a conference with Mr. Dunbar, who then had charge of the affairs of the Americus National Bank, and was acting as its receiver; that Mr. Dunbar stated that Bolton & Bro. had the account with the bank, subject to check, and had assigned it to Mrs. Warlick, and were not indebted to the bank in any manner whatever; that he stated to Dunbar at the time of inquiring as to whether Bolton & Bro. were indebted to the bank that the inquiry was made for the purpose of knowing whether there was a set-off against the account, as he contemplated trading for it with Mrs. Warlick, and Dunbar replied that there was no set-off against Bolton & Bro. On cross-examination the plaintiff stated that Dunbar did not tell him that Mrs. Warlick was indebted to the bank, and he did not ask him. Counsel for the defendant admitted that three dividends had been paid—two of 10 per cent., and one of 5 per cent.—and that one dividend of 10 per cent. was paid before the suit was filed, and the other dividends since, and that the receiver of the Americus National Bank had refused to pay to the plaintiff any of the dividends on the deposit account of Bolton & Bro. The defendant introduced in evidence, over the objection of counsel for the plaintiff, a promissory note for \$6,324, signed by Mrs. Josey V. Warlick, dated August 3, 1913, payable to the order of the Americus National Bank, on November 1st, after date. No evidence was offered as to the insolvency of the

plaintiff's assignor, Mrs. Warlick. The court directed a verdict for the defendant, and the plaintiff made a motion for a new trial, which was overruled, and he excepted.

Ellis, Webb & Ellis, of Americus, for plaintiff in error. W. A. Dodson and Shipp & Sheppard, all of Americus, for defendant in error.

JENKINS, J. (after stating the facts as above). 1. No equity having existed in favor of the debtor against the original holder of the chose in action, and none being held against the present assignee, the sole question for our determination, therefore, relates to whether or not the defendant bank should have been allowed to set off against the plaintiff its indebtedness against Mrs. Warlick, the intermediate assignee of the bank deposit, and who was the assignor of the plaintiff. "Set-off is a defense which goes, not to the justice of plaintiff's demand, but sets up a demand against the plaintiff to counterbalance his in whole or in part." Civil Code of 1910, § 4339. Ordinarily such a right inures only to the benefit of the parties themselves and in their own right. Code, §§ 4340, 4341. But in section 3653 it is provided that title to nonnegotiable choses in action is taken "subject to the equities existing between the assignor and the debtor at the time of the assignment, and until notice of the assignment is given to the person liable," and under the interpretation of this provision of the Code by our Supreme Court there can be no question but that it permits the defeat of such an assignee's claim by virtue of equities subsisting between the original contracting parties. But whether or not the equities of such debtor against an intermediate assignee can be set off against the final holder seems to be a question which has never been adjudicated by the courts of this state. So far as our search has enabled us to ascertain, in none of our cases have the facts ever caused the determination of this question to become pertinent. It is true that our Supreme Court, in the case of *Guerrey v. Perryman*, 6 Ga. 123, uses the following language:

"The rule, with regard to the assignment of choses in action, not negotiable, we understand to be, that every person who takes an instrument, not assignable by the terms of it, must take it principally on the credit of him from whom he receives it, for it is always liable to be defeated by equitable circumstances subsisting between the original contracting parties, being taken legally subject to all the equities of the original debtor."

This language was quoted approvingly in the case of *Third National Bank v. Railroad Co.*, 114 Ga. 892, 40 S. E. 1016. In the later case of *McCaw Mfg. Co. v. Felder*, 115 Ga. 411, 41 S. E. 664, our Supreme Court, speaking through Justice Cobb, uses the following language:

"While as a general rule 'set-off must be between the same parties and in their own right'

(Civil Code [1895] § 3747 [Civil Code 1910, § 4341]), still the transferee of a chose in action other than a negotiable security takes it subject to the equities existing between the original creditor and the debtor. Civil Code [1895] § 3077." Civil Code 1910, § 3653.

But while the language of these decisions might seem to indicate that the equities which may be set up by the debtor against the final assignee are such only as subsisted between the original contracting parties, still inasmuch as equities against intermediate assignees were not involved under the facts in any of those cases, we cannot hold the language quoted to be conclusive in the determination of the question now before us.

Section 3653 of the Civil Code of 1910, referred to above, is as follows:

"All choses in action arising upon contract may be assigned so as to vest the title in the assignee, but he takes it, except negotiable securities, subject to the equities existing between the assignor and debtor at the time of the assignment, and until notice of the assignment is given to the person liable."

A literal construction of this section might seem to indicate that the final assignee takes such securities subject only to the equities existing between his immediate assignor and the debtor, but such a construction would be directly in conflict with each of the rulings already referred to. The question, therefore, which we are called upon to decide is whether such an assignment is taken subject not only to the right of set-off existing between the present parties, by virtue of section 4340, and subject also to equities existing between the original parties, by virtue of the provisions of section 3653, *supra*, but whether such an assignment is taken subject also to the equities existing between the debtor and all intermediate assignees, or at least subject to the equities against the immediate assignor of the holder. In arriving at the true intent of section 3653 it will be observed that while nonnegotiable securities are taken subject to the equities between "the assignor and debtor," such limitation is expressly made to apply only to such equities against the assignor as existed "at the time of the assignment and until notice of the assignment is given to the person liable." We think this provision as to notice can aid in determining the question before us; that is, whether the words "the assignor" relate only to the original creditor, or whether they are intended to comprehend all intermediate assignees. At common law, such choses in action were not assignable, and the purpose of the law we are considering would seem to have been primarily to render such nonnegotiable securities subject to assignment; but at the same time to hold the assignee thereof liable to any then-existing equities against the assignor in favor of the debtor, and further to even hold the assignee subject to subsequently accruing equities against the assignor until notice of the assignment had been given. It can ad-

mit of no question that, under the terms of the Code provisions, any assignee of such a claim could not be defeated therein by the debtor attempting to set up an equity against his original creditor, if the claim arose subsequently to the notice given him of the assignment. This is true under the plain provisions of the law itself. If, then, the debtor could not be heard to defend in such manner, would the fact that an equity arising after such notice exists against a new and different person than the original holder of the claim alter the rule? We cannot think so. The manifest intent of the quoted section seems to be that the notice prescribed is intended to fix the status of all equities, and that, after such notice has been given, any equities subsequently arising are barred, if, then, it be taken as true that no counterclaim in favor of the debtor can arise, after notice to him of the original assignment, the language of the section, wherein it refers to equities existing between the assignor and the debtor "at the time of the assignment and until notice of the assignment is given," would certainly seem to refer to the equities between the original contracting parties. While the suppositions used in the foregoing reasoning may not altogether correspond to the facts in the instant case, they are employed for the purpose of arriving at the correct meaning and intent of the Code section we are seeking to construe; and if the meaning of the section before us has been thus correctly arrived at, then no further difficulty appears in applying its provisions to the present case.

Under the provisions of section 4344, the right of an assignee to set off equities against the original payee of a negotiable paper received under dishonor is applied under a somewhat different rule than the rule applicable where a nonnegotiable chose in action is assigned. In cases where an overdue negotiable paper is received, while the right of set-off is allowed against the "original payee" (section 4344, *supra*), this right is limited to only such counterclaims as are, in some way connected with the contract sued on. While this same distinction seems to obtain in other states as the more general rule, there appears to be considerable lack of uniformity in this respect. 34 Cyc. 749 (8). Thus, when considering those cases in other jurisdictions where the right of set-off against an intermediate assignee is treated, we should bear in mind the distinctions pointed out, whenever the facts of such cases indicate that the attempted set-off was in an action upon a discredited note or bond; still we think that the courts of many jurisdictions have clearly laid down the governing rule, without reference to the special distinctions which we have pointed out in favor of notes and bonds, although taken when past due. The general proposition, as stated in 34 Cyc. 749(5), is as follows:

"Defendants cannot, as against plaintiffs, set off demands against plaintiff's intermediate assignee, unless there is an agreement between the parties allowing it. Thus a set-off against an intermediate assignee, held as a general rule to be unavailable on an action on a note, and the same principle is held to be applicable where plaintiff sues upon a bond."

See, also, 25 Am. & Eng. Enc. of Law (2d Ed.) 530.

In *McKenzie v. Hunt*, 32 Ala. 494, it was held that in an action on a note by a remote indorsee, against the maker, a set-off against the intermediate indorser is not available. In *Mauray v. Jeffers*, 4 Smedes & M. (12 Miss.) 87, it was held that where the payee of a note assigned it, before its maturity and on its dishonor, takes it up and sues the maker, the maker is not entitled to the benefit of a set-off which he held against the assignee. In *Blair v. Mathlott*, 46 Pa. (10 Wright) 262, it was held that an obligor in a bond cannot defalcate against the assignee of an assignee a claim or set-off which he holds against the first assignee. In the opinion in that case it is said:

"It seems to me that it would complicate a plain and beneficent principle much, were we to hold that where a bond, without any right of defalcation between the original parties, is passed by half a dozen transfers, that the final assignee shall have to submit to a settlement of all accounts, great or small, which may have existed between the obligor and each successive assignee. To require inquiries as to the state of accounts between him and such assignees, or in default to have them all defalcated against the ultimate holder, would put an end to the transmission of such choses in action altogether—a thing which the law has no policy in discouraging."

In *Perry v. Mays*, 2 Bailey (S. C.) 354, it was held that in an action on a negotiable note by the indorsee, under an indorsement after maturity, the maker cannot set off a demand against an intermediate holder of the note, not the original payee thereof. In *Savage v. Laclede Bank*, 62 Miss. 588, it was held that:

"Under section 1124 of the Code of 1880, the acceptor, when sued upon a bill of exchange by the last indorsee thereof, cannot set off against the same an account acquired against an intermediate indorser while the bill was held by the latter. This statute, which gives the defendant sued upon 'any such assigned bill of exchange the benefit of all set-offs had against the same previous to notice of the assignment, as though the suit had been brought by the payee,' has reference only to set-offs against the party with whom the defendant dealt."

A Missouri case, very much like the case at bar, and relating to the assignment of a like chose in action, is that of *Frowein v. Calvird & Lewis*, 75 Mo. App. 567, and as the statute of that state is very similar to that of our own, we quote from the opinion of the court at some length, because we deem it to be directly pertinent to the case under review:

"The admissions of the pleadings in the case are as follows, to wit: (1) That the Denton Brothers had a claim for a call deposit amounting to \$215.89 against the insolvent Henry County Bank, of which Calvird & Lewis, the de-

fendants, were the assignees. (2) This claim was assigned to Sarah L. Denton and by the defendants allowed in her name for that amount and a certificate issued to her therefor. (3) That said certificate was for value by her assigned to the Frowein Brothers and was by them assigned for value to plaintiff. (4) That since the last-named assignment the said assignees have declared a dividend of 10 per cent. on the \$100, and that the plaintiff had demanded the same, which demand had been refused; that the Frowein Brothers, at the time of the assignment of said certificate to them, as well as at the time of the assignment thereof by them to the plaintiff, were indebted to said Henry County Bank, and consequently to said assignees, in an amount greatly in excess of that of said certificate.

"The court below refused to make an order requiring the said defendants to pay over to plaintiff the said dividend, and dismissed her petition. The question thus presented is whether or not the court gave the proper judgment on the pleadings.

"It will be seen that the defendants have no claim of set-off against the Denton Brothers, the creditor, or against Mrs. Denton, their assignee in whose favor the certificate of allowance was issued. But the right of set-off is asserted against the plaintiff on the ground that the Frowein Brothers, the intermediate assignees, were, whilst such certificate was in their hands, indebted to the defendants in an amount in excess of that of the certificate. The remedy of set-off was unknown to the common law. It is the creature of statute. By the 2 George II, chapter 27, section 13, it was for the first time enacted that where there were mutual debts between the plaintiff and defendant one debt might be set off against the other. And afterward there was a difference of opinion between the King's Bench and the Common Bench as to the setting off of debts of different natures which gave rise to the statute of 8 George II, chapter 24. By the sixth section of this latter statute mutual debts were authorized to be set-off against each other, notwithstanding such debts were deemed in law to be of different natures.

"Section 8160 of our statute in relation to set-off is in substance the same as that of the English statute just referred to. It has been held by the English courts that the latter statute applies only when the debts between the plaintiff and defendant were mutual legal debts. *Isberg v. Bowden*, 22 Eng. L. & Eq. R. 551. Our statute says, 'That where two or more persons are mutually indebted * * * and one of them commences an action against the other, one debt may be set off against the other.' While the English statute says that, 'Where there are mutual debts between the plaintiff and defendant,' they may be set against each other. It is plain that the terms employed in the former are of similar import to those employed in the latter. The debts due to be the subject of set-off must be mutual between the person who sues and the one sued, or between the plaintiff and defendant. If there is no debt due from the plaintiff at all, as here, how can the statute apply?

"It is clear there is a lack of that mutuality of indebtedness between the plaintiff and the defendants which is required to make the statute applicable. But it is contended by the defendants that section 8161, Revised Statutes, which provides that 'in actions on assigned accounts and nonnegotiable instruments, the defendant shall be allowed every just set-off or other defense which existed in his favor at the time of being notified of such assignment' confers the right of set-off in a case like the present. In actions on assigned accounts and non-negotiable instruments by whom? Does it mean by any assignee whether the defendant have a claim against him or not? Or does it mean

only such an assignee as against whom the defendant has a claim? Or does it mean that where there have been successive assignments and the defendant has a claim against an intermediate assignee that such claim can be set off against that in the hands of the plaintiff, though the latter is not a debtor of the former?

"In *Waterman on Set-Off*, § 118, it is stated: 'Although in an action by the assignee of a promissory note against the maker the defendant (the latter) may set off any proper demand which he may have held against the payee, at any time previous to notice of the assignment to the latter; yet this right does not include demands subsisting against intermediate assignees, through whose hands such note or bond may have passed by blank indorsement or otherwise, unless there is an agreement between the parties to that effect, founded on some new consideration.' And this statement of the law is supported by a number of adjudicated cases: *Hooper v. Spicer*, 2 Swan [Tenn.] 494; *Kennedy v. Manship*, 1 Ala. 43; *Stocking v. Toulmin*, 3 Stew. & P. [Ala.] 35; *Blair v. Mathiott*, 46 Pa. 262; *Downey v. Tharp*, 63 Pa. 322. While *Harris v. Burwell*, 65 N. C. 584, at first glance would seem out of line with the cases last cited, yet when the facts of the case and the terms of the statute which influenced the decision therein are considered it will be found not to be so. Applying the foregoing rule to the present case, it is clear that the defendants cannot set off the plaintiff's claim with that held by them against the Frowein Brothers, the intermediate assignee, through whose hands the plaintiff's demand passed by indorsement.

"In an action on assigned account or non-negotiable note a set-off could not be allowed but for the provisions of section 8161.

"Under the English statute and our section 8160 unless there be a mutual indebtedness the right of set-off can have no existence. But section 8161 is a qualification of section 8160. Keeping in mind the provisions of the latter section, it will be seen that what is meant by the former is that where one of two mutually indebted parties is sued by the assignee of the other, that he shall be allowed every just set-off that he had against the other at the time of the notice of the assignment. The latter of these sections places the assignee and the defendant on the same footing that the assignor and the defendant occupied under the former.

"But if the first assignee does not sue, but passes the claim by assignment to a second assignee and the latter sues thereon, then the defendant will not be permitted to set off plaintiff's claim with that he has on the intermediate assignee. The defendant's right of set-off against a claim is recognized by the statute to exist between himself and the other party, between whom and himself there was a mutual indebtedness and between himself and the assignee of the latter. The statute does not go beyond this. As has been already stated the right is not a creation of the common law, but of the statute, and if it does not exist under the statute it does not exist at all."

If it be true that while the deposit was owned by Mrs. Warlick the bank had the right to apply it in extinguishment of its matured debt against her (7 *Corpus Juris*, 653, § 352; *Bank of Lawrenceville v. Rockmore & Co.*, 129 Ga. 582, 59 S. E. 291; *Luthersville Banking Co. v. Hopkins*, 12 Ga. App. 488, 77 S. E. 589; *Milhouse v. Citizens' Bank of Valdosta*, 14 Ga. App. 240, 80 S. E. 703), it nevertheless failed or refused so to do, and, under the view we have taken, it should not be allowed to set up such claim against a subsequent holder for value.

We are led to believe that the conclusion

we have arrived at is sound, so far as the facts of this particular case go, for the additional reason that under the ruling made in *Nix v. Ellis*, 118 Ga. 345, 45 S. E. 404, 98 Am. St. Rep. 111, Mrs. Warlick could not herself have set off the deposit assigned to her as against her indebtedness due the bank; and, as we deem the right to the defense of set-off to be a mutual one, neither could the bank have set off its claim in an action by her on the indebtedness due by it. In the *Nix* Case, *supra*, it was held that, while one indebted to a bank may ordinarily purchase a claim due by it, and use the same as a set-off, when subsequently sued on a debt due the bank, yet, where the bank becomes insolvent, such a right continues only up to the time of the filing of the petition for the appointment of a receiver, and that the receiver of the bank takes its choses in action in the same plight in which they existed at that time.

It is our opinion that the court erred in allowing the bank to prove its claim against Mrs. Warlick, the intermediate assignee, in defeat of the plaintiff's action.

Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 605)

HALL v. STATE. (No. 8315.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(*Syllabus by the Court.*)

CRIMINAL LAW §918(1)—**MOTION FOR NEW TRIAL—DENIAL.**

No error of law is complained of, and the evidence is sufficient to support the verdict of guilty. The court did not err in overruling the motion for a new trial, based upon the general grounds only.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2163.]

Error from City Court of Tifton; R. Eve, Judge.

Lem Hall was convicted and he brings error. Affirmed.

J. B. Murrow, of Tifton, for plaintiff in error. J. S. Ridgdill, Sol., of Tifton, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 606)

DUFFEY v. STATE. (No. 8320.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(*Syllabus by the Court.*)

1. CRIMINAL LAW §1050—**APPEAL—ASSIGNMENTS OF ERROR.**

The bill of exceptions was not sued out in time to preserve the exception therein, based

upon the overruling of a demurrer to the accusation, and there were no exceptions pendente lite. The assignment of error upon the same ground, which appears in the motion for a new trial, cannot be considered. *Redwine Bros. v. Street*, 18 Ga. App. 77(1), 89 S. E. 163(1); *Kent v. State*, 15 Ga. App. 210(2a), 82 S. E. 762; *Wills v. Young*, 15 Ga. App. 352(2), 83 S. E. 275; *Coulson v. State*, 13 Ga. App. 148, 150(2), 78 S. E. 1108, and cases there cited; *Mayor, etc., of Dublin v. Dudley*, 2 Ga. App. 762, 59 S. E. 84.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2656, 2658, 2660.]

2. MOTION FOR NEW TRIAL.

There is no substantial merit in either of the two remaining special grounds of the motion for a new trial.

3. SUFFICIENCY OF EVIDENCE.

The evidence supported the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Carrollton; James Beall, Judge.

Tolley Duffey was tried on a criminal charge, and from a verdict he brings error. Affirmed.

S. C. Boykin, of Carrollton, for plaintiff in error. Willis Smith, Sol., of Carrollton, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 483)

PICKERT v. JONES. (No. 8018.)

(Court of Appeals of Georgia, Division No. 1.
March 18, 1917.)

(*Syllabus by the Court.*)

1. JUSTICES OF THE PEACE §47(2)—**JURISDICTION—ENFORCEMENT OF MECHANICS' LIENS.**

"A justice's court has no jurisdiction of a suit brought to foreclose a lien on real estate for work done or for material furnished in the improvement of the same." *McAuliffe v. Baum et al.*, 142 Ga. 590, 83 S. E. 239.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 185.]

2. JUSTICES OF THE PEACE §91(1) — **SURPLUSAGE.**

Where an owner of real estate is sued in a justice's court for the price of material used by the defendant in the improvement of the property, and in the same suit the plaintiff claims a lien on the real estate, and prays for both a general judgment against the defendant and a special judgment against the property, that part of the petition which relates to the lien will be regarded as surplusage.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 307-309, 323.]

3. SALES §359(1, 2)—**ACTION FOR PRICE—EVIDENCE.**

Where on the trial of such a case the plaintiff introduced a waybill showing that the material was shipped to the defendant, and testified that he "furnished the material as per itemized bill and shipped to" the defendant, and that he "made repeated efforts to collect the bill, but it has not been paid," and there was no other evidence in the case, it cannot be held that the evidence demanded a verdict for the plaintiff. The suit was upon an implied contract to pay for material furnished to the defendant, and the

itemized statement attached to the suit enumerated the material, but did not fix the value thereof. Although it was undisputed that the material was shipped to the defendant, there was no proof that it was ordered or accepted by her, or that she was bound to accept it, or that it was used for the improvement of her property, either with or without her knowledge or consent; and the evidence for the plaintiff wholly fails to show the value of the material, or to furnish any data from which its value might be inferred. Accordingly the judge of the superior court did not err in sustaining the certiorari sued out by the defendant and in granting her a new trial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056-1058.]

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by A. F. Pickert against Mrs. S. F. Jones. Judgment for plaintiff, motion for new trial granted, and plaintiff brings error. Affirmed.

R. B. Blackburn and C. F. Wells, both of Atlanta, for plaintiff in error. Jos. W. & John D. Humphries, of Atlanta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 476)

SHORE v. BROWN. (No. 7747.)

(Court of Appeals of Georgia, Division No. 2. March 15, 1917.)

(Syllabus by the Court.)

1. TRIAL \Leftrightarrow 159—DISMISSAL AND NONSUIT—GROUNDS.

"If the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover, a nonsuit will be granted." Civ. Code 1910, § 5942.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 359-367.]

2. TRIAL \Leftrightarrow 160 — INVOLUNTARY NONSUIT—POWER OF COURT.

Where the plaintiff fails to make out a prima facie case as stated above, and the defendant does not move for a nonsuit, the court may, in the economy of time and money, on its own motion enter judgment of nonsuit. *Moody v. Davis*, 10 Ga. 408(3); *Moore & Co. v. Cameron*, 12 Ga. 266; *Kelly v. Strouse*, 116 Ga. 874, 43 S. E. 280(8).

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 368.]

3. TRIAL \Leftrightarrow 160—DISMISSAL AND NONSUIT—EVIDENCE—ERROR.

Where the only evidence for the plaintiff was his own depositions, and during the reading thereof to the jury the attention of the judge was temporarily diverted "which prevented a clear understanding of the evidence read," and where the case was allowed to proceed and evidence for the defendant was introduced, and "the court called for the depositions and read them over carefully," and then called attention of counsel for the plaintiff to the fact that the evidence showed that the defendant went into possession

of the property by agreement of the parties, and that no demand had been proved, and, in the opinion of the court, no conversion shown, and the judge asked counsel for the plaintiff if he had anything further to offer, and was answered in the negative, and thereupon the court on its own motion entered judgment of nonsuit, there was in this no error hurtful to the plaintiff, especially as the evidence, taken as a whole, would have authorized the judge to direct a verdict for the defendant. *Zipperer v. Mayor and Alderman of Savannah*, 128 Ga. 135, 57 S. E. 811(4); *Barnes v. Carter*, 120 Ga. 895, 48 S. E. 387(2); *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262(4).

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 368.]

4. TROVER AND CONVERSION \Leftrightarrow 9(4) — CONDITIONS PRECEDENT—DEMAND AND REFUSAL.

In this case the evidence of the plaintiff shows that the sawmill and fixtures for which suit was brought had been hired by him to the defendant for an indefinite period; and where there is such a bailment, before the plaintiff can recover in an action of trover, a demand and refusal must be shown. *Baston v. Rabun*, 115 Ga. 378, 41 S. E. 568; *Loveless v. Fowler*, 79 Ga. 134, 4 S. E. 103, 11 Am. St. Rep. 407(4); *Dunn v. Cox, Hill & Co.*, 85 Ga. 141, 11 S. E. 582.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 61.]

5. TROVER AND CONVERSION \Leftrightarrow 1—ELEMENTS OF ACTION.

In trover conversion is the gist of the action. There must be some act of malfeasance, not mere nonfeasance; some positive wrong, and not the mere omission of what is right. Mere neglect of duty will not support an action of trover. *Southern Express Co. v. Sinclair*, 130 Ga. 372, 60 S. E. 849; *Savage v. Smythe & Co.*, 48 Ga. 562(2); *Roll v. Black, Dud. & Bristol v. Burt*, 7 Johns. (N. Y.) 254, 5 Am. Dec. 264; *Fernald v. Chase*, 37 Me. 289-291; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28(3).

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 1, 2.]

6. APPEAL AND ERROR \Leftrightarrow 973 — DISMISSAL AND NONSUIT \Leftrightarrow 81(2) — DISCRETION OF COURT—NONSUIT—REINSTATEMENT—DISCRETION OF TRIAL JUDGE.

An application to reinstate a case after a nonsuit is addressed to the sound discretion of the trial judge, and this court will not interfere unless that discretion is abused. This court cannot say in this case that the judge abused his discretion. *Cooper v. Jones*, 24 Ga. 474(3); *Bowen v. Wyeth*, 119 Ga. 687, 46 S. E. 823; *City of Atlanta v. Miller*, 125 Ga. 495, 54 S. E. 538; *Bird v. Burgsteiner*, 113 Ga. 1012, 39 S. E. 425; *Harrison v. Tate*, 100 Ga. 317, 27 S. E. 179.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3846; Dismissal and Nonsuit, Cent. Dig. § 183.]

Error from City Court of Hall County; A. C. Wheeler, Judge.

Action by R. M. Shore against J. W. Brown. Judgment of nonsuit, and plaintiff brings error. Affirmed.

E. D. Kenyon, of Gainesville, for plaintiff in error. J. O. Adams, of Gainesville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 454)

TAYLOR v. CONE. (No. 7674.)(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)*(Syllabus by the Court.)***SALES** \S 347(3), 355(1)—**ACTION—DEFENSE—**
WANT OF CONSIDERATION.

Where the purchaser of an automobile inspected it personally before the purchase, made a cash payment, gave his promissory note for the remainder, and received the property, and about four months thereafter made a payment on the note, and in another month made another payment thereon, and some time after the maturity of the note, being pressed for payment of the balance due, wrote to the attorney of the holder of the note a letter in regard to it as follows: "Your letter to hand and noted. It is impossible for me to send you check for that amount now. Have got a judgment against the men that owe me, and just as soon as the sheriff can collect the money I will send to you. I think that will be sooner than you can make it out of me to sue me. You know it is hard to collect anything now. I know Mr. Taylor thinks I don't want to pay him, but I can't help it; I am doing all I can do. If he will wait until I can collect this money he shall have it"—the maker of the note, when sued thereon some months thereafter, could not successfully set up the defense that there had been a total failure of consideration. Therefore a verdict in favor of the defendant in this case was wholly unsustained and the plaintiff was entitled to a judgment for the amount sued for. The court erred in overruling the motion for a new trial. *Baxley Tie Co. v. Simpson & Harper*, 1 Ga. App. 670, 57 S. E. 1090; *Stimpson Specialty Co. v. Parker*, 10 Ga. App. 295, 73 S. E. 412; *Hardee v. Carter*, 94 Ga. 482, 19 S. E. 715; *American Car Co. v. Atlanta Street Ry. Co.*, 100 Ga. 254, 28 S. E. 40; *Lunsford v. Malsby*, 101 Ga. 40, 28 S. E. 496; *Page v. Dodson Co.*, 106 Ga. 80, 31 S. E. 804.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. \S 965, 1025, 1027-1035.]

Error from City Court of Nashville; C. A. Christian, Judge.

Action by J. W. Taylor against J. S. Cone. Judgment for defendant, and plaintiff brings error. Reversed.

J. D. Lovett and Hendricks, Mills & Hendricks, all of Nashville, and J. S. Ridgill, of Tifton, for plaintiff in error. J. H. Gary and J. P. Knight, both of Nashville, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 475)

PITTMAN v. ALEXANDER. (No. 7717.)(Court of Appeals of Georgia, Division No. 2.
March 15, 1917.)*(Syllabus by the Court.)***1. COURTS** \S 190(3)—**DISMISSAL—EVIDENCE.**

The only issue involved in this case being as to whether the defendant in the municipal court of Atlanta was entitled to a set-off in the suit against him, and the evidence upon this issue being conflicting, but ample to justify the judgment of the trial court disallowing the set-

off, the judge of the superior court did not err in overruling and dismissing the certiorari.

2. CERTIORARI \S —**09—FINAL JUDGMENT—**
STATUTE.

Under section 5201, Civil Code 1910, when the superior court sustains a certiorari, it has no authority to render also a final judgment if issues of fact are involved and the case does not necessarily depend upon a controlling question of law. *Almand v. Ga. R. R. & B. Co.*, 102 Ga. 152, 29 S. E. 159; *Ga. R. R. & B. Co. v. Partee*, 107 Ga. 789, 33 S. E. 668; *Williams v. Bradfield*, 116 Ga. 705, 43 S. E. 57; *Patterson v. Cen. of Ga. Ry. Co.*, 117 Ga. 827, 45 S. E. 250; *A. C. L. R. R. Co. v. Shuman*, 121 Ga. 113, 48 S. E. 680; *Bass Dry Goods Co. v. Electric Co.*, 123 Ga. 640, 51 S. E. 579; *Langley Mfg. Co. v. Frey & Co.*, 10 Ga. App. 753, 73 S. E. 1074 (4). But when the finding of the trial court should be and is sustained, and the certiorari overruled, there is no error in rendering final judgment in the case. *Ford v. Price & Lucas*, 116 Ga. 793, 43 S. E. 69 (2); *Ga. So. & Fla. Ry. Co. v. Giddens*, 117 Ga. 799, 45 S. E. 67. Indeed, where a certiorari bond has been given, this would seem the better and more proper procedure. See *Bailey v. Ware & Harper*, 91 S. E. 275, decided at the present term of this court.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. \S 185-194.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Action between C. H. Pittman and Edgar Alexander. Judgment for the latter, and the former brings error. Affirmed.

W. A. James, of Atlanta, for plaintiff in error. Moore & Pomeroy, of Atlanta, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 453)

CAMP v. TURNER et al. (No. 7629.)(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)*(Syllabus by the Court.)***1. TROVER AND CONVERSION** \S —**16—RIGHT OF**
ACTION—POSSESSION.

Without considering the testimony excluded by the court as to the claim of right under which the plaintiff held possession of the property for which she brought her action of trover, her testimony disclosed that she was in fact in possession of the property after the death of her husband, and she was entitled to maintain her action for any interference with such possession except as against the true owner or a person wrongfully deprived of possession. Civil Code of 1910, \S 4482.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. \S 119-147.]**2. TROVER AND CONVERSION** \S —**06—EVIDENCE**
—NONSUIT.

There being proof of possession by the plaintiff and of interference therewith by the defendants, who had not been deprived wrongfully of the property in dispute, and were not the

true owners thereof, the court erred in awarding a nonsuit.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 288-294.]

3. APPEAL AND ERROR ~~§~~743(2)—ASSIGNMENTS OF ERROR—CONSIDERATION.

The assignment of error complaining of the exclusion of a certain writing evidencing a proceeding in the court of ordinary may not be considered, since the contents of the document excluded cannot be ascertained without reference to other parts of the record (*Flynt v. Tribble*, 91 S. E. 80); and, as this assignment of error may not be considered, we cannot rule upon the further assignment of error complaining of the exclusion of testimony to the effect that the plaintiff's possession of the property in dispute was held under and by virtue of proceedings from the court of ordinary, excluded by the court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3011.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Trover by Neonle Camp against Lillie Turner and others. Judgment of nonsuit, and plaintiff brings error. Reversed.

Harris & Harris, of Rome, for plaintiff in error. M. B. Eubanks, of Rome, for defendants in error.

WADE, C. J. Judgment reversed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 492)

MURPHY v. CHIPLEY HOME MIXTURE GUANO CO. (No. 7727.)

(Court of Appeals of Georgia, Division No. 2. March 16, 1917.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR ~~§~~957(1)—JUDGMENT ~~§~~139—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT JUDGMENT—REVIEW.

"Whether a judgment by default will be set aside or not is a question addressed to the sound discretion of the court below, and this court will not, as a general rule, interfere, unless such discretion has been grossly abused." *Lambert v. Smith*, 57 Ga. 25 (1).

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3823; *Judgment*, Cent. Dig. §§ 265-268.]

2. JUDGMENT ~~§~~163—DISCRETION OF TRIAL COURT—SETTING ASIDE DEFAULT.

The court did not abuse its discretion in refusing to set aside a verdict on the ground set out in the defendant's motion for a new trial as follows: "The defendant had conversation in December, 1915, with Mr. Henry Reeves, attorney for plaintiff, by the terms of which agreement the above proceedings were to be suspended until after one Will Crawford, who was then present, could see Mr. Tom Wisdom, from whom defendant had been purchasing similar goods to those sued for, and to whom payment had been made for the goods in question, and who was also a member of the firm claiming said indebtedness, for the purpose of having Mr. Wisdom rectify the error in the account sued on; that said Will Crawford was to see Wisdom and have him see defendant, but that before such had been done the court entered default judgment at the same term at which the case was in default;" the purported agreement being denied

by the attorney for the plaintiff. Civ. Code 1910, § 6251; *Penn & Watson v. McGhee*, 6 Ga. App. 631, 85 S. E. 686 (5); *Exchange Bank of Macon v. Elkan*, 72 Ga. 197; *Mathews & Company v. Bishop*, 106 Ga. 564, 32 S. E. 631 (2); *Moore v. Kelly & Jones Co.*, 109 Ga. 798, 35 S. E. 168 (2).

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 328.]

Error from City Court of La Grange; Frank Harwell, Judge.

Action by the Chipley Home Mixture Guano Company against J. W. Murphy. Judgment for plaintiff, and defendant brings error. Affirmed.

Meadors & Wyatt, of La Grange, for plaintiff in error. Henry Reeves, of La Grange, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 452)

WINDOM v. STATE. (No. 8030.)

(Court of Appeals of Georgia, Division No. 1. March 13, 1917.)

(*Syllabus by the Court.*)

1. INTOXICATING LIQUORS ~~§~~226—OFFENSES—SALE—EVIDENCE.

Upon the trial of one charged with the sale of intoxicating liquor it was error for the court to permit a witness, over proper objection, to testify that he bought whisky from a person other than the defendant, that lived on the same premises with the defendant, when the witness testified that he had never bought any whisky from the defendant, and that the defendant was not present and had no connection with the sale. *Holmes v. State*, 12 Ga. App. 359, 77 S. E. 187.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 282-286.]

2. WITNESSES ~~§~~361(1), 362—IMPEACHMENT—REBUTTAL.

A witness whose impeachment has been attempted by proof of general bad character may be sustained by witnesses who admit that his character is bad, but that they would believe him on oath. The question as to whether the witness has been successfully impeached, and the value of his testimony, is exclusively for the jury. *Taylor v. State*, 5 Ga. App. 237, 62 S. E. 1048.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1167, 1171-1176.]

3. CRIMINAL LAW ~~§~~351(8)—EVIDENCE—FLIGHT.

It is not error for the court to charge the jury in effect that flight by one charged with crime, immediately after the alleged commission of the act, may be considered by the jury as a circumstance, not sufficient itself to establish guilt, but as a circumstance in determining the guilt or innocence of the accused. *Barnett v. State*, 136 Ga. 65, 70 S. E. 868; *Smith v. State*, 106 Ga. 673, 32 S. E. 851, 71 Am. St. Rep. 286.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 779, 930, 931.]

4. RULING ON MOTION FOR NEW TRIAL.

For the reasons assigned in the first headnote, the court erred in overruling the motion for a new trial.

Error from City Court of Newnan; W. A. Post, Judge.

Bolsey Windom was convicted of the sale of intoxicating liquor, and he brings error. Reversed.

Stanford Arnold, of Newnan, for plaintiff in error. W. L. Stallings, Sol., of Newnan, for the State.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 509)

GRAHAM v. SAVANNAH ELECTRIC CO.
(No. 7984.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. CONTROLLING DECISION.

The adjudication of this case is controlled in principle by the decision in *Bird v. Savannah Electric Co.*, 16 Ga. App. 453, 85 S. E. 621, as the material facts in both petitions are substantially the same. There was no error in sustaining the demurrer and dismissing the suit.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Nellie Graham against the Savannah Electric Company. Judgment for defendant, dismissing the suit, and plaintiff brings error. Affirmed.

Oliver & Oliver and L. A. Pinkussohn, all of Savannah, for plaintiff in error. Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 499)

CENTRAL OF GEORGIA RAILWAY CO.
v. SISTRUNK et al. (No. 7773.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. LAW OF CASE.

The questions of law in this case were settled in *Central of Georgia Ry. Co. v. Sistrunk et al.*, 16 Ga. App. 683, 85 S. E. 964, and the pleadings were amended to conform with the rulings there announced.

2. VERDICT AND ERROR OF LAW.

The evidence authorized the verdict, and no error of law was committed.

Error from Superior Court, Screven County; R. N. Hardeman, Judge.

Action by N. E. W. Sistrunk and others against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. E. K. Overstreet, of Sylvania, for defendants in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 499)

PARKER v. LEE. (No. 7785.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. MOTION TO DISMISS.

The motion to dismiss the writ of error is without merit. Acts 1911, p. 150.

2. ACTION ~~ON~~ 27(1), 28—TORT OR CONTRACT—
WAIVER OF TORT.

Where one wrongfully takes the personal property of another and converts it into money, the latter has a right of action ex delicto for the wrong done him, though he is not restricted to that form of action, but may, as a general rule, waive the tort and sue in assumpsit as for money had and received. *Cragg v. Arendale*, 118 Ga. 181, 38 S. E. 399; *Southern Ry. Co. v. Born Steel Range Co.*, 122 Ga. 658, 60 S. E. 488.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-176, 195-215.]

3. OTHER ASSIGNMENTS.

There is no merit in any of the assignments of error.

Error from Superior Court, Berrien County; W. E. Thomas, Judge.

Action between N. D. Parker and F. S. Lee. Judgment for the latter, and the former brings error. Affirmed.

Hendricks, Mills & Hendricks, of Nashville, for plaintiff in error. W. D. Bule, of Nashville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 531)

TURNER v. JOHNSON-LUND CO.

(No. 7896.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. JUSTICES OF THE PEACE ~~ON~~ 206(4)—ANSWER
OF JUSTICE—EFFECT.

Where the answer of the justice of the peace to a writ of certiorari is neither traversed nor excepted to, the court is bound to determine the cause just as made by the answer.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 796.]

2. OVERRULING CERTIORARI.

Upon the answer of the justice of the peace, the court did not err in overruling the certiorari.

Error from Superior Court, Hart County; J. N. Worley, Judge.

Action between C. D. Turner and the John-

son-Lund Company. Judgment for the latter, and the former brings error. Affirmed.

A. G. & Julian McCurry and W. L. Hodges, all of Hartwell, for plaintiff in error. J. H. & Parke Skelton, of Hartwell, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 518)

DOLAN et al. v. LIFSEY. (No. 7937.)
(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)

(Syllabus by the Court.)

1. DENIAL OF MOTION TO DISMISS BILL OF EXCEPTIONS.

There is no substantial merit in the motion to dismiss the bill of exceptions, and it is accordingly denied.

2. CONTRACTS \S 278(1)—"ENTIRE CONTRACT"—CONDITION PRECEDENT.

In an indivisible contract "the entire fulfillment of the promise by either, in the absence of any agreement to the contrary, or waiver, is a condition precedent to the fulfillment of any part of the promise by the other. * * * In determining whether the contract is entire or severable the criterion is to be found in the question whether the whole quantity, service, or thing—all as a whole—is of the essence of the contract. If it appear that the contract was to take the whole or none, then the contract would be entire. Clark, Con. 657." Broxton v. Nelson, 103 Ga. 327, 330, 331, 30 S. E. 38, 68 Am. St. Rep. 97.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1207-1213.

For other definitions, see Words and Phrases, First and Second Series, Entire Contract.]

3. CONTRACTS \S 171(1)—CONSTRUCTION—ENTIRE OR SEVERABLE CONTRACT.

Where a contract is entire, the whole contract stands or falls together. Civ. Code 1910, \S 4223.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 754, 755.]

4. ASSUMPSIT, ACTION OF \S 6(1)—CONTRACTS \S 324(2)—WORK AND LABOR \S 9—ENTIRE CONTRACT—STATUTE.

Where the plaintiff has performed a part only of an indivisible contract, and the defendant has accepted this part performance, the plaintiff can recover upon a quantum meruit, or in assumpsit, but he cannot recover upon the contract itself. Southern Ry. Co. v. Branch, 9 Ga. App. 310, 71 S. E. 696.

[Ed. Note.—For other cases, see Assumpsit, Action of, Cent. Dig. \S 27, 28; Contracts, Cent. Dig. \S 1555, 1556; Work and Labor, Cent. Dig. \S 23, 24.]

5. CONTRACTS \S 327(1)—PERFORMANCE OF CONTRACT.

Where the plaintiff bases his right to recover upon an express contract, which is entire and indivisible, he cannot recover unless he has performed all his obligations under the contract. Hill v. Balkcom, 79 Ga. 444, 5 S. E. 200; Parker v. Farlinger, 122 Ga. 315, 50 S. E. 98; Bennett v. Burkhalter, 128 Ga. 154, 57 S. E. 231; Broxton v. Nelson, supra.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1563-1570.]

6. CONTRACTS \S 343—ENTIRE CONTRACT—RECOVERY.

The contract which is the basis of the action in the case at bar was an entire contract, and the defendants could plead that the plaintiff had breached the contract in certain particulars, setting them forth, and it was not incumbent upon them to allege the amount that they had been damaged by reason of such breaches.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1696, 1697.]

7. STRIKING PLEA.

The court erred in striking the defendants' plea, and the subsequent proceedings in the case were nugatory.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action between W. K. Dolan and others and C. D. Lifsey. Judgment for the latter, and the former bring error. Reversed.

Wm. F. Slaton, Jr., and L. S. Hulbert, both of Atlanta, for plaintiffs in error. Moore & Pomeroy, of Atlanta, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 518)

BRANNEN v. McELVEEN. (No. 7915.)
(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 173(6)—VERDICT—PRESENTATION OF GROUNDS OF REVIEW.

This court will not grant a new trial on the ground that the verdict is contrary to law because the contract on which the suit was based should have been in writing, under the statute of frauds, where it appears that such defense was not raised either by plea or demurrer, motion for nonsuit, or objection to testimony, so as to invoke a ruling in the lower court on the subject. Johnson v. Latimer, 71 Ga. 470(3); Tift et al. v. Wight & Weslosky Co., 113 Ga. 681, 39 S. E. 503(2); Capital City Brick Co. v. Atlanta Coal & Ice Co., 5 Ga. App. 436, 63 S. E. 562.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1088, 1089, 1091, 1092, 1097, 1101.]

2. TRIAL \S 251(5)—ACTION BY PURCHASER—MISLEADING INSTRUCTION.

Where there was an issue of fact as to whether the defendant, under a contract for the purchase of land, expressly agreed that a certain recorded *fi. fa.* which had been obtained against plaintiff and his predecessor in title should be extinguished by the defendant as a part of the purchase price of the land, and where it appeared that, subsequently to the conveyance of the land by the plaintiff to the defendant under a warranty deed, the *fi. fa.* was paid off by the plaintiff, it was error for the trial judge to charge the jury as follows: "I charge you this principle of law: That where a man buys property with a recorded execution against it, he would take it subject to that execution, with or without any understanding to that effect. * * * If Mr. Brannen bought this property, and these executions appeared upon the general execution docket of this county, Mr. Brannen

would have those executions to pay, regardless of whether or not he agreed to assume them. Now, he would have them to pay, or he would suffer the consequences of a levy upon the property, the property in dispute." These instructions were inapplicable, and might reasonably have confused and misled the jury, and this is true although the court further charged the jury that the plaintiff in fact relied, not upon such legal liability, but upon the express contract outside and apart therefrom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 591.]

Error from City Court of Statesboro; Thos. L. Hill, Judge.

Action between J. E. Brannen and Aaron McElveen. Judgment for the latter, and the former brings error. Reversed.

Strange & Metts, of Statesboro, for plaintiff in error. Hunter & Jones, of Statesboro, for defendant in error.

JENKINS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 489)

E. MATTHEWS & SON v. RICHARDS.
(No. 7594.)

(Court of Appeals of Georgia, Division No. 2.
March 16, 1917.)

(Syllabus by the Court.)

1. PLEADING \S 362(5) — PLEA — MOTION TO STRIKE.

All paragraphs of the plea as amended which were lacking in legal sufficiency were stricken by the court on demurrer. There was no error in refusing to strike the other paragraphs.

2. APPEAL AND ERROR \S 1051(1)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Even if testimony as to a certain promissory note, that the note "was given for the purpose of renewing the old note and extending the time of payment," was a conclusion of the witness, and improperly admitted, it was harmless, as the record discloses that other evidence in practically the same words was admitted without objection, and there was positive evidence of the same fact. *Daughtry v. Savannah Ry. Co.*, 1 Ga. App. 393, 58 S. E. 230; *County of Butts v. Hixon*, 135 Ga. 27, 68 S. E. 786(2); *Southern Ry. Co. v. Ward*, 131 Ga. 21, 61 S. E. 913(4).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161, 4162, 4165, 4166.]

3. TRIAL \S 29(2) — PROVINCE OF COURT — OPINION AS TO EVIDENCE.

A witness was asked, "If in answer to the last question you say a new note was given, state for what amount, who signed the new note, and was it given for the purpose of renewing the old note and extending the time of payment? When was the new note to become due?" The witness answered: "Yes; I gave a new note at the time the old note became due, which note was signed by myself and Mr. Matthews, and it was given for the purpose of renewing the old note and extending the time of payment. I don't exactly remember when it was to become due, but think about three months from the date it was renewed." Counsel objected to the question, on the ground that it was leading, and objected to the answer, on the ground that it was a conclusion of the witness, and the judge re-

plied: "That's the very issue in the case. I will let it go in. They decide it on the evidence. I will let it go in." In the motion for a new trial it was contended that this statement was the expression of an opinion by the judge on the evidence, and was "an erroneous and improper invasion by the court of the province of the jury." *Held*, that in this statement the judge neither expressed nor intimated his opinion as to what had or had not been proved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 81.]

4. WITNESSES \S 247 — ANSWER — CONSTRUCTION—"THINK."

"I think" means, according to Webster, to recollect or call to mind; and, as used by the witness, the sentence, "I think I placed the Leak note there as collateral or additional security," is to be taken as a statement of what the witness remembered. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Tex. Civ. App.) 43 S. W. 536; *Humphries v. Parker*, 52 Me. 502-504. In addition to this there was direct testimony by this and other witnesses to the same fact.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 822, 858-860.

For other definitions, see Words and Phrases, First and Second Series, Think.]

5. FORMER RULING FOLLOWED.

Under the rulings of this court when this case was first here (13 Ga. App. 412, 79 S. E. 227(3)), there was no error in permitting the defendant to testify that he "never did receive any notice relative to the payment of the note sued on in this case." Besides, the new note was given in January, 1911, and this witness swore that up to April 25th following he "did not receive any notice relative to the payment of the note."

6. EVIDENCE \S 413—PAROL EVIDENCE—NOTE.

Testimony of the original payee of the note sued on that after the maturity of the note (January 1st) he was told by the person to whom he had traded it that it had not been paid, and replied, "I thought you was going to get that note when it come due, for Jenkins [the maker] was to pay that note off when he got his money for building a house, and would get it by the first of the year," was not subject to the objection that it sought to change, alter, and vary the terms of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1855-1857, 1859, 1860.]

7. CHARGE OF COURT.

There was no error in the excerpt from the charge of the court in the sixth ground of the motion for a new trial, when considered in connection with the note of the judge, explaining and qualifying that ground, and when read in connection with the entire charge.

8. TRIAL \S 255(2)—INSTRUCTIONS—REQUEST—NECESSITY.

"It is not error requiring a new trial to fail to charge upon the subject of the burden of proof, when there is no written request for such an instruction." *Whittle v. Central of Georgia Ry. Co.*, 11 Ga. App. 257, 74 S. E. 1100; *Southern Ry. Co. v. Wright*, 6 Ga. App. 173, 64 S. E. 703(7); *Martin v. Gibbons*, 14 Ga. App. 136, 80 S. E. 522(2); *Johnson v. Reeves*, 133 Ga. 822, 66 S. E. 1081(2).

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 630.]

9. REFUSAL OF NEW TRIAL.

The evidence authorized the verdict, and there was no error in refusing a new trial.

Error from City Court of Cartersville; Joe M. Moon, Judge.

Action by E. Matthews & Son against S. J.

Richards. Judgment for defendant, and plaintiffs bring error. Affirmed.

See, also, 13 Ga. App. 412, 79 S. E. 227.

Wm. T. Townsend, of Cartersville, for plaintiff in error. Jas. R. Whitaker, of Cartersville, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 525)

NEWSOME v. SHEPPARD. (No. 7796.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

CERTIORARI \S 42(4)—ASSIGNMENTS OF ERROR
—SUFFICIENCY—STATUTE.

A petition for certiorari, setting out the testimony introduced in a possessory warrant case, and assigning error only in the following sentence: "Each side closed, and the court made a judgment awarding the said corn to the plaintiff, Sheppard, which judgment the defendant assigns as error," presents no question for determination by the court, and the judge of the superior court properly dismissed the petition for lack of a sufficient assignment. Civ. Code 1910, \S 5183; Papworth v. Fitzgerald, 111 Ga. 54, 36 S. E. 311; Harrell v. Quitman, 17 Ga. App. 299, 86 S. E. 662, and cases there cited. Nothing in Birdford Supply Co. v. Edwards, 16 Ga. App. 518, 85 S. E. 687(1), or in Patterson v. Beck, 133 Ga. 701, 66 S. E. 911(1), conflicts with this ruling.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. \S 70, 71.]

Error from Superior Court, Jefferson County; R. N. Hardeman, Judge.

Action by W. L. Sheppard against Lum Newsome. Judgment for plaintiff, and defendant brings error. Affirmed.

J. C. Newsome, of Gibson, for plaintiff in error. M. C. Barwick, of Louisville, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 583)

UNITY COTTON MILLS v. HASTY &
STRICKLAND. (No. 7726.)
(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1001(1) — CHATTEL
MORTGAGES \S 284—REVIEW—EVIDENCE TO
SUPPORT VERDICT—CLAIMS BY THIRD PER-
SON—SUFFICIENCY OF EVIDENCE.

While this court will not disturb the verdict of a jury where there is evidence to support its findings, the record in this case fails to disclose any testimony on which the verdict can be based.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3928-3933; Chattel Mortgages, Cent. Dig. \S 573.]

Error from City Court of La Grange;
Frank Harwell, Judge.

Proceeding by Hasty & Strickland on levy of a mortgage *fi. fa.* against J. W. Pruett, in which the Unity Cotton Mills interposed a claim. Verdict finding property subject, claimant's motion for new trial overruled, and it brings error. Reversed.

Hatton Lovejoy and Meadors & Wyatt, all of La Grange, for plaintiff in error. M. U. Mooty and A. J. Andrews, both of La Grange, for defendant in error.

JENKINS, J. Hasty & Strickland levied a mortgage *fi. fa.* against J. W. Pruett on two bales of cotton, and Unity Cotton Mills interposed a claim. The verdict found the property subject, and the claimant's motion for new trial was overruled. The issue of fact was whether the cotton belonged to the defendant in *fi. fa.*, and was grown on the "Floyd place," described in the mortgage, or had belonged to his father, J. R. Pruett, from whom the claimant had purchased. It was agreed that the claimant bought the cotton in good faith on October 23, 1914. The levy on the two bales was made on November 5, 1914. J. W. Pruett, the defendant in *fi. fa.*, and his father, J. R. Pruett, testified positively and unequivocally that the cotton was raised by and belonged to the latter; that J. W. Pruett did not raise the cotton; that he had no title or interest in it, and that his sole connection with it was to bring the cotton to town for the purpose of sale, at the request of his father; that some of the proceeds therefrom were paid on two accounts owing by his father, and the balance was turned over to him by the son. Receipts of the parties to whom these two amounts were paid, of the same date as the date of the sale, were in evidence. The only evidence for the plaintiffs in *fi. fa.* was that of G. L. Thompson and of Maynard Strickland, one of the plaintiffs. The testimony of G. L. Thompson in full is as follows:

"I know J. W. Pruett. I know the Floyd farm, which he worked during the year 1914. His land adjoins mine. I know J. R. Pruett, the father of J. W. Pruett. He runs a mill and cotton gin, and owns land adjoining J. W. Pruett. The lands of J. W. Pruett and J. R. Pruett are separated by the public road. I remember seeing two of J. R. Pruett's boys together with J. W. Pruett on a wagon loaded with cotton, carrying it to the gin. They were on the wagon together. I saw this cotton gathered in the field on the Floyd place and loaded on the wagon. Later I was at the gin owned by J. R. Pruett and saw the two bales of cotton. This occasion when I saw the cotton I testified about as loaded on the wagon was not more than 10 days before the levy which I heard about, and my best judgment is that it was 6 or 8 days before. On the former trial of this case I did not testify as is set forth in the brief of evidence as follows: 'I do not know whose cotton it was. I never saw that particular cotton before that I know of. I did not see it gather. I do not know that the cotton on the wagon was J. W. Pruett's cotton. I never saw the

wagon loaded. I do not know on whose land the cotton was raised which I saw on the wagon. I do not know whether that two bales of cotton at the gin was raised. It might have been belonged to J. R. Pruett. I do not know that the cotton levied on was the same cotton which I saw on the wagon at the gin owned by J. R. Pruett. I do not know where the cotton was raised at which I saw at the gin house."

The testimony of Maynard Strickland in full is as follows:

"I went to the Pruett home a few days before the levy and talked with J. W. Pruett. He told me that he had about two bales of cotton. I saw the pile of cotton he was talking about on the porch of his house. It looked to be nearly two bales of cotton. Mr. J. W. Pruett said that he would bring me the two bales within a few days; just as soon as he finished out the two bales. There was about 1,500 pounds of seed cotton on the porch at the time we foreclosed our mortgage. It was levied on. I pointed out the two bales levied on in the Security Warehouse. (It was admitted by attorneys for claimant that the cotton was placed in the warehouse in the name of J. W. Pruett.) I do not know that these two bales of cotton were raised on J. W. Pruett's lands. I do not know that it was raised on the lands covered in our crop mortgage. The seed cotton levied on was not the same cotton I saw at the house on the porch. J. W. Pruett farmed on lands known as the Thompson land and also known as the Floyd land. I do not know whether any one else worked a part of the Floyd place. The cotton levied on was ginned at J. R. Pruett's gin, because his gin makes a peculiar shaped bale."

1. We think the description given by the recorded crop mortgage, though meager, was sufficient to put a purchaser on notice (*Thomas v. Furn. Co. v. T. & C. Furniture Co.*, 120 Ga. 879, 48 S. E. 333); and therefore our decision in this case is based entirely upon the testimony as shown by the record.

2. No principle of law is founded upon better reason or has been more strictly adhered to by this court than that the jury are the proper judges of the weight and sufficiency of testimony and of the credibility of witnesses, and this court will not disturb the verdict of a jury where there is evidence to support its findings. *Davis v. Kirkland*, 1 Ga. App. 5, 58 S. E. 209; *Stricklin & Co. v. Orawley*, 1 Ga. App. 139, 58 S. E. 215; *Charles v. Brooker*, 1 Ga. App. 219, 58 S. E. 218; *Daughtry v. S. & S. Ry.*, 1 Ga. App. 393, 58 S. E. 230. We agree with the following language in the case of *W. & A. Ry. Co. v. Hunt*, 116 Ga. 448, 42 S. E. 785, in which our Supreme Court says:

"We fully recognize that questions of fact are for the jury, and that their discretion as to the facts is a wide one. We believe, also, that they are better judges of the facts than are courts, and we have great respect for their verdicts. They are often affirmed in cases where it seems clear to the members of the appellate court that if they had been in the jury box they would have

rendered a different verdict. We recognize, also, that the discretion to set aside a verdict on the ground that it is strongly and decidedly against the weight of the evidence is reposed by law in the presiding judge, whose opportunities for determining this question are necessarily very much better than those of this court."

In the instant case, however, we have been unable to find in the record any evidence which we deem could be properly held to support the finding of the jury. It will be observed that the witness Thompson does not state that the cotton levied on was the cotton which he saw gathered on the Floyd place and which he saw carried from there to the gin. On the contrary, he says that the occasion on which he saw this cotton was not more than 10 days before the levy, and that in his best judgment it was 6 or 8 days prior thereto, whereas the evidence shows that the levy was made on November 5th, and the mill had actually bought the cotton on October 23d, a period of 13 days prior thereto. Therefore, according to Thompson's evidence, the cotton levied on could not possibly have been the cotton testified to by him, which he had seen gathered on the Floyd place.

The only other witness for the plaintiff in *fi. fa.* was Maynard Strickland, who stated that a few days before the 11th he had gone to the house of the defendant in, *fi. fa.*, J. W. Pruett, and, in a conversation with him, was told that he then had about two bales of cotton, and that he saw a pile of cotton in the seed, containing about 1,500 pounds, on the porch of his house. He testified that he did not know that the two bales levied on were raised on the land known as the Floyd place, covered by the crop mortgage, and that he did not know where it was raised. Even if it can be held the evidence in the record inferentially indicates that the cotton levied upon was the seed cotton seen by this witness on the porch of the defendant in *fi. fa.*, still this witness testified that the defendant in *fi. fa.* farmed on lands not covered by the crop mortgage, known as the Thompson place, and his evidence was entirely silent as to which place the seed cotton he saw had been gathered from.

As the evidence of these two witnesses constitutes all of the testimony on behalf of the plaintiff in *fi. fa.*, we feel necessarily constrained to hold that the verdict is without evidence to support it, and that the judgment of the court below, refusing to grant a new trial, was error.

Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 615)

CAMPBELL v. STATE. (No. 8895.)(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)*(Syllabus by the Court.)***INTOXICATING LIQUORS** \S 236(5)—**UNLAWFUL POSSESSION—EVIDENCE.**

The evidence authorized the conviction of the defendant, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Muscogee County; G. P. Munro, Judge.

Homer Campbell was convicted of an unlawful possession of intoxicating liquors, and he brings error. Affirmed.

T. T. Miller, of Columbus, for plaintiff in error. U. F. McLaughlin, Sol. Gen., and Geo. C. Palmer, both of Columbus, for the State.

LUKE, J. The plaintiff in error was indicted for having unlawfully in his possession within a period of 30 consecutive days more than two quarts of spirituous and intoxicating liquors. The evidence authorized the jury to find that the defendant did have and possess more than two quarts of spirituous and intoxicating liquors within 30 consecutive days; and the jury were authorized to discredit the contention that he was a carrier in possession of the liquor transporting it from Alabama to Georgia for guests at a hotel. Before a carrier may transport and deliver intoxicating liquor there are certain requirements of law which must be complied with. Under the evidence the jury were not authorized to find that this defendant was a carrier as contemplated by the law which he was charged with violating. The court did not err in refusing to give the instructions embodied in the written requests of the defendant, and did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 534)

SIMMONS v. SOUTHERN RY. CO.
(No. 7777.)(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)*(Syllabus by the Court.)***MASTER AND SERVANT** \S 222(2)—**INJURY TO SERVANT—COMPLIANCE WITH ORDERS.**

"In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or of his master's representative, the servant must show that the order was a negligent one under the circumstances. If the order was negligent, and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received

in complying with the order." **Hightower v. Southern Ry. Co.**, 146 Ga. 279, 91 S. E. 52. There was no error in dismissing the petition on general demurrer. See **Cowart v. Southern Marble Co.**, 144 Ga. 254, 87 S. E. 282. The special demurrer is also meritorious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 649.]

Error from City Court of Zebulon; H. F. Dupree, Judge.

Action by James Simmons against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. B. McDonald, of Yatesville, and Robt. L. Berner, of Macon, for plaintiff in error. Battle & Hollis, of Columbus, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 520)

ROGERS, CASSELS & FLEMING v. BENNETT. (No. 8275.)(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)*(Syllabus by the Court.)***1. SUFFICIENCY OF EVIDENCE.**

There was evidence to support the verdict.

2. EXCERPTS FROM CHARGE—ERROR.

When read in connection with the entire charge, the excerpts therefrom complained of in the motion for new trial are not erroneous.

3. TRIAL \S 295(2)—**HARMLESS ERROR—CHARGE.**

Slight errors and inaccuracies of expression which are not likely to mislead the jury, are harmless in a charge which otherwise accurately, fairly, and comprehensively states the contentions of both parties and clearly presents the law applicable thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 705.]

4. TRIAL \S 257, 259(1)—**INSTRUCTIONS—REQUEST.**

The charge covered the issues made by the pleadings, and if fuller instructions on any particular issue were desired, the judge should have been so informed by a timely written request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 642-645, 648, 650.]

5. RULING ON MOTION FOR NEW TRIAL.

The judge did not err in overruling the motion for new trial.

Error from Superior Court, De Kalb County; C. W. Smith, Judge.

Action between Rogers, Cassels & Fleming and Mrs. W. B. Bennett. Judgment for the latter, and the former brings error. Affirmed.

Mark Bolding, of Atlanta, for plaintiffs in error. Green, Tilson & McKinney, of Atlanta, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 501)

NORTON v. LYNNAH et al. (No. 7831.)
(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. TRIAL ~~6~~143—CONFLICTING EVIDENCE—STATUTE.

If the plaintiff's evidence establishes the case substantially as laid, although there be conflict in the testimony of the witnesses for the plaintiff, a nonsuit is not proper. *Outcault Advertising Co. v. American Furniture Co.*, 10 Ga. App. 211, 73 S. E. 20; *Wallace v. Southern Ry. Co.*, 10 Ga. App. 96, 72 S. E. 606; *Civil Code 1910, § 5942*. The evidence of the plaintiff in this case was sufficient to have carried the case to the jury, and the granting of a nonsuit was error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 342, 343.]

2. OTHER ASSIGNMENTS.

There is no merit in any of the assignments of error not covered by the foregoing ruling.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by R. G. Norton against S. H. Lynnah and others. Judgment of nonsuit, and plaintiff brings error. Reversed.

Oliver & Oliver and E. S. Fuller, all of Savannah, for plaintiff in error. Paul E. Seabrook, of Savannah, for defendants in error.

LUKE, J. Judgment reversed.

WADE,, C. J., and GEORGE, J., concur.

(19 Ga. App. 549)

FOSTER, SON & HARLAN v. WHITTEN.
(No. 7998.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. VENUE ~~6~~7—LIMITATION OF ACTIONS ~~6~~104½, New, vol. 6 Key-No. Series—SUSPENSION—IMPRISONMENT.

A suit upon a promissory note under seal, dated February 9, 1891, and due one day after date, was commenced on July 30, 1915. The plaintiff alleged that, "while the note, the foundation of the suit, shows on its face to be barred by the statute of limitations, it in fact is not barred; that for a number of years following the signing of the note defendant resided out of the state of Georgia; that for 12 or 13 years since said note was signed defendant has been incarcerated in the Georgia Penitentiary, being legally dead, and for the remainder of the time has been beyond the limit of the state." *Held*, there was no error in striking the allegation that "for 12 or 13 years since said note was signed defendant has been incarcerated in the Georgia Penitentiary, being legally dead." The criminal act of the defendant, followed by his legal imprisonment, did not postpone the plaintiff's right to commence and prosecute his suit upon the note. The plaintiff was himself unfettered, and could have sued, and the proper venue for the suit remained in the county of the defendant's residence at the time of his arrest and conviction.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 13-16.]

2. CHARGE OF COURT.

The excerpts from the charge of the court to which exceptions are taken are not erroneous for any of the reasons assigned, and the evidence warranted the verdict.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action between Foster, Son & Harlan and O. N. Whitten. Judgment for the latter, and the former bring error. Affirmed.

Geo. W. Head, of Tunnel Hill, and W. E. Mann, of Dalton, for plaintiffs in error. Geo. G. Glenn, of Dalton, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 535)

LOGAN v. DANIEL. (No. 7912.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

CERTIORARI ~~6~~70(8)—QUESTIONS OF FACT—REVIEW.

The petition for certiorari, together with the answer thereto, presents simply a question of fact, and, the trial court having determined that issue against the plaintiff in certiorari, and the superior court having overruled the certiorari, the judgment will not be disturbed.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 206.]

Error from Superior Court, Fulton County: Geo. L. Bell, Judge.

Action between J. L. Logan and Mrs. H. T. Daniel. Judgment for the latter, and the former brings error. Affirmed.

Gober & Jackson and W. I. Heyward, all of Atlanta, for plaintiff in error. Moore & Pomero, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 623)

MILLS v. STATE. (No. 8482.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ~~6~~1178 — APPEAL — GROUNDS OF MOTION FOR NEW TRIAL — ABANDONMENT—ARGUMENT.

The several grounds of the amendment to the motion for a new trial, not being specifically argued in the brief of counsel for plaintiff in error, are deemed abandoned. *Youmans v. Moore*, 11 Ga. App. 66, 74 S. E. 710; *Muse v. Hall*, 18 Ga. App. 651, 90 S. E. 222 (3); *James v. Boyett*, 91 S. E. 219. The mere statement in the brief of counsel that "plaintiff in error insists on each and every ground of his original motion for new trial, also each and every ground of the amended motion," does not amount to an argument. See *Rounsaville v. Camp*, 91 S. E. 446, decided February 16, 1917.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3011-3013.]

2. INTOXICATING LIQUORS \S 236(11)—OFFENSES—SALE—EVIDENCE.

"Upon the trial of one for selling intoxicating liquor, testimony that the person to whom the liquor is alleged to have been sold went to the home of the accused and got a pint of whisky 'from him and his wife,' and thereupon laid 75 cents on the table in the room and went away, is sufficient to authorize a conviction." Greer v. State, 13 Ga. App. 686, 79 S. E. 746. In this case the witness for the state testified that he went to the house of the defendant and asked for and obtained two drinks of whisky and the whisky remaining in a bottle which he carried away with him; that the defendant declined to accept pay for the whisky, and the witness thereupon took 60 cents from his pocket and placed it on the table in the defendant's room and then left the house; that he only knew he left the money on the table, and could not say whether the defendant took it or knew that it was left on the table. The evidence of the defendant's guilt was weak, but the jury were authorized to infer that he had knowledge of the deposit of the money which was made in his presence, and might reasonably infer that a sale was effected, and this court, therefore, cannot hold that the trial judge abused his discretion in overruling the motion for a new trial, based upon general grounds.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. \S 313-315.]

Error from City Court of Nashville; O. A. Christian, Judge.

Zeke Mills was convicted of an unlawful sale of liquor, and he brings error. Affirmed.

J. D. Lovett, of Nashville, for plaintiff in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 604)

BIGGERS v. STATE. (No. 8314.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1169(5)—EVIDENCE—DEDUCTIONS—CURE BY CHARGE.

In the motion for a new trial it is contended that the court erred in refusing to declare a mistrial on the ground that one of the state's witnesses "stated before the jury and in the hearing of the court and jury that, while he did not know of his personal knowledge the defendant, George Biggers, stole the oats, yet information he had received upon investigation pointed to defendant as the leading party in the stealing of the oats, and that he was satisfied that George Biggers, the defendant, was one of the persons who had been stealing oats from him." If there had been any room for misapprehension on the part of the jury as to whether these remarks were made as deductions from the evidence, the prompt action of the court in directing the jury not to consider them obviated the danger.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3141.]

2. CRIMINAL LAW \S 729—ARGUMENT OF STATE'S COUNSEL—CURE.

It is contended that the court erred in failing to declare a mistrial on account of the fol-

lowing language of counsel for the state: "Now, gentlemen of the jury, Mr. Arnall (indicating) does not know how much Biggers may have stolen from him during the time he lived on his farm." This exception is wholly without merit, since the court, as soon as his attention was called to this statement, promptly admonished counsel to stay within the evidence; and thereupon counsel stated to the court in the presence of the jury that he "was simply drawing deductions and conclusions from the evidence in the case, and not stating as a fact that Biggers had been stealing from Arnall." In view of the circumstances in proof and this statement by the prosecuting attorney the remarks excepted to must be construed to mean that the testimony led counsel to the conclusion expressed. See Broznack v. State, 109 Ga. 514, 35 S. E. 123; Smalls v. State, 105 Ga. 669, 31 S. E. 571; Holmes v. State, 7 Ga. App. 570, 67 S. E. 693. "A statement by the prosecuting attorney in his argument, expressive of his opinion of the defendant's guilt. * * * should be construed to mean that the testimony led him to this conclusion. * * * What the law condemns is the injection into the argument of extrinsic and prejudicial matters which have no basis in the evidence." Floyd v. State, 143 Ga. 286, 289, 84 S. E. 971, 972. See, also, Sutton v. State, 18 Ga. App. 162, 166, 167, 88 S. E. 1005; Owens v. State, 120 Ga. 209 (3), 210, 47 S. E. 545.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1692.]

3. RULING ON MOTION FOR NEW TRIAL.

There was evidence to support the finding of the jury, and the trial court did not err in overruling the motion for a new trial.

Error from City Court of Newnan; W. A. Post, Judge.

Geo. Biggers was convicted of larceny, and he brings error. Affirmed.

T. G. Farmer, Jr., of Newnan, for plaintiff in error. W. L. Stallings and W. C. Wright, both of Newnan, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 520)

GRINER v. LOWE. (No. 7942.)

(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)

(Syllabus by the Court.)

SHERIFFS AND CONSTABLES \S 128 — CLAIM CASE—TROVER.

In this case the following undisputed facts are shown by the pleadings and the evidence: The defendant Griner was a lawful constable, and he levied an attachment in favor of R. C. Chancellor and against Dave Lowe upon certain household goods. The wife of Dave Lowe, the plaintiff in this suit in the court below, filed a claim to the goods, but gave no bond. She withdrew this claim, and at the next term of court filed a second claim to the property. When this second claim came on to be heard, neither the claimant nor her attorney appeared to prosecute it, and it was dismissed, and the property was found subject to the execution based upon the attachment which had been levied upon the property. The claimant filed within

four days her appeal to a jury in the justice's court, and when the case was called at the succeeding term of the court, a jury having been drawn, the appeal was dismissed on the ground that no appeal lay from the judgment upon the second claim filed. The claimant then, instead of appealing her case to a jury in the superior court, instituted this trover proceeding in the city court of Nashville, without paying the costs which had accrued upon the filing of the second claim and the appeal to a jury in the justice's court.

Held, under the above facts, the verdict for the plaintiff was unauthorized, and the court erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 136, 260-263.]

Error from City Court of Nashville; O. A. Christian, Judge.

Trover proceeding by Dollie Lowe against Dan Griner. Judgment for plaintiff, and defendant brings error. Reversed.

Ira S. Clary, of Nashville, for plaintiff in error. Wm. Story, of Nashville, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 600)

WILLIAMS WAGON WORKS v. A. T. SMALL & SONS. (No. 7887.)

(Court of Appeals of Georgia. Division No. 2. March 20, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1010(1) — **SALES** — 461 — **FINDING—REVIEW—DESCRIPTION.**

The main issue on the trial of this case seemed to be whether the mare in question was "white" or "iron gray" when she was sold under the conditional bill of sale, and the determination by the learned trial judge that she was iron gray will not be disturbed, there being ample evidence to support his finding. It seems, from the evidence in the record, that the same horse may be "iron gray" in winter and "flea-bitten" or "white" by the following spring. One witness testified: "I would call an iron gray horse a horse that had already started to turn white." In our opinion, the description of the mare in the bill of sale, to wit, "one iron gray mare mule, seven years old," was legally sufficient. *First National Bank v. Spicer*, 10 Ga. App. 503, 73 S. E. 753; *Beaty v. Sears*, 132 Ga. 516, 64 S. E. 321; *Nichols v. Hampton*, 46 Ga. 253; *Farkas v. Duncan*, 94 Ga. 27, 20 S. E. 267.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3981; *Sales*, Cent. Dig. § 1349.]

2. ESTOPPEL — 118 — **PRINCIPAL AND AGENT** — 137(1, 2) — **CONDUCT OF AGENT — EVIDENCE.**

Estoppels are not favored by the law, and they must be clearly established. When it is sought to estop the principal by the conduct of an agent, it must be affirmatively shown that the latter was acting within the scope of his authority. *Keystone Co. v. Farmers' Oil &*

Fertilizer Co., 15 Ga. App. 107, 82 S. E. 665; *Collins v. Crews*, 3 Ga. App. 238, 59 S. E. 727 (4); *Hamilton v. Georgia Railroad*, 78 Ga. 328; *Camp v. Southern Banking & Trust Co.*, 97 Ga. 582, 25 S. E. 362; *Walton Guano Co. v. McCall*, 111 Ga. 114, 36 S. E. 469. It is contended that the plaintiff is estopped from bringing suit to recover the mare, because of the conduct of his salesman Riley. After the conditional sale to Rountree (which was never completed), and while Rountree had possession of the mare, R. A. Williams, who afterwards bought the animal from Rountree, asked Riley "if she was any good." Williams testified: "He told me to buy her, she was a good horse, and to buy her. He did not say a word about A. T. Small Sons having a claim on it. * * * I did not make an examination of the records." Riley's testimony shows that he was employed by the plaintiff, and that he had sold the mare in question to Rountree. There was no evidence to show the scope of Riley's duties or authority. He did not sell the animal to Williams for Rountree, but Williams bought directly from Rountree. The conversation between Riley and Williams appears to have been solely upon the question of the worth or value of the property. Riley made no representations whatever to Williams as to the plaintiff's claim on it, did not purport to be acting for the plaintiff, when he advised Williams to buy it, and no authority for him to act for the plaintiff was shown. Furthermore, the evidence fails to show that Riley knew that Rountree had not paid the original purchase-money note, or that Riley was aware that Williams did not know of the conditional sale to Rountree; the bill of sale having been duly recorded in the office of the clerk of the superior court of Bibb county. Nor is there any evidence to negative the idea that Riley, even if he knew that the purchase price had not been paid by Rountree, supposed that Williams would take up Rountree's note when he purchased the property. Under such circumstances we do not think that the plaintiff is estopped by Riley's conversation with Williams.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 306, 308; *Principal and Agent*, Cent. Dig. §§ 492-494.]

3. SALES — 472(2), 480(4) — **RESERVATION OF TITLE—RECORD.**

It is contended by the plaintiff in error that the judgment should be reversed upon the purely technical point that the evidence did not affirmatively show that the makers of the title reservation note resided in Bibb county, where the note was duly recorded in the office of the clerk of the superior court. In order for the reservation of title to be good as against third persons, the vendee being a resident of this state, it is essential that the contract be recorded in the county in which the vendee resides at the time of the execution of the contract. *Civil Code 1910, §§ 3318, 3319, 3259; Pickard & Hodd v. Garrett*, 141 Ga. 831, 82 S. E. 251(1). There is no contention, nor even the slightest intimation, that as a matter of fact Rountree & Sons, the vendees, did not reside in Bibb county, or that the animal in question was at any time, after its purchase in Bibb county, carried without that county. The contract on its face showed that it was executed in Bibb county. The note was payable at a bank in Macon, and the contract was recorded in Bibb county. The record shows that the witnesses (upon the trial in the city court of Macon) referred to Rountree & Sons' place of business as being "down on Third street," and a fair inference from the evidence, and the only inference that could legitimately arise is that Rountree & Sons resided in Bibb county; and the trial judge, also a resident of Bibb county, sitting by consent without the intervention of a jury, was author-

ized so to find. If this question had been an issue under the pleadings in the case, or if there were any real doubt as to whether the contract had been recorded in the county where the vendees resided, our ruling would be otherwise, and we would hold, as in the cases cited by the plaintiff in error, that the fact that the instrument was so recorded must be affirmatively shown by direct evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1370, 1444, 1445.]

4. APPEAL AND ERROR ⇨1078(1) — ASSIGNMENTS OF ERROR—ABANDONMENT.

The other assignments of error, not being referred to in the brief of counsel for the plaintiff in error, are treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

5. RULING ON MOTION FOR NEW TRIAL.

The finding of the judge was amply supported by the evidence. No error of law appears, and the overruling of the motion for a new trial was not error.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by the Williams Wagon Works against A. T. Small & Sons. Judgment for the latter, and the former brings error. Affirmed.

Walter De Fore and Jas. C. Estes, both of Macon, for plaintiff in error. Hardeman, Jones, Park & Johnston, of Macon, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 525)

ALBRIGHT v. UNIVERSITY SCHOOL OF MEDICINE. (No. 7840.)

(Court of Appeals of Georgia, Division No. 1. March 20, 1917.)

(Syllabus by the Court.)

COLLEGES AND UNIVERSITIES ⇨10—ACTION ON NOTE—DEFENSE—DEMURRER.

A medical college brought suit in a justice's court upon a promissory note. The defendant filed an answer, admitting the execution of the note, but alleging a total failure of consideration, for the following reasons: That "defendant entered said school for the purpose of getting all the benefit of the profession; that he spent several years there, and paid plaintiffs large sums of money for tuition up to January, 1911; that up to said date he had the use and advantages of large equipments of said college; that he was required to furnish dental supplies and equipments necessary to his profession, and that he bought said instruments, and paid for them, and that said plaintiff required him to keep same in their college building; that on or about January 6, 1911, the building in which he was required to keep said instruments was totally destroyed by fire, same being caused, or said to have been caused, by the negligence of the officers of said college in allowing combustible material in said building, and that defendant suffered the total loss of all his instruments and books, which were worth \$140. * * * Defendant says that during the spring term, 1911,

he was compelled to follow the faculty of said college around from building to building in the city of Richmond, Va., and from room to room, in order to finish the term, which defendant says was of very little, if any, benefit to him, and that he does not believe he was benefited at all thereby. Wherefore defendant prays that said note be canceled, and that he have judgment against plaintiff for the sum of \$65 and cost of suit." *Held*, the answer was properly stricken on general demurrer, and the judge of the superior court did not err in dismissing the defendant's petition for certiorari and in awarding judgment against him for principal, interest, and cost.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 29-31.]

Error from Superior Court, Fayette County; W. E. H. Searcy, Jr., Judge.

Action by the University School of Medicine against G. B. Albright. Judgment for plaintiff, and defendant brings error. Affirmed.

W. B. Hollingsworth and Lester C. Dickson, both of Fayetteville, for plaintiff in error. J. W. Culpepper, of Fayetteville, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 511)

BARRINEAU v. HOLMAN. (No. 7790.)
(Court of Appeals of Georgia, Division No. 2. March 19, 1917.)

(Syllabus by the Court.)

1. PLEADING ⇨259—SALES ⇨267 — CONTRACT—IMPLIED WARRANTY—PLEADING.

Where the buyer of a mule freely and voluntarily signed a contract for the purchase of the animal, agreeing to pay a stipulated sum therefor, with full knowledge of the terms of the contract, one of which was that the seller "warrants said property against all such defects as are specifically noted and mentioned herein but against no others, latent or patent," and another that "no statements, representation, or warranty of either party hereto, or by any agent of either, shall form any part of this contract or in any wise affect the same, unless herein set forth, and the undersigned in purchasing the above-described property acts solely upon his judgment," and where no defects of any character as to the property were specifically noted or mentioned in the contract and no representation or warranty (other than stated) as to the property was set forth therein, the doctrine of implied warranty as set forth in section 4135 of the Civil Code of 1910 was not applicable and the purchaser waived all defects either patent or latent, in the property. And in a suit brought upon the note by the seller of the property it was not error for the court to refuse to allow the following amendment to the defendant's answer: "Defendant for further answer says that on the 15th day of March, 1912, the plaintiff sold defendant an iron gray mule for the sum of \$210. The sale of said mule was made without any waiver whatever, but under a general warranty implied by law as to soundness, healthfulness, and suitability as a farm mule, said mule being sold to defendant for

farming purposes; and defendant shows that said mule was totally worthless and unsuited for a work animal, said mule going lame on the first day said mule was put to work, and afterwards by reason of such lameness being unable to do any work; that plaintiff is and has been since 1912 a nonresident of this state. Defendant prays that said damages, to wit, the purchase price of said mule, be set off as against the note sued on, and that he have a judgment for the excess." See *Floyd v. Woods*, 110 Ga. 850, 38 S. E. 225; *Mock v. Kemp*, 17 Ga. App. 448, 87 S. E. 608(1).

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 783-792; Sales, Cent. Dig. §§ 760, 761.]

2. STRIKING ANSWER.

The original answer was insufficient in law, and the court did not err in striking it, and in thereafter rendering judgment in favor of the plaintiff for the full amount sued for.

Error from City Court of Cairo; W. J. Willie, Judge.

Action by J. D. Holman against H. V. Barriereau. Judgment for plaintiff, and defendant brings error. Affirmed.

S. P. Cain, of Whigham, for plaintiff in error. M. L. Ledford and Claude Christopher, both of Cairo, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 528)

RUTLAND et al. v. HILL. (No. 7882.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. ATTACHMENT §339—BONDS—JUDGMENT AGAINST SURETY.

Where an attachment has been dissolved by the giving of a replevin bond, and on the trial a judgment is rendered in favor of the plaintiff for the amount of his claim, it is lawful for the plaintiff to take judgment against the security upon the replevin bond. Section 5113, Civ. Code 1910; *Watters v. Southern Fixture & Cabinet Co.*, 13 Ga. App. 468, 79 S. E. 360.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1223-1232.]

2. JUSTICES OF THE PEACE §205(4)—ANSWER OF JUSTICE—EFFECT.

The court is bound by the answer of a justice of the peace to the petition for certiorari, where the answer is neither traversed nor excepted to as provided by law.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 796.]

3. RULING ON CERTIORARI.

The court did not err in not sustaining the certiorari.

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action between O. E. Rutland and others against B. H. Hill. Judgment for the latter, and the former brings error. Affirmed.

Meadors & Wyatt, of La Grange, for plaintiffs in error. B. H. Hill, of West Point, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 515)

BALDWIN v. BERRY. (No. 7834.)
(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)

(Syllabus by the Court.)

1. CHARGE—EVIDENCE—EXPRESSION OF OPINION—MISLEADING CHARGE.

There was evidence which authorized a finding by the jury that the son of the plaintiff was his father's agent in the negotiations with the defendant as to the giving of a correct bond for title to the land involved, and that the plaintiff through his son refused to make the defendant a correct bond for title and refused to sign the unsigned bond for title, which was given the defendant at the time he purchased the property, unless he would pay to the plaintiff an additional sum of money. This being true, the charge complained of in the special ground of the motion for a new trial was authorized by the evidence. There was in this charge no expression or intimation of opinion by the court as to what had been proved in the case; neither was it misleading or confusing to the jury.

2. APPEAL AND ERROR §1005(2)—VERDICT—REVIEW.

There was some evidence to support the verdict, and, it having been approved by the trial judge, this court is without authority to interfere.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876.]

Error from City Court of Dawson; M. C. Edwards, Judge.

Action between A. J. Baldwin and J. M. Berry. Judgment for the latter, and the former brings error. Affirmed.

R. R. Marlin and W. H. Gurr, both of Dawson, for plaintiff in error. Yeomans & Wilkinson, of Dawson, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 623)

MASON v. STATE. (No. 8465.)
(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §814(3)—INSTRUCTIONS—PRISONER'S STATEMENT AT TRIAL.

Where the defendant has not made a statement in his own behalf, it is not proper for the court to give in charge section 1036 of the Penal Code of 1910, as to a prisoner's statement at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1839, 1979, 1985.]

2. CRIMINAL LAW §1064(7) — APPEAL —
GROUND OF MOTION FOR NEW TRIAL.

A ground of a motion for a new trial as follows: "Because the court charged the jury relative to the defendant's right to make a statement, and the weight to be attached thereto by the jury, although the applicant made no statement"—without more, presents no question for determination by this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2683.]

3. ASSIGNMENTS OF ERROR.

There is no meritorious assignment of error, and the evidence amply authorized the conviction of the accused.

Error from City Court of Eastman; O. W. Griffin, Judge.

Will Mason was convicted, and he brings error. Affirmed.

W. M. Morrison and J. H. Milner, both of Eastman, for plaintiff in error. D. D. Smith, Sol., of Eastman, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 621)

JACKSON v. STATE. (No. 8453.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §935(1) — MOTION FOR
NEW TRIAL—EVIDENCE.

There was direct evidence that the defendant sold whisky, as charged in the indictment, and the court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 3068.]

2. ARGUMENT OF COUNSEL.

The argument of counsel for the state, excepted to in this case, was a legitimate inference from the facts proved.

3. CRIMINAL LAW §827—INSTRUCTION—RE-
QUEST—REASONABLE DOUBT.

If a trial court can make plainer the meaning of the words "reasonable doubt," the request to give in charge "a full and complete explanation of the law of reasonable doubt, and the duty of the jury thereon," does not illustrate the possibility, and amounts to no request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2006.]

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

J. A. Jackson was convicted of an unlawful sale of whisky, and he brings error. Affirmed.

Jas. R. Thomas, of Jesup, for plaintiff in error. A. V. Sellers, Sol. Gen., of Baxley, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 609)

CHISLON v. STATE. (No. 8375.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

MOTION IN ARREST OF JUDGMENT.

The motion to arrest the judgment is without merit, and the court did not err in refusing to set aside the judgment.

Error from City Court of Dublin; R. D. Flynt, Judge.

Ed Chislon was convicted, and he moves to set aside the judgment. Affirmed.

W. A. Dampier, of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 618)

SHELTON v. STATE. (No. 8418.)

(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

PARENT AND CHILD §17(2)—ABANDONMENT
OF CHILD—OFFENSE.

A father who, within this state, willfully and voluntarily abandons his child before it is born, and persists in the abandonment afterwards, leaving it in a dependent condition, is guilty of a misdemeanor under section 116 of the Penal Code of 1910; but a father is not guilty under that section unless the child has been born. Accordingly no offense was set out in an indictment charging the defendant with abandoning his minor child "not yet born," and the court erred in overruling the demurrer thereto. Bull v. State, 80 Ga. 704, 6 S. E. 178; Boyd v. State, 18 Ga. App. 623, 89 S. E. 1091.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 176.]

Error from Superior Court, Bartow County; M. C. Tarver, Judge.

Everett Shelton was convicted of a misdemeanor, and he brings error. Reversed.

M. B. Eubanks, of Rome, for plaintiff in error. J. M. Lang, Sol. Gen., of Calhoun, for the State.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 554)

STEWART & JONES CO. v. GRIFFIN.
(No. 8086.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §185(1)—FELLOW
SERVANTS—"VICE PRINCIPAL."

The term "vice principal," as generally used in the fellow servant law, is defined as including any servant who represents the master in

the discharge of those personal or absolute duties which every master owes to his servants; such duties being generally referred to as the nonassignable duties of a master. *Moore*, by *Next Friend*, v. *Dublin Cotton Mills*, 127 Ga. 609, 56 S. E. 839, 10 L. R. A. (N. S.) 772 (2).

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385, 386, 391, 895.

For other definitions, see *Words and Phrases*, First and Second Series, *Vice Principal*.]

2. MASTER AND SERVANT ¶103(1), 171, 265 (2)—NONASSIGNABLE DUTIES—MASTER'S KNOWLEDGE—DEFECT IN TOOL OR APPLIANCE.

"Among the nonassignable duties of the master are providing machinery and appliances, the place to work, the inspection and repair of premises and appliances, the selection and retention of servants, the establishment of proper rules and regulations, and the instruction of servants. This enumeration, however, is not exhaustive, but simply illustrative." *Moore v. Dublin Cotton Mills*, supra. If the defect in the tool or appliance furnished the servant by the master should have been known to the master, he will be presumed to have known it. "Negligent ignorance is equivalent to knowledge. The patent and obvious character and apparent age of the defect may indicate that the master should have known it." *Ocean Steamship Co. v. Matthews*, 86 Ga. 418, 12 S. E. 632 (2-b).

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 175, 341, 878, 895, 896.]

3. MASTER AND SERVANT ¶288(11)—QUESTION FOR JURY—APPLIANCES—SERVANT'S KNOWLEDGE.

Under the evidence in this case it was for the jury to determine whether the master had knowledge of the defect in the appliance furnished the servant, or in the exercise of ordinary care should have known of it; and it was likewise a question for the jury whether the servant, who did not have charge and control of the appliance, and who was inexperienced in the use of such appliance, knew of the defect, or had equal means with the master of knowing of it. The evidence authorized the jury to find that the appliance was defective, as alleged by the plaintiff, that the master knew or should have known of the defect, and that the servant did not know, and had not equal means of knowing, of the defect. The verdict (for \$1,000) is not excessive.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1079-1082.]

4. TRIAL ¶242—ACTION FOR INJURY—MISLEADING INSTRUCTION.

Error was assigned on the following extract from the charge of the court: "This case involves some of the doctrines of master and servant, and it becomes necessary for the court to give you certain rules of master and servant that you may understand these rules and know how to apply them." This part of the charge is not subject to the criticism that "this case is wholly and entirely a master and servant case"; or that "it misled the jury into believing that there were issues in the case other than master and servant." The case did not involve all of the law on the subject of master and servant, and the entire charge contains only the principles of the law on the subject of master and servant applicable to the facts of this case. No complaint is made of any erroneous instruction of law. The court did not err in overruling the motion for new trial.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 569-576.]

Error from Superior Court, *Habersham County*; J. B. Jones, Judge.

Action by F. G. Griffin against the *Stewart & Jones Company*. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Perkins, of Cornelia, and J. C. Edwards & Sons, of Clarkesville, for plaintiff in error. J. J. & Sam Kimzey, of Cornelia, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 619)

LEDFORD v. STATE. (No. 8388.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶797—TRIAL—INSTRUCTIONS—RECOMMENDATION AS TO PENALTY.

On the trial of a person indicted for the commission of a felony other than one of those enumerated in section 1062 of the Penal Code of 1910, it is the duty of the court to inform the jury of so much of the provisions of that section as relate to their power, in the event of conviction, to recommend that the accused be sentenced as for a misdemeanor, and that such recommendation is effectual to reduce the penalty only when approved by the trial court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1935-1937.]

2. CRIMINAL LAW ¶863(1) — TRIAL — INSTRUCTION—RECALL OF JURY.

Where such omission occurs in the general charge given the jury, it is the right and duty of the court to recall the jury after they have retired to consider their verdict, and to supply the omitted instructions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2065, 2066.]

3. CRIMINAL LAW ¶869(15), 371(1, 12), 372(1), 398(2), 400(7)—INSTRUCTIONS—EVIDENCE—VERDICT.

The charge of the court in the case at bar was not erroneous for any of the reasons assigned, and the objections taken to the admission of evidence are without merit. The verdict is not without evidence to sustain it, and the trial court did not err in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 824, 830-834, 879-886.]

Error from Superior Court, *De Kalb County*; C. W. Smith, Judge.

O. R. Ledford was convicted of altering and defacing a certain instrument of record and a certain public record, and he brings error. Affirmed.

L. J. Steele, of Decatur, and Alonzo Field, of Atlanta, for plaintiff in error. Geo. M. Napier, Sol. Gen., of Atlanta, for the State.

GEORGE, J. The indictment contains two counts. In the first count the defendant is charged with the offense of defacing and falsifying a certain document and instrument recorded in the office of the clerk of the superior court of De Kalb county, Ga., to wit, a deed (copied) dated August 2, 1914, from W. B. Henderson to the defendant, conveying cer-

tain lands described, which was duly recorded on November 18, 1914, in Deed Book No. 88, page 263, of the records belonging to the office of the clerk of the superior court of De Kalb county, Ga., the same being a public office within this state. In the second count the defendant is charged with altering and defacing a certain book, to wit, Deed Book No. 88 of the records belonging to the office of the clerk of the superior court of De Kalb county, Ga., the same being a public office, within this state, by then and there removing and tearing from page 263 of said book a certain deed from W. B. Henderson to the defendant, dated August 2, 1914, and recorded in said deed book at page 263, on November 18, 1914. The defendant was found guilty, with a recommendation that he be punished as for a misdemeanor.

[3] In his motion for a new trial, which was overruled by the presiding judge, he complains that the court erred in admitting the testimony of the clerk of the superior court of De Kalb county, as follows: "I discovered the record torn from Deed Book 84"—and complains further that the court erred in admitting in evidence Deed Book 84, from which pages 515 and 516 appeared to have been removed. According to the testimony of the clerk, the instrument recorded on pages 515 and 516 was a deed executed by the defendant, O. R. Ledford, and his father, R. H. Ledford, to W. B. Henderson, the grantor in the deed referred to and described in the indictment. We think that this evidence was material and relevant to the issue. It is true that the defendant was not indicted for defacing or falsifying this particular deed, nor this particular record of deeds, but the contention of the state, which was established by the evidence in the case, was as follows: The defendant, O. R. Ledford, decided upon a plan to have erected a building on a certain lot owned jointly by himself and father, and entered into an agreement with W. B. Henderson to deed the land to Henderson for the purpose of enabling Henderson to place a loan thereon through one D. M. Matthews, in order to raise the money necessary for the erection of the building. The defendant and his father made the deed to Henderson and Henderson obtained a loan upon the land conveyed therein. Henderson failed at this enterprise, and the defendant found himself with a mortgaged lot on which was an incomplete building. One of the witnesses for the state testified that he informed the defendant that the giving of the deed to Henderson was a foolish thing, and the evidence further discloses that Ledford, upon the failure of Henderson to complete the building, approached the party through whom the loan on the lot was negotiated and asked for an increase in the loan. This increase was refused him, and he was offended. He asserted to the loan agent that he would "beat the mortgage" or would "beat" the lender. The

evidence for the state clearly showed the execution of the deed by the Ledfords to Henderson, and further disclosed that Henderson, who, after his failure to complete the building according to his contract, was incarcerated in Fulton county jail, had deeded the property back to the defendant. This latter deed is the deed referred to and described in the indictment. Upon the trial of the charge of falsifying this latter deed and the record thereof, and of defacing and altering the book in which it was recorded, it was entirely proper to admit evidence that the deed out of the defendant and into Henderson had likewise been removed from Deed Book 88 of the records of file in the office of the clerk of the superior court of De Kalb county. This evidence was admissible to establish: (1) Motive; (2) intent; (3) a common scheme or plan embracing the commission of two or more crimes so closely related to each other that the proof of one tends to establish the other; and (4) the identity of the person charged with the commission of the crime. By removing all traces of the two conveyances—the one from the Ledfords to Henderson and the other from Henderson back to the defendant O. R. Ledford—the mortgage executed by Henderson to Matthews would appear to be fraudulent, as no title would be of record in Henderson. The jury found that by this method the defendant attempted to "beat" the mortgage placed upon the property by Henderson, and the verdict is supported by the evidence. On the admissibility of this testimony see *Bates v. State*, 18 Ga. App. 718, 90 S. E. 481 (1), and cases cited in the opinion.

2. The court allowed the witness Matthews for the state to testify that he made the loan to Henderson, the contractor, and permitted this witness to point out the property upon which the loan was made. It was insisted on the part of the accused that, if a loan were made, the writing would be the best evidence of that fact, and of the particular property upon which the loan was made. The court confined the state, upon this objection, to proof of the mere fact that a loan was made, and that before the making of the loan the property was visited and inspected. Testimony to the same effect by Henderson, the contractor, who was sworn as a witness for the state, was likewise admitted. The trial judge properly admitted this testimony. He did not allow the state to prove by parol any of the terms or provisions of a written contract, but permitted the witnesses to testify to the fact of the making of a contract, and to the fact that a loan was executed upon lands personally inspected, and that a building was commenced and partially completed upon a particular lot. The witness Henderson was further permitted to testify that he reconveyed the property deeded him by the Ledfords to the defendant individually, and pointed out the particular property.

Objection to this testimony was made on the ground that it "attempted to go into the contents of the deed." The evidence for the state disclosed that both the deed from the Ledfords to Henderson, and the deed from Henderson to Ledford, had been delivered by Henderson while in jail to the defendant, and the court properly admitted the testimony. Possession of these instruments having been shown in the defendant, he could not be required to produce them for inspection by the jury, and oral evidence of the contents of the deeds, or either of them, was admissible. *Thomas v. State*, 91 S. E. 247, and cases there cited.

3. The court did not err in refusing "to exclude all the testimony in regard to the contract for the erection of the building" alleged to have been entered into between Henderson and the defendant. The court restricted the testimony to the fact of the execution of the contract, and refused to admit in evidence any of the details of the contract. Certainly the existence of a writing, even where the writing is accessible to the state, may be shown by parol, and the fact of the execution of the contract may be shown by parol. There is no higher evidence of such fact.

[1, 2] 4. The trial judge in his charge failed to instruct the jury that in the event they believed the defendant guilty and so found, they might add to their verdict a recommendation that the defendant be punished as for a misdemeanor, and especially complains that, after the jury had retired and had considered the case for a considerable length of time, it was error to cause the jury to be returned to the box and to supply the omitted charge. It is insisted that this charge, given under the circumstances indicated, influenced the jury to return a verdict of guilty against the defendant. We do not think that the conduct of the court in recalling the jury and in supplying this omitted charge was error. Indeed, the court did precisely what he should have done, as we understand the law. The jury in the trial of a criminal case may be recalled for the purpose of giving them an appropriate instruction previously omitted. Of course, a recharge to the jury may, in certain exceptional cases, harmfully affect the rights of the defendant. It is the better practice to charge every pertinent principle of law applicable to the case before the jury retires from the box. However, if the court should omit to charge some pertinent principle of law applicable to the issues in the case, it is right and proper that the jury should be recalled and the omitted instruction given. If the court is careful to guard and protect the rights of the defendant, the defendant can have no just ground of complaint. In this very case the court cautioned the jury as follows:

"Because of the necessity of adding these instructions, I warn you not to allow these added instructions to in any way influence you in determining the issues or arriving at a verdict. This additional charge must not be considered by you as in any way intimating to you any opinion as to the merits of the case, as the court has none and does not express any opinion. You must consider the issues in the case in the same fair and impartial manner as though these additional instructions had been given you at the time of the general charge."

See *Pritchett v. State*, 92 Ga. 65, 18 S. E. 536 (9); *Rockmore v. State*, 93 Ga. 123, 19 S. E. 32 (3); *Reeves v. State*, 117 Ga. 38 (1), 43 S. E. 404. We find no error in the instructions given the jury upon the second charge. The recommendation of the jury that the defendant be punished as for a misdemeanor was approved by the trial court, and the defendant was accordingly sentenced. The verdict finding him guilty of the offense charged, as hereinbefore indicated, is not without evidence to support it, and the trial court did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 514)

OLARK v. HILLIARD. (No. 7830.)

(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)

(Syllabus by the Court.)

1. VENUE \S 21 — CIVIL CASES — CONSTITUTIONAL AND STATUTORY PROVISIONS.

All civil cases, with certain exceptions, shall be tried in the county wherein the defendant resides. Article 6, \S 16, par. 6, of the Constitution of Georgia; Civ. Code 1910, $\S\S$ 5526, 6543. The exceptions mentioned are: Divorce cases; cases respecting title to land; equity cases; suits against joint obligors, joint promisors, copartners, or joint trespassers; and suits against the maker and indorser of a promissory note, or drawer, acceptor, and indorser of a bill of exchange. Civ. Code 1910, $\S\S$ 5527-5530, 6538-6542.

[Ed. Note.—For other cases, see Venue, Cent. Dig. \S 34.]

2. VENUE \S 7 — PROCEEDINGS BY MONEY RULE—"SUIT."

A proceeding by a money rule is a "suit," within the meaning of sections 5526 and 6543 of the Civil Code. *Roberts v. Keeler*, 111 Ga. 181, 36 S. E. 617(1); *Barrett v. Pulliam*, 77 Ga. 552(4).

[Ed. Note.—For other cases, see Venue, Cent. Dig. $\S\S$ 13-16.

For other definitions, see Words and Phrases, First and Second Series, Suit.]

3. ATTORNEY AND CLIENT \S 126(1)—MONEY RULE—CONSTRUCTION.

The right to rule an attorney for money alleged to be in his possession as such attorney is penal in its nature and must be strictly construed. *Haygood v. Haden*, 119 Ga. 463, 46 S. E. 625.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. $\S\S$ 264, 266-271.]

4. ATTORNEY AND CLIENT §126(1)—VENUE §11 — RETENTION OF MONEY — MONEY RULE.

Where attorneys retain in their hands money from their clients after it has been demanded, they are liable to rule as sheriffs are. Civ. Code 1910, § 4954.

(a) A sheriff is not liable to be ruled outside the county of his residence. *Kellogg v. Buckler*, 17 Ga. 187(4); *Sheffield v. State*, 69 Ga. 730(2).

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 264, 266, 271; *Venue*, Cent. Dig. § 20.]

5. COURTS §188(15)—MONEY RULE—VENUE.

This was a rule nisi issued by the judge of the city court of Savannah, requiring the defendant, an attorney at law, to show cause why he should not pay over to his client a certain sum of money which the client claimed the attorney had collected and refused to pay over to him. The defendant filed his plea to the jurisdiction of the court, alleging that he was not a resident of the county of Chatham, but was a resident of the county of Effingham, and that the courts of the latter county had full jurisdiction of the subject-matter of the suit and the person of the defendant. It was conceded that the defendant was a resident of Effingham county, Ga. It appears that he had an office in the city of Savannah, and was an attorney practicing in the city court of Savannah, and that the controversy between him and his client arose out of an alleged failure to pay over money collected in settlement of a case brought in the city court of Savannah. Under the rulings stated above, the court erred in overruling the defendant's plea to the jurisdiction.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 453.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by George Hilliard against D. H. Clark. Judgment for plaintiff, and defendant brings error. Reversed.

H. B. Strange, of Statesboro, and D. H. Clark, of Savannah, for plaintiff in error. W. R. Hewlett, of Savannah, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 511)

BURTON v. ETHERIDGE. (No. 7775.)

(Court of Appeals of Georgia, Division No. 2. March 19, 1917.)

(Syllabus by the Court.)

1. CONTINUANCE §19—NEW TRIAL §95—PRESENCE IN COURT—EXCUSE.

When a case is set for trial due diligence requires that the defendant, if he desires a continuance, be present either in person or by attorney on the call of the case; and it is not a good ground for a motion for new trial that an agent of the defendant, on the morning of the day of which the case was set for trial, went to the home of the defendant to notify her to attend court, and, finding her in bed sick, was delayed in locating the family physician and getting an affidavit from him as to the condi-

tion of the defendant, and reached the court with the affidavit after the case had been tried.

[Ed. Note.—For other cases, see *Continuance*, Cent. Dig. §§ 41, 43-48; *New Trial*, Cent. Dig. §§ 190-194.]

2. JUDGMENT §109 — ABSENCE OF DEFENDANT AND COUNSEL—PROCEDURE.

Upon the call of a case, if it appears that the defendant is absent, and the attorney for the defendant has his name stricken from the docket and from the case, it is not error for the court to proceed with the case and give it such direction as the pleadings or the pleadings and the evidence may demand. *Howell v. Glover*, 65 Ga. 466(2); *Glover v. Dimmock*, 119 Ga. 696, 46 S. E. 824(1); *Sparks v. Ober*, 138 Ga. 316, 75 S. E. 135.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 160, 162, 179.]

3. DIRECTED VERDICT.

In the instant case it is not made to appear that the judge erred in directing a verdict for the plaintiff. *Phillips & Co. v. Collier*, 87 Ga. 66, 13 S. E. 260; *Moore v. Kelly & Jones Co.*, 109 Ga. 798, 35 S. E. 168(2).

Error from City Court of Atlanta; A. E. Calhoun, Judge.

Action by H. A. Etheridge against Mrs. M. A. Burton. Judgment for plaintiff, and defendant brings error. Affirmed.

John P. Haunson, of Atlanta, for plaintiff in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 615)

HUNTER v. STATE. (No. 8399.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW §742(3)—TRIAL—PROVINCE OF JURY—WEIGHT OF EVIDENCE.

While section 5884, Civil Code 1910, declares that, "If a witness swear willfully and knowingly falsely, his testimony ought to be disregarded entirely, unless corroborated by circumstances, or other unimpeached evidence," yet even without any corroboration the jury may credit a witness against whom there is impeaching evidence. It is for them to say whether he has sworn "willfully and knowingly falsely," and the whole question as to the credibility of witnesses is for the jury under any and all circumstances. *Rice v. Eatonton*, 15 Ga. App. 505, 508-510, 83 S. E. 868; *Huff v. Brown*, 104 Ga. 523, 30 S. E. 809; *Brown v. State*, 10 Ga. App. 50, 72 S. E. 537; *Soloman v. State*, 10 Ga. App. 469, 73 S. E. 623; *Ramsey v. Atlanta*, 15 Ga. App. 345, 83 S. E. 143, and cases there cited; *Brown v. State*, 17 Ga. App. 402, 87 S. E. 155(2).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1721.]

2. SALE OF INTOXICATING LIQUORS.

The evidence sufficiently supported the inference that a sale was intended and effected by the defendant.

3. CRIMINAL LAW §741(2) — QUESTION FOR JURY—IDENTITY.

The court did not err in refusing to exclude the testimony of a witness that to the best of his knowledge and belief the defendant on trial was the man who had sold him whisky. The value of this testimony was for the jury, and

the question of identity was a matter wholly for their determination. *Gray v. State*, 6 Ga. App. 428, 65 S. E. 191(4).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1727, 1728.]

4. CRIMINAL LAW — 360(6) — EVIDENCE — OTHER OFFENSES — SALES OF LIQUORS.

The court confined the testimony as to the purchase of intoxicants from the defendant to a period of two years prior to the finding of the indictment, and expressly ruled out anything in the answer of a certain witness that might refer to transactions occurring prior to such period. The court did not err in declining to rule out the testimony altogether.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822, 823.]

5. RULING ON MOTION FOR NEW TRIAL.

The trial court did not err in overruling the motion for a new trial.

Error from Superior Court, Pike County; W. B. H. Searcy, Jr., Judge.

Peyton Hunter was convicted of the unlawful sale of intoxicating liquors, and he brings error. Affirmed.

C. J. Lester, of Barnesville, and H. O. Farr, of Zebulon, for plaintiff in error. E. M. Owen, Sol. Gen., of Zebulon, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 518)

WRIGHT v. STATE. (No. 8410.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(*Syllabus by the Court.*)

CRIMINAL LAW — 1160 — APPEAL — VERDICT — SUFFICIENCY OF EVIDENCE.

The only assignment of error being that the evidence did not authorize the verdict, and there being some evidence upon which the jury could base their finding, and the verdict having the approval of the trial judge, this court cannot set the verdict aside. *Thomas v. State*, 7 Ga. App. 337, 66 S. E. 964; *Cottle v. State*, 7 Ga. App. 337, 66 S. E. 809; *Alexander v. State*, 1 Ga. App. 239, 67 S. E. 996(2).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084.]

Error from Superior Court, Bulloch County; R. N. Hardeman, Judge.

Edward Wright was convicted, and he brings error. Affirmed.

Fred T. Lanier, of Statesboro, for plaintiff in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 592)

SOUTHERN FERTILIZER & CHEMICAL CO. v. PEACOCK. (No. 7860.)

(Court of Appeals of Georgia, Division No. 2. March 20, 1917.)

(*Syllabus by the Court.*)

APPEAL AND ERROR — 977(4) — REVIEW — GROUND OF NEW TRIAL.

"It may be now considered as settled that this court will not, under any circumstances,

reverse a judgment granting a first new trial, whether the grant be general upon all the grounds of the motion or special upon one or more grounds only, or whether it be upon a ground which involves questions of evidence or upon a ground which involves purely questions of law, unless it is made to appear that no other verdict than the one rendered could possibly have been returned under the law and facts of the case. Unless the case can be brought within the exception just stated, it is useless for parties to bring before this court the judgment of a trial judge granting a first new trial." *Civ. Code* 1910, § 6204; *Weinkle & Sons v. Brunswick & Western R. R. Co.*, 107 Ga. 368, 33 S. E. 471; *Macon Consolidated Street R. R. Co. v. Jones*, 116 Ga. 351, 42 S. E. 468; *Mock v. Savannah & Statesboro Ry. Co.*, 122 Ga. 385, 50 S. E. 121; *Cox v. Grady*, 132 Ga. 368, 64 S. E. 262; *Smith v. Maddox Rucker Banking Co.*, 135 Ga. 151, 68 S. E. 1031; *New v. Southern Ry. Co.*, 136 Ga. 778, 71 S. E. 1104; *Wilkins v. Barnes*, 10 Ga. App. 316, 73 S. E. 349.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3863.]

Error from City Court of Eastman; J. A. Neese, Judge.

Action between the Southern Fertilizer & Chemical Company and J. R. Peacock. Judgment for the latter, and the former brings error. Affirmed.

Roberts & Smith, of Eastman, for plaintiff in error. Chas. W. Griffin, of Eastman, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 502)

LOUISVILLE & N. R. CO. v. HARRIS. (No. 7875.)

(Court of Appeals of Georgia, Division No. 1. March 19, 1917.)

(*Syllabus by the Court.*)

1. RAILROADS — 443(9) — WANTON KILLING OF DOG — EVIDENCE.

There was evidence from which the jury were authorized to find that the killing of the plaintiff's dog by the train of the railway company was wanton and malicious, and the verdict for damages was warranted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1620.]

(*Additional Syllabus by Editorial Staff.*)

2. RAILROADS — 427 — WANTON KILLING OF DOG — LIABILITY.

A railroad company is liable for the wanton and malicious killing of the dog of another.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1534-1538.]

Error from Superior Court, Murray County; A. W. Flite, Judge.

Action by J. W. Harris against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. N. King, of Chatsworth, D. W. Blair, of Marietta, and Tye, Peeples & Tye, of Atlanta, for plaintiff in error.

GEORGE, J. [2] Since the decision in *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, it has been recognized in this state that a railroad company is liable for the wanton and malicious killing of the dog of another; and the facts in *Southern Ry. Co. v. Keel*, 7 Ga. App. 244, 66 S. E. 627; and *Seaboard Air Line Ry. v. Parrish*, 16 Ga. App. 254, 85 S. E. 200, were held sufficient to authorize the jury to infer that the killing of the plaintiff's dog by the railway company was wanton and malicious. The evidence in this case makes a much stronger case against the railway company than is made by the evidence in those cases.

[1] It appears that the track of the railway company, at the point where the dog was killed, was straight for the distance of one mile, and that there was nothing to prevent the servants in charge of the train from seeing the dog. Moreover, the dog was killed at or near a crossing, and the train which ran over and killed the dog went into a siding not more than 50 or 100 yards from this crossing. The train was slowing down for the purpose of entering this siding, and, according to the evidence, must have been going at a very slow rate of speed, not exceeding 4 or 5 miles an hour. An eyewitness saw the dog on the track, 50 yards in front of the train, and the witnesses all testified that the dog turned and ran up the track a distance of about 100 yards before it was finally run down and killed. The brakeman of the company was riding on the pilot of the engine, presumably for the purpose of opening the switch to let the train into the siding. The servants of the defendant company must have seen the dog, and they did nothing whatever to avoid the killing. The train either actually or practically stopped for the purpose of enabling the switchman to throw the switch. These facts illustrate the speed at which the train was running at the time the dog was killed, and strongly indicate that the agents of the railroad company willfully ran down the dog. The defendant offered only one witness, and he was not one of the servants in charge of its train at the time the dog was killed. His evidence was in the nature of expert testimony. Whether a dog, since the act of 1912 (Acts 1912, pp. 46, 47), is personal property in the sense that the owner may maintain an action for its mere negligent injury or destruction, is not decided.

The court did not err in overruling the petition for certiorari and in denying the new trial prayed for.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(39 Ga. App. 539)

GEORGIA NORTHERN RY. CO. v. WINCHESTER. (No. 7927.)

(Court of Appeals of Georgia, Division No. 1. March 20, 1917.)

(Syllabus by the Court.)

1. RAILROADS \S 443(9)—MALICIOUS KILLING OF DOG—ACTION—EVIDENCE.

There was evidence from which the jury could legitimately infer that one of the plaintiff's dogs was killed and the other injured by the wanton and malicious conduct of the engineer in charge of the railway train, and the verdict for damages was therefore not unauthorized.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1620.]

(Additional Syllabus by Editorial Staff.)

2. ANIMALS \S 44 — MALICIOUS INJURY OR KILLING OF DOG—LIABILITY.

The owner of a dog may maintain an action against one who wantonly, maliciously, or intentionally injures or kills it.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. $\S\S$ 115-122.]

3. APPEAL AND ERROR \S 1001(1)—VERDICT—EVIDENCE.

The Court of Appeals cannot set aside a verdict with some evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. $\S\S$ 3928-3933.]

Error from Superior Court, Colquitt County; W. E. Thomas, Judge.

Action by F. J. Winchester against the Georgia Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Shipp & Kline and L. L. Moore, all of Moultrie, for plaintiff in error. J. B. Fussell, of Moultrie, for defendant in error.

WADE, C. J. [2] In this case it is unnecessary to consider whether the adoption by the Legislature of the act of 1912 (Acts of 1912, pp. 46, 47), reciting that "all dogs are hereby made personal property and shall be given in and taxed," authorizes a recovery against a railway company for negligently killing or injuring a dog, and in such cases creates a presumption against the company as in cases of injuries to persons or other property; since, under numerous decisions of this court and of the Supreme Court, an action is maintainable against one who wantonly, maliciously, or intentionally injures or kills his dog.

[1] From the answer to the petition for certiorari, it appears that the plaintiff testified, in his own behalf, that he was the owner of two dogs, one of which was killed and the other injured by the train of the defendant company; that he witnessed the incident and "saw the engineer sitting in his proper place and looking ahead," as the witness was on the same side of the train as the engineer; and that "the track was straight for something like 180 yards from the point where the dogs were run over, back in the

direction from which the train came, and the dogs were upon the track and running in front of the engine for a considerable part of this distance"; that in his opinion the engineer saw or by the exercise of diligence would have seen the dogs, but "the engineer made no effort to slacken the speed of the train or to frighten the dogs from the track; he did not ring the bell or blow the whistle or open the cylinder cocks." The engineer testified for the defendant that he did not see the dogs until just before he ran over them, when they were about 2 feet in front of the pilot, and he was running about 20 miles an hour and was looking out; that his attention was called by the fireman to them just as he saw them, and there was no way in which to save them; that he liked dogs and would have stopped the train if he had seen them; that he was coming around a curve and was on the right side of the engine, and therefore could not have seen them in any event.

Assuming that the jury accepted as true the evidence of the plaintiff in preference to that delivered by the engineer, the track was in fact straight, and not curved, and the dogs were plainly visible, and there was nothing to prevent the engineer from seeing them, and they must have been seen by him some time before they were struck, especially as the undisputed evidence shows that they ran along ahead of the engine for some distance, for the engineer himself said that he was looking forward all the time. The testimony was not disputed that no effort was made to slacken the speed of the train or to frighten the dogs from the track, or that the engineer did not ring the bell or blow the whistle or open the cylinder cocks. The jury was therefore authorized to find, from the testimony of the plaintiff as to the unobstructed character of the track, and from the admission of the engineer that he was looking ahead, that the latter did in fact see the dogs on the track some time before they were struck, notwithstanding his denial, and deliberately failed to slacken the speed of his engine or to make any effort to frighten them off of the track, but, in entire disregard of the probable consequences to the dogs, continued to run his train at the same rate of speed, and hence that the resulting injury to one dog and the death of the other could be directly attributed to his wanton and malicious conduct. The case of *L. & N. R. Co. v. Harris*, 91 S. E. 928, this day decided, rests upon very nearly the same facts, and the evidence in this case is measurably stronger than that in the case of *Seaboard Air Line Ry. v. Parrish*, 16 Ga. App. 254, 85 S. E. 200. To repeat: According to the plaintiff, the engineer could and must necessarily have seen the dogs if he was looking down the straight track; and, according to the en-

gineer, he was in fact looking down the track before and at the time the injury occurred, notwithstanding his further statement that he could not then see the dogs. It was for the jury to say, either that the engineer was prevented from seeing by a curve in the track, or did not in fact for any reason see the dogs, and hence that his failure to check the train was not deliberate, wanton, or malicious; or, on the other hand, that, the track being straight, he not only could but did see the dogs in ample time to prevent the injury, and hence his failure to make any effort to stop the train or to frighten the animals from the track was deliberate, wanton, or malicious. See, in this connection, *Southern Railway Co. v. Keel*, 7 Ga. App. 244, 66 S. E. 627.

[3] We cannot set aside a verdict with some evidence to support it, and therefore hold that the judge of the superior court did not err in overruling the certiorari, since there was evidence to sustain the recovery upon the ground that the injury to the dogs was wantonly and maliciously inflicted.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 529)

WESTBERRY et al. v. HAND. (No. 7890.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. SHERIFFS AND CONSTABLES ⇨138(3) — LEVY—LIABILITY FOR DAMAGES—EVIDENCE. The petition was not subject to the general or the special demurrers, and the evidence supports the verdict.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 295, 296.]

(Additional Syllabus by Editorial Staff.)

2. SHERIFFS AND CONSTABLES ⇨139(5) — LEVY—DAMAGE TO PROPERTY—QUESTION FOR JURY.

In a suit for the value of a mule levied on by a deputy sheriff and killed while in his custody, he could not complain that the verdict was for only \$125, where plaintiff valued the mule at \$175; as its value was for the jury, which was not bound by the opinion of witnesses.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 303-307.]

3. SHERIFFS AND CONSTABLES ⇨119 — POSSESSION OF PROPERTY—LIABILITY.

A sheriff, with regard to care of property under judicial process, is a bailee for hire, and as such is required to use reasonable care in the preservation of the property, and for neglect in performance of such duty is liable.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. §§ 195, 199-204.]

Error from Superior Court, Wayne County; J. P. Highsmith, Judge.

Suit by J. E. Hand against J. E. Westber-

ry, Jr., and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Jas. W. Poppell and Jas. R. Thomas, both of Jesup, for plaintiffs in error. D. M. Parker, of Waycross, and Gibbs & Turner, of Jesup, for defendant in error.

GEORGE, J. Hand sued Westberry, deputy sheriff, and his bondsman, Bennett, for \$175, the value of a mule. The jury returned a verdict for the plaintiff for \$125. The defendants made a motion for a new trial, and the judgment overruling the motion is assigned as error. Hand was the owner of a mule levied upon by the deputy sheriff, Westberry. The deputy sheriff refused to accept bond, and carried the mule a distance of several miles into a strange community. Hand expressly cautioned Westberry, when Westberry refused to accept bond and carried the mule away, to put the mule in a barn or stable, and not to turn it into a lot or put it under wire fence, because it would jump, and would not stay under wire fence. He particularly advised the deputy sheriff of the danger to the mule if it should be placed under wire fence. Westberry carried the mule home and placed it in his stable, and later turned it into a field surrounded by an ordinary wire fence, securely and properly built. In this field was a cross-fence made of wire, which was for temporary purposes only, and was not substantial. The wire was of small size, and was, by reason of its construction (fully set forth in the petition), liable to injure or damage stock. According to the evidence of an eyewitness who was living with and working for the deputy sheriff, the mule belonging to the plaintiff, with other stock, was turned into this field and began running rapidly as it entered the field. On the first round of the field Hand's mule ran into the cross-fence made of wire which was calculated to injure and damage stock, and insecurely strung upon insufficient stakes, and broke its neck.

[2] 1. The defendants could not complain, because the verdict was for only \$125, while in the opinion of Hand his mule was reasonably worth \$175. The question of the value of an article is peculiarly for the jury, and that body is not absolutely bound by the opinions or estimates of the witnesses on that subject. *Minchew v. Nahunta Lumber Co.*, 5 Ga. App. 154, 62 S. E. 716 (4).

[3] 2. Sheriffs and deputy sheriffs are liable to an injured party in respect to certain things specified, and "for or in respect to any other matter or thing whatever relating to or concerning their respective offices," under Civil Code 1910, § 5341.

"A sheriff, with regard to care of property in his possession under judicial process, is a bailee for hire, and as such is required to use reasonable care and diligence in the preservation of the property." *Am. & Eng. Ency. of Law* (2d Ed.) vol. 25, p. 712, citing *Gilmore v. Moore*, 30

Ga. 628, and *Cape Fear Steamboat Co. v. Bartholomess*, 67 Ga. 452.

"The sheriff who has property in his custody is liable for the loss thereof or injury thereto resulting from his failure to use due care and diligence to preserve the same." 35 Cyc. 1688, citing *Johns v. Robinson*, 119 Ga. 59, 45 S. E. 727, and *Gilmore v. Moore*, supra.

Without question, we think that an officer intrusted by law with the possession of personal property is liable to the owner of that property for negligence in the performance of his trust or duty, or for fraud or neglect in the execution of his office.

[1] 3. The petition set forth a cause of action, and was not subject to general demurrer. The acts of negligence were set forth with sufficient particularity, and the petition was not subject to any of the grounds of the special demurrer. The deputy sheriff was fully advised of the character and habits of the mule, and was directly warned that the mule would damage or injure itself if placed under wire fence. Disregarding this information and this warning, he intentionally placed the mule in the inclosure surrounded by a wire fence and across which a temporary wire was strung. It cannot be said, under the evidence in this case, which was not controverted by the deputy sheriff, that the mule was killed as the result of an unavoidable accident. The deputy was guilty of concurring negligence in causing the death of the mule. The verdict, approved by the trial court, is clearly supported by the evidence, and there was no error in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 592)

VICTOR v. BROAD ST. HOTEL CO.

(No. 7833.)

(Court of Appeals of Georgia, Division No. 2
March 20, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 1011(1)—FINDING—CONCLUSIVENESS.

A judgment rendered by a judge who by consent tried a case without a jury will not be set aside by this court when it appears that the evidence, though conflicting, was sufficient to support his finding. *Small v. Charleston Bagging Manufacturing Co.*, 102 Ga. 585, 27 S. E. 763.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3988.]

Error from City Court of Floyd County; John K. Davis, Judge.

Action between A. Victor and the Broad Street Hotel Company. Judgment for the latter, and the former brings error. Affirmed.

Eubanks & Mebane, of Rome, for plaintiff in error. Barry Wright and Denny & Wright all of Rome, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 598)

MOORE v. CITIZENS' BANK OF ASHBURN. (No. 7868.)(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)*(Syllabus by the Court.)***NEW TRIAL §=155—MOTION—HEARING—DISMISSAL—"NEXT TERM."**

Where a suit was filed, returnable to the quarterly term of a city court, and during the term at which a verdict thereon was rendered a motion for a new trial was made, and the order of the judge set a day for its hearing in vacation, and provided that if the motion should not then be heard, it should be heard at such time in vacation as counsel might agree upon, and, upon failure to agree then, at such time and place as the presiding judge might fix on the application of either party, of which time and place the opposite party should have at least five days' notice, and that if, for any reason, the motion should not be heard and determined before the beginning of the "next term" of the court, then it should stand on the docket until heard and determined at that term or thereafter; and where, without fault of the movant, it was not heard at the date fixed in vacation, nor at the next succeeding quarterly term of the court, the motion thereupon went over, by operation of law, to the following quarterly term, and was not subject to be called up without notice at an intervening monthly term, and then dismissed on the grounds that no brief of evidence had been filed and there was no appearance for the movant.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 315.]

For other definitions, see Words and Phrases, First and Second Series, Next Term.]

Error from City Court of Ashburn; R. L. Tipton, Judge.

Suit by Mrs. A. M. Moore against the Citizens' Bank of Ashburn. Judgment for defendant, and plaintiff brings error. Reversed.

Mrs. A. M. Moore filed in the city court of Ashburn a suit against the Citizens' Bank of Ashburn, returnable to the April quarterly term, 1914, of the court, in which she sought to recover on an account the sum of \$1,275, besides interest and costs. At the appearance term the defendant filed an answer, and at the April quarterly term, 1916, on April 17th, the case was tried and a verdict was return in favor of the defendant, upon which judgment was duly entered. The plaintiff, before the adjournment of the court, filed a motion for a new trial on the general grounds; and on the presentation of the motion the trial judge passed the usual orders, directing that the defendant show cause before him in vacation at Ashburn, Ga., at 10 o'clock a. m. on the third Monday in June, 1916, why the motion should not be granted, and that the motion be heard and determined at that time and place. One of the orders then granted provided, among other things, as follows:

"If, for any reason, said motion is not heard and determined at the time and place above fixed, it is ordered that the same shall be heard and determined at such time and place in vacation as counsel may agree upon, and, upon failure to

agree, then at such time and place as the presiding judge may fix, on the application of either party, of which time and place the opposite party shall have at least five days' notice. If, for any reason, this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at said term, or thereafter."

It appears that prior to the date set for the hearing of the motion, the movant's counsel, having been unable to secure a transcript of the evidence and charge of the court in time to prepare and present for approval a brief of the evidence by the third Monday in June, 1916, wrote to the judge a letter, requesting a postponement of the hearing. On June 19, 1916, the judge, in response to the letter, wired counsel for the plaintiff that the motion would be continued until "the next term," unless an earlier date should be agreed upon. However, there was no formal order continuing the hearing. (The next quarterly term of the court convened on the third Monday in July, 1916, but no action in reference to the motion was taken at that time. On August 21, 1916, during the regular monthly term of the court, counsel for the defendant moved to dismiss the motion for a new trial, because no brief of evidence had been filed and there was no appearance for the movant. It does not appear that counsel had made any agreement that the motion for a new trial should be heard and determined on that date, or that there had been any previous order fixing August 21, 1916, as the date for the hearing, and no notice had been given counsel for the movant that the motion would be called up at that time. The motion to dismiss was sustained, and an order was granted accordingly.)

The act approved August 21, 1906, creating the city court of Ashburn, provided as follows:

"The regular terms of said court of Ashburn shall be held monthly and quarterly at such time as the judge of said court may designate by publication of an order fixing the date for said terms, and at the monthly terms of said city court such matters may be disposed of as do not require a jury and the amount does not exceed five hundred dollars." Georgia Laws 1906, p. 152, § 11.

By an amendment to this act, approved August 3, 1916, although the distinction between the monthly and the quarterly terms was preserved, the provision limiting the jurisdiction of monthly terms to amounts of \$500 was stricken, so that the act as amended provides that:

"The regular terms of said city court of Ashburn shall be held monthly and quarterly at such times as the judge of said court may designate by publication of an order fixing the date for said terms, and at the monthly terms of said city court such matters may be disposed of as do not require a jury."

Appended to the certificate of the trial judge appears the following note by him:

"Aug. 21, 1916, was a regular term of court. During my tenure, motions for new trial, without regard to amount, have always stood for hear-

ing at 'the next term' after the date first fixed, without regard to whether it was quarterly or monthly."

E. K. Wilcox, of Valdosta, and A. S. Bussey, of Ashburn, for plaintiff in error. Jas. H. Pate and J. A. Comer, both of Ashburn, for defendant in error.

JENKINS, J. (after stating the facts as above). Under the terms of the trial judge's order, the motion for a new trial not having been heard on the date set therefor in vacation, and no further order thereon being taken, it stood for hearing in term time; and, not being heard at the succeeding July quarterly term of the court, it thereupon went over to the next term. Civ. Code 1910, § 6090; A., K. & N. Ry. Co. v. Strickland, 114 Ga. 998, 41 S. E. 501; Holtzendorff v. Dillard, 136 Ga. 241, 71 S. E. 132; Phoenix Bank v. Shirling (Sup.) 91 S. E. 23. Whether the "next term" must be taken to mean the next succeeding monthly term, or the following quarterly term, is the only question which the record presents for determination. If the former construction be correct, then the action taken in calling up and dismissing the motion was legal and proper; but if, when the motion was not heard at the July quarterly term, it went over by operation of law to the next succeeding quarterly term of said court, the judge would not have authority at an intervening monthly term to call up the motion without notice and dismiss it. The petition was filed to the quarterly term of the city court of Ashburn, and was tried before a jury therein. The amendatory act, approved August 3, 1916 (Laws 1916, p. 197), does not abolish the distinction between the quarterly and the monthly terms, but only gives the same jurisdiction as to amount at each, and provides that the quarterly terms shall have exclusive jurisdiction in jury cases. The case with which we are dealing must have been properly entered upon the trial docket of the quarterly term, and the motion so entered upon its motion docket. The legal effect of the order originally setting the motion down for hearing at a date fixed in vacation was, relatively to this case, a continuation of the quarterly term until that time. Herz v. Frank, 104 Ga. 638, 30 S. E. 797; A., K. & N. Ry. Co. v. Strickland, supra; Cole v. Illinois Sewing Machine Co., 7 Ga. App. 338(2), 66 S. E. 979. The motion not being then heard, and no additional order being taken, jurisdiction was not lost, but was postponed to term time. Helmly v. Davis, 111 Ga. 860, 36 S. E. 927. This term time would seem to be such term as has jurisdiction of the case. Warren v. Slaton, 14 Ga. App. 734(2), 82 S. E. 307. The case having been filed, docketed, and tried before a jury at the quarterly term, its status as a quarterly term case thus became fixed, and the fact that the motion in said case was a

matter for the judge to hear could not give jurisdiction to the monthly term. While, under the proper order, it might have been heard in vacation, yet if term time be relied upon for jurisdiction, then only term time during which jurisdiction to try the case would be had would suffice. Nor do we think that the custom theretofore followed by the trial judge, as evidenced by the note to his certificate, would alter the rule. Of his purpose to act with perfect fairness it is indisputable proof; but if we be correct in our interpretation of the law, and the movant was injured by failing to receive the benefit of a substantial right which by law was allowed him, then custom must give way thereto. Walton v. William Hester Marble Co., 17 Ga. App. 75, 86 S. E. 279.

Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 576)

GEORGIA COTTON CO. v. CENTRAL OF GEORGIA RY. CO. (No. 7702.)

(Court of Appeals of Georgia, Division No. 2. March 20, 1917.)

(Syllabus by the Court.)

1. CARRIERS \Leftrightarrow 114—DELIVERY—NOTICE—ALABAMA STATUTE.

The provisions of section 6137 of the Alabama Code of 1907 as to the mailing of notice to consignees by common carriers on the arrival of freight have no application to the responsibility of railway companies of that state as insurers of freight when under the contract the shipment is intended to be delivered at a private or other siding, even though such siding be within the corporate limits of a city having a daily mail.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620.]

(Additional Syllabus by Editorial Staff.)

2. CARRIERS \Leftrightarrow 88—CONTRACTS—"DELIVERY" OF FREIGHT—SIDE TRACK.

Under the Alabama law, a carrier may, by custom or contract, make a valid "delivery" of freight by merely placing the car upon a side track at a place where it has no agent, and this is true when neither the consignee nor his representative is there to accept it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 280-289½, 319-321.]

For other definitions, see Words and Phrases, First and Second Series, Delivery.]

3. CARRIERS \Leftrightarrow 114—DELIVERY—LIABILITY—ALABAMA LAW.

Where it is intended that delivery of freight shall be made at a private siding, etc., the Alabama rule is that where by custom or contract the duty of the carrier is performed when it places the car on a side track ready for unloading by the consignee, the liability of the carrier as carrier ceases.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 608-620.]

4. CARRIERS \Leftrightarrow 88 — DELIVERY OF GOODS — PLACE—CONTRACT.

A compress company, as the duly authorized general agent of a cotton company, the shipper and consignee, to receive for it all cotton consigned to it at its place of business over the defendant's lines, and which broke the seals and unloaded the cars, might agree with the carrier

as to the manner by which it desired that such deliveries should be made, including deliveries after business hours.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 280-289½, 319-321.]

5. CARRIERS ⇨114—DELIVERY OF FREIGHT—BILL OF LADING—"PRIVATE OR OTHER SIDING."

Where cotton shipped by plaintiff was intended for delivery to its agent, a compress company, on its track, such track was a private or other siding within the provision of the bill of lading that property delivered on a private or other siding shall be at the owner's risk after the cars are detached from trains.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620.]

6. CARRIERS ⇨114—DELIVERY OF FREIGHT—SIDE TRACK—ALABAMA LAW.

Under the Alabama law the clause in the bill of lading that when freight is delivered on a private or other siding it should be at the owner's risk after the cars had been detached from trains, applies to deliveries made within the limits of a corporate city, having a daily mail within Code Ala. 1907, § 6137, relating to delivery and notice to consignees.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620.]

Error from City Court of Savannah; Davis Freeman, Judge.

Suit by the Georgia Cotton Company against the Central of Georgia Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Adams & Adams, of Savannah, for plaintiff in error. Lawton & Cunningham and H. W. Johnson, all of Savannah, for defendant in error.

JENKINS, J. This was a suit in the city court of Savannah by the Georgia Cotton Company, as shipper and consignee, against the Central of Georgia Railway Company, for the value of 65 bales of cotton, transported over the lines of the defendant from several points in Alabama to Troy, Ala. The entire shipment being within the state of Alabama, counsel for both parties properly agreed to try the case according to the Alabama decisions. There was no disputed issue of fact, and, after the submission of the evidence on behalf of both parties, each of them asked that a verdict be directed in its favor. The trial judge directed a verdict in favor of the railway company.

It appears that the cars containing these 65 bales of cotton were burned while on the tracks alongside the west platform of the Atlantic Compress Company, at Troy, Ala., in a fire which originated in and which destroyed the compress. It was not contended that the defendant was in any wise responsible for the fire, or negligent in any act pertaining thereto. The cars containing the cotton involved in the litigation were detached and placed on the side track along the platform of the compress company about 6 o'clock p. m. November 23, 1910, and the fire destroying the cars and their contents occurred about 5 o'clock, a. m. on the following morning, No-

vember 24th, prior to the hour at which the compress company would have opened for business had not the 24th been Thanksgiving Day, a legal holiday. The railway company, having admitted its receipt of the cotton for transportation, and the value of the cotton, pleaded that it had, before the destruction of the property, fully complied with its contract of shipment, by delivering the cotton to the duly authorized agent of the plaintiff, so as to relieve it entirely from further responsibility therefor. In furtherance of this defense it set up in its answer two distinct theories:

(1) According to the evidence of Carter, manager for the plaintiff company, the following written order was in force at the time of the shipment:

"Troy, Ala., Sept. 1st, 1908. Central of Georgia Railway Company, Troy, Ala. You are hereby authorized and directed to deliver to the Atlantic Compress Company all cotton owned by or consigned to the undersigned or to our order at Troy, Ala., and also to deliver in the same manner all cotton shipped to 'order notify' of which we are or shall become owners by transfer, assignment, or endorsement of the bill of lading. The compress will receive and receipt to you for all such cotton as our agent. But it is expressly agreed that such delivery shall not operate to cancel or release your carrier's lien on any cotton on which freight charges have not been regularly paid. The order shall remain in full force and effect until revoked in writing, p/p Georgia Cotton Co., M. H. Carter."

According to Carter's evidence the cotton in question was "not intended for sale or delivery by the Georgia Cotton Company, at Troy, but was intended for reshipment." He testified that the cotton company did not desire and had not required cotton deliveries to be made at the regular depot or warehouse of the railroad company at Troy, but did desire and had required it to be delivered on the said regular side track of the compress company, running along the western side of the compress and known as the compress and guano side track. He further stated in his testimony that it had been the custom for the plaintiff's cotton to be placed on this side track at night when the freight so arrived. According to his evidence, the purpose of the cotton company in having the cotton sent to this side track was that it might be reweighed and classed at the compress, although it further appears from the evidence that the railway company might proceed to have such cotton compressed when so delivered, and, if objection thereto was made by the shipper, a different and higher freight rate might be charged.

Evidence was adduced in behalf of the defendant from W. T. Steeger, the manager of the compress company, showing that prior to the said shipment an oral agreement had been entered into between him, as such manager, and Boone, the agent of the railway company at Troy, whereby the railway company was to furnish to the compress com-

pany an abstract showing the car numbers and contents, relating to all cotton delivered on the said track after the closing hours, this abstract to be given to the night watchman of the compress company. This arrangement, as to the method of delivery after business hours, had been suggested by him, as manager of the compress company, and was made in order to facilitate the handling of cotton in the early morning, and in order to avoid delay in the unloading of the cotton. He testified that this arrangement had been in force from 1906 until and including November 24, 1910. The evidence showed that the plaintiff itself had no knowledge of such arrangement. Steeger stated that this oral agreement as to the delivery of shipments of cotton after business hours, while it accorded, as he understood it, with the usual written contract as subsequently entered into between the railroad and the compress company as to the delivery of cotton, had also been made, as to the details, for what he considered to be the best interests of the parties concerned.

The evidence for the defendant showed that the conductor of the railway company had placed and detached the cars containing this cotton on this side track to the compress platform about 6 o'clock p. m. November 23, 1910, and that an abstract showing the numbers and contents of the cars so placed was taken to the office of the superintendent of the compress company and placed upon his desk about 11 o'clock, p. m. of the same evening by the cashier of the railway company's freight office at Troy, and that the night watchman of the compress company had been notified that the abstract had been left on the superintendent's desk.

(2) The defendant further pleaded the provisions of section 5 of the bills of lading under which the shipments were made, and which were attached by the plaintiff to his petition, to wit:

"Property destined to or taken from a station, wharf, or landing at which there is no regular appointed agent shall be entirely at risk of owner after unloading from the cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings, shall be at owner's risk until the cars are attached to and after they are detached from trains, or until loaded into and after unloaded from vessels."

There seems to be no question that, for several years prior to the shipment involved, all the plaintiff's cotton had been regularly delivered by the railway company in cars on this side track of the compress company platform at Troy, and that plaintiff had knowledge of this fact. The testimony of Carter, the manager for plaintiff company, of Steeger, manager of the compress company, and of Boone, the agent of the railway company, at Troy, all agreed as to this. The evidence of Carter indicated that this side track adjacent to the platform of the compress company was used exclusively for the

purposes of the compress company, and was not a public track used by the railway company for its general business, and that it was generally known as the side track of the compress company. There was some evidence, however, showing that occasionally this track was used, at a point opposite the extreme south end of the compress, for unloading freight for another party, and also that it was used by the railway company to obtain access to the storage house of the Standard Chemical & Oil Company, which is at the extreme southern end of this track and across the street from the compress company. All the witnesses seemed to agree, however, that the track adjacent to the platform of the compress company was used primarily and almost exclusively for the purposes of the compress company, and the president of the compress company testified that it was located on the property of the Troy Compress Company, which at the time of this shipment was operated by the Atlantic Compress Company.

[1] 1. The plaintiff, in his petition, set forth section 6137 of the Code of Alabama, which provides as follows:

"A common carrier, if the place of the destination * * * is a city or town having a daily mail, is not relieved from liability as a common carrier by reason of a deposit or storage of freight in a depot or warehouse, unless, within twenty-four hours after the arrival of such freight, notice thereof is given to the consignee, personally or through the mail; and if notice is given through the mail, the postage must, by the consignee, be refunded to the carrier."

The rule as to the time when the liability of a railway company as a common carrier ceases, under the Alabama law, appears to be different from the rule which obtains in Georgia. Our state follows what is known as the Massachusetts rule (embraced in section 2739 of our Civil Code), to the effect that when the transportation is ended and the goods are ready for delivery at destination, the liability imposed as a common carrier is ended; but Alabama follows what is known as the New Hampshire rule, as interpreted by the Michigan court, through Judge Cooley, to the effect that the carrier is liable as an insurer, not only during the transit, but until it has notified the consignee of the arrival of the goods at the point of destination, and until he should have a reasonable time to effect their removal. Quite a clear and concise discussion of the different rules of liability will be found in *Poythress v. Durham & S. R. Co.*, 148 N. C. 391, 62 S. E. 515, 18 L. R. A. (N. S.) 427. In that case the court sets forth the Massachusetts rule and the courts which follow it, including Georgia, the New York rule and the stricter liability imposed by the New Hampshire rule, which it says is followed by most of the courts of this country, including those of Alabama.

In *L. & N. R. Co. v. Oden*, 80 Ala. 38, which appears to be a leading Alabama case,

the Supreme Court of that state says (80 Ala. 41):

"Until the consignee has had a reasonable opportunity to remove the goods, the liability of the railroad company as a [common] carrier continues; but on his failure to do so, the company is only responsible thereafter as a warehouseman or keeper for hire."

In *Collins v. Ala. G. S. R. Co.*, 104 Ala. 390, 18 South. 140, the Supreme Court of Alabama says:

"According to the decisions of this court, without reference to any statute on the subject, the liability of a railroad company as a common carrier of goods transported over its line does not cease on the arrival of the goods at their destination and their deposit there in a warehouse, but continues until the lapse of a reasonable time for the removal of the goods by the consignee, and its liability as a warehouseman does not begin until its liability as a common carrier has ceased. *Railroad Co. v. Ludden*, 89 Ala. 613, 7 South. 471; *Railroad Co. v. Ledbetter*, 92 Ala. 326, 9 South. 73. As a general rule, the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them to the consignee."

Section 6137, pleaded in the petition, and which provides how a common carrier may be absolved from liability as an insurer on arrival of freight at its depot or warehouse, sets forth, in effect, that a common carrier is not relieved from such liability, even after the goods are deposited in its depot or warehouse, unless, within 24 hours after the arrival of the freight, notice is given the consignee, personally or through the mail. This statute has, of course, been before the Alabama courts a number of times. It was doubtless intended to settle the question in Alabama—about which the decisions of many states are in conflict—as to whether or not a consignee must be notified of the arrival of goods, and also to fix the time when the liability as a common carrier ceases. In *Central of Ga. v. Burton*, 165 Ala. 425, 51 South. 643, the court, in discussing this statute, says, with reference to a town having a daily mail:

"Of course the statute applied to continue the relation as a common carrier, unless the notice provided for was given."

In *Hearn v. L. & N. R. R. Co.*, 6 Ala. App. 483, 60 South. 600, this statute was again before the Alabama court, and it appears that not only must the 24 hours expire, but also 48 hours after the giving of the notice, there being another Alabama statute allowing the consignee this additional 48 hours to remove his freight.

Thus, it would appear that the Alabama statute and decisions have rendered quite clear the determination of the question as to when the liability of a railway company in that state terminates as that of a common carrier and begins as that of a warehouseman; and, had the cotton involved in the present transaction been carried by the railway company to its depot or warehouse, its liability under the facts outlined would have been manifest. In the instant case, however,

the question would appear to be, not whether the railway company was liable as an insurer, by virtue of its duties as a common carrier, or as a warehouseman, under the rule applying where the shipment had been delivered to its depot or warehouse and the notice given, but rather the question is as to whether the liability of the defendant had altogether ceased at the time of the destruction of the property by virtue of the delivery of such freight to the consignee, through its duly authorized agent. If this be correct, as to the issues involved in the case at bar, then the Alabama statute and decisions, relied upon by the plaintiff in error, and which distinguish the liability of a common carrier as an insurer and as a warehouseman, could have no relevancy to the question we are called upon to determine. This would seem to be certainly true unless under the authority given by the plaintiff to the railway company, authorizing and directing it to deliver its cotton to the Atlanta Compress Company contemplated that all such deliveries should be made to such agent from the depot or warehouse of the railway company in the usual way. If it must be conclusively presumed from the quoted authority given by the plaintiff to the defendant that such was the intention of the parties, then the Alabama Code section and the rulings thereon, referred to, would have a proper and controlling application. We think, however, that all the evidence in the case clearly indicates that it was the intention of both parties, the cotton company and the railway company, that such shipments should be delivered to the compress company, not from the depot or warehouse of the railway company, but at the side track along the plant of the plaintiff's agent, the compress company. It will be recalled that Carter himself testified that this had been the custom in previous deliveries, and that cotton reaching Troy at night had been then placed upon the side track referred to. Thus the shipment not being intended for delivery from the depot or warehouse of the railway company, we think the provisions of the Alabama Code section have no application to the case at bar, since the statutory notice, therein provided for, relates only to deliveries by the railway company from its own depot or warehouse.

[2] In the rulings of the Supreme Court of Alabama it has been held that a railway company may, by custom or contract, make valid delivery of freight by merely placing the car upon a side track in places where there is no agent of the railway company to receive same, and this is true when neither the consignee nor any one representing him is there to accept same. See *S. & N. A. R. Co. v. Wood*, 66 Ala. 167, 41 Am. Rep. 749; *Id.*, 71 Ala. 215, 46 Am. Rep. 399; *So. Ry. v. Barclay*, 1 Ala. App. 348, 56 South. 26. If it were true that the cotton involved in the present litigation had been taken by the rail-

way company to its depot or warehouse for delivery, then we would not be inclined to think that such a contract as is relied upon in the present case would be binding, under the rulings made in that state, although under Alabama cases, even where delivery is intended to be made from the company's own depot, the rules of liability can be modified by contract made between the parties. The tendency of the courts of that state seems to be to limit, rather than enlarge, such right of contract. In the case of *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49, the court says:

"It is of the utmost importance to the commerce of the country that carriers should be held to a strict accountability. On this subject we concur in the remarks of Chief Justice Gibson that: 'Though it is, perhaps, too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them.' *Atwood v. Transportation Co.*, 9 Watts (Pa.) 87, 34 Am. Dec. 503. This is especially so in reference to exceptions inserted in bills of lading."

In *Louisville & N. R. R. Co. v. Oden*, 80 Ala. 38, the court held that a stipulation in a bill of lading that the railroad company shall be liable only as a warehouseman, after the arrival of the freight at the point of destination, and that the consignee shall receipt and take it away as soon as it is ready for delivery, without providing for a notice to the consignee when it is ready, is unjust and unreasonable. The *Oden* Case, however, has been since reviewed by the Supreme Court of Alabama, in the case of *Western Ry. of Ala. v. Little*, 86 Ala. 161, 5 South. 563, from which we quote:

"In *L. & N. R. R. Co. v. Oden*, 80 Ala. 38, we ruled that a special contract, by which the company's liability as a common carrier was terminated on the arrival of the freight at the depot, and the failure of the consignee to receive and remove it as soon as ready for delivery, without notice, was unjust and unreasonable; but pretermitted an expression of opinion (a decision of the question not being required by the case whether a railroad company may, by special contract terminate its liability as carrier at a time earlier than that fixed by law for its continuance. The question is now directly presented, both by demurrer to pleas and instructions to the jury. Appellee contends that the provisions in the bill of lading comes within the rule which forbids a common carrier to contract for exemption from liability for damages caused by his own negligence. We do not so interpret the stipulation. It does not purport to release the company from any risk whatever, ordinary or extraordinary, attached by law to the employment of a common carrier, while the goods are in transitu. The intention and effect are to fix a period, after the transportation is complete, when the goods pass from the custody of the company as a carrier to their keeping as warehouseman."

Thus, it will be seen from the decisions just quoted from, all of which pertain to deliveries from railway depots or warehouses, that while the general rule of liability may be, to some extent, modified by express contract, the courts of that state seem disposed

to limit within reasonable bounds the right of contract in contravention of the general rule; and, did the contract relied upon in the present case pertain to such a delivery, we would be strongly disinclined to uphold its validity.

[3] Where, however, it is intended that the delivery shall be made at a private siding, the rule is altogether different, and the courts are much more liberal in their grant of authority relating to private contracts, exempting railroads from liability. Indeed, the general rule seems to be that where, by custom or contract, the duty of the carrier is performed when it places the car containing the goods on a side track, ready for unloading by the consignee, then from that time the liability of the carrier as carrier ceases. The Supreme Court of Alabama holds that in the absence of any specific provision on the subject in the contract of shipment, the shipper's assent to such delivery is implied from the mere fact that he knew the carrier had no agent at the particular place to which the consignment was made.

"We can see no reason why a railway company, acting as a common carrier, cannot stipulate, by a contract, expressed or implied, that their liability as a [common] carrier shall terminate with a delivery at a particular point, and that they will assume no liability [at all in such case] as warehouseman. If the consignee is fully advised, at the time of shipment, that the company has no agent at the particular station or place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business. The delivery of the carload of corn on the side track at 'Smith's Mills' terminated the liability of appellant. It would be unreasonable to require the railroad company to employ a special agent to keep the corn in further custody, unless there was an agreement, express or implied, to do so. When the consignee was informed that there was no agent of the company there, he was virtually told that there would be no custody of the goods by the carrier after arrival. The shipment, after such knowledge, was an assent, on the part of the shipper, to the implied conditions." *South & N. A. R. Co. v. Wood*, 66 Ala. 167, 173 (41 Am. Rep. 749).

When the same case was before the court on a second appeal, it was again recognized that so far as any question of liability on the part of the carrier to the shipper was concerned, its control over the car and its contents was to be regarded as having ended when the car was placed on the side track at the point of destination, and that there was no liability on its part for any loss of the contents of the car thereafter occurring. *S. & N. A. R. R. Co. v. Wood*, 71 Ala. 215, 46 Am. Rep. 390; 5 Cyc. 457, note 53.

In the case of *Stone v. Rice*, 58 Ala. 95, 98, the court says:

"Doubtless a deposit, sanctioned by usage, of the goods in question on the river bank, at Gore's landing, within view of, and where they could be protected by the warehouseman, whether so protected in fact or not, would have been good."

This court held, in *Bainbridge G. Co. v. A. C. L. R. R. Co.*, 8 Ga. App. 677, 70 S. E. 154, that:

"There is nothing in the public policy of this state or of the state of Alabama to prevent a shipper and carrier from contracting as to when cars loaded upon a side track shall be considered as delivered to the carrier; and in such case delivery under the agreement may not actually take place, although the car is loaded and sealed and a bill of lading issued by the carrier."

The converse of the proposition must be equally true, namely, that a consignee and a carrier may, without contravening any rule of law or public policy, contract as to when cars of freight placed upon a side track shall be considered as delivered, so as to absolve the carrier from any further duty or liability in regard thereto.

[4] It is contended, however, by counsel for the cotton company that the agreement referred to as entered into by the agent of the railway company and the agent of the compress company, whereby the parties undertook to prescribe the method of receiving cotton on behalf of the cotton company when delivered after business hours, is not binding upon compress company, because it had no knowledge of and did not enter into the agreement as to what should constitute such a delivery. But inasmuch as the statutory law cannot have application, we see no reason why the compress company, as the duly authorized general agent of the cotton company to receive for it all cotton consigned to it at Troy over the lines of the defendant, could not arrange, by such an agreement, for the manner and method by which it desired that such deliveries should be made. Under the evidence in this case the railway depot was 300 yards distant from the compress company's buildings and track, and it would seem unreasonable, therefore, to require the railway company to place the cotton upon the side track of the compress company where it would be out of the railway company's supervision and under the care and custody of the watchman or other employees of the compress company, without relieving the railway company of further responsibility as to the delivery, especially where, as in this case, the duty of breaking the seals and unloading the cars was always performed by the compress company as agent of the cotton company.

[5] 2. In addition to the defense of delivery, set up by the defendant, in accordance with the authority granted to the compress company as its agent, and the contract made in pursuance thereto, the defendant contended that section 5 of the bills of lading, already quoted, under which this cotton was shipped, clearly exonerated it from liability under the facts of the case. It will be need-

less, in this connection, to again cite or quote from the decisions governing the delivery of freight on private or other sidings. The statement of the evidence in this case makes plain the essential facts that the cotton was intended for delivery to the agent of the plaintiff on the tracks of the compress company, that this track was a private or other siding, within the meanings of the bills of lading, and that the cars, containing the cotton, were placed at the compress platform on this track, and detached from the railway company's train, some hours before it was destroyed in the compress fire.

So far as the bills of lading are concerned, though not signed by the shipper, they are valid and binding under the laws of Alabama, which differ in this respect from the Georgia rule. In Alabama a bill of lading is regarded as a special contract, if accepted by the shipper with knowledge or opportunity of knowledge of its contents. *Steele v. Townsend*, supra, (5); *A. G. R. Co. v. Little*, supra; *Jones v. C., S. & M. Ry. Co.*, 89 Ala. 376, 8 South. 61. Moreover, in the case at bar the cotton company sued upon the bills of lading and attached them to its petition as exhibits.

[6] It is contended, however, by the plaintiff in error, that the clause in the bills of lading referred to, and the decisions of the Alabama court, relating to deliveries at side tracks, have reference only to such deliveries made on sidings in the country, and do not pertain to deliveries made within the limits of a corporate city having a daily mail. We do not think it true, however, that any reason is apparent in law or in logic why a like valid delivery may not be made by agreement between the parties, even where the side track or special point for delivery happens to be within the corporate limits of such a city or town. Nothing in Alabama Code section 6137 inhibits such delivery. It is frequently the only method of delivery which can be made. If it is not competent for the carrier and the owner to agree that such a delivery shall be valid, the result would be to paralyze many great industries whose factories or plants are situated within the corporate limits of large cities, and who depend entirely upon this method of delivery. Many large manufacturers, or warehouses, in such cities, are miles distant from the railway company's depot or regular place of delivery, and they receive freights only in cars on side tracks, at their factories. A common carrier could not be expected, or legally required, to surrender its custody and control over freight by placing the cars on such a side track, if it is still to be held responsible for the property.

Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 619)

PERRY v. STATE. (No. 8438.)(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)*(Syllabus by the Court.)***1. CRIMINAL LAW** \S 262—ARRAIGNMENT—WAIVER.

"The right of formal arraignment and plea will be conclusively considered as waived, where the defendant goes to trial before the jury on the merits, and fails, until after verdict, to bring to the attention of the court that he has not been formally called upon to enter a plea to the indictment." *Hudson v. State*, 117 Ga. 704 (1), 45 S. E. 66; *Waller v. State*, 2 Ga. App. 636 (1), 58 S. E. 1106; *Brown v. State*, 91 S. E. 939, this day decided.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 614, 615.]

2. CRIMINAL LAW \S 1160—CONVICTION—REVIEW.

The evidence in this case, while circumstantial, was sufficient to authorize the conviction of the accused of the offense of hog stealing. The exceptions taken to the charge of the court, so far as approved by the trial judge, are without merit, and the verdict, approved by the trial court, will not be disturbed by this court. *Landrum v. Landrum*, 145 Ga. 307 (2), 89 S. E. 201.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084.]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

George Perry was convicted of hog stealing, and he brings error. Affirmed.

Ben. A. Way, of Hinesville, for plaintiff in error. W. F. Slater, Sol. Gen., of Eldora, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 619)

BROWN v. STATE. (No. 8437.)(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)*(Syllabus by the Court.)***1. CRIMINAL LAW** \S 262—TRIAL—ARRAIGNMENT—WAIVER.

"The right of formal arraignment and plea will be conclusively considered as waived, where the defendant goes to trial before the jury on the merits, and fails, until after verdict, to bring to the attention of the court that he has not been formally called upon to enter a plea to the indictment. *Pol. Code* 1910, § 10; *Bryans v. State*, 34 Ga. 323; *Hudson v. State*, 117 Ga. 704, 45 S. E. 66." *Waller v. State*, 2 Ga. App. 636 (1), 58 S. E. 1106; *Perry v. State*, 91 S. E. 939, this day decided.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 614, 615.]

2. CRIMINAL LAW \S 1160—VERDICT—REVIEW.

There being some evidence to support the verdict, which was approved by the trial court, this court will not arbitrarily set aside the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3084.]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Mary Brown was tried on a criminal charge, and from the verdict she brings error. Affirmed.

Ben. A. Way, of Hinesville, for plaintiff in error. W. F. Slater, Sol. Gen., of Eldora, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 516)

RUBY v. BOYETT. (No. 7900.)(Court of Appeals of Georgia, Division No. 2.
March 19, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR** \S 1078(3)—EXCEPTIONS—ABANDONMENT.

The exception to the ruling upon the demurrer to the original plea, not having been argued in the brief of counsel for the plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4258.]

2. BILLS AND NOTES \S 485—INDORSEMENT—DENIAL—PRESUMPTION—BURDEN OF PROOF—EVIDENCE.

The Code of this state provides that an indorsement of a note, when it is sued on by the indorsee, need not be proved "unless denied on oath." *Civil Code* 1910, § 4299. It follows as a negative pregnant that where such an indorsement is denied on oath, there must be proof of the genuineness of the indorsement. "In such a case the existence of a genuine indorsement will be essential to the case of the plaintiff, and the burden of proof ordinarily rests upon the person 'to the existence of whose case or defense the proof of such fact is essential.' *Civil Code* [1895] § 5160 (*Civ. Code* 1910, § 5746). The provisions of *Civil Code* 1895, § 3696 [*Civil Code* of 1910, § 4288], relating to the law of presumptions, are to be construed in connection with section 3705 [*Civil Code* of 1910, § 4299], and are not to be considered as so qualifying the rule there stated as to place upon the defendant the burden of disproving the genuineness of an indorsement, when, by his plea filed under oath, he denies the indorsement. Under this interpretation of the law, and the condition of the record, the note [was] not admissible in evidence without evidence as to the genuineness of the indorsement." *Bruce v. Neal Bank*, 134 Ga. 364, 367, 67 S. E. 819, 821. It is true that in that case the sufficiency of the plea therein to withstand the demurrers interposed was not passed upon, but the rulings in the case generally, and the well-considered and logical opinion by Mr. Justice Atkinson, construing the various Code sections bearing thereon, are, in the opinion of this court, controlling in the case at bar.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1542-1554; *Pleading*, Cent. Dig. § 866.]

3. BILLS AND NOTES \S 485—SUIT BY INDORSEE—BURDEN OF PROOF.

The instant case was a suit by the indorsee of a promissory note, and the defendant made by amendment the following verified plea: "Defendant denies the title of plaintiff to said note, and denies both the genuineness and legality of the indorsement of the Citizens' Bank of Attapulgus, on the back thereof, and denies that said indorsement was authorized by said bank, and denies that title to said note has ever passed out of said bank." This plea, denying the genuineness of the indorsement, was sufficient to

put upon the plaintiff, the burden of proving the indorsement, and the court did not err in overruling the oral demurrer to the plea as amended.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1542-1554; Pleading, Cent. Dig. § 866.]

4. BILLS AND NOTES \S 508 — **FAILURE TO PROVE INDORSEMENT.**

The plaintiff having failed to prove the indorsement of the note, the court did not err in excluding the note from the evidence and in awarding a nonsuit.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1728-1732.]

Error from City Court of Bainbridge; H. B. Spooner, Judge.

Suit by W. J. Ruby against G. L. Boyett. Judgment for defendant, and plaintiff brings error. Affirmed.

Hartsfield & Conger, of Bainbridge, for plaintiff in error. Will H. Krause and M. E. O'Neal, both of Bainbridge, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 526)

ANDERSON v. DANIEL. (No. 7856.)

(Court of Appeals of Georgia, Division No. 1. March 20, 1917.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS \S 453(3, 4)—**JUSTICES OF THE PEACE** \S 77—**AMENDMENT—REPRESENTATIVE CHARACTER OF PARTY—EFFECT.**

According to the allegations in the petition for certiorari, which were admitted by the answer of the magistrate to be correct, suit was brought in a justice's court on an account against "H. H. Anderson, administrator," which was by permission of the court amended to read against "H. H. Anderson, as administrator," without more; and "at the appearance term defendant filed a plea denying any indebtedness, and a plea of set-off, alleging that the plaintiff was due the estate of Mrs. J. C. Morris." Judgment was apparently rendered against H. H. Anderson as administrator of the estate of the said Mrs. Morris.

(a) The court did not err in permitting the suit to be amended by inserting "as" before "administrator." Civil Code of 1910, § 5690. "Strict pleading is not required in the justice courts, and the omission of the word 'as' before executor, in a suit there against such executor, or in the verdict or judgment against him, does not vitiate the proceeding." *Dorsey v. Black*, 55 Ga. 315(3).

(b) While the amendment allowed by the court did not by itself sufficiently indicate that the suit was brought against Anderson as administrator of a particular estate, nevertheless the plea filed by the defendant treated the demand as one against the estate of the intestate, and sought to set up a counter demand in behalf of the said estate against the plaintiff, and therefore the estate was concluded by the judgment rendered. "While it is a well-established rule of law that a judgment rendered against one sued as an individual is not conclusive of any right he may have in a representative capacity, such as executor, administrator, or guardian, yet where, in defense to an action

brought against one as an individual, he files an answer which practically, though not in express terms, makes him in his character as administrator of a deceased person a defendant to the action and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action." *Braswell v. Hicks*, 106 Ga. 791, 32 S. E. 861. See, also, *Lamar v. Lamar*, 118 Ga. 684, 688, 689, 45 S. E. 498; *Wadley v. Oertel*, 140 Ga. 326, 330, 331, 78 S. E. 912. In this case the answer by its express terms made the administrator of the deceased person a defendant to the action, and the defense interposed was in the right of the intestate's estate.

(c) Where suit is brought in a justice's court by summons against an administrator, which is substantially against him in his representative capacity, as appears therefrom, and as also appears by the express terms of the plea filed by the defendant in behalf of his intestate's estate, the judgment, if entered against the administrator without providing for collection out of the property of the intestate, would be irregular, but not void, and would be amendable; the rights of third parties not being affected. *Humphrey v. Johnson*, 143 Ga. 703, 705, 83 S. E. 830(5); *Pryor v. Leonard*, 57 Ga. 136. This ruling, however, may not be required by the facts of this case, since the exact form of the judgment against the administrator is uncertain from the record.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1895-1908; Justices of the Peace, Cent. Dig. §§ 247-249.]

2. JUSTICES OF THE PEACE \S 202(2)—**WITNESSES** \S 138 — **COMPETENCY—TRANSACTIONS WITH DECEDENT—OBJECTIONS.**

It does not appear that objection was interposed to any testimony delivered by the plaintiff in support of his demand against the estate of the decedent, or relating to his transactions with the decedent. The objection urged to the testimony of one Pierce touching his knowledge as to transactions between the plaintiff and the decedent was properly overruled, so far as the record discloses, since it nowhere appears therein that Pierce was the agent of the surviving party or was interested in the result of the suit, or was for any other reason disqualified under the provisions of Civil Code 1910, § 5858, and subdivisions thereof. In the brief of counsel for the plaintiff in error it is insisted that the judgment should be reversed because "the only evidence going to prove the account sued on was the testimony of the plaintiff in the court below," and his testimony was inadmissible as to transactions between himself and the deceased party. The petition for certiorari sets forth the testimony of the plaintiff without showing that any objection whatever was interposed thereto, and further recites that objection was made to the testimony of Ellis Pierce, and error is assigned thereon because the court admitted Pierce's testimony as to transactions with the decedent, and no reason is alleged why Pierce was not a competent witness as to such transactions.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 781-788; Witnesses, Cent. Dig. §§ 574, 575.]

3. APPEAL AND ERROR \S 1078(1) — **ASSIGNMENTS OF ERROR—ABANDONMENT.**

Other alleged errors complained of in the petition for certiorari, not being referred to in the brief of counsel for the plaintiff in error, will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256.]

4. OVERRULING CERTIORARI.

The judge of the superior court did not err in overruling the certiorari.

Error from Superior Court, Murray County; A. W. Fite, Judge.

Suit by E. E. Daniel against H. H. Anderson, as administrator. Judgment for plaintiff, and defendant brings error. Affirmed.

H. H. Anderson, of Chatsworth, for plaintiff in error. W. W. Sampler, of Spring Place, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 440)

MOYE v. STATE. (No. 7879.)

(Court of Appeals of Georgia, Division No. 1. March 13, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 1167(5) — FALSE PRETENSES \S 26 — INDICTMENT — DEMURRER — REVIEW — HARMLESS ERROR.

An accusation charging the offense of cheating and swindling by the use of deceitful means and artful practices, and containing the averments that the defendant did falsely represent to the prosecutor that one Gay had promised to sign a certain note with the defendant "as security," payable to the Merchants' Bank, of McRae, Ga., in the sum of \$55 and that one McGlohorn had also promised to sign said note, "when in truth and in fact the said Clem Gay and Jesse McGlohorn had not promised to sign said note, and the said W. L. Moye [the defendant] knew that said representation was false, and he made said statement with the purpose of deceiving the said W. N. Watson [the prosecutor], and with the intent to defraud the said W. N. Watson, and for the purpose of obtaining the said W. N. Watson to sign said note, and the said W. N. Watson was deceived by said false statement and was induced to sign said note upon the strength of said statement, and was injured and defrauded by the signing of said note in the sum of \$71.21," and that the prosecutor did not suffer any loss or injury until the 10th day of May, 1916, when he was compelled to pay off a judgment which was obtained against him on said note, is not subject to general demurrer on the ground that it does not charge the commission of any offense, nor to special demurrer on the ground that it does not appear whether the note was signed by the prosecutor as principal or as security, nor whether any money or anything of value was received by the defendant on said note, nor that the money, if any was obtained by virtue of the execution of the note, was not paid to the prosecutor, Watson. The ground of the special demurrer, that the alleged statement of the defendant that he would execute a mortgage on a certain mule merely constituted a future promise, is well taken; but, since this allegation appears to have been abandoned by the state, no evidence being offered in support thereof, the error of the court in overruling this ground of the demurrer was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3105, 3108; False Pretenses, Cent. Dig. \S 31.]

2. CRIMINAL LAW \S 917(2) — TRIAL — CONTINUANCE.

The evidence is sufficient to show the guilt of the accused beyond a reasonable doubt, and there was no error in overruling the motion for a new trial, based upon the general grounds and upon the ground that the court erred in overruling a motion for continuance made by

the defendant. The evidence of the absent witness, as it appears in the record, was not so material on any issue in the case as to require a continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2162.]

Error from City Court of Dublin; J. B. Hicks, Judge.

W. L. Moye was convicted, and he brings error. Affirmed.

Larsen & Crockett and Chappell & Burch, all of Dublin, for plaintiff in error. S. P. New, Sol., of Dublin, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 624)

KINARD v. STATE. (No. 8483.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 824(9) — TRIAL — INSTRUCTIONS — CIRCUMSTANTIAL EVIDENCE.

"On the trial of a criminal case, where the conviction depends entirely upon circumstantial evidence, it is the duty of the judge, whether requested or not, to give in charge to the jury the principles of law by which the weight of the circumstances is to be determined and under what circumstances a conviction on circumstantial evidence is warranted." This rule has been often recognized and applied. Weaver v. State, 135 Ga. 317, 320, 69 S. E. 488; Hamilton v. State, 96 Ga. 301, 22 S. E. 528; McElroy v. State, 125 Ga. 39, 53 S. E. 759; Smith v. State, 125 Ga. 296, 54 S. E. 127; Hart v. State, 14 Ga. App. 714, 82 S. E. 164; Harden v. State, 13 Ga. App. 34, 78 S. E. 681 (2); Harris v. State, 18 Ga. App. 710, 90 S. E. 370, and cases there cited.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1999.]

2. RECEIVING STOLEN GOODS \S 8(1, 3) — POSSESSION — PRESUMPTION.

"The recent possession of stolen goods, unexplained, is a strong circumstance to be considered by the jury, but raises no presumption of guilt as a matter of law." Griffin v. State, 86 Ga. 258, 12 S. E. 409; Harris v. State, supra. In a case of larceny from the house, the recent possession of the stolen goods, unexplained to the satisfaction of the jury, is a circumstance from which the jury may infer the guilt of the party in whose possession the goods are found, but whether the jury should draw the inference from such circumstances is a matter entirely for them. Barlow v. State, 17 Ga. App. 728, 88 S. E. 212.

[Ed. Note.—For other cases, see Receiving Stolen Goods, Cent. Dig. \S 16, 17.]

3. CRIMINAL LAW \S 409, 538(3) — EVIDENCE — INCRIMINATING ADMISSION — CONFESSION.

An incriminatory admission is not a confession of guilt, but is only a circumstance from which guilt may be inferred. A confession is direct evidence, but incriminatory admissions can logically be considered as indirect or circumstantial evidence only. In the instant case the evidence is sufficient to warrant the jury in inferring the guilt of the accused, but, since the case depended entirely upon indirect evidence, the failure to give in charge to the jury the law of circumstantial evidence as embraced in section 1010 of the Penal Code of 1910 re-

quires a reversal of the judgment of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 918, 919, 972, 1229.]

Error from City Court of Nashville; C. A. Christian, Judge.

Ed Kinard was convicted of receiving stolen goods, and he brings error. Reversed.

J. C. Smith and Wm. Story, both of Nashville, for plaintiff in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 626)

ELDER v. WOODRUFF HARDWARE & MFG. CO. (No. 7869.)

(Court of Appeals of Georgia, Division No. 2. March 23, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇨977(4)—FIRST GRANT OF NEW TRIAL—REVIEW.

"The first grant of a new trial will not be disturbed by the Court of Appeals unless the plaintiff in error shows that the law and the facts require the verdict notwithstanding the judgment of the presiding judge. Civ. Code 1910, § 6204; Hughes v. Atlanta Steel Co., 9 Ga. App. 510, 71 S. E. 934, and cases cited. This rule applies though two new trials have been granted, one to the plaintiff, and the other to the defendant. Jordan v. Dooly, 129 Ga. 392, 58 S. E. 879. In this case the bill of exceptions and the record fail to show that the verdict rendered was demanded by the law and the evidence, and the judgment granting a new trial must be affirmed." Owens v. Cocroft, 11 Ga. App. 235, 74 S. E. 1098; Butler v. Sansone, 138 Ga. 767, 76 S. E. 54.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863.]

Error from City Court of Jefferson; J. A. B. Mahaffey, Judge.

Action between Paul Elder and the Woodruff Hardware & Manufacturing Company. Judgment for the latter, and the former brings error. Affirmed.

Ray & Ray, of Jefferson, for plaintiff in error. Lewis C. Russell, of Winder, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 621)

LATTY v. STATE. (No. 8464.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(Syllabus by the Court.)

1. LARCENY ⇨55 — SUFFICIENCY OF EVIDENCE.

The evidence, although wholly circumstantial, was sufficient to warrant the conviction of the defendant of the offense of simple larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167-169.]

2. CRIMINAL LAW ⇨782(3) — LARCENY ⇨77(2)—INSTRUCTIONS—EVIDENCE.

The charge of the court was not, for the reasons assigned, erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1882; Larceny, Cent. Dig. § 203.]

(Additional Syllabus by Editorial Staff.)

3. CRIMINAL LAW ⇨863(2) — RETURN OF JURY—REPETITION OF CHARGE.

The repetition of a charge as to the presumption of guilt arising from possession of recently stolen property, made upon the request of the jury after they had retired, was not objectionable as unduly emphasizing the contentions of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2067.]

Error from City Court of Hall County; A. C. Wheeler, Judge.

J. A. Latty was convicted of simple larceny, and he brings error. Affirmed.

E. B. Dunlap and W. B. Sloan, both of Gainesville, for plaintiff in error. Hammond Johnson, Sol., of Gainesville, for the State.

GEORGE, J. [1] The defendant was convicted of the larceny of 600 pounds of seed cotton, and of 12 sacks specifically described in the indictment. The evidence against the accused was wholly circumstantial. On a careful review of the evidence we are of the opinion that the defendant's guilt was established beyond a reasonable doubt. The circumstances proved were sufficient to exclude every other reasonable hypothesis than that of his guilt.

[2] During the trial of the case the court charged the jury as follows:

"I charge you that the possession of stolen property within a short time after it is stolen, if that possession is unaccounted for and unexplained, affords a presumption of guilt, but this presumption is not one of law, and does not require a verdict of guilty, even though shown, and the jury will still acquit if there be a reasonable doubt of the defendant's guilt."

It is said that there was no evidence to authorize this instruction. The evidence discloses that the sacks alleged to have been stolen, and which contained the cotton, also alleged to have been stolen, were found in the buggy of the defendant, upon his premises and at his home, shortly after the larceny. The evidence does not show that the defendant was in actual charge of the buggy, or that he at any time had actual possession of the sacks. The charge excepted to was followed by this statement of the judge:

"As to whether there has been any possession of stolen goods shown in this case is a matter solely and exclusively for you to determine from the evidence; the court does not and cannot express or intimate any opinion on the facts in the case, and the charge here given is with reference to principles. I charge you that if any of the property alleged to have been stolen should be found in the buggy or on the premises of the defendant, if that property was put there by some one else other than the defendant, without his knowledge, this would not

be such possession as would authorize an unfavorable presumption against him."

We think the judge was right in giving the instruction excepted to, and that he was warranted by the evidence in so doing. The instructions given in immediate connection with the charge assigned as error were at once timely and proper.

[3] After the jury had deliberated for some length of time, the court, on request, repeated the charge, above quoted. We do not think that the repetition of this part of the charge, made upon the request of the jury, unduly emphasized the contentions of the state. The jury had the right to call upon the court for a recharge upon any principle of law or rule of evidence applicable to the facts of the case. There was no error in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 455)

WELLS v. JEFFERSON COUNTY.
(No. 7771.)

(Court of Appeals of Georgia, Division No. 1.
March 15, 1917.)

(Syllabus by the Court.)

1. BRIDGES — 37 — INJURY FROM DEFECTIVE BRIDGE—LIABILITY.

The provision of the Political Code of 1910, § 748, making counties primarily liable for injuries caused by defective bridges, whether erected by contractor or by the county authorities, is not applicable to a bridge erected over a water course which divides one county from another. To bridges of the latter class (that is, to county line bridges), sections 419 to 423 of the code are applicable, and liability attaches only in accordance with section 768; that is, for failure of the county to take a sufficient bond from the contractor. *Brooks County v. Garlington*, 7 Ga. App. 225, 66 S. E. 625; *Willingham v. Elbert County*, 113 Ga. 15, 38 S. E. 348; *Forsyth County v. Gwinnett County*, 108 Ga. 510, 33 S. E. 892; *Laurens County v. McLendon*, 91 S. E. 283.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 96, 103–105, 109.]

2. BRIDGES — 46(1)—LIABILITY OF COUNTY—STATUTE.

Counties are not liable to suit for any cause of action unless made so by statute. Pol. Code 1910, § 384. There is no statute expressly authorizing suit against a county for failure to repair a bridge after seven years have elapsed from the date of its construction. *County of Monroe v. Flynt*, 80 Ga. 489, 6 S. E. 173; *Arnold v. Henry County*, 81 Ga. 730, 8 S. E. 606; *Dougherty County v. Newson*, 107 Ga. 811, 33 S. E. 660.

3. BRIDGES — 46(3)—DEFECTIVE BRIDGES—ACTION FOR INJURY—PETITION.

In this case, the petition alleged that the injuries sustained were caused by the defective condition of a county line bridge, and that the county authorities causing the construction of the said bridge failed to take bond in accordance with section 768 of the Political Code of 1910. It is not alleged that the bridge was built by contract, nor that the bridge was let out to the lowest bidder, nor that the alleged injuries occurred within seven years after the bridge was built. In fact, the plaintiff did not allege

when or how the bridge was built, and there is no claim in the petition that the bridge was simply repaired within a period of seven years preceding the injury. The petition is predicated upon the theory that the county was primarily liable for a negligent failure to repair the defects in the bridge after knowledge of the existence of such defects. *Held*, the petition was properly dismissed on general demurrer. Even if a county is liable for its negligence (which is not expressly declared by statute) in failing to cause a county line bridge to be repaired by letting out the contract therefor to the lowest bidder at public outcry at the location of such bridge, after having advertised the letting out of the contract as provided in section 419 of the Political Code of 1910, the petition in this case was defective in that it failed to allege that the bridge in question was built since the act of 1881 (Acts 1880–81, p. 132), from which that section was taken. *Seymore v. Elbert County*, 116 Ga. 371, 42 S. E. 727. The decisions in the cases of *Mackey v. Ordinaries of Murray and Whitfield Counties*, 59 Ga. 832, and *Davis et al. v. Horne*, 64 Ga. 69, relied on by counsel for plaintiff in error, were considered and declared to be unsound in *County of Gwinnett v. Dunn*, 74 Ga. 358, and *Arline v. Laurens County*, 77 Ga. 249, 2 S. E. 833.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. §§ 110–114.]

Error from City Court of Louisville; E. W. Jordan, Judge.

Action by J. W. Wells against Jefferson County. Judgment for defendant, and plaintiff brings error. Affirmed.

L. D. McGregor, of Warrenton, and W. L. Phillips, of Louisville, for plaintiff in error. R. G. Price and J. R. Phillips, both of Louisville, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 550)

MOSELY v. KING HARDWARE CO.
(No. 8017.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. JUDGMENT — 365—SETTING ASIDE—DILIGENCE OF DEFENDANT—DISCRETION OF TRIAL COURT.

There was no abuse of discretion on the part of the trial judge in denying the motion to set aside the judgment and reinstate the case, on the ground that the judgment was rendered in the absence of the defendant and her attorney. The evidence was amply sufficient to support a finding that the defendant was lacking in diligence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 707.]

2. COURTS — 189(7)—MUNICIPAL COURTS — DECLARATION—OBJECTION.

The objection that no declaration in attachment was filed is without merit. There was attached to the original attachment in this case a complete itemized statement of the account sued upon, as well as a copy of the contract of sale covering the various items enumerated. The trial judge not only directed the attention of movant's counsel to this fact at the time of the trial, but also referred him to the following rule of the municipal court of Atlanta: "The law relating to declarations in attachment shall be deemed to have been complied with when the

plaintiff in attachment shall have filed with the clerk of this court, at the first term, an itemized statement of the account, if it be based on an account, or a copy of the note, if based on a note, or a written statement of an action for damages, if based on a claim for damages."

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 413, 458.]

3. COURTS \S 189(6)—MUNICIPAL COURTS — RETURN—ESTOPPEL.

The attachment was made returnable to the May "A" term of the municipal court, and the defendant was notified that it was the intention of plaintiff to ask for a general judgment, and the record shows that service was affected within the proper time, and the defendant filed an answer and a counterclaim before that term, without raising any objection as to the term to which the attachment was made returnable. *Held*, the defendant was estopped from attacking the judgment on the ground that the case was improperly made returnable to that term.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 458.]

4. MOTION TO SET ASIDE JUDGMENT.

Other grounds of the motion to set aside the judgment are either without any substantial merit or are not argued in the brief of counsel for the plaintiff in error. The judge of the superior court, therefore, did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the King Hardware Company against Mrs. W. S. Mosely. Judgment for plaintiff, and defendant brings error. Affirmed.

Lowndes Calhoun, of Atlanta, for plaintiff in error. Anderson, Slate & D'Orr, of Atlanta, for defendant in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 626)

JENKINS v. STATE. (No. 8500.)
(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

1. CORRECT INSTRUCTIONS.

None of the instructions of the court excepted to are erroneous for any reason assigned.

2. CRIMINAL LAW \S 938(1), 942(1), 1156(3)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE — IMPEACHING EVIDENCE — DISCRETION OF TRIAL COURT.

The grant of a new trial on newly discovered evidence is largely within the sound discre-

tion of the trial judge. His discretion, unless abused, is not judicial error. The newly discovered evidence tends only to impeach one of the state's witnesses, and the denial of the motion upon this ground was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2306, 2312, 2313, 2315, 2317, 2331, 3069.]

3. CONCLUSIVENESS OF VERDICT.

The evidence for the state amply sustains the verdict, and the verdict has been approved by the trial judge, and no reason appears why this court should interfere.

Error from Superior Court, Bibb County; J. P. Highsmith, Judge.

Allen Jenkins was tried on a criminal charge, and from the verdict he brings error. Affirmed.

Wm. E. Martin, Jr., and Hubert F. Rawls, both of Macon, for plaintiff in error. John P. Ross, Sol. Gen., of Macon, for the State.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 607)

STOCKS v. STATE. (No. 8369.)
(Court of Appeals of Georgia, Division No. 1.
March 23, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS \S 241—RULING—REVIEW.

The evidence was sufficient to support the inference that a sale of whisky had been consummated by delivery in exchange for an agreed purchase price accepted by the defendant at the time; and therefore this court cannot hold that the judge of the superior court erred in overruling a certiorari where error was assigned upon general grounds only.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 349-354.]

Error from Superior Court, Fulton County; J. T. Pendleton, Judge.

Ike Stocks was convicted of the unlawful sale of whisky, and he brings error. Affirmed.

Thos. B. Brown, of Atlanta, for plaintiff in error. Lowry Arnold, Sol., E. T. Williams, E. A. Stephens, and Jno. A. Boykin, Sol. Gen., all of Atlanta, for the State.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(173 N. C. 712)

CROMARTIE v. VIRGINIA-CAROLINA
LUMBER CO. (No. 291.)(Supreme Court of North Carolina. April 4,
1917.)1. LOGS AND LOGGING \S 3(11)—EXTENSION
CONTRACT—PAYMENT—WAIVER.

Where plaintiff sold timber and received payment upon an estimated amount larger than the amount actually upon the land, and thereafter by deed extended the contract time for removal for three years, in consideration of an annual percentage on the original purchase price, which was not paid, though the timber was removed, he could not claim a forfeiture of the contract and his ownership of the timber, where his conduct had led defendant to believe that, in view of the overestimate in the original contract, the extension payments would not be exacted.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9.]

2. LOGS AND LOGGING \S 3(11) — TIME FOR
REMOVAL—EXTENSION DEED—RECOVERY.

In such case, where there was no consideration for plaintiff's promise not to enforce payments provided by his extension deed, he could recover such payments.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9.]

Appeal from Superior Court, Bladen County; Winston, Judge.

Action by R. B. Cromartie against the Virginia-Carolina Lumber Company. Judgment for plaintiff in part, and he excepts and appeals. Affirmed.

This is an action to recover the value of certain timber cut and removed from the land of the plaintiff by the defendant, heard upon exceptions to the report of a referee.

The facts, not excepted to, show that in 1907 plaintiff sold the timber and received \$4,500 therefor. This consideration was based upon an estimated quantity of 3,000,000 feet at \$1.50 per thousand, which was the then agreed value of the timber. This original deed carried a five-year right to cut and remove, but in 1910 plaintiff executed a deed extending the original period for three additional years, the consideration therefor being 5 per cent. annually on the original purchase price. When the original period expired only one-third of the timber had been cut, but within the time limited in the extension deed the other two-thirds was cut and removed by defendant. The referee and court found that the two-thirds of all the timber which was cut after the expiration of the original period was 1,000,000 feet, and therefore the entire timber on the land when the original deed was made was necessarily only 1,500,000 feet.

Defendant admitted that it had not paid the extension money, but offered evidence to show that it offered to pay it, and would have paid it but for the fact that the plaintiff said he would not charge it; that he had already been paid for 3,000,000 feet; that defendant was going to lose; and that he would not collect it. The defendant offered

the following evidence in support of this contention:

O. C. Benbow, officer of defendant, who conducted the negotiations with plaintiff, testified:

"Prior to the expiration of the original period in 1912 I offered to pay the extension money more than once. Plaintiff said he was satisfied there was not going to be 3,000,000 feet there, and that I had paid enough, was going in the hole, and he was not going to exact it of me. At that time I was able and ready and willing to pay it. I would have paid it but for plaintiff's statement. I had cut only one-third of the timber, and would have been foolish not to offer it. * * * I talked with plaintiff as many as four times, and he always said he was not going to charge it; that he had been paid for the timber; was satisfied the timber would not cut 3,000,000 feet that was paid for, and would not require anything more."

F. J. Tyson testified:

"Plaintiff said he thought Benbow was doing all he could to get the timber off; that he had had a hard time over there, and he did not expect to charge any extension. * * * Just before I left plaintiff asked what I would do if I was in his place in regard to charging extension. * * * At this last conversation plaintiff appeared to be undecided as to whether he would charge the extension money."

The plaintiff himself testified:

"Tyson was in my store, * * * and I asked his advice as to what I ought to do. * * * I suppose that conversation was after the expiration of the original period, but I am not positive."

Upon this testimony his honor found as a fact:

"Defendant was led to believe, and did in good faith believe, as the result of negotiations entered into between himself and plaintiff, that plaintiff would not exact the extension money or require it to be paid; and, had it not been for this honest and bona fide belief upon the part of said Benbow, the extension money would have been duly paid by the defendant."

The court held that plaintiff could still collect the extension money, but that he could not, after leading defendant to believe that he would waive the extension money, treat it as a trespasser and sue for the value of the timber cut during the extension period. The court therefore entered judgment against defendant for the extension money due under the deed, to wit, \$281.25, and interest, and plaintiff excepted and appealed.

Bayard Clark, of Elizabethtown, for appellant. T. C. Hoyle, of Greensboro, and McIntyre, Lawrence & Proctor, of Lumberton, for appellee.

PER CURIAM. The plaintiff sold his timber at the price of \$1.50 per 1,000 feet, and received therefor \$4,500; the timber being estimated to be 3,000,000 feet. It turns out, according to the report of the referee, that there were only 1,500,000 feet of the timber, and the plaintiff has therefore been paid \$2,250 more than the contract price.

[1] In addition to this, he seeks to recover the value of the timber again upon the ground that, as the timber was not cut within the

first five-year period, and as the extension money was not paid or tendered at the time provided for in the extension deed, the timber belonged to him as owner of the land when it was cut and removed.

His honor finds as a fact that the extension money was not paid or tendered because the defendant was led to believe by the conduct of the plaintiff that it would not be exacted, and denied relief to the plaintiff except as to the extension money, and in this there is no error, of which the plaintiff can complain.

In 16 Cyc. 805, it is said:

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections, which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of one misled."

And in *Lumber Co. v. Price*, 144 N. C. 54, 56 S. E. 685:

"A right can only be * * * forfeited by such conduct as would make it fraudulent and against conscience to assert it. If one acts in such a manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act, which he would otherwise not have done, the fraudulent party will be restrained from asserting his right."

[2] It is true there is no consideration for the promise on the part of the plaintiff not to enforce payment of the extension money, and for this reason he can recover it as provided in the judgment, but he had the right, without consideration, to surrender his right of recovery to the defendant, and, having led the defendant to believe he would not collect it, he cannot claim a forfeiture brought about by the failure of the defendant to pay or tender the extension money.

Affirmed.

(173 N. C. 269)

WYNNEWOOD LUMBER CO. v. TRAVELERS' INS. CO. (No. 294.)

(Supreme Court of North Carolina. April 4, 1917.)

1. ACTION — 27(1) — FORM — CONTRACT OR TORT — INSURER'S LIABILITY TO INSURED FOR NEGLIGENT DEFENSE OF ACTION.

Where an insurer by an employers' liability policy, on being notified of an action for injuries to the insured's servant, assumes the defense, and is negligent in conducting the suit to insured's loss, the latter can sue the insurer for breach of its implied contract to exercise reasonable care in conducting the suit, or in tort for negligence.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 160-176, 195.]

2. INSURANCE — 514 — EMPLOYERS' LIABILITY INSURANCE — REFUSAL TO COMPROMISE — LIABILITY.

Where, by an employers' liability policy, insurer and insured agreed that the insurer should have the sole right to compromise and settle claims brought against insured, and the insurer did not exercise its power fraudulently, oppressively, or otherwise than in good faith in refusing to compromise a claim, insured should not recover from the insurer an amount which in-

sured was required to pay, over and above the face of the policy, which was paid by insurer, in satisfying a judgment in favor of an injured servant, since the insurer's honest mistake of judgment in refusing to compromise did not subject it to liability.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1298.]

3. INSURANCE — 514 — EMPLOYERS' LIABILITY INSURANCE — DEFENSE BY INSURER — FAILURE TO PROSECUTE APPEAL.

Where an employers' liability policy gave the insurer the right to defend a suit, the fact that the insurer failed to prosecute an appeal was not of itself a tort or a breach of its implied contract to defend without negligence; it having assumed the defense.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1298.]

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by the Wynnewood Lumber Company against the Travelers' Insurance Company. From a judgment dismissing the action on demurrer, plaintiff appeals. Affirmed.

This is a civil action upon complaint and demurrer. The demurrer was sustained, and, the plaintiff electing to stand upon its complaint, the action was dismissed.

McClammy & Burgwin, of Wilmington, for appellant. Geo. Rountree, Thomas W. Davis, and J. O. Carr, all of Wilmington, for appellee.

BROWN, J. This action is brought to recover the sum of \$5,000, which the plaintiff alleges it was compelled to pay on a judgment obtained against it by one Joseph Jones, as damages for injuries sustained while in its employment. The complaint shows that the defendant had issued a policy of indemnity in the usual form in the sum of \$5,000, indemnifying the plaintiff from loss by reason of injury to its employes. One Jefferson Jones, working on the logging road, was seriously injured, and plaintiff alleges that it gave notice to the defendant of the injuries and assisted in making the investigation, and that it could have settled the claim for from \$1,000 to \$2,500, but the defendant company refused to do so. Action was brought by Jones against the plaintiff, the Wynnewood Lumber Company, and it was defended by counsel employed by the Travelers' Insurance Company. The trial resulted in a verdict for \$20,000 damages. Subsequently the court reduced this verdict to the sum of \$15,000, and by the negotiations entered into by counsel for the insurance company and the Wynnewood Lumber Company with counsel for the plaintiff, Joseph Jones, an agreement was entered into whereby the appeal was abandoned, and judgment was entered for \$10,000. \$5,000 of this sum was paid by the plaintiff in this action, and \$5,000 by the defendant.

The ground of demurrer is that the facts set forth in the complaint do not constitute a cause of action. In the brief of the learned counsel for the plaintiff, it is said:

"This raises the question as to whether or not an insurance company, which has issued a policy of insurance indemnifying the plaintiff against loss which has the right under the terms of the policy, after notice of injury, to take absolute control of the litigation, and fails to settle at a time that it could settle, without loss to the insured, can evade payment, when it controls the suit, and the judgment rendered is for four times the amount of the policy issued."

[1] It is true, as held by other courts, that where an insurer under an employers' liability policy, on being notified of an action for injuries to the insurer's servant, assumes the defense thereof and was negligent in conducting the suit, to the loss of the employer, the latter was entitled to sue the insurance company for breach of its implied contract to exercise reasonable care in conducting the suit or in tort for negligence. *Mfg. Co. v. Plate Glass Ins. Co.* (C. C.) 171 Fed. 495.

There is no allegation in the complaint in this action that the defendant company was guilty of any negligence in the conduct of the suit brought against the plaintiff for the injuries to Jones. There is no allegation that it failed to employ competent counsel, and no allegation that the counsel employed by it was guilty of any negligence, the consequence of which was a verdict and judgment against the plaintiff. So far as the complaint shows, the case was conducted properly and skillfully, although it resulted in a verdict of \$20,000 against the plaintiff.

[2] The only suggestion of a tortious act is in the language used with reference to the defendant's negligently refusing to settle the Jones claim for \$1,000 or \$2,500. A casual examination of the policy makes it clear that the parties agreed that the defendant should have the sole right to compromise and settle claims brought against the plaintiff. There is no allegation that this power was exercised by the defendant fraudulently, oppressively, or otherwise than in good faith. That provision was evidently placed in the contract for the protection of the insurer and gives the insurer the right to exercise its own judgment as to when a compromise and a settlement shall be made. Of course, it must be exercised in good faith and without any wrongful or fraudulent purpose. When properly exercised, it is binding upon the insured. It turns out that it would have been better for all parties, the plaintiff as well as the defendant, if the offer of a compromise had been accepted, but, as is said in the brief of the counsel for the defendant, "This is a case where hindsight turns out to be better than foresight." It was a mistake of judgment, something not unusual in the affairs of this life. Such a mistake, honestly made, does not subject the person to legal liability. *Schmidt v. Ins. Co.*, 244 Pa. 286, 90 Atl. 653, 52 L. R. A. (N. S.) 126.

It is well settled that these provisions in policies of insurance indemnifying employer against loss by injury that the insured shall

have the exclusive right to compromise and settle such claims are valid if exercised in good faith. The insurer is liable where it assumes the duty of defending a suit and negligently fails to discharge such duty. The insurer is also liable if it exercises the exclusive power of settlement in bad faith, or for purposes of fraud to the injury of the insured. *New Orleans Co. v. Casualty Co.*, 114 La. 153, 38 South. 89, 6 L. R. A. (N. S.) 562.

A case very much in point is *Zinc Co. v. Fidelity & Deposit Co.*, 162 Wis. 39, 155 N. W. 1081. In this case the Wisconsin court held that, under policy indemnifying employer against claims for personal injury in any case up to \$5,000, the insurer was not bound to settle a claim, though it might be settled for \$5,000 or less, so that, where it had contributed \$5,000 on a judgment of \$12,500, the insured could not recover the excess which he was required to pay.

[3] The fact that the defendant failed to prosecute an appeal does not constitute of itself either a tort or a breach of the implied contract, for the reasons given by the Supreme Court of Iowa in *Lumber Mfg. Co. v. Employers' Assurance Corporation*, 117 Iowa, 180, 90 N. W. 616, 62 L. R. A. 617, viz.:

"An insurer against employer's liability, whose contract gives it the right to defend against suits by employees against the assured, and which, after a judgment in excess of the insurance has been obtained against the assured, agrees to perfect an appeal, is not liable for negligently failing to do so, whereby the judgment is affirmed, in the absence of anything to show that the judgment was erroneous, and that plaintiff could not have succeeded on a second trial."

See, also, *Davison v. Casualty Co.*, 197 Mass. 167, 83 N. E. 407.

We are of opinion that the complaint fails to state a cause of action either as a breach of the implied contract or in tort for negligence, and that his honor properly sustained the demurrer.

Affirmed.

(173 N. C. 238)

POPE v. McPHAIL et al. (No. 113.)

(Supreme Court of North Carolina. April 4, 1917.)

1. FRAUDS, STATUTE OF §103(1)—SUFFICIENCY OF MEMORANDUM.

Where defendant vendor who orally contracted to sell land executed a deed and deposited it in escrow, and the plaintiff purchaser executed purchase-money notes, which were also deposited in escrow, the deed was sufficient memorandum to take the oral contract of sale out of the statute of frauds, and the purchaser might, notwithstanding the vendor obtained possession and destroyed the deed, recover damages for the breach.

2. VENDOR AND PURCHASER §343(4)—BREACH OF CONTRACT—DAMAGES.

Where a vendor breaks his contract to convey lands, the purchaser is entitled not only to the remedy of specific performance, but to an action for damages.

[Ed. Note.—For other cases, see Vendor and Purchaser. Cent. Dig. §§ 1027, 1028.]

Appeal from Superior Court, Harnett County; Stacy, Judge.

Action by Willie M. Pope against A. R. McPhail and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Civil action to recover damages for breach of contract to sell land. On denial of liability the jury rendered the following verdict on issues as to defendant McPhail:

"(1) Did the defendant contract and agree to sell the said land in question to the plaintiff as alleged in the complaint? Answer: Yes.

"(2) Did the defendant A. R. McPhail prepare, execute, and sign a deed to said land in accordance with such contract, as alleged in the fourth paragraph of the complaint? Answer: Yes.

"(3) If so, has deed been destroyed? Answer: Yes.

"(4) Did the defendant A. R. McPhail breach his contract with the plaintiff, as alleged in the complaint? Answer: Yes.

"(5) What damages, if any, is plaintiff entitled to recover? Answer: \$1,000."

Judgment on the verdict, and defendant excepted and appealed, relying for error on the refusal of the judge to order a nonsuit, and for the reason that there was no memorandum of the contract in writing as required by the statute of frauds.

J. R. Baggett, of Lillington, for appellants. E. F. Young and Clifford & Townsend, all of Dunn, for appellee.

HOKE, J. [1] The evidence on the part of the plaintiff tended to show that, in July, 1911, defendant entered into an oral contract with plaintiff to sell the latter a tract of land in Sampson county, N. C., of 640 acres, sufficiently designated and described, for the sum of \$7,000, to be evidenced by plaintiff's notes, one for \$2,500, due September 1, 1911, and a second note for \$4,500, due December 1, 1912, and that, pursuant to said verbal contract, defendant and wife prepared and signed a deed for the property and for the consideration stated, which was duly probated, purporting to convey the said land to plaintiff, and plaintiff and wife executed promissory notes due and a mortgage on the land to secure the same and these papers, with a memorandum in writing also signed by the parties, were delivered to the Bank of Clinton, N. C., to hold in escrow until defendant could secure a complete title to the land which he was selling, the memorandum referred to being to the effect that the papers should be held in escrow, etc.; that in violation of the contract defendant McPhail took the papers from the Bank of Clinton or in some way procured the same, and, having destroyed his deed, sold and conveyed the land to a third party at an advance price of \$1,000, the purchaser now holding the land under a deed duly registered. Upon this testimony the motion for nonsuit was properly overruled, and the jury having found the same to be true, plaintiff has a clear right

of action. While there is much authority to the contrary, it is the rule in this jurisdiction that, when parties, having entered into an oral contract to sell land, prepare and sign a written deed substantially expressing the bargain and deliver the same in escrow, such a deed is a sufficient "memorandum," within the meaning and requirement of our statute of frauds, and the contract may be considered and dealt with as a valid and binding agreement. We have so held at the present term in *Vinson et al. v. Pugh & Wooten*, 91 S. E. 838, Associate Justice Brown delivering the opinion, and *Flowe v. Hartwick*, 167 N. C. 452, 83 S. E. 841, and *Magee v. Blankenship*, 95 N. C. 563, are in recognition of the principle. A similar ruling has been made in other states by courts of recognized authority. *Moore v. Ward*, 71 W. Va. 393, 76 S. E. 807, 43 L. R. A. (N. S.) 390, Ann. Cas. 1914C, 263, *Parrill v. McKinley*, 50 Va. (9 Grat.) 1, 58 Am. Dec. 212, *Bowles v. Woodson* (6 Grat.) 47 Va. 78, *Johnston v. Jones*, 85 Ala. 286, 4 South. 748, and *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427, seems to sustain the position.

[2] Plaintiff, then having a valid contract to purchase the land which was wrongfully broken by defendant, is entitled to recover the damages he has sustained by the breach. This being a contract to convey land, he has ordinarily an additional remedy by action for specific performance, but he is not confined to that in any case. He can always avail himself of an action for damages for such a wrong if he so elects (*Warren v. Dail*, 170 N. C. 406, 87 S. E. 126); a right emphasized in this instance by the fact that defendant has conveyed the property to a third person who holds by conveyance of prior registry, and plaintiff's remedy, by specific performance, is no longer available.

There is no error, and judgment in plaintiff's favor is affirmed.

No error.

(173 N. C. 231)

ORVIS BROS. & CO. v. HOLT-MORGAN MILLS. (No. 285.)

(Supreme Court of North Carolina. March 23, 1917.)

1. GAMING ~~§~~50(2) — INSTRUCTION — LAW OF CASE—NECESSITY—STATUTE.

In an action on a note which it was alleged, and the evidence tended to show, was based on a contract for pretended sale of in future cotton in violation of Revisal 1905, §§ 1639, 3823, 3824, and instruction that the burden was on defendant, and if it had shown that the contract was illegal, the jury should answer the issue, "Was the note in question based on a contract for cotton on margins and without any intention of the contracting parties to deliver or receive the actual cotton?" "Yes," and if defendant had failed in this respect, they should answer such issue "No," was not adequate or a compliance with the statute, since the court should have explained the meaning of the statutes relating to "illegal consideration" and "gambling contracts" at least in a general way;

as the jury is not supposed to know the provisions of the statute or to understand them.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 104.]

2. GAMING ⇨12 — GAMBLING CONTRACTS — SALES FOR FUTURE DELIVERY.

Under Revisal 1905, §§ 1689, 3823, 3824, making an agreement for an adjustment upon the basis of the difference in prices of the commodity at the time fixed void if the parties to a contract for the sale of cotton for future delivery, did not intend that the cotton should be delivered, but their purpose was to conceal under the terms of a contract of sale a gambling deal, or transaction, by which they contemplated no real bargain as to the article agreed to be delivered, the contract was void.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 22.]

3. GAMING ⇨19(1)—ILLEGAL CONSIDERATION FOR NOTE—RIGHTS OF PAYEE.

The payee of a note based on an illegal contract for margins due on cotton "futures" in the form of a sale of cotton for future delivery cannot recover upon the note.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 39, 42.]

4. GAMING ⇨19(1) — NOTE — ILLEGALITY OF CONSIDERATION—EFFECT OF RENEWAL.

Where a note was void because based on an illegal contract for margins due on cotton futures, repetitions by the payee, who was connected with the original transaction, of the promise to pay by renewals of the note, the consideration remaining the same, did not impart any validity to the note.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. §§ 39, 42.]

Appeal from Superior Court, Cumberland County; Winston, Judge.

Action by Orvis Bros. & Co. against the Holt-Morgan Mills. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

The action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs March 25, 1915, for \$2,100, due 60 days after date. Plaintiffs introduced the note in evidence and then rested. Defendant alleged that the note was given for margins upon what is known as "futures" or contracts in the form of a sale of cotton to be delivered in the future, when there was no real intention to deliver the cotton, but merely to settle them by paying the differences in prices according to the rise or fall of the market. There was evidence tending to show that the original note was given for such margins and renewed from time to time. The jury returned the following verdict:

"(1) At the time of the alleged indebtedness to Orvis Bros. & Co. by the defendant, and at the time of the execution of the note sued on, was the defendant, Holt-Morgan Mills, engaged in the ordinary course of its business in the manufacture of cotton? Answer: Yes.

"(2) Is the defendant indebted to the plaintiffs, and, if so, in what sum? Answer: \$2,100, and interest from March 25, 1915.

"(3) Was the note in question based on a contract for cotton on margins and without any intention of the contracting parties to deliver or receive the actual cotton? Answer: No."

Judgment for the plaintiffs, and appeal by defendant.

Robinson & Lyon and Cook & Cook, all of Fayetteville, for appellant. Johnson & Johnson, of Warsaw, for appellees.

WALKER, J. (after stating the facts as above). [1] The charge of the judge was very meager. He simply instructed the jury that the burden was upon the defendant, and, if it had shown that the contract was illegal, they should answer the third issue "Yes," but if it had failed in this respect, they should answer it "No." We do not think this was an adequate charge or a compliance with the statute. All the evidence tended to show that the contracts for the pretended sales of cotton were condemned by our statute. Revisal, §§ 1689, 3823, 3824. There was no instruction or intimation to the jury as to what would be an illegal contract, and in this respect the jury were left, without any aid from the court, to pass upon the validity of the note according to their own notion of the law. The statute requires that "the judge shall state in a plain and correct manner, the evidence given in the case and declare, and explain, the law arising thereon." This was not done. The jury were not told what would constitute an "illegal consideration" or a "gambling contract" under the statute in cases of this kind. Nor was anything of the kind said to them which was calculated to enlighten their minds upon this vital question in the case. The judge must instruct the jury as to the law of the case in some way, even if it be a general statement of the same. In the latter event, if either party would have more special instructions given, he must ask for them. We said in *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225:

"The rule which requires that the complaining party should ask for specific instructions if he desires the case to be presented to the jury by the court in any particular view does not, of course, dispense with the requirement of the statute that the judge shall state in a plain and correct manner the material portions of the evidence given in the case and explain the law arising thereon. Revisal, § 535; *State v. Kale*, 124 N. C. 816 [32 S. E. 892]."

The statute clearly defines what is an illegal contract where there is no real sale, but merely an agreement for an adjustment upon the basis of the differences in the prices of the commodity at the time fixed. Gregory's Supplement, § 1689. But the jury are not supposed to know these provisions or to understand them, and their meaning should have been explained to them, not in every phase or view of the matter, but at least in a general way, so that they might comprehend the inquiry submitted to them. We said in *Edgerton v. Edgerton*, 153 N. C. 167, 69 S. E. 53:

"The form of the contract is not conclusive in determining its validity, when it is assailed

as being founded upon an illegal consideration and as having been made in contravention of public policy. If under the guise of a contract of sale the real intent of the parties is merely to speculate in the rise or fall of the price and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gambling contract and void."

And again:

"When, however, there is no real transaction, no real contract for purchase or sale, but only a bet upon the rise or fall of the price of a stock, or article of merchandise in the exchange or market, one party agreeing to pay if there is a rise, and the other party agreeing to pay if there is a fall in price, the agreement is a pure wager. No business is done; nothing is bought or sold, or contracted for. There is only a bet."

[2] In this case was it the intention of both parties that the cotton should not be delivered, or was it their purpose to conceal, in the deceptive terms of a fair and lawful contract of sale, a gambling deal, or transaction, by which they contemplated no real bargain as to the article agreed to be delivered? If so, the contract is void. *Holt v. Wellons*, 163 N. C. 124, 79 S. E. 450. We said in that case:

"Of course, the law deals only with realities, and not appearances; the substance, and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that 'the knave counterfeits well—a good knave.' It always rejects the ostensible for the real in looking for fraud or a violation of law. The essential inquiry, therefore, in every case is as to the necessary effect of the contract and its true purpose."

See, also, *Harvey v. Pettaway*, 156 N. C. 375, 72 S. E. 364, and numerous cases cited therein. A proper form of the issue in cases like this one is suggested in *Rankin v. Mitchem*, 141 N. C. at page 281, 53 S. E. 854.

[3] Another question is: Can plaintiff recover upon the note if it was given in payment of margins due on contracts made ostensibly for the sale of cotton, but really with no intention of a delivery? It is said in *Embrey v. Jemison*, 131 U. S. 347, 9 Sup. Ct. 779, 33 L. Ed. 172:

"While there are authorities that seem to support the position taken by the defendant in error, we are of opinion that, upon principle, the original payee cannot maintain an action on a note the consideration of which is money advanced by him upon or in execution of a contract of wager, he being a party to that contract, or having directly participated in the making of it in the name of or on behalf of one of the parties."

That case was cited with approval in *Garseed v. Sternberger*, 135 N. C. 502, 47 S. E. 603, where it was held:

"If a broker or other agent is employed to carry out an illegal transaction, and is privy to the unlawful design, and by virtue of his employment performs services, makes disbursements, suffers losses, or incurs liabilities, he has no remedy against his principal. 'Not only is this true, but it has been held that any express promise made by the principal to reimburse

him is void'"—citing *Embrey v. Jemison* and other cases.

Both cases were approved in *Burrus v. Witcover*, 158 N. C. 384, 74 S. E. 11, 39 L. R. A. (N. S.) 1005, with a full discussion by Justice Allen. If the jury believed the evidence as it now is, and found the facts to be in accordance with it, defendant was entitled to their verdict (*Holt v. Wellons*, 163 N. C. at page 130, 79 S. E. 450, and failed to receive it, perhaps, because the jury were not informed as to the law. Errors in rulings upon the admission and exclusion of testimony were alleged, but they need not be noticed.

[4] Repetitions of the promise to pay it did not impart any validity to the note. It was just as void as before, if the consideration was margins due on "futures," or gambling contracts; plaintiff being a party to the original transaction and note, and continuing as such. *Cobb v. Guthrie*, 160 N. C. 313, 76 S. E. 81; *Garseed v. Sternberger*, supra; *Burns v. Tomlinson*, 147 N. C. 645, 61 S. E. 614; *Burrus v. Witcover*, supra.

There was material error in the charge.

New trial.

(173 N. C. 273)

In re GORHAM. (No. 295.)

(Supreme Court of North Carolina. April 4, 1917.)

1. TRUSTS \approx 63%—RESULTING TRUST—WHAT CONSTITUTES.

A resulting trust, being based entirely on contract or statute, does not arise merely because a wife loaned her husband money.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 91, 92, 98–100.]

2. HUSBAND AND WIFE \approx 149(2, 3)—WIFE'S SEPARATE PROPERTY—CONFUSION WITH HUSBAND'S PROPERTY.

Where a wife loaned her husband money and allowed such funds to be mingled with his in erecting a residence, she is not entitled after his death to a lien on the house for such loan in preference to his other creditors.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 574.]

Appeal from Superior Court, Cumberland County; Winston, Judge.

In the matter of E. E. Gorham, administrator. From an order of the court sustaining as modified a referee's report regarding a claim of decedent's wife, the administrator and claimant appeal. Affirmed.

Q. K. Nimocks and E. G. Davis, both of Fayetteville, for administrator. Sinclair. Dye & Ray, of Fayetteville, for claimant.

CLARK, C. J. This is a matter arising out of the administration of the estate of John C. Gorham, deceased. His widow, who has since married and is Mrs. Chedester, is a claimant against the estate. Her claim was referred to H. S. Averitt, referee, to report the facts and conclusions of law. The referee found that the wife of the deceased loaned him the sum of \$6,129.70, which bears

interest from September, 1907, and that some part thereof, but the evidence does not prove how much, was used by him in building his residence. He further finds that there is no agreement shown that it should be used in the building, and that no resulting trust arises in her favor for whatever amount was so used, and that therefore she is not entitled to a lien upon the home place, or on the proceeds thereof, for such of her money as was used by her husband in the erection of the house. She had filed a claim for the amount used by the husband describing it as a loan. Though she was allowed in this proceeding to amend that claim by striking out the words "as a loan," the referee finds as a fact that it was a loan, and further that as a matter of law by signing the petition for a sale of the house and lot for partition, and by acceptance of the value of her dower out of the proceeds, she is estopped to set up a lien against the home place or the proceeds thereof, but is entitled to file her claim as an unsecured creditor against the estate for the sum loaned her husband.

The court on appeal sustained the report of the referee, except that he finds that the amount of money loaned by the wife which was used by the deceased in building the house was \$6,129.70. The administrator appeals from this ruling upon the ground that there is no evidence to support it. The claimant appeals because it was held that she had no lien or resulting trust in the building for that amount. The evidence is that the building cost \$12,000, and that no part of the wife's money went into the purchase of the lot on which it was erected.

If the judgment is correct, in which we concur, that the wife has no lien or resulting trust on the house by reason of the loan to her husband, it becomes immaterial to consider the ruling that the widow was estopped, by joining in the partition proceedings and receiving the value of her dower out of the proceeds, to set up the lien, and also whether or not the evidence established how much of the money she loaned her husband went into the construction of the building.

[1, 2] There was no evidence and no findings that the husband received the money under an agreement to use it or any part of it in constructing the building, and there is nothing from which the court could construe that there is a resulting trust in the wife's favor. It could not arise from the mere fact of loaning money to her husband. Such lien could arise only by contract or by statute, and there was neither, and there was nothing to put other creditors on notice of such lien. Even if there was such use of the wife's money together with other funds in building the house, the wife, having permitted such mixture of the funds, could not claim a lien. *Wells v. Batts*, 112 N. C. 263, 17 S. E. 417, 34 Am. St. Rep. 506. There is also authority,

if it were necessary to pass on the point, that by joining in the proceedings for sale of the premises in partition and accepting her allotment thereof for dower she is estopped. *Weeks v. McPhail*, 129 N. C. 73, 39 S. E. 732; *Propst v. Caldwell*, 172 N. C. —, 90 S. E. 757.

The judgment that the claimant is entitled to prove for the full amount of the loan as found by the judgment against her husband's estate as an unsecured claim and to receive her pro rata is affirmed.

(173 N. C. 276)

JACOBS et al. v. WILLIAMS et al. (No. 303.)
(Supreme Court of North Carolina. April 4, 1917.)

1. ADVERSE POSSESSION ⇨71(1)—COLOR OF TITLE—DEED.

A deed to an ancestor of plaintiffs who claimed title by adverse possession held to constitute color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415, 416, 427, 429.]

2. ADVERSE POSSESSION ⇨62(3) — HUSBAND'S TITLE CHARACTER — POSSESSION OF WIDOW AGAINST HEIRS.

A widow's possession under her dower right is not adverse to her deceased husband's heirs.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 329-332, 340.]

3. ADVERSE POSSESSION ⇨43(6)—DURATION — TACKING.

A widow's possession under her dower right may be tacked to her husband's possession for purpose of perfecting title by adverse possession in the heirs.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 220.]

4. ADVERSE POSSESSION ⇨115(5) — JURY QUESTION.

Evidence that plaintiff's ancestor was in possession of land for 18 years, and his wife, under her dower right, for some 40 years thereafter, made their adverse possession of the property included within the dower right a jury question.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 696, 697, 699, 700.]

5. ADVERSE POSSESSION ⇨115(5) — JURY QUESTION.

Evidence that plaintiff's ancestor was in adverse possession for 18 years and testimony of two plaintiff heirs that they were thereafter in possession for over 3 years made their adverse possession a jury question.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 696, 697, 699, 700.]

6. APPEAL AND ERROR ⇨843(2)—NECESSITY OF DECISION.

Where there is evidence of adverse possession of the entire tract, it is unnecessary to decide what effect possession of a portion under a dower right would have on the remainder.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331.]

7. APPEAL AND ERROR ⇨215(1)—RESERVING GROUND FOR REVIEW—OBJECTION TO INSTRUCTIONS.

In an adverse possession action, the character of defendant's possession will not be considered upon appeal where submitted to the jury under instructions not objected to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309, 1310; Trial, Cent. Dig. § 683.]

Appeal from Superior Court, Pender County; Connor, Judge.

Action by Taylor Jacobs and others against Riley Williams and others. Judgment for plaintiffs, and defendants appeal. No error.

This is an action to recover land. The plaintiffs are the heirs at law of Matthew Jacobs, and claim title by adverse possession. They introduced a deed covering the land in controversy from Thomas Jacobs to Matthew Jacobs of date September 10, 1840, and offered evidence tending to prove that their ancestor, the grantee in said deed, had continuous possession of said land from the date of the deed until his death about 1858, and claimed and used it as his own. After his death dower was allotted in said land to the widow of Matthew Jacobs, Eliza Jacobs, at December term, 1858, of the court of pleas and quarter sessions. Evidence was also introduced tending to prove that the widow remained in possession of the land after the death of her husband until her death in 1900, and that during a part of the time the plaintiffs were in possession with her. The widow, Eliza Jacobs, afterwards married William Williams, the date not stated. In 1860, June 2, W. A. Lamb executed a deed to William Williams covering the land, and it is under this deed the defendants claim. On the 1st day of June, 1897, William Williams conveyed a part of said land to one of the defendants, and a part to another defendant.

The defendants offered evidence tending to prove that Eliza Jacobs died in 1890, and that they have been in the adverse possession of said land since that time.

An action was commenced by the plaintiffs against the defendants to recover said land February 4, 1907, in which judgment of nonsuit was entered at January term, 1910, and this action was commenced within one year thereafter.

The defendants moved for judgment of nonsuit, upon the ground that there was no evidence of 21 years' adverse possession under color in the plaintiffs, and therefore it had not been proven that title was out of the state, which was overruled, and the defendants excepted. There are also several exceptions to the charge, but all of them, except one to a statement of an agreement by counsel as a misapprehension, are on the ground there was no sufficient evidence to justify the charge given.

The jury returned the following verdict:

"(1) Are the plaintiffs, or any of them, the owners and entitled to the possession of the land described in the complaint as the Matthew Jacobs land outside the dower? Answer: Yes.

"(2) Are the plaintiffs, or any of them, the owners and entitled to the possession of the land described in the complaint as the dower of Eliza (Williams) Jacobs? Answer: Yes.

"(3) Are defendants in the unlawful possession of either of said tracts of land? Answer: Yes.

"(4) What sum, if any, are plaintiffs entitled

to recover of defendants as damages? Answer: One penny.

"(5) Did Eliza Williams die seven years or more before February 4, 1907? Answer: No."

Judgment was entered upon the verdict in favor of the plaintiffs, and the defendants excepted and appealed.

Bland & Bland and C. E. McCullen, all of Burgaw, for appellants. R. G. Grady and C. D. Weeks, both of Wilmington, for appellees.

ALLEN, J. The only question presented by the appeal is whether there is any evidence that the plaintiffs and those under whom they claim have had an adverse possession under color for 21 years, and in considering this question we must accept the evidence of the plaintiffs as true, and must give to it the construction most favorable to them. As to the part of the land covered by the dower the evidence showing title in the plaintiff is too clear to admit of debate.

[1] The deed to the ancestor of the plaintiffs dated in 1840 is color of title, and the uncontradicted evidence is that the grantee in this deed entered into possession of the land and used it openly as his own until his death in 1858, and that after the allotment of dower in the same year to his widow she remained in possession exercising acts of ownership, until her death, which the evidence of the plaintiffs shows was in 1900.

[2, 3] The possession of the widow is not adverse to the heir, but it may be tacked to the possession of the ancestor for the purpose of perfecting title in the heir. This question was fully considered and decided in *Atwell v. Shook*, 133 N. C. 391, 45 S. E. 778, in which the court says:

"It is clear that the possession of the heir may be added to the possession of the ancestor to complete the 20 years which will bar the action. We do not understand this to be controverted, but the defendant says that the possession of the widow was not the possession of the heirs, but was adverse to them. This is the point in the case. We agree with his honor that the question is not whether the widow took any title by the allotment of the homestead, but whether she claimed under the heirs, thereby making her possession their possession. Certainly her possession could not be adverse to the heirs, and this is so without regard to the question, discussed before us, as to the effect of the allotment of the homestead. If, instead of taking a homestead, she had taken a dower in her husband's land, and in the allotment the three acres to which he had no paper title were included therein, and she remained in possession, certainly such possession would inure to the benefit of the heirs, being an elongation of the husband's title or estate. This would not be upon the principle that she acquired any new or independent right by the allotment of the dower, but that she claimed under the husband, and thereby her possession inured to the benefit of the heirs."

[4, 5] There is also evidence of an adverse possession of 21 years of the land outside of the dower.

John Jacobs, one of the plaintiffs and an heir, testified that he was born on the land

in 1843, and lived there from his earliest recollection until he was 19 or 20 years of age; that they "tended turpentine and farmed" and "worked the whole place where was any pine"; that after he left the place he went back from time to time, and Eliza Jacobs, the widow, "was cultivating all the cleared land, all of the 175-acre tract." This is evidence of a possession in the ancestor and in the heir from 1840, the date of the deed to the ancestor, to 1862 or 1863, more than 21 years.

Melvin Jacobs, another plaintiff and heir, testified that he was not 2 years old when his father died; that he worked on the land from the time he "was big enough" till he "was grown," and lived there till he "was about 21"; that he split rails, cut firewood, and hauled straw off any part of the land not included in the dower. If the witness was born 2 years before the death of his father, and lived on the land until he was 21, he lived on the land 19 years after the death of his father, which, added to the possession of his father from 1840 to 1858, or 18 years, would furnish evidence of possession in the heirs and their father of 37 years.

[6] It therefore appears that there is evidence of 21 years' adverse possession of the land outside of the dower as well as of that included therein, without passing on the effect on the other land of the possession of the dower by the widow.

[7] Nor is it necessary to consider the character of the possession by Williams after his marriage with the widow of Matthew Jacobs, or of the possession of the defendants, as these questions were submitted to the jury under a charge free from objection.

We have considered all of the exceptions, and find no error.

No error.

(173 N. C. 184)

NEWBERN COTTON OIL & FERTILIZER CO. v. LANE et al. (No. 185.)

(Supreme Court of North Carolina. March 21, 1917.)

1. MORTGAGES \Leftrightarrow 154(1), 176 — VENDOR AND PURCHASER \Leftrightarrow 228(3) — REGISTRATION — ACTUAL NOTICE.

In the absence of fraud, actual notice of a prior unregistered deed or mortgage cannot affect the rights of subsequent purchasers or mortgagees whose deed or mortgage has been duly recorded, since no notice of a prior mortgage, however full and formal, will supply notice by registration.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 344-346, 425; Vendor and Purchaser, Cent. Dig. § 498.]

2. MORTGAGES \Leftrightarrow 415(3) — FORECLOSURE — COUNTERCLAIM.

In a suit to foreclose a mortgage in which judgment was entered on the notes, but foreclosure was refused as against defendant, who in good faith purchased the mortgaged premises before registration of the mortgage, such defendant's counterclaim for goods sold plaintiff should be allowed as against plaintiff's claim

of right to charge the amount as an offset against the mortgagor's notes.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1223, 1224.]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by the Newbern Cotton Oil & Fertilizer Company against M. D. Lane and others. From the judgment, plaintiff appeals. No error.

This is a civil action, tried at November term, 1916. The court sustained a motion to nonsuit plaintiff on its cause of action, and directed a verdict for the Fort Barnwell Company on its counterclaim. From the judgment rendered, the plaintiff appealed.

Moore & Dunn, of Newbern, for appellant. Ward & Ward, for appellees.

BROWN, J. The plaintiff sues to foreclose a mortgage executed by defendant M. D. Lane, July 12, 1911, to secure \$3,500 evidenced by seven notes of \$500 each, indorsed by J. W. Lane, three of which remain due and unpaid. The mortgage was recorded April 24, 1915. Some time prior to the registration of the mortgage, the lands secured therein were conveyed to the defendant the Fort Barnwell Company for the recited consideration of \$5,000. At that date the property conveyed was subject to several outstanding incumbrances. The deed was recorded May 8, 1913. It appears in the evidence that at the time of the organization of the Fort Barnwell Company, the defendant M. D. Lane was the owner of the stock in said corporation, and sold to defendant Farrior one-half of the capital stock for cash under an agreement that the money was to be applied to the payment of prior incumbrances on the property, which was done. Farrior purchased the remainder of the stock in November, 1914. M. D. Lane testified substantially that no stock was issued when company was first organized for purpose of selling stock; that the property consisted of several farms, live stock, equipment, etc., belonging to him. Stock issued about June 1, 1913, he and Farrior being officers; that he knew plaintiff's mortgage existed partly unpaid; that he was secretary treasurer up to December 1, 1914, afterwards general manager, employed by Farrior. Witness owned some stock up to December, 1914; that he did not tell Farrior about plaintiff's mortgage; could not say Farrior knew of its existence; had no ground to think so; never mentioned. Farrior had no interest there except in the corporation; that he never told Ives, president of plaintiff; Farrior knew about the mortgage; that he agreed to sell Farrior half of the stock among other things, and agreed to convey to the corporation the particular property in plaintiff's mortgage as a part of the transaction; that he told Farrior the land to be convey-

ed, and this was part of it, and part of the basis of the value of the stock.

[1] The plaintiff asked witness Lane:

"Did not you tell Ives on two occasions that Farrior knew all about that mortgage when he took over the property?"

This question was properly excluded. It is well settled that in the absence of fraud actual notice of a prior unregistered deed or mortgage executed since December 1, 1885, cannot affect the rights of subsequent purchasers whose deed or mortgage has been duly recorded. No notice of a prior mortgage, however full and formal, will supply notice by registration. *Wood v. Lewey*, 153 N. C. 401, 69 S. E. 268; *Harris v. Lumber Co.*, 147 N. C. 631, 61 S. E. 604.

The court rendered judgment for want of an answer against M. D. Lane and J. W. Lane, and refused to enter a decree of foreclosure against the other defendants. In this there was no error. The stock issued by the Fort Barnwell Company was sold for value, and the proceeds applied to prior incumbrances on the lands.

There is no evidence of fraud, and upon all the evidence the court properly held that said corporation, as well as Farrior, were bona fide purchasers for value prior to registration of plaintiff's mortgage.

[2] The defendant's counterclaim is based on goods and merchandise sold by it to plaintiff, and for which there is an admitted balance due of \$274.77. The plaintiff claimed the right to apply this to the Lane notes. The manager and president of plaintiff testified that the money was due unless it could be charged up as an offset against the Lane notes. His honor properly held it was not a set-off, and directed a verdict on the counterclaim for defendant.

No error.

(173 N. C. 265)

ELLIOTT v. SMITH. (No. 288.)

(Supreme Court of North Carolina. April 4, 1917.)

1. BANKS AND BANKING \S 227(3)—LIABILITY OF BANK—EVIDENCE—REPRESENTATION BY OFFICER.

In an action by the receiver of a bank against the indorser of a note, evidence held sufficient to warrant the jury in finding that the cashier of the bank, acting in its behalf, agreed to register a mortgage given by the maker to the indorser, and that the mortgage was deposited with the cashier for the bank, so that the receiver could not recover from the indorser after the security of the mortgage had been lost by the bank's failure to record it until after subsequent mortgages were recorded.

2. APPEAL AND ERROR \S 1059—HARMLESS ERROR—EXCLUSION OF EVIDENCE—IMMATERIAL EVIDENCE.

The exclusion of evidence as to a custom of a bank to collect registration fees and to note the collection on the papers, as corroboration of the testimony of the cashier that he did not agree to register a mortgage, is not prejudicial, where it was conceded that it would have had no appreciable effect on the verdict, and the bank had

the benefit in the charge of the circumstance that no fees were paid as tending to corroborate the evidence of the cashier, and there was no proof as to whether a notation was made on the paper or not.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4208.]

Appeal from Superior Court, Cumberland County; Connor, Judge.

Action by S. D. Scudder as receiver of the Fourth National Bank of Fayetteville, against John L. Smith, in which Charles Elliott as successor of the receiver was substituted as party plaintiff. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action commenced before the recorder's court of Cumberland county, in the name of S. D. Scudder, receiver of the Fourth National Bank, of Fayetteville, N. C., against John L. Smith. Judgment was rendered in the recorder's court in favor of the defendant, and the plaintiff appealed to the superior court. S. D. Scudder having resigned as receiver and Charles Elliott having been duly appointed his successor, he was substituted in the superior court as party plaintiff, and the action was tried at the February term, 1917, of Cumberland superior court. The defendant admitted the execution of the note sued on, amounting to \$300, upon which there was a credit of \$25, the note being dated January 7, 1913, payable to the Fourth National Bank, and signed O. Wadkins, which note was indorsed by defendant, Smith. It appeared from the evidence that Wadkins applied to the bank through A. W. Peace, cashier and vice president of the bank, for a loan of \$300, some time prior to January 7, 1913, offering as security certain real estate. Peace refused to loan the money on this security, and later Wadkins came into the bank with Smith, on the 7th day of January, 1913, and the bank, through Peace, as cashier and active vice president, loaned the money on a note payable to the bank, indorsed by Smith. At the time this transaction was had with the bank, Smith delivered to the bank a note of \$300, payable to Smith, and a mortgage securing same, dated January 7, 1913, the mortgage being also made to Smith. Smith testified that he took this mortgage as security for his indorsement, as he wanted some protection; that the mortgage was at that time a first mortgage on the property, worth at least \$2,000; that he delivered same to Peace and asked him to have it recorded, and that he (Peace) said he would. The note and mortgage remained in the possession of the bank from January 7, 1913, up to the time of the receivership in February, 1916. It was not registered by the bank until September 14, 1914, prior to which time two other mortgages were registered on the same land, and the mortgage to one W. F. Smith & Co. was registered in May, 1913, and the property foreclosed there-

under and sold to one Breece, at the price of \$1,000. A. W. Peace testified that he had no understanding or agreement of any kind with Smith about recording the paper, that no registration fees were paid to him to have the same recorded, and that he simply held the note and mortgage payable to Smith at Smith's request. His honor held that if the jury should find that Peace, acting as an officer of the bank, agreed to have the mortgage recorded, and, relying on this promise, Smith delivered the unregistered mortgage to him, and took no further steps toward having it recorded, on account of Peace's promise, then it was the duty of the bank to have it properly recorded within a reasonable time, and if it failed so to do, they should answer the issue in favor of the defendant. Plaintiff excepted. There was a verdict and judgment for the defendant, and the plaintiff appealed.

Rose & Rose, of Fayetteville, for appellant. Sinclair, Dye & Ray, of Fayetteville, for appellee.

ALLEN, J. [1] It is not denied that the value of the mortgage deposited by the defendant Smith with the cashier of the bank was destroyed as a security and indemnity, on account of the failure to register it until after two other mortgages, subsequent in date, were registered, but the plaintiff contends that there is no evidence of an agreement to register; that if there is such evidence it was an agreement made by the cashier personally, which would not be binding on the bank, and that the mortgage was not deposited as collateral with the bank, and was merely left with the cashier to hold for Smith. We cannot determine the fact, and the only legal question presented by these contentions is whether there is evidence to support findings in favor of the defendant that there was an agreement to register the mortgage, that the agreement was made for the bank, and that the mortgage was deposited with the cashier for the bank. On the first point as to the agreement, the defendant testified:

"I turned both note and mortgage over to Mr. Peace, and told him to have the mortgage recorded. He said he would. Mr. Peace was then cashier of the bank."

On the other questions all the evidence for the plaintiff and the defendant shows that the cashier was acting for the bank at the time the agreement was made, if made at all, and that the parties understood that the mortgage was deposited with the bank.

"Mr. Peace: Witness for the plaintiff, testified that he was cashier and active vice president of the Fourth National Bank, of Fayetteville, N. C., in January, 1913, and that he handled the transaction with Mr. Smith and Mr. Wadkins. He never saw the land described in the mortgage. Wadkins wanted to borrow \$300, offering as security a mortgage on real estate. He declined this, and Wadkins later came in with Jno. L. Smith, and the witness filled out the note payable to the bank; Wadkins signed it, and

Smith indorsed it. I accepted the note for the bank, and Smith and Wadkins had mortgage executed by Wadkins and wife to Smith with them at the time, and these papers were attached to the note given the bank. I made no agreement with Smith to have the mortgage registered, and no registration fees were paid for this purpose. I had the mortgage registered and the bank paid the fees. Wadkins had left this community, and I was informed that his affairs were in bad shape. My recollection is that Mr. Smith was also in trouble at that time, and, not knowing the outcome of those troubles, I got out the mortgage and had same recorded. From the 7th day of January, 1913, up to the appointment of the receiver, the bank had possession of the note and mortgage. The writing in the face of the note payable to the bank is in my handwriting."

If "he handled the transaction with Mr. Smith and Mr. Wadkins"; if the note and mortgage executed by Wadkins to Smith were attached to the note payable to the bank; if all the papers were handed to the cashier, and were thereafter in the possession of the bank, and the bank paid the fees for registration, as the cashier testified—there is evidence that the agreement to register was made for the bank, and that the papers were deposited with the bank. The consideration for the promise was the additional security for the loan. His honor submitted the question to the jury in a charge free from objection, telling them, among other things:

"Upon the admitted facts in this case, the court charges you that if you find from the evidence, and by its greater weight, that at the time Smith indorsed the note upon which this action is brought, he called Mr. Peace's attention to the fact that the mortgage was not recorded, and requested him to have same recorded; that Peace was acting in the matter as an officer of the bank; that Peace thereupon agreed to have the mortgage recorded; and that, relying upon this promise by Peace, the defendant delivered the mortgage, unrecorded, to the bank, and took no further steps toward having the same recorded on account of Peace's promise to have this done—then it was the duty of the bank to have the mortgage recorded within a reasonable time thereafter, and, it being admitted that the bank did not have the mortgage recorded until September, 1914, there was a failure of the bank to perform its duty in this regard, and you will answer the first issue, 'Yes.'"

[2] There is also an exception by the plaintiff to the exclusion of evidence that it was the custom of the bank to collect registration fees and to note the collection on the papers. We recognize the principle that under certain conditions evidence of custom is competent in corroboration of a witness, but in this case, as counsel for the plaintiff practically conceded, it would have no appreciable effect on the verdict, and the plaintiff had the benefit in the charge of the circumstance that no fees were paid as tending to corroborate the evidence of the cashier that no agreement was made, and there was no proof as to whether a notation was made on the paper or not.

The case has been tried under proper instructions; and, in our opinion, there is evidence to support the verdict, and no reversible error.

No error.

(173 N. C. 711)

In re CROSS' WILL. (No. 255.)

(Supreme Court of North Carolina. April 4, 1917.)

1. WILLS \Leftrightarrow 208—**CONTEST—EVIDENCE.**

On the issue of devisavit vel non, where the paper writing offered as the last will and testament was proven with all the formalities required by law, it was admissible in evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 873.]

2. WILLS \Leftrightarrow 155(1)—**UNDUE INFLUENCE.**

The undue influence essential to the invalidity of a will must be of a fraudulent character.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375, 379.]

Appeal from Superior Court, Wake County; Bond, Judge.

Caveat by W. F. Cross against the Bank of Holly Springs, executor, proponent of the will of A. J. D. Cross, deceased. Judgment for proponent on the issue of devisavit vel non, and the caveator appeals. No error.

Issue of devisavit vel non tried upon the following issues:

"(1) Was the paper writing propounded, signed, witnessed, and executed according to formalities required by law to make a valid last will and testament? Answer: Yes.

"(2) Did the said A. J. D. Cross, at time said paper writing was executed, have sufficient mental capacity to make a valid last will and testament? Answer: Yes.

"(3) Was the execution of said paper writing procured by undue influence over said deceased, as alleged? Answer: No.

"(4) Is the paper writing propounded the last will and testament of A. J. D. Cross, deceased? Answer: Yes."

The court answered the fourth issue as legal inference from answers to 1, 2, and 3. From the judgment rendered, the caveator, W. F. Cross, appealed.

H. E. Norris, Armistead Jones & Son, and Douglass & Douglass, all of Raleigh, for appellant. Percy J. Olive, of Apex, and J. C. Little and R. N. Simms, both of Raleigh, for appellees.

PER CURIAM. [1] The paper writing offered as the last will and testament of the testator, A. J. D. Cross, was proven with all the formalities required by law, and the court very properly permitted it to be offered in evidence and read to the jury.

The only assignments of error relate to the second and third issues. There are 65 assignments of error, 44 of them relating to the evidence. Nearly all of them are briefly noticed in the brief of the learned counsel for the caveator. We have concluded that it is unnecessary to discuss them seriatim, and it would answer no good purpose. Suffice it to say that a careful examination discloses no substantial or reversible error.

[2] The one prayer for instruction relates to the third issue and was properly refused. The undue influence essential to invalidate this will must be of a fraudulent character, and we find no evidence sufficient to support

that contention. His honor might well have so charged the jury. It is therefore unnecessary to consider the charge upon that issue. The exceptions to the charge upon the second issue relating to mental capacity are without merit. The learned judge clearly followed the well-settled decisions of this court in presenting that issue to the jury.

No error.

(173 N. C. 274)

SNEEDEN v. DARBY. (No. 300.)

(Supreme Court of North Carolina. April 4, 1917.)

1. COURTS \Leftrightarrow 185—**APPEAL FROM RECORDER'S COURT—TIME FOR TAKING—EFFECT OF DELAY.**

Under Pub. Laws 1909, c. 398, as amended by Pub. Loc. Laws, 1911, c. 217, requiring appeals from recorder's to superior court to be taken as appeals from justices of the peace, and Revisal 1905, § 608, requiring the last-named appeals to be docketed at the ensuing term of court, a failure to docket an appeal from the recorder's court at the ensuing term necessitates a dismissal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 603.]

2. COURTS \Leftrightarrow 185—**APPEAL FROM RECORDER'S COURT — DISMISSAL — JUDGMENT ON STAY BOND.**

Under Revisal 1905, § 607, authorizing judgment against appellant and his sureties upon failure to take an appeal, judgment may be entered upon the stay bond when dismissing the appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 603.]

Appeal from Superior Court, New Hanover County; Connor, Judge.

Action by James W. Sneed against James J. Darby. From a judgment dismissing defendant's appeal, affirming the judgment of the recorder's court and against the surety on the stay bond, the defendant appeals. Affirmed.

This is a civil action begun on the 25th of May, 1916, by summons issued from the recorder's court of New Hanover county, at the instance of the plaintiff, to recover money alleged to be due him by the defendant for labor performed. Judgment was duly rendered on July 8, 1916, in favor of the plaintiff and against the defendant for the sum of \$192.12, from which the defendant gave notice of appeal to the superior court. The next term of the superior court of New Hanover county after the rendition of said judgment was held on the 11th day of September, 1916, which was "for the trial of criminal cases only," and at the succeeding term of the superior court of said county, which was for the trial of civil cases only, defendant having failed up to that time to have said appeal docketed on his own behalf, on the 27th day of October, 1916, which was the fifth day of said term, plaintiff caused said appeal to be docketed, and paid the fees therefor, for the purpose of moving for the dismissal of the same, under section 607 of the Revisal of

1905. Thereupon judgment was rendered in the superior court dismissing the appeal and affirming the judgment of the recorder, and also against the surety upon the stay bond.

The defendant excepted and appealed upon the ground that the docketing of the judgment in the superior court was a docketing for the purpose of the appeal, and that no further action was required to perfect the appeal, and also upon the ground that the court could not dismiss the appeal and at the same time enter judgment upon the stay bond.

J. O. Carr, of Wilmington, for appellant.
J. C. King and L. Clayton Grant, both of Wilmington, for appellee.

ALLEN, J. [1] The act establishing the recorder's court in Wilmington (chapter 398, Public Laws 1909, as amended by chapter 217, Public Local Laws 1911) provides that "any person desiring to appeal to the superior court, in a criminal or civil case, from a judgment of the recorder's court, shall be allowed to do so in the same manner as is now provided for appeals from the courts of justices of the peace," and section 608 of the Revisal requires an appeal from a justice to the superior court to be docketed "at the ensuing term of said court."

It has been frequently held that a failure to comply with this provision of the statute and to docket the appeal at the ensuing term entitles the party recovering judgment to dismiss the appeal. The latest case on this question is *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473.

It follows, therefore, that there is no error in dismissing the appeal, as the defendant has never docketed his appeal in the superior court.

The provision of the statute relied on by the defendant saying that "all judgments for the plaintiff rendered by the recorder shall be duly docketed in the office of the clerk of the superior court, and execution shall be issued thereon as is now provided by law for executions," does not refer to proceedings connected with the appeal, but to the docketing of the judgment for the purposes of lien and execution.

[2] The judgment against the sureties on the stay bond is also authorized under section 607 of the Revisal, which provides:

"That if the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of said court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant accordingly, and for the costs of appeal and against his sureties upon the undertaking, if there be any, according to the conditions thereof."

It is probable that the defendant was not more diligent because he did not hope to reduce the amount recovered before the record-

er, as it is stated in the judgment in that court that the plaintiff submitted to the defendant an account showing \$235.63 due him, and that this was not denied by the defendant, and that the claim of the defendant against the plaintiff for \$43.51 was allowed, leaving a balance of \$192.12, for which judgment was rendered.

Affirmed.

(173 N. C. 208)

BOWDEN et al. v. LYNCH et al. (No. 170.)
(Supreme Court of North Carolina. March 28, 1917.)

1. WILLS §471 — CONSTRUCTION — GENERAL INTENT.

The general intent of the will should prevail even against minor considerations in conflict with it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 989.]

2. WILLS §626 — CONSTRUCTION — ESTATES CREATED — TENANCY IN COMMON.

A will devising property to the widow during her life, empowering her to give to each child its respective legacy, giving to one child after his mother's death one-half of the property, and to two grandchildren certain personalty, to revert should they die without issue, and to another child a fourth of the remainder of the land, but to revert if she should die without issue, and to three other children the balance of the land, all the provisions being subject to the condition that if any child died without heirs lawfully begotten of his body surviving him the legacies shall revert to the survivors of the children and their heirs, grants to the children and grandchildren in succession, and not as tenants in common.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1301.]

3. WILLS §498 — CONSTRUCTION — ESTATES CREATED — "ISSUE" — "LAWFUL BEGOTTEN HEIRS OF THEIR BODY."

In such will, the words "issue" and "lawful begotten heirs of their body," being used indiscriminately as descriptive of children, should be accorded such meaning in construing the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087-1089.

For other definitions, see Words and Phrases, First and Second Series, Issue.]

4. WILLS §545(2) — CONSTRUCTION — ESTATES CREATED — SURVIVORSHIP.

The time of dying without children which will give rise to survivorship must be referred to the death of the devisee, and not to the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1172.]

5. WILLS §463 — CONSTRUCTION — PRESUMPTIONS.

It is presumed that every part of a will expresses an intelligible intent, and is to be considered, and no words should be rejected if any meaning can possibly be given them.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 982.]

6. WILLS §551 — CONSTRUCTION — DEVISEES — SHARES.

A will devised property to the widow during her life, empowering her to give to each child its respective legacy, giving to one child after his mother's death one-half of the property, and to two grandchildren certain personalty, to revert should they die without issue, and to another child a fourth of the remainder of the land, but to revert if she should die without issue, and

to three other children the balance of the land, and provided that "if any of my children before mentioned shall die without heirs lawfully begotten of their body them surviving * * * the legacies herein given shall revert back to the survivor or survivors of my children and the lawful begotten heirs of them surviving." *Held*, that on the death of a devisee without children the children of a deceased devisee were entitled to the share that would have gone to such devisee had she survived.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1186-1190.]

7. WILLS ⚡551—CONSTRUCTION—DEVISEES.

But under such will the children of a child not mentioned who died before the testator are excluded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1186-1190.]

8. DEEDS ⚡116 — VALIDITY — QUITCLAIM DEED—FUTURE INTEREST.

Under a will which granted lands to the widow during her life, and then to children in succession, providing for reverter to the other children should any child die without issue, a deed of certain children in quitclaim form conveying "all right, title, and interest, estate, claim and demand, both in law and equity as well in possession as in expectancy," granted all the estate of the children joining in it.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 330.]

Appeal from Superior Court, Greene County; Whedbee, Judge.

Suit by R. N. Bowden and wife and others against E. L. Lynch and wife and others. From the decree rendered, plaintiffs and defendants appeal. Affirmed.

This is an action to recover land, both parties claiming under Gray R. Pridgen, who died in 1866, leaving a will, the material parts of which are as follows:

Item First. I give and devise to my beloved wife, Mary T. Pridgen, during her natural life, all my land, money, stock of every kind, household and kitchen furniture, and in the meantime she, the said Mary T. Pridgen, can give off to each child their respective legacies hereinafter named.

Item Second. I give to my son H. R. Pridgen after the death of his mother, Mary T. Pridgen, one-half of my land, one horse, bridle and saddle, one cow and calf, one sow and pigs, two ploughs and gear, one horse car, one bed and its necessary furniture to him and the lawful begotten heirs of his body forever.

Item Third. I give to Egbad Rouse and Edward Rouse each one bed and its necessary furniture to them and the lawful begotten heirs of their body them surviving, but if they leave no issue then to revert back to my children Henry R., Elizabeth J., Nancy, Sarah E., and M. B. Hill.

Item Fourth. I give to my daughter Mary B. Hill, wife of D. Hill, one-fourth part of the remainder of my tract of land and if she die without issue lawfully begotten of her body then to revert back to my other four children Henry R., Elizabeth J., Nancy, and Sarah E.

Item Fifth. I give to my daughters Nancy, Elizabeth J., and Sarah E. Pridgen the balance of my land to share and share alike, also one bed and its necessary furniture each, to them and the lawful begotten heirs of their body forever.

My will is that if any of my children before mentioned shall die without heirs lawfully begotten of their body them surviving, then and in that case the legacies herein given shall revert back to the survivor or survivors of my chil-

dren and the lawful begotten heirs of their body them surviving forever.

The said Gray R. Pridgen died, leaving him surviving five children, viz.: Henry R. Pridgen, Mary B. Hill, formerly Mary B. Pridgen, Elizabeth J., Sarah E. Pridgen, and Nancy Pridgen, the testator having only one other child, Winnie Rouse, who died in the year 1863, or three years before the death of testator. Her name does not appear in the will as devisee or legatee, though her children are bequeathed certain personal properties by item 3 of the will.

In the year 1873, the lands of which Gray R. Pridgen died seised and possessed, and which are situate in said Greene county, and which were devised in his said will, were duly partitioned and allotted in severalty to the said five children of the said Gray R. Pridgen to whom said lands were devised, lot No. 3 in said division having been allotted to said Nancy Pridgen, said lot being the land in controversy. On January 4, 1877, Nancy Pridgen executed a deed upon a valuable consideration, by which she purported to convey said lot of land to Patrick Lynch, under whom the defendants claim, and on the same day all of the plaintiffs in this action, except the children of Mary B. Hill and Winnie Rouse executed to said Lynch a deed in consideration of \$1, by which they—

"do bargain, sell and quitclaim unto the said Patrick Lynch, and to his heirs and assigns forever, all our and each of and right, title and interest, estate, claim and demand, both at law and equity, and as well in possession as in expectancy of, in and to all that certain piece or parcel of land situated in the county of Greene and state aforesaid, known as lot drawn by Nancy Pridgen in a division of the lands of G. R. Pridgen, deceased, adjoining the lands of Patrick Lynch and others."

Nancy Pridgen died in 1909, leaving no children, but leaving surviving Henry R. Pridgen and Sarah E. Bowden, children of Gray R. Pridgen, and also the children of Winnie Rouse, Mary B. Hill, and Eliza Pollock, all of whom are the plaintiffs in this action. Mary T. Pridgen, wife of Gray R. Pridgen, is dead.

The controversy arises upon the construction of the last paragraph of the fifth item of the will, and upon the effect of the quitclaim deed to Patrick Lynch. The plaintiffs contend that upon the death of Nancy Pridgen her share passed under the fifth item of the will to the children of Gray Pridgen surviving her, and to the children of those, who had died leaving children, and that the deed to Patrick Lynch, being a quitclaim deed, did not convey this title.

The defendants claim Nancy Pridgen took an estate in fee, but if not that only the children of Gray Pridgen surviving Nancy Pridgen would take, and that this interest passed under the deed to Lynch, and that if the children of a deceased child are included in the devise, that the deed to Lynch conveyed

the title of all the plaintiffs except as to the children of Mary Hill.

His honor held that the children of Mary Hill were entitled to one-fourth of the land under the devise, and that the defendants were entitled to three-fourths thereof under the deed to Lynch, and entered judgment accordingly, and the plaintiffs and defendants excepted and appealed.

J. Paul Frizzelle and Geo. M. Lindsay, both of Snow Hill, for appellants. M. T. Dickinson, of Goldsboro, for appellees.

ALLEN, J. [1, 2] It is apparent from an inspection of the whole will that the paramount and controlling purpose in the mind of the testator was to provide for the five children named therein and their children, and that he intended for the children and grandchildren to take in succession, and not as tenants in common, and this general intent should prevail even against minor considerations in conflict with it if they appeared in the will. *Lassiter v. Wood*, 63 N. C. 360; *Balsley v. Balsley*, 116 N. C. 477, 21 S. E. 954.

[3] It is also clear that the will was drawn by one who was not versed in technical legal rules or language, and that the terms "issue," and "lawful begotten heirs of their body," are used indiscriminately as descriptive of children. This is illustrated by the third item in which personal property alone is disposed of, and this is given to Egbad and Edward Rouse and the "lawful begotten heirs of their body," but if they leave "no issue," then "to revert back" to the children of the testator. Here we have "lawful begotten heirs" and "issue" referring to the same class, and evidently meaning children, and this construction has been placed on similar language in a number of cases. *Tucker v. Moye*, 115 N. C. 71, 20 S. E. 186; *Francks v. Whitaker*, 116 N. C. 518, 21 S. E. 175; *Smith v. L. Co.*, 155 N. C. 392, 71 S. E. 445. In the last case cited items in a will were considered very much like the fifth item in the will before us, and the court said:

"Construing this will in reference to these authorities and bearing in mind the well-recognized positions that as to wills the intent of the testator as ascertained from the consideration of the whole will in the light of the surrounding circumstances must govern (*Holt v. Holt*, 114 N. C. 241 [18 S. E. 967], and that as to both wills and deeds the intent as embodied in the entire instrument must prevail, and each and every part must be given effect if it can be done by fair and reasonable intentment before one clause may be construed as repugnant to or irreconcilable with another (*Davis v. Frazier*, 150 N. C. 447 [64 S. E. 200]), we are of opinion that the will conveys to the children mentioned in the third item an estate in fee, defeasible on dying without leaving lawful issue of his or her body surviving, and in that event as to either, and when it occurs, the interest passes to the surviving children or to the lawful heirs who may be surviving any of my children'; and that by these words the testator did not intend heirs in the ordinary or general meaning of the term, but surviving issue and in the sense of children and grandchildren, etc., of the devisees

named, and that in case this interest should arise to them, they would take and hold as purchasers directly from the deviser."

In the last paragraph in the fifth item "children" must therefore be substituted in one place for "heirs lawfully begotten of their body," and in the other for "lawful begotten heirs of their body," and the paragraph must be read as follows:

"My will is that if any of my children before mentioned shall die without children them surviving, then and in that case the legacies herein given shall revert back to the survivor or survivors of my children and the children them surviving forever."

[4] Under the authorities since the case of *Buchanan v. Buchanan*, 99 N. C. 308, 5 S. E. 430, the time of dying without children, which will give rise to survivorship, must be referred to the death of the devisee, and not to the death of the testator (*Harrel v. Hagan*, 147 N. C. 111, 60 S. E. 909, 125 Am. St. Rep. 539, *Rees v. Williams*, 165 N. C. 201, 81 S. E. 286, and cases cited), and the question is: Who are included in the words "children them surviving," as of the death of Nancy Pridgen?

[5] It is presumed that every part of the will "expresses an intelligible intent—i. e., means something" (*Wooten v. Hobbs*, 170 N. C. 214, 86 S. E. 811); and this intent is not only to be "gathered from the language used, if possible" (*Freeman v. Freeman*, 141 N. C. 99, 53 S. E. 620), "but in seeking for his intention we must not pass by the language he has used; if we do, we shall make the will and not expound it" (*Alexander v. Alexander*, 41 N. C. 231, approved in *McCallum v. McCallum*, 167 N. C. 311, 83 S. E. 250). "Every part of a will is to be considered in its construction, and no words ought to be rejected, if any meaning can be possibly put upon them. Every string should give its sound." *Edens v. Williams*, 7 N. C. 31.

[6] We must then give some meaning to the language "children them surviving," and they are not the children of the testator, because they are already provided for in the same paragraph. Nor is reference made to children of living children of the testator, as the property is given in the same item of the will to the children of the testator absolutely, subject to be defeated only in the event of dying without children.

The only other conclusion permissible if we give any meaning to the language of the testator is that he intended to include the children of deceased children of the testator, and this accords with the leading purpose of the will.

It follows, therefore, that his honor was correct in holding that the plaintiffs, who are the children of Mary B. Hill, who died before Nancy Pridgen, are entitled to one-fourth of the land in controversy.

[7] The children of Winnie Rouse, who died before the testator, are excluded, because Winnie Rouse is not mentioned in the will, and the devisees under the terms of the

will are to the children of the testator named, and to the children of those deceased "before mentioned."

[8] We are also of opinion that the quitclaim deed executed by the plaintiffs passed their interest to the defendant. It purports to convey all "right, title, and interest, estate, claim and demand, both in law and equity, as well in possession as in expectancy," and is in all material respects like the deed which was sustained in *Kornegay v. Miller*, 137 N. C. 661, 50 S. E. 315, 107 Am. St. Rep. 505, which has been approved on this point in *Cheek v. Walker*, 138 N. C. 449, 50 S. E. 863, *Smith v. Moore*, 142 N. C. 299, 55 S. E. 275, 7 L. R. A. (N. S.) 684, *Beacom v. Amos*, 161 N. C. 367, 77 S. E. 407, and is a controlling authority.

In the *Kornegay Case* the grantor could only take in the event of a death of one without issue, and before the contingency happened she executed a deed in consideration of \$1, conveying "her right, title, and interest, present, contingent, and prospective," and it was held that the grantor had a "possibility, coupled with an interest," which passed by her deed, and that it operated "to vest in the plaintiff the equitable title to all of the interest, title, and estate which she has or may, by the happening of the contingency provided for, have in the locus in quo; that this title is something more than the mere right in equity; that in the event of the plaintiff's death without offspring, the title will be perfected without any act on the part of the plaintiff or those claiming under him; that the consideration agreed upon by the parties is sufficient and adequate to pass such equitable title, and sustain it in the event the perfect title shall come to her."

There is no error.

Affirmed.

(173 N. C. 279)

JONES v. JONES. (No. 323.)

(Supreme Court of North Carolina. April 4, 1917.)

1. DIVORCE \S 212—ALIMONY—TEMPORARY ALIMONY—ALLOWANCE.

In an action for divorce from bed and board, it appeared that the defendant husband cursed and abused his wife, striking her at times and overworking her. The husband was guilty of drunkenness, boasted of his infidelity, and humiliated his wife, by his conduct driving her from his home. After the wife returned at the husband's solicitation he attempted to force her to release his property, and then took the children of the marriage into a foreign state, asserting that he would defeat her claims to alimony. *Held*, that in such case an award of temporary alimony and suit money, the husband being a prosperous landowner, with a net income of \$2,000 in favor of the wife, who was without funds, was proper.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 614-618.]

2. DIVORCE \S 214(2)—ALIMONY—TEMPORARY ALIMONY—ALLOWANCES.

Revisal 1905, § 877, provides that when notice of a motion is necessary, it must be served

10 days before the time appointed for the hearing, but the court or judge may, by an order to show cause, prescribe a shorter time. Section 1566 declares that no order allowing alimony pendente lite shall be made unless the husband has five days' notice thereof. A wife's complaint, filed during the term, asked for an order for alimony pendente lite, and the order was made five days thereafter on the last day of the term. *Held*, that as defendant relied on his answer as an affidavit, and the motion for alimony pendente lite was made in open court, its allowance was not subject to attack because five days' notice thereof was not given, the court having power to shorten the time, and the statute applicable to such notice applying only when the motion is heard out of term.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 627.]

3. DIVORCE \S 212—ALIMONY—ALLOWANCE PENDENTE LITE.

Under Revisal 1905, § 1566, providing that no order allowing alimony pendente lite shall be made unless the husband have five days' notice thereof, but declaring that no notice shall be necessary if the husband has abandoned his wife, or left the state, or is about to dispose of the property for the purpose of defeating the claim of his wife, alimony pendente lite may be allowed without five days' notice, where the wife was driven from her husband's home by his conduct, and he informed her he was going to sell his property, and was not going to be bothered by women and children.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 614-618.]

4. DIVORCE \S 90—ACTIONS—COMPLAINT.

Where the verification of a complaint in an action for divorce from bed and board was in the words of the statute, and recited that the facts set forth as grounds had existed to plaintiff's knowledge at least six months prior to the filing of the complaint except those stated as having occurred within six months, the complaint is not subject to attack on the ground that it did not aver the facts stated therein had existed to the plaintiff's knowledge for six months prior to his filing.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 283-286.]

5. DIVORCE \S 51—ACTIONS—CONDONATION.

Where a wife, on condition that her husband should not again mistreat her, condoned his misconduct occurring six months before filing a complaint for divorce from bed and board, the husband's subsequent misconduct and breach of condition revived his earlier misconduct, so as to entitle the wife to rely on it.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 185-187.]

6. DIVORCE \S 215, 227(1), 286—ALIMONY—ATTORNEY'S FEES.

The amount of attorney's fees and alimony pendente lite is within the discretion of the trial court, and not reviewable, unless it is abused.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 632-634, 653, 769, 770.]

7. DIVORCE \S 306—ALIMONY—MAINTENANCE.

Where the defendant husband had taken minor children of the marriage without the state, the court may, on the wife's application, grant her an allowance for their maintenance, to begin when they should be placed in her custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 798.]

8. DIVORCE \S 298(4)—CUSTODY OF CHILDREN—RIGHT TO AWARD.

In a suit for divorce from bed and board, where the defendant husband had been guilty

of drunkenness and immoral conduct, had used improper language to his wife, and struck her, and had carried very young children of the marriage without the jurisdiction, it is proper for the court to order him to place them in the custody of the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 784.]

9. HUSBAND AND WIFE §3(2)—CHASTISEMENT OF WIFE.

A husband has no right to correct his wife by physical force, and to beat her with his fists.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 8.]

10. DIVORCE §27(18)—ACTIONS—GROUNDS.

A husband's false charge that his wife was unfaithful, together with his applying profanity to her, is ground for divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 83.]

Appeal from Superior Court, Person County; Cooke, Judge.

Action by Lelia B. Jones against Walter J. Jones. From a judgment allowing plaintiff alimony pendente lite and counsel fees, defendant appeals. Affirmed.

This is an appeal from the judgment allowing the plaintiff alimony pendente lite and counsel fees, in an action for divorce from bed and board. The action was begun September 18, 1916, the summons being returnable to October term of Person, 1916, which began on October 16th. The complaint was filed Saturday, October 14th. On Wednesday of October term the plaintiff moved in open court for an allowance for alimony pendente lite and counsel fees in accordance with the request in the complaint. The defendant in open court resisted the motion. The court postponed the hearing till the next evening, Thursday, October 21st; when court being about to adjourn, he heard the motion and found the following facts upon the complaint and answer used as affidavits, and such other evidence as was offered: That the plaintiff and defendant were married in October, 1911, and have two children, aged 3½ and 1½ years, respectively; that the defendant has offered such indignities to the person of the plaintiff as to make her condition intolerable and her life burdensome; that in August, 1916, the defendant abandoned the plaintiff and caused her to leave his home; that in 1914 he tried to get the plaintiff to release her right in his property and make him free in consideration of \$1,000, and became greatly enraged because she did not do so; that in 1913 the defendant said to the plaintiff that "when he got his business straight and like he wanted it, the plaintiff could take the cook and go to hell, or walk up and down the big road and eat flint rocks, as far as he cared"; that he often left the plaintiff for three or four days during the week and refused her request for a pistol for protection during his absence; that he drank a great deal of whisky, and in November, 1914, he accused the plaintiff of taking a quart of his

whisky, which he later found in his auto, but did not apologize; that in 1914 the defendant repeatedly stayed out two or three nights in the week, until 4 o'clock in the morning, and in November of that year he moved a negro woman and her children into a house in the yard, and boasted to the plaintiff the woman's boy was his son; that the negro woman and her children annoyed the plaintiff by taking her wood, and were insolent to her, and that when the plaintiff complained the defendant upheld the negro woman and abused the plaintiff, and upon the plaintiff's saying that she could not stand such conditions any longer, and would have to go home, the defendant told her she "could take her choice"; that under such conditions her health becoming impaired and fearing for her personal safety she went to her father's; that about three weeks thereafter the defendant went to her, asking her to return, and promised that he would not mistreat her again, and would send the negro woman away, and under the circumstances and relying upon such promise she returned with the defendant, who did get rid of the negro woman, but in a day or two began to abuse the plaintiff, insisting that she should sign papers releasing all her interest in his property, and give him a divorce, and upon her refusal he became greatly enraged and told the plaintiff she could "go to * * * and eat flint rocks for all he cared"; that he unnecessarily required her to do an unusual amount of work just prior to Christmas, 1914 (when she was in a pregnant condition), in regard to hog killing, and though she did all she could, the defendant told her if she "did not attend to business what in — did he want with her there"; that when the plaintiff had finished the work of drying up the lard, besides doing the cooking and looking after the house while she was in an exhausted condition therefrom, the defendant brought a drunken companion home with him late on Christmas Eve and made the plaintiff late at night cook an oyster supper for them, though she had already cooked supper for the family; that the defendant was often gone a week at a time without letting plaintiff know his whereabouts, without having any one at home for her protection; that in May, 1916, the defendant told the plaintiff he was "going to sell everything, and was not going to be bothered with women and children; that he had enough to take care of himself, and did not expect to hit a lick of work for any one," and often repeated this to the plaintiff; that in August, 1916, he came to plaintiff's father's about 2 o'clock at night, and carried her home, reaching there about 4 o'clock in the morning, whereupon the defendant himself retired to bed, but put the plaintiff to work preparing breakfast and supply of bread to last his hands three days; that in August, 1916, the defendant took the

oldest child from plaintiff's arms, and struck the plaintiff on her breast, knocking her against the sewing machine, which blow left finger prints and bruises on the plaintiff for several days; that he charged the plaintiff with adultery with one Loman, which charge the court finds was untrue and without foundation; that the defendant took both the children away and carried them to his father's house in Virginia; that he was often drunk and used personal violence and foul language to her.

The judge finds that the plaintiff during her married life had been a good, kind, and dutiful wife, and has performed faithfully her household duties, and has often been required, in addition to cooking, washing, ironing, cleaning the house, and attending to the children, to work in the garden, and carry slops to the hogs, a quarter of a mile distant; that the plaintiff gave the defendant no cause of provocation for his cruel and unjust conduct, or for the indignities he has heaped upon her, and that she was put in bodily fear of the defendant, and her life rendered intolerable and burdensome, and that the plaintiff, by reason of defendant's false accusations against her and his violence, is unable to endure living further with him.

The judge also finds that the defendant is a man of good health and strength, 47 years of age, of good earning capacity, and is worth from \$15,000 to \$20,000, and owns, according to admission of his counsel in open court 535 acres of land; that the defendant for the last two years has greatly neglected his farm and other business; that the net annual income of the defendant with proper attention to business is reasonably \$2,000 per year; that the plaintiff has no separate estate, is worth no property, and has no means of subsistence during the pendency of litigation or to pay for the prosecution of this action; that the defendant removed the children from the jurisdiction of this state and carried them to Virginia, where they now are; and that the plaintiff is entitled to the custody of said children.

Upon finding the foregoing facts and others of like nature, the judge awarded the custody of the two children to plaintiff, and adjudged that the defendant should in 30 days pay to the plaintiff or into court the sum of \$150, to enable her to prosecute this action, and that he should pay her or into court for her benefit \$50 per month alimony, to begin on the day of the order, and \$15 per month for the support of said children, to begin when they are placed in her custody.

The defendant excepted and appealed.

Wm. D. Merritt, of Roxboro, and Bryant & Brogden, of Durham, for appellant. L. M. Carlton, of Roxboro, and Manning & Kitchin, of Raleigh, for appellee.

CLARK, C. J. [1, 2] There was evidence to support the above findings of fact, and it

cannot be questioned that upon such findings the judgment of the court is fully supported. The cases of *Everton v. Everton*, 50 N. C. 202, and *Miller v. Miller*, 78 N. C. 102, cannot be deemed authority in this day, but if they were, they would not authorize the reversal of the orders made by the judge in this case. Indeed, the defendant's counsel rest the appeal practically upon the proviso in Revisal, § 1566, as follows:

"Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or the succeeding section, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint."

But this court has uniformly held that the five days' notice of a motion applies only when such motion is heard out of term, and that parties are fixed with notice of all motions or orders made during the term of court in causes pending therein. *Hemphill v. Moore*, 104 N. C. 379, 10 S. E. 313, *Coor v. Smith*, 107 N. C. 431, 11 S. E. 1089, and numerous cases since. In *Lea v. Lea*, 104 N. C. 603, 10 S. E. 488, 17 Am. St. Rep. 692, which was upon a motion for alimony pendente lite, the court said:

"The statute does not require that a day shall be set when a motion in the cause is to be heard at term. It only provides that five days' notice shall be given, and we think that this requirement was fully complied with in the present case."

In the case at bar the complaint, filed on Saturday, October 16th, asks for an order for alimony pendente lite, and the order was made on the Thursday following, October 21st, five days thereafter. In *Zimmerman v. Zimmerman*, 113 N. C. 434, 18 S. E. 334, the court held on an appeal from an order for alimony:

The "application for alimony can be made by a motion in the cause, and a defendant is fixed with notice thereof. It is only when made out of term that a notice is necessary"—citing *Coor v. Smith*, 107 N. C. 430, 11 S. E. 1089.

In *Moore v. Moore*, 130 N. C. 333, 41 S. E. 943, it was held:

"A motion for alimony pendente lite may be heard anywhere in the judicial district; five days' notice being required when heard out of term time," and holding that such five days' notice "is required only when a motion is heard out of term"—citing *Zimmerman v. Zimmerman*, 113 N. C. 432, 18 S. E. 334.

Besides all this, Revisal, § 877, provides:

"When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order to show cause, prescribe a shorter time."

In this case the court in effect did shorten the time, when refusing to hear the motion on Wednesday he directed that it be heard the following day, which was the last day of the term. It is true that the statute as to alimony makes the time of the notice five days, instead of ten; but the authority conferred by Revisal, § 877, authorizes the judge

to shorten the time for the notice in any case "when notice of a motion is necessary."

In Pell's Revisal, under section 877, a great number of cases are cited holding that a party to an action pending in court "is fixed with notice of all motions and orders, except those made out of term, of which notice must be given." A motion might be made during the term of court, without previous notice, in a case of such nature that it would be error for that reason to enter judgment thereon without giving the defendant sufficient time to prepare affidavits or other evidence, but this would not be on the ground that a motion in a cause if made at term necessarily requires notice. The defendant in this case relied on his answer as an affidavit in the cause, and does not allege that he did not have opportunity of fully setting up his defense. In fact his case was carried over till the next day, and to the latest moment before the court adjourned. The plaintiff, as the court finds, was wholly without means of subsistence or means of prosecuting the cause. If the hearing had been postponed till some other time, or to some possibly distant point in the district, she would have been unable to present her cause, if the finding of the judge is correct in this particular, as we must take it to be.

The facts found most fully justified the order of the judge. It would have been a great hardship to deny the plaintiff a hearing at this term of the court, which hearing was had five days after application for the order filed on Saturday, and which in itself gave notice of the motion of which the defendant had service, for he filed his answer thereto at that term, and the hearing was had upon such answer, treated as an affidavit, and the defendant did not offer any additional evidence. Though he was in court, he did not go upon the stand as the plaintiff did, nor did he offer additional affidavits. The refusal to postpone the hearing longer than the next day does not show any hardship placed on the defendant, whereas its postponement without good cause would have been a great hardship to the plaintiff.

[3] Moreover, Revisal, § 1566, provides that no notice shall be necessary if the husband has abandoned his wife and left the state, or if he is about to dispose of his property for the purpose of defeating the claim of his wife. The court found that plaintiff was driven from home by the defendant's conduct, and that he had told plaintiff he was going to sell everything, and was not going to be bothered by women and children. The verification to the complaint avers that the defendant has threatened to sell his property, and that he is about to remove his property and effects from the state, whereby the plaintiff may be disappointed in the alimony, and the court finds that the defendant has removed the two children from the jurisdiction of this state and has them in Virginia.

[4] The defendant excepts that the complaint does not aver that the facts therein stated had existed to the knowledge of the plaintiff for six months prior to the filing of the complaint. But the verification is in the language required by the statute: "The facts set forth in the complaint as grounds for a divorce from bed and board have existed to her knowledge at least six months prior to the filing of the complaint" (which are sufficient facts under the statute, if true), and adds, "except those therein stated as having occurred within said six months," and these last are merely in aggravation.

[5] Where there was condonation upon a condition which is broken, the former conduct of the defendant is revived in full force. Page v. Page, 167 N. C. 346, 83 S. E. 625. And here the court found that whatever condonation there was, was upon condition that the defendant would never mistreat the plaintiff again, and the facts show that he continued to mistreat her. Upon the complaint verified as in this case the plaintiff can proceed to trial upon the facts, which existed prior to six months, and also upon the facts occurring since said six months, at least so far as necessary to show breach of the condition upon which the condonation was made. Sanders v. Sanders, 157 N. C. 229, 72 S. E. 876.

[6, 7] The amount of attorney's fees and alimony is within the discretion of the trial court, and is not reviewable, unless such discretion is abused. Moore v. Moore, 130 N. C. 333, 41 S. E. 943; Barker v. Barker, 136 N. C. 316, 48 S. E. 733; Bailey v. Bailey, 127 N. C. 474, 37 S. E. 502. The court had the right to award the plaintiff an amount per month for the maintenance of the children, to begin when the children should be placed in her custody. Ellett v. Ellett, 157 N. C. 161, 72 S. E. 861, 39 L. R. A. (N. S.) 1135, Ann. Cas. 1913B, 1215.

[8] It was in the sound discretion of the trial court to award the custody of the children, and in view of the facts as to the conduct and character of the defendant, his continued drunkenness, and that he had already carried the children out of the state, the order to place them in the custody of the mother was proper.

[9, 10] The charges of brutality and mistreatment are not merely allegations in the complaint, but are findings of fact by the judge, and justify his judgment. The ruling of Pearson, C. J., in State v. Black, 60 N. C. 262, 86 Am. Dec. 436, that a husband had the right to thrash his wife "to make her behave herself," and the ruling of the trial judge in State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78 (which was affirmed on appeal), that a husband "had a right to whip his wife with a switch no larger than his thumb," were merely the expression of judicial opinion formulated in the barbarous ages of the common law (for there was never a statute

to that effect), which still lingered in the atmosphere of the reports, and was brusquely brushed aside by Settle, J., in *State v. Oliver*, 70 N. C. 61, when he succinctly said, "The courts have advanced from that barbarism." This was said in 1874, now more than 40 years ago, and when the writers of both those opinions were still on the bench and with their concurrence. But if that doctrine was still law, it would not justify this defendant, who, as the judge finds, beat his wife with his fists, and left bruises upon her, and not under the pretense even of "making her behave herself." Nor would his false charges of adultery and his profanity and other mistreatments be justified within the limits of *Everton v. Everton* and *Miller v. Miller*, above cited, if we could hold that we had not also "advanced from that barbarism." Indeed, the facts which in *Miller v. Miller* were held to be a venial offense in the husband, and not entitling the wife even to a divorce from bed and board or alimony, have now been made by the Legislature ground for an absolute divorce.

The judgment of the court below must be affirmed.

(173 N. C. 215)

MASSEY v. ALSTON. (No. 256.)

(Supreme Court of North Carolina. March 28, 1917.)

1. EQUITY § 48—JURISDICTION—REMEDY AT LAW.

A finding that there was a contract for the payment of money entitled the plaintiff to no equitable relief, since such contract could be enforced by simple action at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158.]

2. EQUITY § 12—FRAUD—PURCHASE OF LAND—BREACH OF CONTRACT TO PAY.

Where upon receiving a deed for land the purchaser promises to pay the purchase money, and the promise does not induce the delivery of the deed, or is not intended to influence the vendor to part with its possession, equity will not interfere because the vendor has an adequate legal remedy, but where he promises to pay when he has no intention of doing so, and the vendor is induced thereby to give up something of value, it is considered as fraudulent and equity will intervene.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 22.]

3. EQUITY § 12—FRAUD—EQUITABLE RELIEF—WHEN GRANTED.

Where plaintiff on defendant's request paid for land, taking title in himself and in defendant, who promised to pay for one-half thereof immediately, with the specific intention not to pay and for the purpose of securing title in himself without paying therefor, the mere fact that plaintiff could have prevented the fraud by requiring security would not defeat his right to equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 22.]

4. TRUSTS § 99—CONSTRUCTIVE TRUST—BREACH OF CONTRACT—FAILURE TO PAY FOR LAND.

In such case the plaintiff, while entitled to rescission and cancellation of the deed, could also

have the purchase money made a charge upon the land upon the trust theory.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 150.]

5. TRUSTS § 99—EQUITABLE RELIEF—WHEN GRANTED—CHARACTER OF REMEDY.

Where plaintiff, on defendant's request, paid for land, taking title in himself and defendant, who promised to pay half the price, with the intention of getting title without paying therefor, though no lien could be declared, a decree impressing a charge on the land should be sustained as necessary to carrying out the contract between the parties.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 150.]

6. TRUSTS § 374—EQUITABLE RELIEF—WHEN GRANTED—CHARACTER OF REMEDY.

In such case plaintiff was not entitled to any accounting for rents and profits as vendor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 607-612.]

7. JUDGMENT § 707—CONCLUSIVENESS—EFFECT ON PERSONS NOT PARTIES.

In an action between persons who had entered a partnership, to which their creditors were not parties, such creditors were not affected by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230.]

8. TRIAL § 133(1)—CONDUCT OF TRIAL—REMARKS OF COUNSEL.

It is largely within the discretion of the judge whether counsel be permitted to make remarks, and at what time he will interfere.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316.]

9. TRIAL § 126—CONDUCT OF COUNSEL.

A party or witness should not be subjected unjustly to abuse calculated to degrade him or bring him into ridicule or contempt.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 308.]

Appeal from Superior Court, Wake County; Bond, Judge.

Suit by Henry Massey against Louis Alston. Judgment for plaintiff, and defendant appeals. Modified.

The action was brought to obtain equitable relief against a transaction in which plaintiff alleged that the defendant had induced him to part with the possession of a deed for an interest in land upon a false and fraudulent promise to pay at once the consideration therefor, which was mentioned in the deed. The allegation is that plaintiff was to buy the land from Eunice Dunn, the owner thereof, and pay the entire purchase price to her, and convey one-half interest in the same to defendant, upon his promise to pay immediately in cash to plaintiff his share of the purchase money, that he obtained the deed upon this promise fraudulently intending at the time not to pay for the same, and there is some evidence of an additional representation, viz. that there was something wrong with the deed, and that he pretended to want the deed for the purpose of correction, whereas his real intention and design were to get possession of it in order to record it, and thereby vest the title in him without paying

for the land or performing the promise by reason of which he procured it. Issues were submitted to the jury and answered as follows:

"(1) Did Henry Massey pay \$150 for land described in complaint, and was an undivided half interest in the land conveyed to Louis Alston by Eunice Dunn upon an agreement between said Alston and plaintiff, Massey, that if said conveyance should be so made the said Alston would at once pay to plaintiff Massey the sum of \$75 as alleged in the complaint? Answer: Yes.

"(2) What part, if any, of said \$75, and interest, has been paid by defendant, Alston, to plaintiff, Massey? Answer: No part; nothing.

"(3) Was it agreed at any time between plaintiff, Massey, and defendant, Alston, that said property should become and be a part of the partnership property to be owned by a partnership existing between said Massey and said Alston? Answer: Yes.

"(4) Did the defendant, Louis Alston, procure title to an undivided half of said lot without paying for same and fraudulently intending at the time not to pay for it? Answer: Yes."

The court gave judgment for the plaintiff declaring the amount of the purchase money agreed to be paid by defendant to be a lien on the land and decreed a sale thereof to pay it, and ordered an account to be taken of the partnership. Defendant appealed.

Douglass & Douglass, of Raleigh, for appellant. B. C. Beckwith and C. W. Beckwith, both of Raleigh, for appellee.

WALKER, J. (after stating the facts as above). [1] It is manifest that the finding upon the first issue entitled the plaintiff to no equitable relief, as it merely shows a contract for the payment of money, which can be enforced by a simple action at law for its recovery.

[2] But the response to the fourth issue presents quite a different phase of the matter, and the facts found do entitle the plaintiff to relief in equity. Where upon receiving a deed for land the vendee promises to pay the purchase money, and the promise does not induce the delivery of the deed, or is not intended to influence the vendor to part with its possession, equity will not interfere because the vendor has an adequate legal remedy; but where he promises to pay when he has no intention of doing so, as in the present case, and the vendor is induced thereby to give up something of value, it is considered as fraudulent, and equity will intervene. 35 Cyc., treating of this question, under the title, "Intention to Pay," at page 79 et seq., says:

"Although a representation of intention ordinarily amounts to a mere promise, yet, if a person represents that he has a certain intention when he has not, he makes a misrepresentation of fact. Accordingly it is generally held that one who buys goods on credit impliedly represents that he intends to pay for them, and that if he intends not to pay for them he is guilty of fraud. The intention not to pay must be a pre-existing intention; that is, it must exist at the time of the sale, or contract to sell, and must be an intention, not merely to pay when the price falls due, or according to agreement, but not to pay at all."

The principle was then being stated in regard to personal property, but it applies equally to sales of real estate. Referring to like dealings between vendor and purchaser, the same authority says:

"A promise as to the future conduct of the party making the same, as distinguished from a statement of present fact, cannot amount to fraud or misrepresentation if the party making such promise had at the time of making it the intention of performing the same. And the same is true of a mere prediction or a statement of intention or expectation. If, however, the party making the promise had at the time of making it no intention of performance, the promise involves a false statement as to the intention of the promisor, and may amount to fraud or misrepresentation." 39 Cyc. 1256.

And again:

"A representation of intention or expectation as to some future act or performance, although it may have induced the agreement, is not a sufficient ground for a charge of fraud merely because it is not afterward carried into effect. It must have been made with intent to deceive. Where the statement of intention can be construed as really a statement of fact, it is treated as a fraud if false, as where there is a false statement of intention. It has repeatedly been held that one who purchases goods on credit impliedly represents that he intends to pay for them, and if he not only fails to disclose his insolvency, but intends at the time not to pay for them, there is such fraud on the part of the purchaser as will entitle the seller to rescind the contract." 9 Cyc. 418.

In *Edgington v. Fitzmaurice*, 29 Ch. Div. 459, Lord Justice Cotton said:

"It was argued that this was only the statement of an intention, and that the mere fact that an intention was not carried into effect could not make the defendants liable to the plaintiff. I agree that it was a statement of intention, but it is nevertheless a statement of fact."

And in the same case is the following concurring opinion of Lord Justice Bowen, which has been frequently quoted:

"A mere suggestion of possible purposes to which a portion of the money might be applied would not have formed a basis for an action of deceit. There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else. A misrepresentation as to the state of a man's mind is therefore a misstatement of fact."

Bispham's Equity (9th Ed.) § 211, under the title of "Fraud," thus states the same principle:

"The representation must not be an expression of intention merely. A man has no right to rely upon what another says he intends to do, unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement and for the breach of which the other side has ordinarily an adequate remedy at law. But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief."

Mr. Bispham is fully sustained in this view by the authorities cited by him in sup-

port of the text. As we are told by moralists and jurists, words are to be understood by courts of justice in the sense which it was intended they should have, and which those using them wished, and believed, that they should be believed by him to whom they are addressed, and the latter has the right to accept and act upon them as having such a meaning. The intention that he should thus understand them and govern himself accordingly in his business intercourse with another who used them is what gives a right to relief if it turns out that they are false, if they induce the other party to act to his prejudice relying upon the truth of what is said in accordance with a fair and reasonable interpretation of the words. If defendant said that he would pay at once, or immediately, if the deed was delivered to him, and he had no intention of keeping his promise and no ability to do so, as in this case, and he made the false statement dishonestly and for the purpose of getting possession of the deed, and thereby overreaching the plaintiff, knowing that plaintiff was trusting in his promise and its strict fulfillment, and gave up the deed because he did so confide in defendant's integrity, and in the belief that he would do exactly what he had promised, we cannot see why this is not such a false representation as would entitle the plaintiff to equitable relief. And the great weight of authority is to this effect. It was said in *Goodwin v. Horne*, 60 N. H. 485:

"Ordinarily false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable, or can be made the ground of defense. *Long v. Woodman*, 58 Me. 49; *Murray v. Beckwith*, 43 Ill. 391; *Loupe v. Wood*, 51 Cal. 586; *Jorden v. Money*, 5 H. L. Cas. 185; *Cool Torts*, 486. But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense. Such are cases of concealed insolvency and purchases of goods with no intention to pay for them. *Bradley v. Obear*, 10 N. H. 477."

And this court has announced the same doctrine in *Des Farges v. Pugh*, 93 N. C. 31, 53 Am. Rep. 446, quoting from *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993, the following:

"The doctrine is now established by a preponderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud, which entitles the vendor, if no innocent party has acquired an interest in them, to disaffirm the contract and recover the goods." And he cites a number of authorities, both English and American, to support his position."

It is further said:

"It matters not * * * by what means the deception is practiced, whether by signs, by words, by silence, or by acts, provided that it actually produce a false and injurious impression, of such a nature that it may reasonably be supposed that but for such deception the vendor might never have entered into the contract."

The principle was applied in *Crabtree v. Bradbury* (Ark.) 13 S. W. 935, to a sale of land where the facts were similar to ours, and where the court said:

"There was evidence to warrant the court in finding that appellant L. P. Crabtree obtained the deed from Bradbury through a pretended purchase of the land conveyed thereby, with the preconceived intention and determination not to pay for it; and this was a fraud for which the deed should have been canceled. * * * Fraud avoids a contract ab initio, both at law and in equity, and gives the defrauded party the right utterly to reject the contract"—citing *Taylor v. Mills*, 47 Ark. 247, 1 S. W. 283, and other cases; *Kerr on Fraud and Mistake*, 333, 334, where it is said that the contract will be rescinded or the defrauding party will be compelled in some way to make his representation good."

In *Cerny v. Paxton*, 78 Neb. 134, 110 N. W. 882, 10 L. R. A. (N. S.) 640:

"The procuring of property upon a promise which the party at the time does not intend to perform is a fraud. And it makes no difference whether the property is real or personal." * * * "Ordinarily, false promises are not fraudulent, nor evidence of fraud, and only false representations of past or existing facts are actionable. * * * But when a promise is made with no intention of performance, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense"—citing *Dowd v. Tucker*, 41 Conn. 197; *Goodwin v. Horne*, 60 N. H. 485; and numerous other cases.

[3] It can make no difference that the plaintiff could have secured the payment of the money by adopting other methods at the time; for this will not defeat his equity to relief. If defendant's promise and the declaration of his intention had been sincere and faithful, instead of the opposite, all such precautions were unnecessary and the business of life could not be conducted, if it were required that men should anticipate, and expressly guard against the wily devices to which the deceitful may resort. The defendant will not be allowed thus to take advantage of his own wrong, by which the plaintiff was innocently misled, and escape the consequences of his act by pleading that he should not have been trusted, but, on the contrary, dealt with on the supposition that he would act dishonorably. The law does not look with favor upon such an inadequate excuse for the wrong, but affords relief against the fraud because plaintiff might well have relied upon the promise and was misled by it, instead of pursuing some other course which defendant really prevented by his deceitful promise. The courts have rejected such a defense. *Piggott v. Stratton*, *De Gex, F. & G.* 33; *Sewing Machine Co. v. Bullock*, 161 N. C. 1, 76 S. E. 634. In the case last cited numerous authorities are collected to show that such a defense, which is founded, of course, not in the merit of the plaintiff, but the demerit of the defendant, is not allowable. We there said:

"We find this in *Cottrill v. Krum*, 100 Mo. 390, 13 S. W. 753, 18 Am. St. Rep. 549: 'It is no excuse for, nor does it lie in the mouth of, the defendant to aver that plaintiff might have

discovered the wrong and prevented its accomplishment had he exercised watchfulness, because this is but equivalent to saying: "You trusted me; therefore I had the right to betray you." The same idea is expressed in another opinion thus: "We doubt if it is equity to allow a sharper to insist on the fulfillment of his bargain, on the ground that his victim was so destitute of sagacity as to make no further inquiries"—citing *Pomeroy v. Benton*, 57 Mo. 531; *Wannell v. Kem*, 57 Mo. 478. No man can complain that another has relied too implicitly on the truth of what he himself stated (*Kerr on Fraud*, p. 81); for it is not just that a man who has intentionally deceived another should be permitted to say to him, 'You ought not to have trusted me, and you were yourself guilty of negligence,' when he had special knowledge of the facts, of which he knew the other to be ignorant. *Bigelow on Fraud*, p. 523 et seq. 'We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud, on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood.' *Hale v. Philbrick*, 42 Iowa, 81. 'The very representations relied upon may have caused the party to desist from inquiry and neglect his means of information; and it does not rest with him who made them to say that their falsity might be ascertained, and it was wrong to credit them. To this principle many authorities might be cited.' *Graham v. Thompson*, 55 Ark. 299 [18 S. W. 58, 29 Am. St. Rep. 40]. 'A person cannot procure a contract in his favor by fraud, and then bar a defense to suit on it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him.' *Warder v. Whitish*, 77 Wis. 430 [46 N. W. 540]. 'However negligent the party may have been to whom the incorrect statement has been made, yet that is a matter affording no ground of defense to the other. No man can complain that another has too implicitly relied on the truth of things he has himself stated.' *Reynell v. Sprye*, 1 De Gex, M. and G. 549. These cases are approved in *Strand v. Griffith*, 97 Fed. 854 [38 C. C. A. 444], which is a very instructive one"—citing also *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377; *Pollock on Torts*, 293, and *Griffin v. Lumber Co.*, 140 N. C. 514, 53 S. E. 307, 6 L. R. A. (N. S.) 463, where the principle as stated in the above cases was applied.

In the connection and also on the general question as to the representation being actionable, we may add the case of *Herndon v. Railway Co.*, 161 N. C. 650, 77 S. E. 683, where it was held that a promise without any intention to perform it, and merely to induce action by another, is fraudulent in a legal sense, and the party who is the victim of the fraud is entitled to relief, citing *Hill v. Gettys*, 135 N. C. 375, 47 S. E. 449, and *Braddy v. Elliott*, 146 N. C. 582, 60 S. E. 507, 16 L. R. A. (N. S.) 1121, 125 Am. St. Rep. 523, both of which fully sustain the principle, and they were decided upon transactions concerning the conveyance of lands, and not sales of personal property.

[4] The next question is as to the proper remedy. The plaintiff would be entitled to rescission of the contract and cancellation of the deed, but is this the only relief? *Kerr on Fraud and Mistake* at page 333 says that, when a contract has been induced by false representation or the transaction is tainted with fraud and the person who committed the fraud is a party to the transaction, the

latter will be set aside, if the nature of the case and the condition of the parties admit of it, or the defrauding party will be compelled to make his representation good, so that "the one whose interest has been affected by the misrepresentation (or fraud) has an equal right to be placed in the same situation as if the fact stated were true." He then says that the defrauded party may elect to have the transaction set aside, or to have such relief as will make good the representation. We do not base the right to the decree upon the doctrine of the vendor's lien, which does not exist in this state, but upon the equity arising out of the fraud to have the purchase money made a charge upon the land, upon the idea that defendant should be adjudged to hold the land in trust because of the fraud, and not be entitled to hold it absolutely until the purchase money has been paid. It is not, in principle, unlike the case of *Sykes v. Boone*, 132 N. C. 199, 43 S. E. 645, 95 Am. St. Rep. 619, where a trust was created because the title had been obtained by a false promise. It is in the nature of a trust *ex maleficio*. It was said in a similar case:

"Where the party fraudulently obtained the conveyance having at the time no intention of procuring a conveyance to his grantor, equity should have no hesitation in treating the transaction as a completed sale and requiring him to pay the value of the premises he received and retained. The mere fact that the person defrauded might have a remedy at law would not deprive her of the right to come into a court of chancery and have the agreed consideration, or the value of the premises, declared to be an equitable lien upon the lands." *Merrill v. Allen*, 38 Mich. 487.

It would be against conscience for defendant to hold the land, as he insists he has the right to do, and not pay for it, after procuring the deed and the title by a fraud practiced upon the plaintiff.

A court of equity is not bound to wrest the property from the wrongdoer by a rescission, but may mold its decree to the particular and controlling equity of the case and the real and substantial rights of the parties. *Story's Eq. Jur.* §§ 27 and 28; *Edwards v. Culberson*, 111 N. C. 342, 16 S. E. 233, 18 L. R. A. 204, where Chief Justice Shepherd discussed the subject at length. Equity makes use of the machinery of a trust for the purpose of affording redress in cases of fraud, and will follow the property obtained by a fraud in order to remedy the wrong, and only stops the pursuit, when the means of ascertainment fails or the rights of bona fide purchasers for value, without notice of the fraud or trust, have intervened.

"The beautiful character, pervading excellence, if one may say so, of equity jurisprudence," says Judge Story, "is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes." *Edwards v. Culberson*, *supra*.

"It is very evident," said the court in *Danzen's Appeal*, 73 Pa. 65, "that the deed was a

mortgage, or a trust *ex maleficio* would arise; for when the deed was delivered no consideration passed. Miller procured the estate without payment of any purchase money, and therefore stood in no better situation in point of fact than one in whose name a deed is taken by another who pays the purchase money. In equity the estate should remain in Lanzeisen, who had received nothing but a promise to raise money for his use, unless the promise to raise be equivalent of the money when raised. If the promise was not intended to be performed by Miller, the deed was obtained by a deceit, and it was a fraud at the time it was delivered. But if the promise be performed, the true intention of the parties is executed, and the deed should stand as a security for the money."

But more directly to the point is the following statement of the principle in 2 Story's Eq. Jur. § 1265, p. 495:

"In equity even more strongly than at law the maxim prevails that no man shall take advantage of his own wrong. The truth is that courts of equity, in regard to fraud, whether it be constructive or actual, have adopted principles exceedingly broad and comprehensive in the application of their remedial justice, and especially where there is any fraud touching property, they will interfere, and administer a wholesome justice, and sometimes even a stern justice, in favor of innocent persons who are sufferers by it without any fault on their own side. This is often done by converting the offending party into a trustee, and making the property itself subservient to the proper purposes of recompense, by way of equitable trust or lien. Thus a fraudulent purchaser will be held a mere trustee for the honest, but deluded and cheated vendor."

The purchaser, where he has procured the title by fraud, will be treated as holding the land in trust (*ex delicto* or *ex maleficio*) for the benefit of his vendor, at least, in order that his obligation to the latter may be enforced. If one invests the money of another in land especially when the money has been obtained by fraud, a court of equity will follow the fund so laid out in the land, and subject the latter by sale, if necessary, to the reimbursement of the defrauded party or owner of the money. *Edwards v. Culbertson*, supra.

"In cases of this sort the cestui que trust (the beneficiary) is not at all bound by the act of the other party. He has therefore an option to insist upon taking the property, or he may disclaim any title thereto, and proceed upon any other remedies to which he is entitled, either in rem or in personam. The substituted fund is only liable to his option. But he cannot insist upon opposite and repugnant rights." 2 Story's Eq. Jur. § 1262.

What substantial difference is there between such an equity and ours, where land is procured, instead of money, upon a false and fraudulent representation of intention to pay for it. The form of the transaction is different, but not the substance. It is said that:

"The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto* are practically without limit, and the principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoers." 2 Pomeroy's Eq. Jur. § 1053, p. 628.

[5] But if this were not a valid reason for declaring the lien, the decree should be sustained, upon the ground that the declaration

of a lien is necessary to conform to the purpose for which the conveyance was made, and to execute that purpose, viz. that the property should become a part of the partnership's assets, each of the parties contributing one-half of the purchase money for the original tract bought of Eunice Dunn.

[6] The plaintiff is not entitled to any accounting for rents and profits as vendor, which relief would follow a rescission, for the decree merely carries out the contract, and vests the title to the land in the defendant, subject, however, to the payment of the purchase money. What will be the rights of the parties in this land hereafter growing out of their partnership dealings we need not now determine, nor until the account is taken. The sections of the judgment numbered 1, 2, 3, 4, and 5, being the questions "specially referred to," will be stricken out at present and without prejudice, and a reference ordered to take and state the partnership account, if necessary. The questions eliminated above, if they became material in taking the account, or in the further progress of the case, may then be considered, but no rents and profits can be recovered unless due by defendant to the partnership in some way or to plaintiff on account of the partnership relation.

[7] The other questions are not important. The creditors cannot be affected by this judgment; they not being parties to the action. It will be time enough to hear them when they assert their rights.

[8] There is an exception to remarks of counsel. As we said substantially in *State v. Davenport*, 156 N. C. 596, 72 S. E. 7, and *State v. Tyson*, 133 N. C. 692, 45 S. E. 838, it must be left largely to the discretion of the judge at what stage of the case he will interfere to protect a party against any abuse of privilege by counsel. If the offense is aggravated, it may call for immediate action, and it may always be safer to act promptly, and also to give the jury proper caution in the charge against any wrong influence of improper remarks made in the heat and zeal of debate, but at least it is a case for the exercise of a sound and wise discretion, and for a full provision against harm to the injured party. Counsel, too, should be careful lest they spoil a verdict, otherwise perfectly good, by intemperate utterances or immoderate speech.

[9] A party or witness should not be subjected unjustly to abuse which is calculated to degrade him or to bring him into ridicule or contempt, and when this occurs, he is clearly entitled to the protection of the court when he asks for it in proper time, and sometimes, perhaps, when he does not, for the court should extend it voluntarily, in the exercise of its judgment and if necessary in order that the trial may proceed fairly and impartially and lead to a just result. We have adverted to this matter again because

of the comparative frequency of such exceptions as this one. In this case the judge acted quickly and administered a proper caution. *State v. Hill*, 114 N. C. 780, 18 S. E. 971. Counsel, no doubt, was exasperated by the alleged conduct of the witness on the stand towards him, and was, in a measure, excusable for what he said under the influence of the supposed provocation, and certainly does not seem to have been blamable for any intentional excess of description or denunciation. We are not ready to say that abuse by counsel may not be so gross sometimes as to require the court to interfere of its own volition, without any appeal from a party, but this question is not before us. See *State v. Tyson*, supra; *State v. Davenport*, supra. The remarks of counsel were checked by the judge, and what the attorney afterwards said was addressed to the court, and not to the jury. We cannot see that any harm was done. It was sufficient that the judge promptly intervened and stopped counsel in a proper manner, and his language was explicit, positive, and peremptory enough.

There was no error in the rulings of the court upon the questions of evidence, and the judge was right in confining the trial to the material questions in controversy.

The judgment will be modified as herein indicated.

Modified.

(107 S. C. 32)

WAIT v. WILLIAMS. (No. 9654.)

(Supreme Court of South Carolina. March 26, 1917.)

1. PLEADING ⇨362(3)—MOTION TO STRIKE—IMMATERIAL AVERMENTS—ANSWER.

In an action on a written contract reciting that plaintiff had sold and conveyed to defendant a tract of land, the consideration being various sums and lands in exchange, together with the satisfaction and payment of a note and chattel mortgage executed to plaintiff by another, on which there was due considerably more than \$1,000, but that it was inconvenient to pay the same, and therefore defendant agreed to pay plaintiff \$1,000 in full satisfaction of the note and mortgage, or if defendant preferred the same should be assigned to him, averments in the answer as to what defendant said the mortgagor told him, together with the mortgagor's denial of the claim, held properly stricken; such allegations raising no issuable fact, and there being no averment that defendant believed them.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1152.]

2. CONTRACTS ⇨334—ACTION—ANSWER—FAILURE OF CONSIDERATION.

In such case, the answer after the striking out of allegations as to statements of the mortgagor held sufficient to show a failure of consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1660-1663.]

3. GUARANTY ⇨4—CONSTRUCTION.

Such contract was not merely a guaranty of the payment of the note and mortgage, but was an express agreement to pay the sum named.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3-6.]

4. ASSIGNMENTS ⇨97—ASSIGNMENT WITHOUT RECOURSE—OBLIGATION OF INDORSER.

An assignment of a chose in action, without recourse, as a mortgage and note, relieves the assignor of the general liability of an indorser, but in the absence of further limitation he is liable on the implied warranties of a vendor that the note and mortgage are valid and subsisting legal obligations, and that the property described in the mortgage is subject to levy.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 172-175.]

5. CONTRACTS ⇨91—ACTIONS—DIRECTED VERDICT.

In an action on a contract, where defendant set up failure of consideration, and there was evidence to support his plea, verdict should not be directed for plaintiff.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 259.]

Appeal from Common Pleas Circuit Court of Greenville County; T. J. Mauldin, Judge.

Action by W. L. Wait against J. Hudson Williams. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

James H. Price, of Greenville, for appellant. B. Wofford Wait, of Darlington, and J. J. McSwain, of Greenville, for respondent.

HYDRICK, J. This action was brought on a written contract, dated February 25, 1915, in which it is recited that plaintiff had sold and conveyed to defendant a tract of land, the consideration being various sums and lands in exchange, "together with the satisfaction and payment of a note and chattel mortgage executed to said Wait by L. P. Hendrix, on which said note there is considerably more than \$1,000 due," but that it was inconvenient then to pay the same; and therefore, in consideration of the premises and the extension of time for payment, defendant agreed to pay plaintiff \$1,000, on November 1, 1915, which was to be in full satisfaction of the note and mortgage, or, if defendant preferred, the same were to be assigned to him by plaintiff, without recourse.

The first paragraph of defendant's answer was a general denial, except as thereafter admitted; and the remaining paragraphs were as follows:

"(2) That defendant admits the execution of the contract specified in the complaint, but alleges (as will be shown by said contract) that it was in simple words merely to guarantee to plaintiff the payment of a note and mortgage due plaintiff by L. P. Hendrix. That defendant was informed and believed by plaintiff or his agents that the said note and mortgage was perfectly good, and that there were no defenses to the same. That defendant has himself called upon L. P. Hendrix for the payment of the said note and mortgage, and alleges that the said L. P. Hendrix claims that the same is unjust, and that he is not due plaintiff anything like \$1,000. Defendant alleges that the said L. P. Hendrix is an ignorant man, and plaintiff is a minister of the gospel, and that the said L. P. Hendrix declares that the said plaintiff induced the said L. P. Hendrix to sign the said note and mortgage under misrepresentations, and was charging him for a lot of fertilizers which plaintiff of his own accord shipped to Greenville to sell two or three years ago. That the said L. P. Hendrix

denies the said note and mortgage, and sets up the defense of failure of consideration against the same. That defendant has served notice upon the said L. P. Hendrix to appear and defend the complaint in this case.

"(3) *That by reason of the defense entered by the said L. P. Hendrix against the said note and mortgage, which defendant believed to be absolutely good from statements made to him when the trade referred to was made, defendant alleges that there has been a failure of consideration for the contract set forth in the complaint.*"

On plaintiff's motion, the court struck from the answer the parts italicized. Plaintiff proved tender of the note and mortgage assigned to defendant, without recourse, and defendant's refusal of payment. Defendant testified that some of the property described in the mortgage is not in existence, some of the stock having died, but did not say whether it died before or after he signed the contract with plaintiff. L. P. Hendrix, the mortgagor, testified "that he did not consider that he owed anything on the note and mortgage," and that "he would fight the note, and mortgage in court." The court excluded the details of his transactions with plaintiff, to which no exception was taken. There was other testimony, which is not relevant to the points decided. Defendant appeals from judgment on verdict directed for plaintiff, and raises the issues herein considered.

[1] There was no error in striking from the answer the matter italicized. It states no defense or issuable fact. It states only what defendant says Hendrix told him, or what he says Hendrix claims with regard to the note and mortgage and his liability thereon. Defendant does not allege, even on information and belief, that what Hendrix told him, or what Hendrix claims, is true.

[2] But there was enough left in the answer to admit evidence of the failure of consideration of the contract sued on, which could have been shown by proving the want or failure of consideration of the note and mortgage prior to the date of the contract sued on, or the existence at that time, of defenses to the note and mortgage which would have defeated in whole or in part the recovery of a judgment for what was called for on the face of those papers.

[3] The contention of defendant that the contract is only a guaranty of the payment of the note and mortgage is too untenable to require discussion. In language too plain to admit of doubt, defendant agreed to pay plaintiff \$1,000 for an assignment of the papers, without recourse.

[4] An assignment of a chose in action, without recourse, relieves the assignor of the general liability of an indorser; but, in the absence of any further limitation of his liability, he is liable upon the implied warranties of a vendor, who impliedly warrants that the thing sold is what it purports to be—in this instance, that the note and mortgage were valid subsisting legal obligations for the amount called for by the note, and the prop-

erty described in the mortgage. *Strange v. Ellison*, 2 Ball. 385; *Hall v. Latimer*, 81 S. C. 90, 61 S. E. 1057; *Bank v. Speegle*, 91 S. C. 13, 74 S. E. 40. But there is no implied warranty of the solvency of the mortgagor, or of the value of the property described in the mortgage. The law is stated in 2 R. C. L. at page 627:

"Even where the words 'without recourse' are added in an assignment of a chose in action, there still remains an implied warranty that the right transferred is what it purports to be, namely, that it is a valid and genuine obligation of the parties, based on adequate and sufficient consideration, and that the amount of money it calls for was owing and unpaid at the time of the assignment."

The authorities cited in the note fully sustain the text. See especially the case of *Trustees v. Siers*, 68 W. Va. 125, 69 S. E. 468, Ann. Cas. 1912A, 924, and the authorities cited in the principal case, and the note reviewing the authorities.

[5] There is no exception to the exclusion of the testimony of Hendrix with regard to his transactions with the plaintiff, which might or might not have shown the want or failure of consideration of the note and mortgage; therefore the judgment cannot be assailed on that ground; but there was enough in his testimony and in that of defendant to warrant a reasonable inference that, at the date of the contract sued on, the amount called for on the face of the note and mortgage was not due and owing by the mortgagor, and that some of the property described in the mortgage was not then in existence. True, the testimony upon these points is very vague and indefinite, and therefore unsatisfactory and inconclusive, and we do not intimate any opinion as to whether the inferences suggested should or should not have been drawn from it, but, as it was susceptible of those inferences, the court erred in directing the verdict.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(107 S. C. 90)

PORTER v. BENNETTSVILLE & C. RY.

(No. 9659.)

(Supreme Court of South Carolina. March 28, 1917.)

1. MASTER AND SERVANT ~~6-285(9)~~—INJURIES TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In a railroad section foreman's action for injuries caused by an unfastened telephone booth eight feet high with a base of three by four feet which fell upon him, in which the evidence was conflicting on the question whether the height of the booth was out of proportion to its base, the issue of defendant's negligence held for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1016.]

2. EVIDENCE \Leftrightarrow 513(2)—OPINION EVIDENCE—EXPERTS—COMPETENCY.

A carpenter admittedly qualified to testify as an expert with regard to the proper construction of buildings generally, although he had no experience in the building of telephone booths, was properly allowed to express his opinion that the booth was too high for its base, since the question before the court was the stability of the structure, and not its fitness as a telephone booth.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318.]

3. DAMAGES \Leftrightarrow 216(1) — INSTRUCTIONS — MEASURE.

An instruction on measure of damages reading "If you find the plaintiff is entitled to recover actual damages, you may take into consideration future damages, and future damages are reasonably certain will result in the future from the injury," and "you may take into consideration the loss of time and capacity to earn a livelihood, physical and mental pain and suffering, and that which he is reasonably certain of necessity to suffer in the future, the permanency of the injury, and the impairment of his health," was not subject to the too critical objection that it authorized an award of damages not caused by plaintiff's physical injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548, 549.]

Appeal from Common Pleas Circuit Court of Marion County; Thos. S. Sease, Judge.

Action by John W. Porter against the Bennettsville & Cheraw Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

D. D. McColl, of Bennettsville, and A. F. Woods, of Marion, for appellant. L. D. Lide and W. F. Stackhouse, both of Marion, for respondent.

HYDRICK, J. Defendant appeals from judgment for plaintiff for \$3,000 damages for personal injuries.

While plaintiff was at work on defendant's track as section foreman, a telephone booth placed by the track for the purpose of giving train orders was blown down and fell on him, injuring him severely and permanently in body and limb.

[1] The base of the booth was about 3x4 feet, and it was 8 feet high. It was set upon two rough-hewn cross-ties without being braced or anchored to the ground or fastened to the cross-ties. Plaintiff's evidence tended to show that its height was out of proportion to its base to withstand an ordinary wind, and that it was overturned by such a wind. Defendant's evidence tended to show that it was a reasonably safe structure, and that it was blown down by a storm of extraordinary violence. Plaintiff's evidence warranted a finding of actionable negligence, and defendant's evidence did no more than raise a conflict as to that issue; therefore the court properly overruled defendant's motion for a directed verdict, and submitted the issue of defendant's negligence to the jury.

[2] One of plaintiff's witnesses who had been a carpenter and building contractor for 22 years was allowed to express his opinion

that the booth was too high for its base. The objection to this testimony was, not that the witness was not qualified to testify as an expert with regard to the proper construction of buildings generally, but that it did not appear that he had had any experience in the building of telephone booths. The question before the court was not as to the fitness of the structure as a telephone booth, but as to its stability, as to which the witness was competent to speak as an expert. The objection was properly overruled.

[3] As to the measure of damages, the court told the jury:

"If you find the plaintiff is entitled to recover actual damages, you may take into consideration future damages, and future damages are such as are reasonably certain will result in the future from the injury. You may take into consideration the loss of time and capacity to earn a livelihood, physical and mental pain and suffering, and that which he is reasonably certain of necessity to suffer in the future, the permanency of the injury, and the impairment of his health."

The objection that this instruction allowed the jury to award damages for mental anguish not caused by plaintiff's physical injuries is too critical.

Judgment affirmed

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(107 S. C. 99)

MOLLOY v. MOLLOY. (No. 9662.)

(Supreme Court of South Carolina. March 29, 1917.)

HUSBAND AND WIFE \Leftrightarrow 295, 300—ACTION FOR ALIMONY—TEMPORARY ALIMONY—DISCRETION OF COURT.

In an action for alimony, the allowance of temporary alimony and counsel fee is a question largely within the discretion of the circuit judge, and his decision will not be reviewed except for an abuse of such discretion.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1084-1088, 1098.]

Appeal from Common Pleas Circuit Court of Charleston County; Edward McIver, Special Judge.

Action for alimony by Agnes E. Molloy against T. L. Molloy. From an order granting plaintiff's motion for temporary alimony and counsel fee, defendant appeals. Appeal dismissed.

Logan & Grace, of Charleston, for appellant. Legge & Allan, of Charleston, for respondent.

FRASER, J. This is an action for alimony, begun by service of a summons and complaint, the complaint being afterwards amended. The defendant demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. Pending a hearing on the demurrer motion was made before his honor, Special Judge Edward McIver, for temporary alimony and

counsel fee. His honor granted the application, and this appeal is from his order.

Appellant in his argument says:

"While there are three exceptions, they raise a single question, that the entire record comprising the complaint, the affidavits on behalf of plaintiff and on the part of the defendant show that plaintiff is not entitled to temporary alimony."

In *Levin v. Levin*, 68 S. C. 126, 46 S. E. 945, this court says:

"The delicacy of the subject makes the application of principle to the facts of each case the real judicial task."

In *Gordon v. Gordon*, 91 S. C. 245, 74 S. E. 360, and other cases it is held that the question of the allowance of temporary alimony and counsel fee is a matter largely within the discretion of the circuit judge, and this court sees no abuse of discretion in the case.

The appeal is dismissed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(107 S. C. 28)

NATIONAL BANK OF SAVANNAH v. SOUTHERN RY., CAROLINA DIVISION. (No. 9652.)

(Supreme Court of South Carolina. March 22, 1917.)

1. ACTION ⇐27(1)—MISDESCRIPTION OF BILL OF LADING—NATURE OF ACTION.

An action against a carrier for negligently issuing a bill of lading misdescribing the property is based upon tort, and not contract.

[Ed. Note.—For other cases, see *Action, Cent. Dig. §§ 160-176, 195.*]

2. TORTS ⇐22—JOINT LIABILITY—CARRIER AND SHIPPER.

A railroad company and shipper co-operating in issuing bills of lading falsely describing property shipped are joint tort-feasors.

[Ed. Note.—For other cases, see *Torts, Cent. Dig. §§ 29, 31.*]

3. JUDGMENT ⇐631—PAYMENT—EFFECT ON ACTION AGAINST JOINT TORT-FEASORS.

Although judgment may be recovered against either or both joint tort-feasors, collecting the entire judgment against one tort-feasor bars further proceedings against the other.

[Ed. Note.—For other cases, see *Judgment, Cent. Dig. §§ 1064, 1088, 1147.*]

Appeal from Common Pleas Circuit Court of Kershaw County; A. W. Holman, Special Judge.

Action by the National Bank of Savannah against the Southern Railway, Carolina Division. Judgment for defendant, and plaintiff appeals. Affirmed.

Garrard & Gazan, of Savannah, Ga., and McCullough, Martin & Blythe, of Greenville, for appellant. B. L. Abney and Frank G. Tompkins, both of Columbia, for respondent.

WATTS, J. This is an action of plaintiff against the defendant for \$13,004.04, and interest at 7 per cent. per annum from January 6, 1911. The defendant answered denying the material allegations of the complaint. At that time there was pending in the United

States Court for the District of South Carolina an action by the same plaintiff against the Kershaw Oil Mill and Lancaster Oil Company, which action was based on the same facts set out in the complaint herein. This case in the United States court after protracted litigation resulted in the plaintiff's finally obtaining judgment on January 29, 1913, for the sum of \$11,416.58, which was paid on April 3, 1914, at that time amounting to \$12,353.37.

The defendant after this judgment was paid filed a supplemental answer to the complaint in this case and alleged and sets up as a bar to this action the proceedings in the federal court, alleges payment of the judgment, and pleads the recovery and satisfaction of this as a bar to this action, and sets up as another defense that the claim is barred because of the fact that it was not filed within four months prescribed by the bills of lading. The defendant demurred to these two defenses, and the cause was heard by Special Judge W. A. Holman, at the summer term of court, 1914, for Kershaw county, who sustained the demurrer relative to the time of filing the claim and overruled the demurrer as to the plea of the defendant that the payment of the judgment obtained in the federal court was a bar to the action.

From this order both plaintiff and defendant appeal, and the questions raised by the exceptions present two questions for the determination of this court. The first is:

"Under the facts of this case is the judgment and satisfaction thereof in the case of plaintiff against the Kershaw Oil Mills in the federal court a complete bar to this cause of action?"

We will consider this question. No one is entitled but for one full compensation for a violation of his rights.

[1] The plaintiff insists that his action against the oil mill was an action in tort, and against the defendant is an action in contract. We think under the facts in the case that this is a fine-drawn distinction. The erroneous statement placed in the bills of lading by the oil mill companies and the defendant railroad constituted a tort. It was by reason of this erroneous statement alone that the bank was induced to pay out money for the bills of lading and lost its money. The preliminary question to be determined is whether this action is for breach of contract or a tort. The action is for an alleged violation of duty on the part of the defendant in negligently issuing a bill of lading purporting to be cotton when it was "linters." The alleged violation of duty on the part of the defendant was a tort. The action is for a tort. The plaintiff was injured by the defendant's negligence in issuing a bill of lading containing erroneous statement by reason of which plaintiff suffered damage. Chief Justice Gary, in *Pickens v. Railroad Co.*, 54 S. C. 502, 32 S. E. 567, laid down the law that:

"An action by a passenger against a railroad company for failure to carry her to her destination by reason of its negligence is an action in tort, and not one in contract."

[2] The complaints by the plaintiff in the two cases are identical. It is conclusively shown that both actions grew out of the same state of facts under the allegations of the complaint. The Kershaw Oil Mills Company and the railroad company acted together and caused to be issued the alleged fraudulent bills of lading in question. The allegations of the complaint make the oil mills and the railroad joint tort-feasors. It alleges and shows that the railroad company at the request of the oil mills assisted the oil mills in carrying out its purpose as to the issuance of erroneous and misleading bills of lading. The wrong act of one was the wrong act of both; they acted together in concert, and by mutual assistance aided each other in issuing the erroneous bills of lading. The oil mill requested it. The railroad acceded to this request, and issued the bills of lading as asked for. The wrong done to the plaintiff was the joint act of the defendant and the oil mill. Both were joint tort-feasors.

[3] The plaintiff had the right to sue them separately and to recover judgment against each. If the plaintiff had prosecuted both actions to judgment, it could have done so, and then elected which judgment it would collect, but it could have only one satisfaction. The plaintiff could have a judgment against either of the defendants or both as they were joint tort-feasors, but it could have but one satisfaction for the wrong done. But when the plaintiff obtained its judgment against the oil mill and accepted satisfaction of it, as was done in this case, then under the law the defendant was released from all liability to the plaintiff. There was but a single tort, and by the acceptance of the amount paid on the judgment obtained in the federal court and satisfying the same the plaintiff was compensated for all damages it sustained by reason of the wrongful issuance of the bills of lading in the action.

It is unnecessary for us to consider the exceptions made by the defendant.

The plaintiff's exceptions are overruled. Judgment affirmed.

GARY, C. J., and HYDRICK, J., concur in the result. FRASER and GAGE, JJ., concur.

(107 S. C. 109)

THOMAS et al. v. SPARTANBURG RY., GAS & ELECTRIC CO. et al. (No. 9865.)

(Supreme Court of South Carolina. March 29, 1917.)

1. DISCOVERY §51 — SHOWING REQUIRED — STATUTE.

In administering the remedy of discovery, under Code Civ. Proc. 1912, §§ 427, 428, et seq., the rules that formerly obtained in equity as to the showing required, etc., which have not

been changed by statute, are generally adhered to.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 85.]

2. DISCOVERY §55 — APPLICATION — PRIMA FACIE SHOWING.

To warrant a court in exercising the power of granting discovery under statute, the moving party should show, at least prima facie, such facts as will enable the court to form its own opinion.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 68-70.]

3. DISCOVERY §97(4) — STATUTE — AFFIDAVIT — SUFFICIENCY.

Under Code Civ. Proc. 1912, §§ 427, 428, et seq., an order to compel defendant to furnish a paper should not be granted upon an affidavit which merely assumes existence of paper and fails to show that the persons applied to for inspection had possession at time of application and refused to allow inspection, or that inspection is necessary for prosecution of action.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 128, 129.]

4. DISCOVERY §48 — PERSONS WHO MAY BE EXAMINED.

Under Code Civ. Proc. 1912, §§ 427, 428, et seq., a bill of discovery should not be granted for examination of parties not officers or agents of a corporation to be examined.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 62.]

5. APPEAL AND ERROR §559 — ORDER SETTLING CASE — IRRELEVANT MATTER.

An order settling the case, which required appellants to print a great deal of irrelevant matter in the "case," will be reversed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2483-2489.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Thos. S. Sease, Judge.

Action by A. J. Thomas and others against the Spartanburg Railway, Gas & Electric Company and another. From an order allowing plaintiffs to examine as witnesses officers of the unnamed defendant, and an order settling the "case," defendants appeal. Both orders reversed.

Sanders & De Pass, of Spartanburg, for appellants. Gwynn & Hannon, Nicholls & Nicholls, and John Gary Evans, all of Spartanburg, for respondents.

HYDRICK, J. Plaintiffs brought this action to recover of defendants the penalties provided by statute (sections 3949, 3950, vol. 1, Civ. Code 1912) for the failure of defendants to provide their cars with fenders, and alleged, inter alia, that the defendant Spartanburg Railway, Gas & Electric Company became liable for the penalties from February 23, 1910, the date the statute became effective, until the latter part of 1912, when the defendant the South Carolina Light, Power & Railways Company "obtained all or a part of the stock of the said Spartanburg Railway, Gas & Electric Company and assumed control of same, enjoying all the rights and privileges, and incurring all the liabilities and penalties, of its predecessor," and

that, since that time, the defendant South Carolina Light, Power & Railways Company has incurred and is liable for such penalties, to wit, \$10 a day for every day that its cars were operated without fenders.

The defendants filed separate answers, and each denied liability upon numerous grounds, unnecessary to mention here, and pleaded a misjoinder of actions. Some time after the filing of the answers, defendants gave notice that, on the call of the case for trial, they would move to require plaintiffs to elect against which defendant they would go to trial. On May 23, 1916, on motion of plaintiffs, the court ordered F. H. Knox and W. S. Glenn to appear and be examined by plaintiffs as witnesses and officers of the defendant South Carolina Light, Power & Railways Company. From that order the defendants appealed, and also from an order settling the "case."

[1] Plaintiffs sought to take the testimony of the witnesses named under the provisions of chapters 5 and 6, sections 427, 428, et seq., of the Code of Civil Procedure, which take the place of the former equitable remedy by a bill of discovery. *Hall v. Joiner*, 1 S. C. 186. Therefore, in administering the statutory remedy, the rules that formerly obtained in equity as to the kind of showing that it was necessary to make to obtain discovery, and as to when discovery would be allowed, and to what extent, are generally adhered to, except where they have been abrogated or modified by statute. 9 R. C. L. 166, 181; 14 Cyc. 340 et seq.

The motion in this case was made upon the pleadings, and upon a written request previously served upon defendants' attorneys, to which no response appears to have been made, and on affidavit of Mr. Gwynn, one of plaintiffs' attorneys. The request is to the effect that plaintiffs' attorneys be permitted to inspect and copy, or that defendants' attorneys furnish them with a copy of, the documentary evidence or records showing that the Spartanburg Railway, Gas & Electric Company sold all its property and franchises to the South Carolina Light, Power & Railways Company, as alleged in the answer of said defendant, and the evidence in support of the denial therein that said defendant incurred any of the liabilities or penalties of its predecessor. The request proceeds:

"If you cannot do this, or decline to do so, tell us where the information can be found, or give us a statement of one of the officers of the companies, either Mr. Knox or Mr. Glenn, covering the matters in question. This may be more convenient and expeditious. A statement of any responsible person who knows the facts will be satisfactory to us."

The substance of Mr. Gwynn's affidavit is that he had received a letter from the secretary of state to the effect that the records in that office do not show any connection between these defendants; that he had examined the city and county records, without being able to find any evidence of such con-

nection; that he had made inquiry of "every individual whom he thought knew anything about the transaction, that deponent thought would be willing to disclose the same"; that defendants have refused to give any information; that "deponent believes it will be necessary for the defendant to use the papers or documents, or evidence of same, at the trial to make his defense, and that unless the plaintiff is allowed an inspection of, or allowed to make or have a copy, it will be impossible for him to prepare and properly prosecute his cause of action."

[2] In *Jenkins v. Bennett*, 40 S. C. 393, 18 S. E. 929, Chief Justice McIver, speaking for the court with regard to the examination of a party under the statute, said:

"We think it clear that, before this somewhat extraordinary power should be exercised, the moving party should show, at least *prima facie*, such fact or facts as would enable the court to exercise its discretion as to whether such a power as is invoked should be exercised. Now, in this case no *facts* of any kind are stated in the affidavit upon which the motion was based. The bald statement, that the papers desired to be inspected 'contain evidence relating to the merits of the action,' is nothing more than an expression of the plaintiff's *opinion*, and cannot be regarded as a statement of any *fact*. Again, we think that there should be some statement showing a necessity for the exercise of such a power. It does not appear that any request or demand to be permitted to make the inspection has been made and refused. For aught that appears, such a demand or request would have been complied with; and this, we think, ought to have appeared."

[3] When analyzed, the showing made by plaintiffs in this case appears to be clearly insufficient under the rule stated in *Jenkins v. Bennett*, *supra*, to warrant the exercise of the discretion vested in the court by the statute. In the first place, it is not stated positively, or even upon information and belief, that any such paper as plaintiffs desire to inspect and copy is in existence; that such a paper exists is merely assumed, without stating any fact upon which such assumption may be predicated. The South Carolina Light, Power & Railways Company denied in its answer that it assumed liability for penalties incurred by its predecessor, which, by necessary implication, is a denial of the existence of any such paper. Moreover, if there is any such paper in existence, it is not stated positively, or even inferentially, that any of the persons applied to for permission to inspect and copy it had possession of it at the time of such application and refused to allow plaintiffs to inspect and copy it. Mr. Gwynn does not say that he applied either to Mr. Knox or Mr. Glenn to ascertain whether any such paper is in existence, and, if so, to be allowed to inspect and copy it. On the contrary, the inference from his affidavit is that he did not apply to either of them, for he says that he applied only to these "whom he thought would be willing to disclose the same," without giving the name of a single person to whom he applied, except the defendants' attorneys. Clearly they were un-

der no legal obligation to comply with his request, and plaintiffs do not seek to have them examined.

Furthermore, no facts are stated from which the court can conclude that discovery of such paper, if it be in existence, is necessary to the prosecution of plaintiffs' action. We have only Mr. Gwynn's opinion that it is. Facts should have been stated which would have enabled the court to form its own opinion. In the last part of the affidavit, above quoted, Mr. Gwynn says that he believes that it will be necessary for defendant to use the paper to make out its defense, and, unless he is allowed to inspect and copy it, it will be impossible for plaintiffs to prepare and prove their cause of action, which seems to be a non sequitur; for, if defendants must use it to make out their defense, they will have to produce it at the trial, and put it in evidence, and then plaintiffs can avail themselves of it for what it may be worth in making out that part of their cause of action which depends upon the assumption by one of the defendants of the liability incurred by its predecessor. Plaintiffs really want defendants to furnish them with information which will enable them to decide which one of the defendants they have the best cause of action against, and which one it will be best for them to elect to proceed to trial against.

[4] Again, it is not stated positively, or even on information and belief, that Mr. Knox and Mr. Glenn are officers of the defendant corporations, or either of them. That, too, seems merely to have been assumed. If they are not officers or agents of the corporation to be examined, clearly plaintiffs have no right to examine them under the provisions of the Code under which this motion was made; nor is it stated, either positively, or on information and belief, that either of them has such paper, or has ever had or seen it. Plaintiffs' purpose appears to be merely to fish for evidence.

In this view of the case it becomes unnecessary to decide whether discovery on the part of a corporation may be compelled, in a proper case and upon a proper showing therefor, by examination of its agents or officers, who are not parties to the action, as to which no opinion is expressed. The question is not raised, and therefore we do not decide whether, in the absence of a statute modifying the general rule of evidence, a party to an action, whether individual or corporation, can be required to discover evidence that would subject him to a penalty or forfeiture. But see 9 R. C. L. 179; 14 Cyc. 335; 1 Or. Ev. § 451.

[5] The order settling the "case" must also be reversed, because it required appellants to print a great deal of irrelevant matter in violation of the rules of this court. The "case" proposed by appellants contained all that was necessary for a proper presentation of the questions made by the appeal. If any-

thing, it contained more than was necessary, for it proposed to set out the pleadings in full, when they should have been briefed, omitting matters irrelevant to this appeal. The amendment proposed by respondents to print the entire record was improper, and should not have been allowed. If there had been anything in the record that would throw light upon the questions raised by the exceptions, that alone should have been offered as an amendment.

Both orders are reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

(107 S. C. 106)

SILVEY'S ESTATE et al. v. KOPPELL et al.

CRADDOCK-TERRY CO. v. SAME.

WARD-TRUITT CO. v. SAME.

(No. 9664.)

(Supreme Court of South Carolina. March 29, 1917.)

PROCESS ~~§~~ 119—EXEMPTION FROM SERVICE—ATTENDANCE AT CRIMINAL TRIAL—NONRESIDENTS.

Nonresidents of the state, being within the state for the purpose of standing their trials for a criminal offense in the federal court, were not subject to service of a summons and complaint in actions begun against them in the state court; as the tendency of such process would be to distract their attention from the criminal case.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 148, 149.]

Appeal from Common Pleas Circuit Court of Greenwood County; Frank B. Gary, Judge.

Actions by estate of John Silvey, W. A. Speer, A. C. McHand, and R. K. Rambo, partners known and trading under the firm name of John Silvey & Co., and by the Craddock-Terry Company, and by the Ward-Truitt Company, against Leon Koppell and Morris Koppell, partners known and trading under the firm name of the Palmetto Dry Goods Company. From an order refusing to set aside the service of a summons and complaint upon the defendants, they appeal. Order reversed.

Calhoun A. Mays, of Greenwood, for appellants. Featherstone & McGhee, of Greenwood, for respondents.

FRASER, J. This is an appeal from an order refusing to set aside the service of a summons and complaint upon the appellants. The appellants were served with the summons and complaint while they were on trial for a criminal offense in the federal court held at Greenwood, in this state. The defendants are nonresidents of this state, and within the state for the purpose of standing their trials. It is conceded that, if the appellants had been engaged in the trial of a civil case, the service would have been invalid.

The respondents contend that there is a difference between the attendance of a non-resident in a civil case and the attendance of the defendant on a criminal case. The one is voluntary and the other involuntary.

There are two reasons why one in attendance upon the trial of a cause in court should not be served with process in another case: (1) Voluntary appearance might thereby be prevented; (2) the tendency to distract the attention of parties and witnesses from the cause then being tried. The second only applies here, and *Granite Brick Co. v. Titus*, 95 S. C. 47, 78 S. E. 540, is authority. See, also, *Stewart v. Ramsay*, 242 U. S. 128, 37 Sup. Ct. 44, 61 L. Ed. —. The second reason applies more strongly to criminal than to civil cases. If there is ever a time when a man needs the unimpeded exercise of his every faculty, it is when he is on trial for crime, and this is true whether he be guilty or not guilty.

The order appealed from is reversed.

GARY, C. J., and HYDRICK, WATTS, and GAGE, JJ., concur.

(107 S. C. 115)

FAIREY v. HAYNES. (No. 9666.)
(Supreme Court of South Carolina. March 30, 1917.)

TRIAL \S 314(1)—**COERCION OF VERDICT.**

In an action of claim and delivery, concluding an instruction with: "Don't you undertake to fool me by coming out and saying that you have agreed to a mistrial. I would dislike to send such a good-looking body of men to jail, and that is what I would have to do"—was improper as coercing a verdict.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 472, 473, 747.]

Gage, J., dissenting.

Appeal from Common Pleas Circuit Court of Orangeburg County; Geo. E. Prince, Judge.

Action by W. C. Fairey against William Haynes. Judgment for plaintiff, and defendant brings exceptions. Reversed.

Jacob Mooror, of Orangeburg, for appellant. John S. Bowman, of Orangeburg, for respondent.

HYDRICK, J. The nature of the action and a general statement of the facts will be found in the opinion of this court on a former appeal. 101 S. C. 499, 85 S. E. 1063. It was there held that evidence of the transactions between the parties prior to the execution of the chattel mortgage of February 11, 1913, under which plaintiff claims title to the property in dispute, was admissible on the issue of payment. Therefore there was no error in admitting such evidence.

In attempting to prove payment defendant introduced two receipts, both dated March 3, 1913, aggregating \$314.82, the amount which the mortgage in question was given to secure. One was for \$275, and ex-

pressly stated that it was in settlement of a real estate mortgage of anterior date. The other was for \$39.82, and stated that that amount had been applied to the chattel mortgage here in question, and that there was a balance due thereon of \$275. Defendant contends that the mortgage here in question covered all his prior indebtedness to plaintiff, including the balance due on the prior real estate mortgage. The court correctly charged that the burden was upon him to show that these receipts which he had accepted did not correctly set forth the transaction of that date, and that their aggregate amount should have been credited on the chattel mortgage.

The trial judge concluded his charge to the jury as follows:

"No one can order a mistrial but me. I am the only one that can order it. Don't you undertake to fool me by coming out and saying that you have agreed to a mistrial. I would dislike to send such a good-looking body of men to jail, and that is what I would have to do."

Under the authority of *State v. Shuman*, 90 S. E. 596, the eighth exception, which complains of this language as tending improperly to coerce a verdict, must be sustained.

The other exceptions are so clearly devoid of merit as to require no consideration. Judgment reversed.

GARY, C. J., and WATTS and FRASER, JJ., concur.

GAGE, J. I dissent. I think the facts of this case and of the *Shuman* Case materially differ. In my opinion, the judgment ought to be affirmed.

(106 S. C. 507)

SOUTHARD v. MARLBORO AGRICULTURAL CO. (No. 9640.)
(Supreme Court of South Carolina. March 15, 1917.)

1. DISMISSAL AND NONSUIT \S 5—**VOLUNTARY—BEFORE TRIAL.**

The court may authorize plaintiff to discontinue a case after the pleadings are completed, and the cause ready for trial.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. \S 6-12.]

2. APPEAL AND ERROR \S 273(1)—**EXCEPTIONS—SUFFICIENCY.**

An exception that permission to dismiss the case was erroneous because the pleadings had been completed and cause ready for trial is too indefinite.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 1620-1623, 1625, 1629, 1630.]

3. BILLS AND NOTES \S 481—**DEFENSES—SUFFICIENCY OF PLEADING.**

In an action by the assignee of a note, defendant's allegations that plaintiff secured the note after maturity, and that the assignor was his uncle, are insufficient to connect plaintiff with the assignor's alleged wrongful acts toward defendant.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. \S 1530-1532, 1559-1561.]

4. DISMISSAL AND NONSUIT \S 15—VOLUNTARY—DISCRETION OF COURT.

A trial court has discretionary power to permit plaintiff to discontinue the cause before trial.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 31.]

5. DISMISSAL AND NONSUIT \S 15—VOLUNTARY—DISCRETION OF COURT.

Where defendant's pleading would not sustain an affirmative judgment against plaintiff, there is nothing to indicate the trial court did not exercise its discretion in allowing plaintiff to discontinue the case before trial.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. \S 31.]

Appeal from Common Pleas Circuit Court of Marlboro County; T. H. Spain, Judge.

Action by E. F. Southard against the Marlboro Agricultural Company, a corporation. From an order allowing plaintiff to discontinue the action, defendant appeals. Affirmed.

The exceptions are as follows:

I. Because Hon. T. H. Spain committed error in granting the motion to dismiss the case for the reason that the pleadings had been made up and the case was ready for trial.

II. It is respectfully submitted that Hon. T. H. Spain in dismissing the cause committed error for the reason that the defendant, the defendant corporation, and the stockholders had acquired rights at that time before the court, and were entitled to have all questions and issues raised by the answer determined by the court, and that plaintiff E. F. Southard and the original holder of the note mentioned and referred to in the complaint, L. H. Southard, were nonresidents of the state of South Carolina, and having come into the court and submitted themselves to the jurisdiction of the court, and having brought the defendant corporation into the court, the defendant, together with the manager, upon whom the complaint was served, and the other stockholders, had acquired a material right, and being in court, and the jurisdiction of nonresidents having been acquired, all of the parties defendant and those interested were entitled to have all questions raised by the complaint and the answer determined; it being further respectfully submitted that Judge Spain in granting the order must have taken the position that the only question raised by the pleadings was the matter of the note under which E. F. Southard claimed, whereas an examination of the pleadings will show that, while this was the basis of the cause of action set up in the complaint, it was of minor importance compared with the issues raised by way of affirmative defense in the answer of the defendants.

J. K. Owens, of Bennettsville, for appellant. Stevenson, Stevenson & Prince, of Bennettsville, for respondent.

GAGE, J. Appeal from a formal order of the circuit court, whereby the plaintiff was allowed, with the defendant's consent, to discontinue the action. The suit is upon two notes made by the defendant to L. H. Southard, and by him assigned to the plaintiff, E. F. Southard.

There are two exceptions, which ought to be reported.

[1, 2] The first is unsound on its face; for it is common practice to discontinue a case

when "the pleadings are made up and the cause is ready for trial." The exception is so indefinite that it signalizes no error.

[3] The second exception is verbose and argumentative; but the kernel of it is that L. H. Southard, said to be an uncle of the plaintiff, had wronged the defendant in ways particularized in the complaint, and the wrongs were allied with the note sued on; that the court had acquired a jurisdiction of L. H. Southard, and the defendant had a right to have these wrongs adjudged; that E. F. and L. H. Southard had conspired together to cheat and defraud the defendant, as was evidenced by their alleged acts. But L. H. Southard is not a party to the action; he is a nonresident; he has not been brought into the action; and one of the prayers for relief was that he might be brought in. His acts are irrelevant, so far as they affect him; for no judgment can be pronounced against him. Nor are the allegations of the answer sufficient to entangle the plaintiff with the alleged illegal conduct of L. H. Southard. The only allegations in the answer which refer to the plaintiff are that, if he purchased the notes, he got them after maturity; that they had no consideration. Then there is the allegation quoted below, the only one which suggests any connection betwixt the two Southards in the wrongs recited against L. H. Southard:

"And the defendant further alleges upon information and belief—that is, upon the acts and doings of L. H. Southard and E. F. Southard—that the plaintiff, E. F. Southard, and L. H. Southard have conspired and colluded to defraud and cheat the said company out of the said land, and also out of other large amounts of money."

The answer alleged no "acts and doings" of E. F. Southard, and alleged no facts or circumstances tending to show he had any part in the conduct charged against L. H. Southard. The only facts alleged which touch E. F. Southard are his kinship to L. H. Southard and his ownership of the note. By no sort of reasonable conjecture do these two circumstances join him in the alleged conspiracy to defraud the defendant.

[4, 5] Had the court retained the case, and tried it to the end, the outcome under the pleadings could not have affected the plaintiff, E. F. Southard, except perhaps to have defeated his recovery on the notes, and that event he may yet compass, if he be sued again. The court had the clear right, if it exercised its discretion to do so, to permit the plaintiff to discontinue the cause. State v. Railroad, 82 S. C. 13, 62 S. E. 1116. There is no exception that the court did not exercise its discretion; and there is nothing in the record to negative that view.

We have not considered the circumstance that the defendant, acting through its alleg-

ed president, consented to the order of discontinuance.

The order below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(107 S. C. 96)

KELLY v. KEYSTONE LUMBER CO.
(No. 9661.)

(Supreme Court of South Carolina. March 29, 1917.)

MASTER AND SERVANT \S 288(5)—**INJURIES TO SERVANT—ASSUMPTION OF RISK.**

In an action for injuries sustained while operating defendant's skidder, caused by the breaking of a chain used in securing the skidder which both plaintiff and defendant knew was defective, as assumption of risk is an affirmative defense, the court properly refused to direct a verdict for defendant in the absence of evidence that plaintiff had reason to believe that there was danger to himself from such defect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. \S 1077.]

Appeal from Common Pleas Circuit Court of Marlboro County; S. W. G. Shipp, Judge.

Action by Don Kelly against the Keystone Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. K. Owens, of Bennettsville, for appellant. Gibson, Muller & Tison, of Bennettsville, for respondent.

FRASER, J. The appellant states his case as follows:

"Don Kelly, on the 28th day of October, 1913, while in the employ of the Keystone Lumber Company, 'and attending to his regular duties,' was struck on the right side and on the right arm by a rope that was used in rigging up a skidder. The skidder, at this time, was on an ordinary flat car. The track had been built out in the woods, and headed toward a tree, and at this point the machine was in operation. The bull block was rigged up to this tree by means of a chain, to which was attached a rope, holding the bull block, or pulley arrangements, steady. The chain to the tree holding the derrick or bull block in place gave way, and the rope, striking Don Kelly, injured him.

"The plaintiff, Don Kelly, in operating this skidder, was in charge of the throttle of the engine, and also of the friction lever which controls the drum. When the engine is running and the lever released the cable is unwound from the drum, taken out into the woods, fastened to the saw stock, the signal given to the man operating the skidder, and by pressing the lever down, this cable is tightened and the log drawn in and loaded on a car. This pull throws pressure on the chain that holds the bull block in position, and it was at the time the saw stock was being thrown in and the pressure was on this chain that it gave way and struck Kelly, who was on the flat car where the skidder was stationed. The strain upon the cable, and consequently upon the bull block, is regulated by pressure upon the friction lever in charge of operator.

"This way of rigging up a skidder is the usual and ordinary way of doing this work. The chain gave way at this time because of the fact that it was defective. Don Kelly knew that the chain was defective, and continued to work it without being told to do so after the defect was

noted, and without being promised that the chain would be repaired. Don Kelly was 24 years old on the 27th day of September, 1915. Therefore he was about 22 years old when the accident occurred.

"The sole question before the court at this time is whether or not Don Kelly assumed the risk of the injury which he afterwards sustained."

The appliances were defective, and the plaintiff knew it. In *Baldwin v. Piedmont Mfg. Co.*, 102 S. C., at page 409, 86 S. E. at page 381, we find:

"There being no question of the master's negligence, then the master assumed the burden of proving its affirmative defense of assumption of risk. The master is not liable for obvious risks caused by his negligence, or those of which the servant knew. The servant assumed the risk of those. The question was, What was the risk in wiping off the machine? Was it the thrusting of the hand too far into the machine, or was it that the hand would be jerked into the machine? The plaintiff admitted that he knew if he thrust his hand too far into the machine he would be hurt. He did not admit that he knew that his hand was liable to be jerked into the machine, and there was no proof that he knew or ought to have known or assumed this risk."

There may be defects in a machine that impede its operation. There may be defects in a machine that are dangerous to the operator. There is not a word in the case (the defendant's evidence is not in the record) to show that the operator had reason to believe that there was danger to himself.

Assumption of risk is an affirmative defense, and his honor, Judge Shipp, could not have directed a verdict.

The exception is overruled, and the judgment affirmed.

GARY, C. J., and WATTS, HYDRICK, and GAGE, JJ., concur.

(107 S. C. 57)

Ex parte McKIE et al.

In re McKIE'S ESTATE et al.

(No. 9657.)

(Supreme Court of South Carolina. March 27, 1917.)

1. WILLS \S 288(1)—**CONTEST—PRESUMPTIONS—KNOWLEDGE OF CONTENTS.**

Ordinarily, proof of a writing purporting to be a will and signed and witnessed according to the statute raises the presumption that the testator knew the contents thereof, and the burden is on contestant to show the contrary.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 651, 652.]

2. WILLS \S 324(4)—**CONTEST—PRESUMPTION—KNOWLEDGE OF CONTENTS—SPECIAL CIRCUMSTANCES.**

Where the circumstances surrounding the transaction cast doubt on whether testator knew the contents of the purported will, there should be some proof apart from mere execution of the instrument that testator knew its contents, and the jury must determine whether testator had such knowledge.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. \S 225, 770.]

3. WILLS \S 331(1)—CONTEST—INSTRUCTIONS—KNOWLEDGE OF CONTENTS—EVIDENCE.

Where the evidence showed that testatrix was 84 years old, and that her sight was bad, that she had been abed for many weeks, that a doctor was secured from a distant city instead of from the neighborhood, and was asked by proponents if testatrix would be injured by executing a will, that there was bad feeling between the children to whom the estate was given and who resided with testatrix and a son who resided elsewhere and who received only a nominal bequest, that testatrix was unable to direct the pen in signing, that no statement was made by testatrix or any one in the room when the will was executed, that it was a will, and that the relations between testatrix and a son excluded from the estate were friendly, it was proper for the court to charge that the presumption that the testator knew the contents of the paper was not conclusive, and that the surrounding circumstances might be so suspicious as to require affirmative evidence, and that the jury must determine that question by the preponderance of the testimony.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 782, 784.]

4. WILLS \S 324(2)—CONTEST—TESTAMENTARY CAPACITY—QUESTIONS OF LAW AND FACT.

How much capacity is required to make a will is a question of law; whether testator had that much is a question of fact.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 768.]

5. WILLS \S 324(2)—CONTEST—TESTAMENTARY CAPACITY—QUESTION FOR JURY—EVIDENCE.

Where the testimony showed that testatrix was very old and nearly blind, that she was physically unable to write her name, and was propped up in bed to sign the instrument, that she did not say the instrument was a will, nor did any of those present say so, it was a question for the jury whether she had testamentary capacity, though all the witnesses to the will and the attending physician and others testified that she had mind enough to make the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 768.]

6. WILLS \S 164(5) — CONTEST — EVIDENCE — RELEVANCY—UNDUE INFLUENCE.

In proceedings to contest a will for undue influence, declarations by a devisee, showing an intention to influence testatrix to discriminate against a son, are relevant if competent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

7. TRIAL \S 140(1) — QUESTIONS FOR JURY — CREDIBILITY OF WITNESSES.

The credibility of a witness, in law, is always for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 334.]

8. WILLS \S 164(5) — CONTEST — EVIDENCE — HEARSAY—DECLARATION OF INTENTION.

In proceedings to contest a will for undue influence, a declaration by a devisee, showing an intention to induce testatrix to exclude contestant, is not hearsay, but is original testimony to establish intent, and is admissible, since the presence of a design or plan to do a given act has probative value to show that the act was in fact done.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

9. EVIDENCE \S 269(1) — DECLARATIONS — INTENT.

A declaration by a person as to his intention is the best evidence of such intent, and in con-

nection with the circumstances may be sufficient to establish intent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1063.]

10. WILLS \S 164(5)—CONTEST—DECLARATION—INTEREST OF DECLARANT.

A declaration showing an intention to induce testatrix to make a will excluding a son is admissible to show undue influence, though made before the will was executed, since its admissibility does not depend on its being against interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

11. WILLS \S 164(5) — CONTEST — DECLARATIONS—DECLARATION BEFORE WILL.

Declarations showing an intent to exercise undue influence made before the execution of the will are admissible in view of the presumption that the state of mind once proved to exist continued, and was carried into effect by the subsequent acts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

12. WILLS \S 164(5) — CONTEST — DECLARATIONS—ADMISSION AGAINST OTHER DONEES.

The fact that a declaration by one devisee, showing an intent to exercise undue influence injuriously affected the interests of the other donees in proceedings to contest the will, does not render it inadmissible, where all but two of the other donees were connected by similar declarations with the undue influence and the interests of those two would be only slightly diminished by a distribution as intestate property.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

13. WILLS \S 164(5)—CONTEST—DEATH OF DECLARANT.

A declaration by a devisee, showing an intention to exercise undue influence on testatrix, is not rendered inadmissible in contest proceedings by the death of declarant before trial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

14. WILLS \S 164(5)—CONTEST—DECLARATION—RELEVANCY—UNDUE INFLUENCE.

Declarations by devisees, showing an intention to exercise undue influence, are admissible, though there was no testimony to show a connection between the intent of declarants and the acts of testatrix, where the will as executed conformed to the declared intention, since the connection between the two was then not a wild guess, but an inference which appealed to the judgment of the jury.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 409, 410.]

Appeal from Common Pleas Circuit Court of Edgefield County; Thos. S. Sease, Judge.

Proceedings to contest the will of Mrs. Margaret L. McKie, in which Daniel McKie and others were proponents and Josiah McKie contestant. Decree for contestant, and proponents appeal. Affirmed.

The following is the charge of the court and the exceptions of appellant:

Charge.

Mr. Foreman and Gentlemen: To put you at ease along that line, I have already made arrangements for the sheriff to get your supper for you immediately after this charge is made; and he will either bring it to you or conduct you to the hotel. You are to try this case, gentlemen, according to the law and evidence; you

have taken an oath that you will well and truly try this case according to the law and the evidence; you have no interest in the outcome of the case, except to render a proper verdict. You have no friends that you are to take care of as jurors; neither have you any enemies that you are to punish by your verdict; you and I are totally disinterested parties; we are not here to do anything but the right thing according to our best understanding; you will not be influenced by anything that is improper for you to consider. The question that I propose to submit to you reads as follows, and you will have this small piece of paper with you, and also the alleged will, in the jury room, and nothing more: Is the paper presented for probate, and dated 3d day of October, 1912, the last will and testament of Margaret L. McKie? And you will answer, "Yes" or "No," and write your name, and the word "Foreman" under it. That is the only question that is submitted to you. You will answer that according to the law and evidence; you cannot make any law of your own; you must take the law as given you by the court; and just here there are certain propositions of law that I desire to call to your attention along the lines of the requests to charge on both sides, and the requests to charge. I cannot state all the law in one proposition, because it would take too long a sentence, covering a page or more, and you would not understand it, very likely, as well as if I should instruct you in short propositions of law and the requests that are written out.

Now, before that: We are not here to make the will of Margaret L. McKie; we are not here to say, if you conclude that is the will of Margaret L. McKie, that it is a just will or an unjust will, because the law says, and it is the law, that a person having property has the right and privilege of making any disposition of their property that they please. The only question is: Is the paper that has been introduced in testimony the will of Margaret L. McKie? If it is not her will, then your answer to this question will be, "No;" if it is her will, then the answer to the question will be, "Yes." The law prescribes how a will shall be made. Under section 3564, and I believe the enactment of this law was by the Legislature in 1824, says: All wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor, and of each other, by three or more credible witnesses, or else they shall be utterly void and of none effect. That does not mean that a blind person cannot make a will; that does not mean that a person who is totally blind cannot make a will, but the statute, in order for a will to be valid, must be complied with and you must find that it has been complied with from the testimony; it may be inferred from the testimony; all conclusions of juries are inferences from the testimony.

I charge you, gentlemen, that the proponent of a will is called upon to prove that it is the will of the deceased by the preponderance of the evidence. That does not necessarily mean the greater number of witnesses, but it means by the greater weight of the evidence. It does not mean that it must be proven to be the will of the deceased beyond a reasonable doubt; but it simply means that the testimony must preponderate in favor of the validity of the will. For example: If you take all the testimony in favor of the will, and put it in an imaginary scale or balances on the one side thereof, and take all the testimony against the will, or the validity thereof, and place on the other side of the imaginary scales or balances, and if it stands evenly balanced in your mental picture, in your experiment, then the will cannot stand, and your answer to that question will be "No;" but if

the side in your mental picture in which you have placed all the testimony in favor of the will preponderates in the slightest degree over the evidence against it, then there lies the preponderance and you would write a verdict in the form of "Yes" to this question. That is what I mean by preponderance of the evidence.

A great deal has been said about presumptions. I charge you as a general principle of law applicable to all presumptions in this case, that all presumptions are rebuttable. There is no conclusive presumption in this case, and when I speak of presumption I mean a presumption that is rebuttable.

Now, taking up the requests of the proponent of the will, I charge you as follows:

"(1) That the law in this state puts no restraint upon the power of a citizen to dispose of his or her property as he sees proper. He may give all of his property to one or more of his children, and exclude the balance of his children from participation in his estate; or he may give his property to a stranger, if he sees proper to do so." I charge you that.

I charge you this as requested:

"(2) When the proponent of a will proves the formal execution of it, including the attestation and subscription, as required by law, a presumption of testamentary capacity arises, since every adult person is presumed to be sane until the contrary appears." I charge you that, and in connection I desire to read you a further sentence from a case from which that is quoted. Now, that is in addition to the other request. I read from volume 2, Richardson's Reports, page 236: "Where a testator is of sound mind his knowledge of the contents of the will, as of any other instrument, is presumed from the fact of execution. If he be of doubtful capacity, the law requires that the presumption, arising from the fact of execution, should be confirmed by additional and more direct proof of assent. The character of that proof is to be considered." And I add, is to be considered by the jury, or rather, all the testimony is for the jury.

"(3) When the formal execution of a will is proved, a prima facie case is made out, and the burden is then on the contestant to show the invalidity of the will." I charge you that.

"(4) When a testator is of sound and disposing mind and memory at the time of the execution of a will, his knowledge of its contents, as of any other instrument in writing, will be presumed from the fact of execution." I charge you that, and in connection I desire to read from the Enc. of Evidence, page 258: "The general presumption is that a testator, having executed his will, had knowledge of its contents, but this presumption is never conclusive, and the surrounding circumstances may be so suspicious as to require affirmative evidence of this fact." Also on page 259, footnote: "That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds it as a will. This burden is satisfied, prima facie, in the case of a competent testator by proving that he executed it. But if those who oppose it succeed by a cross-examination of the witnesses, or otherwise, in meeting this prima facie case, the party propounding must satisfy the tribunal affirmatively that the testator did really know and approve of the contents of the will in question before it can be admitted to probate." I charge you that, and I simply adopt the language as my own charge on that point to that extent.

The respondent, Josiah McKie, has requested me to charge you the following propositions of law. I take it that this first request is a correct analysis of the statute that I read in your hearing, to wit, section 3564. It only elaborates and explains that section that I read to you; that is, section 3564 of the Code of Laws of South Carolina.

"(1) That under section 3564 of the Code of

Laws of South Carolina, it is enacted, and it is the law, that all wills shall be in writing, and be signed by the party purporting to enter into the same, or by some other person in his or her presence, and by his or her express direction; and the jury is charged that if the alleged will in this case of Margaret L. McKie was not signed by her, but by her son, Daniel McKie, in her presence, but not by her expressed direction, then they must find that it was not her will, for the statute requires that the will must be either signed by her, or by some other person in her presence, and by her expressed direction, or otherwise it is null and void." I charge you that, gentlemen; and I charge you also that the statute says nothing about where one person assists another in signing a will; and I charge you that if another person assists the maker of a will, the alleged maker of a will, of her own signature, then that would be a sufficient compliance with the law on that point.

"(2) That whilst 'expressed direction' may be inferred from circumstances surrounding the transaction, yet the jury must be satisfied that such expressed directions were given by the testatrix, before they can find in favor of the will." I charge you that in connection with what I have already charged you.

"(3) On the question as to whether or not the paper in question, purporting to be the last will and testament of Margaret L. McKie, was her last will and testament, the jury is charged that unless they find from the preponderance of the testimony that she knew it was her will, and was acquainted with its contents, and executed it as such, they must find against the will. They must be satisfied that she knew its contents, or even if she executed it, it is not her will." I charge you that, gentlemen.

"(4) The jury are the judges of her mental capacity at the time of the alleged execution of the paper in question, and if they find for any reason that she was of doubtful capacity, then before they can find for the will they must go further and find that she gave instructions for its making, or that it was read over to her and that she understood it." I charge you that, and in that connection I desire to instruct you on the matter of undue influence. You will notice that the law says undue influence; it does not say influence, because I do not suppose any will ever was made unless something influenced the making of the will. The influence, which is undue and sufficient to invalidate a will, must be so great as to constrain the inclinations of the testator, to overbear and conquer his will, and make him the obedient, though reluctant, agent of another's dictation in the testamentary disposition of his property. His free agency must be overcome, so that the instrument does not express his will, but the will of another. That is what I mean when I say "undue influence." Therefore I charge you that if the alleged testatrix was unduly influenced in the making of this paper as her will, then you will find against the will, and answer the question, "No."

"(5) Whilst it is so, that proof of the execution of a will raises a presumption that the testatrix knew the contents of the will and approved it, yet that presumption is only prima facie and is rebuttable; and the jury are the judges whether by the testimony the presumption has been rebutted or not, and if in any way they are satisfied that the presumption has been shaken then they are to say from all the evidence whether they are satisfied that the testatrix knew of the contents and approved of the will and if on all of the evidence they are not so satisfied, they should find against the will." I charge you that.

Now, in the sixth request to charge I leave the words, "was blind." I prefer to leave out the words, "was blind," because that might be charging on the facts. I charge you the sixth request with that modification.

"(6) The jury is charged that if they find that the testatrix, at the time of the alleged execution of the will, was of doubtful capacity, then before they can find in favor of the will they must be satisfied by the preponderance of the testimony, that she gave instructions for the making of the will, or that it was read over and explained to her, and she understood it and approved of it as her will." I charge you that, but I charge you also, in that connection, that if you find that that was her will, giving emphasis to "will"—that is, that it was no one else's will, that it was no one else's will—that necessarily carries with it that she knew the contents of the will, and that it was her will and was made without undue influence; even then, of course, you would find accordingly.

The main question, and the sole question is, and all the evidence has been introduced to throw light on this question, Is the paper presented for probate and dated 3d day of October, 1912, the last will and testament of Margaret L. McKie? Now, you are entitled to have this with you in the jury room, on that question, and that is all. Whatever your verdict is, you will write it out in this shape, "Yes," or "No," and sign your name and write the word "Foreman" under it. You will bring in a sealed verdict, and when you have agreed on your verdict, you will seal it up, put it in an envelope, put it in your pocket, knock on the door, inform the sheriff that you have agreed, and he will let you out; say nothing about your verdict and be back in court at 9:30. Retire.

Exceptions.

First. Because his honor, the presiding judge, having allowed proponents' fourth request to charge, to wit: "When a testator is of sound and disposing mind and memory at the time of the execution of a will, his knowledge of its contents, as of any other instrument in writing, will be presumed from the fact of execution"—erred by charging further in relation thereto: "That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by any one who propounds it as a will."

Second. Because his honor, the presiding judge, having allowed proponents' fourth request to charge (supra) and the respondent, Josiah McKie, having failed to present any testimony whatsoever, that the testatrix did not know of and approve the contents of her will, his honor erred, as a matter of law, in refusing proponents' third ground of motion for a new trial.

Third. Because his honor, the presiding judge, erred in allowing the fourth request to charge submitted in behalf of the respondent, Josiah McKie, to wit: "The jury are the judges of her mental capacity at the time of the alleged execution of the paper in question, and if they find for any reason that she was of doubtful capacity, then before they can find for the will they must go further and find that she gave instructions for its making, or that it was read over to her, and that she understood it"—the error being, it is respectfully submitted, that or which tended to show, any doubt as to the testamentary capacity of the testatrix, the rule of doubtful capacity as stated by his honor imposed upon proponents a burden of proof which the law does not impose, thereby the jury was misled to the prejudice of proponents.

Fourth. Because his honor, the presiding judge, erred in allowing the sixth request to charge submitted in behalf of respondent, Josiah McKie, to wit: "The jury is charged that if they find that the testatrix, at the time of the alleged execution of the will, was of doubtful capacity, then before they can find in favor of the will they must be satisfied by the preponderance of the testimony, that she gave instructions for the making of the will, or that it was read over and explained to her, and she understood

it and approved of it as her will"—the error being, it is respectfully submitted, that there being no testimony in the cause, which showed, or which tended to show, any doubt as to the testamentary capacity of the testatrix, the rule of doubtful capacity, as stated by his honor, imposed upon proponents a burden of proof which the law does not impose, and thereby the jury was misled to the prejudice of proponents.

Fifth. Because his honor erred in charging the jury as follows: "I charge you, as a general principle of law applicable to all presumptions in this case, that all presumptions are rebuttable. There is no conclusive presumption in this case, and when I speak of presumption I mean a presumption that is rebuttable"—the error being that his honor thereby charged on the facts of the case, to wit, "There is no conclusive presumption in this case," said statement having the effect of removing from the consideration of the jury the question whether or not the presumptions which exist in the case were rebutted by the testimony.

Sixth. Because his honor, the presiding judge, erred in admitting in evidence the testimony of Mrs. Bettie Wood as to the statement alleged by her to have been made to her by James McKie, now deceased, the said Jas. McKie, at the time that said statements were alleged to have been made, not having any interest in the matters in controversy in this proceeding; and it is respectfully submitted that the statements so alleged to have been made in relation thereto constitute hearsay testimony.

Seventh. Because his honor, the presiding judge, erred in admitting in evidence the testimony of the witness John M. Wood, as to the statements alleged by him to have been made to him by James McKie, now deceased, the said James McKie, at the time that said statements were alleged to have been made not having any interest in the matters in controversy in this proceeding; and it is respectfully submitted that the statements so alleged to have been made in relation thereto constitute hearsay testimony.

Sheppard Bros., of Edgefield, for appellants. Hendersons, of Aiken, and N. G. Evans, of Edgefield, for respondent.

GAGE, J. This cause was tried before a jury, and the issue was, will or no will. The verdict was "no will." The will was proven in the probate court by James and Daniel McKie, sons and executors. The probate court sustained the will, and the trial in the circuit court was on appeal therefrom, was de novo, and was before a jury. Before the instant trial James had died, unmarried and intestate, we assume.

The history of the case is this:

Mrs. Margaret L. McKie, a widow some 84 years of age, lived in Edgefield county; and in the house with her there lived two unmarried daughters, two sons and a married daughter. Another married daughter lived apart; and her eldest son, Josiah, lived in Aiken county, some miles away from his mother. Thus there were seven children. The mother died in December, 1912, and there was thereafter filed in the probate court a purported will of hers, made in the month of October, 1912. Thereby the testatrix devised the whole of her estate, valued at \$5,000 in money and 300 acres of land, to her children other than Josiah; to him she bequeathed \$10.

The instrument was signed "Margaret L.

McKie"; the testatrix only held the pen; it was guided by the son Daniel so as to describe the name, and a witness suggested that; no word was uttered at the signing by the witnesses to the will, or by the testatrix, or by any one else, to indicate that the document was a will; the witnesses presumed it was a will from the circumstance that three persons were called to witness the paper.

The testatrix died of a leaky heart, and was a bed six months before the end; and while a bed the alleged will was executed. The instrument was prepared by Mr. J. William Thurmond; but he did not testify at the trial.

There are seven exceptions, but the appellant has argued but four issues. They are these: (1) The court rightly charged the proponents' fourth request that when a testator of sound mind has executed a will in due form, his knowledge of its contents is thereby presumed; but the court wrongly added thereto, "That the testator did know and approve of the contents of the alleged will is therefore part of the burden of proof assumed by every one who propounds a will." (2) The court rightly charged as proponents' fourth request that when a testator is of sound mind at the execution of the will, then his knowledge of its contents is presumed; but the court wrongly refused to set the verdict aside, upon the ground urged by the proponents for a new trial that the contestant failed to present any evidence that the testatrix did not know the contents of the will. (3) The court erred in charging, as the contestant's fourth request, that the jury was the judge of the testatrix's mental capacity at the time of the alleged execution; and if the jury find for any reason that the testatrix was of then doubtful capacity, then before they can find for the will they must go further and find that she knew its contents, because appellants say there was no particle of testimony tending to show doubtful capacity. (4) The court erred in admitting the testimony of Mr. and Mrs. Wood, touching a declaration to them of James and a declaration of Daniel, about the intent of James and Daniel with reference to the exclusion of Josiah by the testatrix. Let the charge, the request, and the exceptions be reported.

The first, second, and third issues are so closely allied that they overlap one another; indeed, they present the same issue in differing phases.

The first issue and exception which the appellant makes is not predicated upon an accurate statement of that which the court did charge. The exception sets out only a part of what the court charged, and it does not set that out in sequence, but in disordered fragment.

[1] The proponents' fourth request is sound as far as it goes. It dealt with a person of sound disposing mind and memory. It only

stated that the contents of the will of such a one would be presumed to be known to the maker. It did not suggest a person who was aged and infirm, and who made a will under all the circumstances testified to in the instant case. It is true that ordinarily the proof of a paper writing, signed and witnessed according to the statute, and purporting to be a will, entitles it to be regarded as such. And it will be then presumed, as matter of fact, that the testator knew the contents of the paper. The contestant must show the contrary. *Kaufman v. Caughman*, 49 S. C. 159, 27 S. E. 16, 61 Am. St. Rep. 808; *Mordecai v. Canty*, 86 S. C. 476, 68 S. E. 1049. While therefore the proponent of a paper purporting to be a will must of course prove that the testator knew its contents, yet that is sufficiently done, in the first instance, when the paper is presented and its execution is in due form of law. See *Nott, J., Warley v. Warley*, cited in 12 Rich. 249.

[2] On the other hand, if all the circumstances which surround the transaction, and, as disclosed by the testimony, cast doubt upon whether a testator did know what was in the will, then there ought to be some proof, apart from the mere execution of the instrument, that the testator knew its contents; and the jury then must judge if the testator did have knowledge of its contents. *Boyd v. Boyd*, 3 Hill, 341; *McNinch v. Charles*, 2 Rich. 229; *McKnight v. Wright*, 12 Rich. 232.

[3] The circumstances in the instant case relied on to show lack of knowledge are these: Shortly before the instrument was executed the doctor was asked by the proponents if the lady would be injured to execute a will; the lady was afeared, and had been for many weeks. She was 84 years old, and her sight was bad; she was unable to direct the pen so as to describe her name; the sending to distant cities to get a doctor instead of getting one from the vicinage; the existence of bad feeling betwixt those children who got the estate and who resided with her and Josiah, that is expressly admitted in appellants' argument; the exclusion by the will of Josiah from its provisions, except for a nominal bequest; the friendly relation betwixt Josiah and his mother as testified to by him; the absence of any statement made by the testatrix, or by any one present in the room at execution, that the paper being signed was a will; the denial by the other children of Josiah's presence with his mother more than once. We have not considered the questioned testimony of the Woods. The proponents recognized the force of these circumstances, and to overcome them they offered testimony that Daniel had read the will to his mother, and that the testatrix had told Miss Danforth why Josiah was excluded from the will. But the court had no right to pass upon the issue thus made; it was the province of the jury to find, first, whether the testimony did cast doubt upon the testatrix's knowledge of

the contents, and, if it did, then did all the testimony by its preponderance show knowledge of the contents? There was evidence on both sides of the question. The court did not charge the jury that when the contestant introduced testimony which tended to cast doubt upon the testatrix's knowledge of contents, that the burden was then shifted on the proponents to prove knowledge; the charge was, that if the circumstances cast doubt upon whether the testatrix had knowledge of the contents, then other testimony must show knowledge.

The contestant's fifth request, duly allowed and not excepted to, stated the same postulate plainly. That is to say, in such a case the contestant would put into issue one side of the scale the circumstances which tended to show lack of knowledge; the proponents would put into the other side of the scale the will duly signed, and along with it testimony tending to show knowledge; that side which preponderated would be entitled to the verdict. The court so charged the jury just before it considered the request to charge.

The contestant's sixth request, allowed and excepted to, but not specifically argued, directed the jury that it must be guided by the preponderance of the testimony. And to that request the court added this in its own words:

"I charge you that, but I charge you also, in that connection, that if you find that that was her will, giving emphasis to 'will'—that is, that it was no one else's will, that it was no one else's will—that necessarily carries with it that she knew the contents of the will, and that it was her will and was made without undue influence; even then, of course, you would find accordingly."

The first exception is overruled.

The second exception and issue is directed to the court's refusal to set the verdict aside, and for the reason there was a total failure of evidence to show lack of knowledge of the contents. The exception in effect is, the court charged proponents' fourth request that the execution of a will by a person of sound and disposing mind and memory presumed knowledge of the contents; the contestants were bound to show contra that the testatrix had no knowledge of contents; that there was no particle of testimony to that effect. This exception raises no question; it is concluded by what we have said hereinbefore.

We come now to the third exception and issue; it springs out of the court's allowance of the contestant's fourth request. The jury was certainly the judge of the testatrix's capacity to make a will at the time it was signed. The request stated that. The jury was as surely to judge if there was then doubtful capacity. The request stated that. If the jury found the latter postulate to be true, then it ought to have been satisfied that the testatrix understood the contents of the will. The request stated that. The appellants say, though, and that is the

point of the exception, that there was no particle of testimony tending to show "doubtful capacity"; that all the testimony showed capacity; and that therefore the court had no warrant to submit to the jury if the testatrix understood the contents.

[4] The court charged the proponents' second request, that proof of the paper writing drew to it a presumption of the testator's capacity; and in that connection the court read to the jury from the case of *McNinch v. Charles*. How much capacity it takes to make a will is a question of law; whether the testator had that much is a question of fact. *Tillman v. Hatcher, Rice, 271*. In the case at bar, as in the case just cited, the court left it to the jury to find if the capacity was doubtful.

[5] It is true all the witnesses to the will and the attending physician and others testified that the testatrix had mind enough to make a will. But the mind resides in the body, and the ailments of the flesh act upon the mind. In the instant case the testatrix was very old; she was nearly blind; she could not write her name; she was propped up in bed to sign; she did not say the paper was a will, nor did any of these present say so. These and the other circumstances hereinbefore particularly recited all went to the jury; and the jury was not bound to accept the view of the witnesses. The words of the court in the *Tillman-Hatcher* Case at page 280 are pertinent here. The issue was "within the peculiar province" of the jury. Doubtful capacity is not conterminous with mental alertness. There might be capacity, yet it may not have been exercised under the particular circumstances of the case. Capacity and undue influence may be closely allied in a particular case, as they were in the case at bar. And the court added to the fourth request a proper direction about undue influence.

In the case of *Boyd v. Boyd, 3 Hill, 343*, the court also referred to the intimate connection betwixt bodily infirmity and doubtful capacity. Judge O'Neal, who tried the case, said:

"I thought, and so said to the jury, that although the mind of Thomas Boyd was good, that yet, from his great age, his pain, and hardness of hearing, there ought to be proof of instructions."

We are therefore of the opinion that the court was warranted, under the circumstances, to submit to the jury whether or not the testatrix's capacity to make a will was doubtful, and that the request was therefore relevant.

The only other issue is whether the testimony of the witnesses Mr. and Mrs. Wood was competent. They gave in evidence, for the contestants, declarations made in their presence by Daniel and by James McKie, and by Mrs. Stevens too.

[6] The proponents objected to the testimony because it was hearsay, and because James McKie was at the time dead. The is-

sue that was up for trial was whether the contents of the will expressed the real mind of the testatrix. The circumstances before set out had opened the door to that inquiry, and any testimony which shed light on that question was relevant. If the before-mentioned circumstances suggested an inference of undue influence, of doubtful capacity, or a lack of knowledge of the contents, then a declaration by the parties to the influence would confirm such inference.

The testimony is now challenged on four grounds: First, that it is hearsay; second, that it was made when the declarants had no interest, to wit, before the will was made; and, third, because it affects the interests of the four daughters who were not inveigled into the declarations; and, fourth, because one of the declarants, James McKie, was dead when the declarations were given in evidence.

The exception refers more particularly to the declarations of James, because Daniel and Mrs. Stevens were both on the witness stand, and denied the declarations they were said to have made. These were the declarations of James as given in by Mrs. Wood:

"A. He came to our house and said he came to see about some property; that he did not expect to give cousin Si anything at all. After he came he mentioned that I had had some dealings that way, and I told him, 'No, I never had any dealings to leave out a member of a family'; that when my mother died Mr. Sheppard wrote her will, and he said they charged too much, and I said, 'Why don't you give it to her?' and he said, 'She will not do it, and I will have to wait until she does not realize what she is doing to do that themselves.' Q. And he said to you at that time that he would have to wait before the old lady got so old she did not know what to do? A. That she did not realize what she was doing; and that she would not sign it and leave out any member. Q. She would not sign it and on account of that he would have to wait until she did not know what she was doing before he could get her to do it? A. Yes, sir."

And these were the declarations of James as given in by Mr. Wood:

"A. He wanted to know how to get a will drawn and keep his mother from knowing it; he wanted to get a will drawn up sufficient to get the property from Si McKie; he did not want him to have anything. Q. What did he say? A. He said he wanted to know how my wife managed to get the place we were living on that her mother gave her, and she said she got Mr. Sheppard to draw up the papers; Mr. Sheppard and her mother decided on it, and he said that was his trouble, and he said the devilish lawyers wanted it all for fixing up the papers. Q. He said that was his trouble; that his mother was not willing to cut Si out? A. Yes, sir; that she was not willing to cut Si out. Q. The paper your wife had Mr. Sheppard fix was on what matter? A. Mr. Sheppard had drawn up a deed for my wife's mother, deeding her the place and land, and he wanted to know how the deed was drawn up, like he did, without paying Mr. Sheppard anything to do it."

[7] Whether this be true was peculiarly a question for the jury; the credibility of a witness, in law, is always for the jury.

[8] If it be true that Mrs. McKie desired to include Josiah as a legatee of her bounty, and

that James knew the fact, and that James intentionally postponed the making of the will until Mrs. McKie was unable to know what she was doing, and that Daniel had her to sign a will under the circumstances before named, and that thereby Josiah was excluded, and that James and the others were unfriendly to Josiah, and that Josiah was not permitted to see his mother in her last illness, then the jury might conclude the instrument was not expressive of the testator's mind. So much will not be challenged. The thing that is challenged is the way of proving James' intent, to wit, by his declaration of it.

[9] Nobody knows a person's intent but the person and his God; and if the person shall declare his intent hostile to another, that declaration is the best evidence of it; and when there is added to the declaration the circumstances of the case, the intent may be established. "The presence of a design or plan to do a given act has probative value to show that the act was in fact done," Wigmore, § 102. "There is no situation in which a design to do an act would be irrelevant to show the doing of the act." Wigmore, § 104. See cases cited at 2205 in the same work.

So that the declaration was not hearsay, but original testimony; it went to establish the actor's wrong intent out of his own mouth.

[10] The circumstance that at the time the declaration was made James had no interest in his mother's estate because the will had not yet been made does not render the testimony incompetent. The books do say that a declaration against interest is not competent unless the declarant then have an interest. And when the declaration is strictly in derogation of one's interest and nothing more, there is no ground to admit it unless there be then a present interest. But in the instant case the declaration was not of that narrow character. The declarant had some sort of interest in expectancy in the testatrix's estate; but if the circumstances and the declarations were true, he set on foot a scheme to accomplish the defeat of his mother's real will, so that his interest might be enlarged and that of Josiah might be defeated.

[11] It is true the will had not been made when the declarations were made. But "the existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted." Bigelow, J., in *Cook v. Moore*, 11 Cush. (Mass.) 213.

[12] The further suggestion of appellant, that six persons are legatees, under the will, and the declarations of three of them ought not to impair the whole instrument, is plausible, but it is not sound in this case. The Iowa case cited by the appellant to sustain that view was announced where the evidence

of undue influence was very meager, and where the declaration itself was equivocal. The case from Missouri cited by the appellants (*Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 526, 80 Am. St. Rep. 604) is more in point, and it goes to the length stated. But our own case, hereinafter cited, is contra.

In the instant case all the six children, except Mrs. Stevens and Josiah, were living with Mrs. McKie. Of those six Daniel, James, Mrs. Stevens, and Miss Mattie are more or less linked in the testimony with at least the alleged plan to keep Josiah from seeing his mother in her last illness. And Mrs. Wood testified that Mrs. Stevens made declarations similar to those made by James; here is Mrs. Wood's testimony referring to what Mrs. Stevens declared:

"A. She said because we do not expect to give him anything, and as soon as my mother dies he will come in and want his part, and we do not expect to give him anything; and Dan said, 'No; we will have to give him a little to make it stick. We will have to give him a little to make it stick.'"

Of the four proponents, then, Mrs. Mason and Miss Mary are the only ones who are not connected by word of mouth with the alleged scheme. If the verdict of the jury shall be sustained the distribution of the estate will not materially affect the interest of Mrs. Mason and Miss Mary. By the will the four daughters were to have \$1,250 each, and James and Daniel were to have 300 acres of land, of unascertained value. By the statute of distributions, the whole estate will be equally divided between the seven children. Furthermore, all the children made common cause against Josiah; the jury might have inferred they were with James from the start. Our own case of *Peeples v. Stevens*, 8 Rich, 200, 64 Am. Dec. 750, makes full answer to the appellant's suggestion, as well as to most of the other issues we have discussed. It is practically decisive of this case.

[13] The last suggestion of the appellant, that James' declaration is incompetent because he was dead at its giving, is of no consequence. No statute lays embargo upon it; there is no rule of law which inhibits the giving in evidence a competent declaration of one then dead. And in some cases the declaration is not competent, unless the declarant be then dead. *Lowry v. Moss*, 1 Strob. 64.

[14] One other question was argued by one of the appellants' counsel; it is stated thus: "The testimony fails to connect in any way the testatrix with the declarations [of James and Daniel]. There is no evidence of action or reaction so far as she was concerned. It is too remote in point of time and substance."

The argument is that the declaration is irrelevant to show that the intent of the declarants operated to accomplish the end to which it reasonably pointed. If the testimony was competent, and it was; if the declaration was true, and the jury found it was; and if the event which followed, to

wit the terms of the will, conformed to the declaration—then the connection between the two events is not a matter of wild guess, but one which appeals to the judgment of a jury.

Our judgment is that the exceptions show no error below, and the judgment of the circuit court is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(107 S. C. 101)

McFADDEN v. McFADDEN et al. (No. 9663.)

(Supreme Court of South Carolina. March 29, 1917.)

1. WILLS \Rightarrow 524(2)—DEVISE TO HEIRS AS A CLASS.

Generally, when there is a devise to heirs as a class, they take at the death of the testator, unless a different time is fixed by the word "surviving" or some other equivalent expression.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 117.]

2. WILLS \Rightarrow 506(1)—DEVISE TO "HEIRS."

A devise to testator's widow for life, remainder to a son, and, if he died without issue, his share to be "divided equally among my other children," except a named daughter, and if "any of my children die leaving no issue," the property "to be divided equally between my heirs," excepting that daughter, gave the excluded daughter's children no possible interest, since the absence of qualification of the word "heirs," as by use of the word "surviving" or other equivalent expression, showed that the class described as "heirs" was determinable, not at the life tenant's death, but at decedent's death, at which time the excluded daughter's children were not "heirs" of decedent, but merely lineal descendants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1090.]

Appeal from Common Pleas Circuit Court of Clarendon County; Geo. E. Prince, Judge.

Suit by C. F. McFadden against Lena E. McFadden and others. From a decree, plaintiff appeals. Reversed.

The following is the decree of trial court:

This is a suit for specific performance on the part of the plaintiff against Lena E. McFadden, in which other parties claiming interest in the land are made parties. Lena E. McFadden refuses to purchase, alleging that the plaintiff cannot give a good and marketable title to the premises. The land in question was derived by the plaintiff under the second clause of the last will and testament of his father, William J. McFadden, deceased. The following quotations from the will are necessary for a determination of the questions arising in this case:

Item 2. "I give, devise and bequeath to my son, Charles Fishburn McFadden, and my wife Elizabeth J. McFadden, that tract of land whereon my dwelling house and store is situated, to be surveyed so as to contain three hundred and thirty-five acres. Now it is my will and devise for my wife, Elizabeth J. McFadden, to live in my present dwelling during her natural life and to enjoy all the rents, profits and issues of said tract of land, 335 acres, as long as she remains my widow and no longer, and at her death said lands to go to my son, Charles F. McFadden. Should he die without leaving legal issue his share of land must be divided

equally between my other children, share and share alike, except my daughter, Mrs. Butler Du Bose."

Item 8. "It is my wish and desire that my children enjoy the privileges of my plantation whilst single and disposed to be peaceful. I further desire and wish should any of my children die leaving no issue, said property herein mentioned shall revert back, and become the property of my estate to be divided equally between my heirs with the exception of Mrs. Bertha Du Bose."

In other clauses of said will, the other children of the testator except Mrs. Du Bose are given portions of the real estate of the testator without any life estate intervening.

I find that at the time of the making of the will and until his death, the testator, and his daughter, Mrs. Du Bose, were estranged, and the same was true as to her children in esse.

When this cause came on to be heard, the attorneys announced that, if the Du Bose children, Anglo Du Bose, Fleetwood Du Bose, and Mabel Stoudemire, should be found to be excluded from any possible interest in the said land, the other parties had already agreed among themselves to a settlement of their various contentions respecting not only this tract of land, but other portions passing under said will, and it would be very much in the interest of harmony and to the quieting of litigation to have a special decree, deciding the sole question as to whether or not under any possible construction of the will the Du Bose children could take. I am therefore passing only upon this question, as no other question has been argued or submitted to me.

If the second clause in the will were the only one to be considered, it is plain that only the children of the testator could take in any contingency; and as the Du Bose children above mentioned are not children, but grandchildren of the testator, they would be excluded. But as to the eighth clause of said will, if it were to be subsequently decreed that the word "heirs" therein used is to be taken in its technical sense, and if the reversion and distribution therein mentioned should be fixed by said subsequent decree as referring to the death of C. F. McFadden at any time, without leaving issue, then I hold that under such a construction the said Du Bose children, if their mother were then dead, would not be barred, but would take as purchasers in case of the happening of the contingency; that is to say, if C. F. McFadden should die leaving no issue.

R. D. Epps and Raymon Schwartz, both of Sumter, for appellant. Purdy & O'Bryan, of Manning, for respondents.

GARY, C. J. This is an action for specific performance, and the appeal involves the construction of a will. The facts are fully stated in the decree of his honor the circuit judge. The vital question in the case is whether the rights of the "heirs" are to be determined with reference to the time of the testator's death, or the death of his respective children leaving no issue.

[1] The well-recognized rule is that when there is a devise to "heirs" as a class, they take at the death of the testator, unless a different time is fixed by the word "surviving," or some other equivalent expression. The construction of the word "heirs," when used alone, and likewise when preceded by the word "surviving," is fully discussed in *Evans v. Godbold*, 6 Rich. Eq. 26. In that

case the court held that there is a devise upon the contingency of survivorship, and a precedent life estate is interposed, upon the determination of which the survivors are to take. The period of survivorship is referred to the termination of the life estate, and not to the death of the testator. It, however, clearly appears that such would not have been the conclusion but for the word "surviving," as shown by the following language:

"It is properly suggested in the circuit decree that the term 'surviving' in application to heirs of testator would be unmeaning if referred to heirs at testator's death. In that case, 'heirs,' standing by itself, would have precisely the same meaning, as 'surviving heirs.' But it is not true, that 'surviving heirs' is a mere pleonasm, when referred to survivorship at the death of the tenant for life. Without the use of it, the heirs of testator at his death would have taken a vested interest, transmissible to their representatives, and widowers and widows of the children, not heirs of the testator, would have taken shares. *Leeming v. Sherratt*, 24 Eng. C. R. 14; *Bankhead v. Carlisle*, 1 Hill, Eq. 358. Heirs of the same person may be very different individuals at different epochs. In *Huist v. Dawes*, 4 Strob. Eq. 38; *Id.*, 4 Rich. Eq. 415, in note, where, after precedent particular estates, the estate, real and personal, was given contingently to J. S. in fee, who died during the subsistence of the particular estates, it was held that those persons who were the heirs and distributees of J. S. at the time of his death, and not different individuals who were his heirs at the falling in of the estate for enjoyment, were entitled to his estate by descent and succession. *Hicks v. Pegues*, 4 Rich. Eq. 413. The converse is a corollary from this doctrine; and if his heirs at the termination of the particular estate be designated by a testator as purchasers of the remainder, they take in exclusion of heirs at his death."

These principles are fully sustained by the following authorities: *Rountree v. Rountree*, 26 S. C. 450, 2 S. E. 474; *Durant v. Nash*, 30 S. C. 184, 9 S. E. 19; *Simpson v. Cherry*, 34 S. C. 68, 12 S. E. 886; *Selman v. Robertson*, 46 S. C. 262, 24 S. E. 187; *Barber v. Crawford*, 85 S. C. 54, 67 S. E. 7; *Ballard v. Connors*, 10 Rich. Eq. 389; *Seabrook v. Seabrook*, 10 Rich. Eq. 495; *Schoppert v. Gillam*, 6 Rich. Eq. 83.

[2] In the case now under consideration, the word "heirs" is not qualified by the word "surviving" or any other equivalent expression. Therefore the death of the testator, and not that of the life tenant, is the period to which we must look for the purpose of determining who are to take.

Mrs. Butler Du Bose cannot take, however, for the very good reason that the testator so willed. Nor can her daughters take because they were not "heirs" of the testator, at the time of his death. There is a difference between "heirs" and lineal descendants. *Rembert v. Vetoe*, 89 S. C. 198, 71 S. E. 959.

Judgment reversed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(107 S. C. 31)

MIMS et al. v. JONES et al. (No. 9658.)
(Supreme Court of South Carolina. March 28, 1917.)

1. SLAVES — CHILDREN OF SLAVES — LEGITIMACY — STATUTES — CONSTRUCTION.

Under the Enabling Act of December 21, 1865 (13 St. at Large, p. 291), as to legitimacy of children born to slave parents who sustained marriage relations, where the evidence showed that the deceased ex-slave at the time of the passing of such act lived in the marriage relation with plaintiff, and that three children were born to them, the wife and children took an interest in the estate of such ex-slave, and were entitled to partition.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115.]

2. SLAVES — CHILDREN OF SLAVES — LEGITIMACY — STATUTES — CONSTRUCTION.

Such interest vested on the passage of the act.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115.]

3. SLAVES — MARRIAGES — VALIDITY.

Where, on passage of Enabling Act (13 St. at Large, p. 291), a slave was living in the marriage relation with a slave woman, he could not thereafter contract a valid marriage with another woman while the first wife lived.

[Ed. Note.—For other cases, see *Slaves*, Cent. Dig. §§ 114, 115.]

4. PLEADING — AMENDMENT — TRIAL — AMENDMENT — DISCRETION OF COURT.

A motion to amend is always in the sound discretion of the court.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 601.]

5. PLEADING — AMENDMENT OF ANSWER — TO CONFORM TO PROOF.

Where the only testimony of the transaction relied on by defendant was her own, which was objected to as incompetent, and which was at least unsatisfactory, leave first asked on hearing of the master's report to amend the answer to conform thereto was properly refused.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 605.]

Appeal from Common Pleas Circuit Court of Greenville County; Thos. J. Mauldin, Judge.

Suit by Phyllis Mims and others against Sarah Ann Jones and others. Decree for plaintiffs, and Sarah Ann Jones appeals. Affirmed.

Plaintiffs served the following exceptions to master's report:

I. The said master erred in holding and reporting that the plaintiff Phyllis Mims had no interest in the premises herein sought to be partitioned; whereas he should have held that under the testimony the said Phyllis Mims and the said Newton Jones under the terms of the act of 1865 (13 St. at Large, p. 291) were husband and wife, and that the said Phyllis Mims was the lawful widow of the said Newton Jones, and as such was entitled to one-third interest in said lands.

II. Because the clear weight of the testimony showed that the said Phyllis Mims and the said Newton Jones, former slaves, lived together as man and wife before emancipation, were so living when the act of 1865 was passed, and continued so to live until after the youngest child of the said Phyllis Mims, to wit, Emma Jones, was born; the master therefore erred in holding that the said Phyllis Mims was entitled to no interest in this land.

III. Because the master having properly found and reported that the said Phyllis Mims and the said Newton Jones before emancipation occupied the relation to each other as man and wife, and that the plaintiffs Riley Mims, Anna Jackson, and Emma Jones were the issue of this relation, and that said children were acknowledged by the said Newton Jones as his legitimate children and entitled to inherit from him as such, it is respectfully submitted that the said master erred in holding and deciding that the said Phyllis Mims had no interest in this land; whereas he should have held that the said Phyllis Mims was the lawful widow of the said Newton Jones and entitled to inherit from him as such.

IV. It is further submitted that the said master erred in deciding and reporting that although the relation of husband and wife between the said Phyllis Mims and the said Newton Jones was established under the act of 1865, yet because the said Newton Jones never made the selection and complied with the conditions of section 3 of the act of 1865, that therefore the marriage relation which existed between them was rendered null and void; whereas he should have held that said provision of said act of 1865 had no application to this case because when the said act of 1865 was passed no other person except the plaintiff Phyllis Mims claimed to be the wife of the said Newton Jones, and no other person except the said Newton Jones claimed to be the husband of the said Phyllis Mims.

V. Because the said master erred in holding and reporting that there was some testimony to the effect that at some time the said Newton Jones had relations with at least two other slaves in a somewhat similar manner to his relation with the said Phyllis Mims, and that he recognized the issue of those relations of his the same as he recognized the issue of Phyllis Mims; whereas he should have held that there was no testimony whatever to the effect that the said Newton Jones ever lived with any other woman as his wife until after the passage of the act of 1872 (15 St. at Large, p. 183), and that there is no competent evidence that he ever recognized any others as his children except the plaintiffs Riley Mims, Anna Jackson, and Emma Jones.

VI. Because the relation of husband and wife having been established by the testimony between the said Phyllis Mims and the said Newton Jones, the rights and interests of the said Phyllis Mims as such wife were vested, and conferred upon her all the rights vouchsafed under the law to all married women; said master therefore erred in deciding and reporting that the said marriage had been rendered void for the reasons stated by him.

VII. The said master further erred in holding and reporting that the defendant Sarah Ann Jones was entitled to be reimbursed for the money alleged to have been paid by her on a mortgage given by the said Newton Jones to the Mutual Loan Fund of Greenville, S. C., for the following reasons: (a) No such claim was ever raised by the pleadings. (b) The only testimony offered to sustain said claim was that of the said defendant Sarah Ann Jones, and such testimony was incompetent and should have been excluded under section 438, vol. 2, of the Code of 1912, said testimony being as to a transaction between the deceased Newton Jones and said witness who was a party to the action and interested in the result. (c) The said testimony of the said witness was vague, indefinite, and uncertain, and did not specify what payments she had made, when she had made them, and the amount thereof.

VIII. That said master erred in holding and reporting that the said Sarah Ann Jones and the said Newton Jones were legally married and living together as husband and wife until the death of the said Newton Jones, and that Sarah Ann Jones was therefore the lawful widow of the said Newton Jones, and as such entitled to a one-third interest in this land; whereas he

should have held that at the time of the alleged marriage between the said Sarah Ann Jones and the said Newton Jones the plaintiff Phyllis Mims, his lawful wife, was alive, and that said marriage between the said Newton Jones and the said Sarah Ann Jones was null and void, and that the said Sarah Ann Jones has no interest in this land.

The decree of the circuit court is as follows:

This is an action brought by the plaintiffs against the defendants to partition a certain lot of land situate in the city of Greenville, county and state aforesaid, which belonged to Newton Jones, now deceased, at the time of his death, the said Newton Jones having died intestate on or about the 29th day of July, 1912; and to have the interests of the plaintiffs and defendants ascertained and determined.

The contention of the plaintiffs, as set forth in their complaint, is that the plaintiff Phyllis Mims, and the said Newton Jones, were both slaves and lived together as man and wife for several years previous to emancipation, and were so living in December, 1865, when the act of the Legislature commonly called the "Enabling Act" was passed, and continued so to live for a long time thereafter, and that the plaintiffs Riley Mims, Anna Jackson, and Emma Jones were their legitimate children, and that, as such they with their mother, Phyllis, are the sole heirs at law of the said Newton Jones and entitled to the whole of the land herein sought to be partitioned. The defendant Sarah Ann Jones in answer claims that she is the lawful widow of the said Newton Jones, and the defendants Clarissa Seawright, John Jones, and Ellen Walker are his brothers and sisters, and that as such they are entitled to the whole of the land in question. The defendant Mrs. A. C. Davis was made a party defendant by the order of the court, and in her answer alleges that she is the owner of any interest which the defendant John Jones ever had in said land, he having conveyed any such interest to her.

The principal issue raised by the pleadings in the case is as to who constitute the heirs at law of the said Newton Jones, deceased, and who are entitled to the proceeds of sale of the real estate herein sought to be partitioned; and the solution of this issue involves what is commonly known as the "Enabling Act," designed to establish and regulate the domestic relations of persons of color, passed in December, 1865 (13 St. at Large, 291).

So much of said act as relates to this issue provides as follows:

I. "The relation of husband and wife amongst persons of color is established."

II. "Those who now live as such are declared to be husband and wife."

III. "In case of one man having two or more reputed wives, or one woman two or more reputed husbands, the man shall, by the 1st day of April next, select one of his reputed wives, or the woman one of her reputed husbands; and the ceremony of marriage, between this man or woman, and the person so selected, shall be performed."

IV. "Every colored child, heretofore born, is declared to be the legitimate child of his mother, and also of his colored father, if he is acknowledged by such a father."

VII. "Cohabitation, with reputation, or recognition of the parties, shall be evidence of marriage, in cases civil and criminal."

XII. "The relation of parent and child, amongst persons of color, if recognized, confers all the rights and remedies, civil and criminal, and imposes all the duties that are incident thereto by law, unless the same are modified by this act, or some legislation connected herewith."

I have studied this act in connection with the act of 1872 (15 St. at Large, p. 183).

It seems that the controlling questions of fact in this case are: Did the plaintiff Phyllis Mims

and the said Newton Jones live together as man and wife before emancipation, and were they so living together in December, 1865, when said act was passed? And were the plaintiffs Riley Mims, Anna Jackson, and Emma Jones their children and acknowledged to be such by them? And did the plaintiff Phyllis Mims have any other reputed husband living at that time, or did the said Newton Jones have any other reputed wife living at the time of the passage of the said act? By reference to the act (13 St. at Large, 291), it will be observed that the act in question was approved December 21, 1865.

By a previous order of this court, this case was referred to the master to hear and determine all the issues of law and fact raised by the pleadings, and make his report to the court thereon, together with leave to report any special matter. In conformity with said order the said master held references, took the testimony, and made his report to the court. The plaintiffs and the defendant Mrs. A. C. Davis filed exceptions to said report, and the matter now comes before me on said exceptions to said report. The defendant Sarah Ann Jones files no exceptions. It has been more than half a century since the incidents constituting the main facts of this case transpired, but, from the evidence produced before the master, I have concluded that the preponderance of said testimony shows that the plaintiff Phyllis Mims and the said Newton Jones were slaves before emancipation, and lived together as husband and wife, and were so living at the time of the passage of the said act of December, 1865, and continued so to live for a long time thereafter; and both regarded themselves, and were regarded by their family both black and white, and by others, as man and wife; that one of their children, the plaintiff Riley Mims, was born before emancipation, and that the other two children, the plaintiffs Anna Jackson and Emma Jones, were born after emancipation, and while the said Phyllis Mims and the said Newton Jones occupied the relation to each other as husband and wife, that all of said children were acknowledged by them as their legitimate children; and that the plaintiff Phyllis Mims had no other reputed husband at the time of the passage of said act, or at any other time; and that the said Newton Jones had no other reputed wife at the time of the passage of said act, nor for a long time thereafter, nor until their youngest child, the plaintiff Emma Jones, was born. By reference to the report of the master it will be seen to appear as I quote therefrom: "It is very evident from the testimony on this point (that is, as to whether Newton Jones had more than one wife) that the said Newton Jones left the community in which he had been residing certainly in the early part of 1868, if not sooner, and that some time thereafter he was living with one Vickie West in or near the city of Greenville, with whom he continued to live until she died, although the testimony shows that he continued to visit Phyllis Mims from time to time after coming to Greenville."

Now allowing the twenty days provided by statute in which a statute takes effect, or rather after which it does take effect, in the absence of specific words therein fixing the time for the same to take effect (Code 1912, vol. 1, § 30), I am persuaded that the preponderance of the testimony is to the effect that Newton Jones certainly regarded Phyllis Mims as his wife, and she regarded him as her husband at the time the aforesaid act went into effect. The finding of the master to the effect that Newton continued to visit Phyllis "from time to time after coming to Greenville" strengthens my conviction as to

this, and I think this finding is amply supported by the evidence, and carries the relationship of husband and wife, occupied by Newton and Phyllis, as found and reported by the master in his first conclusion of fact, well beyond the point of time when the act of 1865 in question went into effect.

[1-3] From the above conclusion of fact, I find and conclude, as matters of law, that the exceptions of the plaintiff, 1, 2, 3, 4, 5, 6, and 8, must be sustained.

Now as to the claim of the defendant Sarah Ann Jones although the said defendant in her answer set up no claim for reimbursement for moneys alleged to have been paid out by her, and although she made no motion before the master to be allowed to amend her answer, in that regard, yet, under or over, objections by the plaintiff the master allowed said defendant to introduce evidence as to said claim; and although the only testimony offered was that of said defendant herself, which was objected to as incompetent under section 438 of the Code of Civil Procedure, and although the plaintiffs objected to said claim upon the further ground that, in no event was she entitled to be subrogated to the rights of the creditor whose debt she alleged she had paid, and although the testimony given by the said defendant was vague, indefinite, and uncertain, and, I might add unsatisfactory, the master overruled all objections on the part of the plaintiffs, and the defendant Mrs. A. C. Davis, and found and reported that the said defendant Sarah Ann Jones was entitled to be paid the amount of this claim before any division of the funds arising from the sale of the real estate. This is made the grounds of the plaintiffs' seventh exception, and was also excepted to by the defendant Mrs. A. C. Davis. During the argument before me on the hearing of exceptions from the master's said report, the attorney for said defendant Sarah Ann Jones made a motion to amend his answer by alleging the facts constituting said claim.

[4, 5] A motion to amend is always in the sound discretion of the court, but I think it would be unfair, or at least, in the view I take of the case, it would serve no valid purpose to allow the amendment asked for at this stage of the proceedings, and especially so since the only testimony offered by the said defendant was her own, which was objected to as incompetent, and in itself showed that she was a mere volunteer; that she was not requested by either the said Newton Jones or the said creditor to make any payments on said debt, or to be subrogated to the rights of the said creditor. Besides, if I had felt compelled to grant the motion, I would have felt it incumbent on me to allow plaintiffs and the defendants to introduce their testimony in opposition to this claim. I think, therefore, that the master erred in admitting this testimony and allowing said defendant's claim. The motion to amend, therefore, is refused, and plaintiff's seventh exception and the exceptions of the defendant Mrs. A. C. Davis in reference to this claim are both sustained.

Ansel & Harris, of Greenville, for appellant. A. Blythe, of Greenville, for respondents.

GARY, C. J. For the reasons therein stated, the judgment of the circuit court is affirmed.

HYDRICK, WATTS, FRASER, and GAGE, JJ., concur.

(79 W. Va. 789)

FREEBURN v. BALTIMORE & O. R. CO.
(No. 3114.)(Supreme Court of Appeals of West Virginia.
March 13, 1917.)*(Syllabus by the Court.)***APPEAL AND ERROR** §502(2, 6, 7)—**RECORD—**
MATTERS TO BE SHOWN—PRESERVATION OF
GROUND OF REVIEW.

To entitle a litigant to a review by this court of an alleged error committed in directing a verdict, it is essential for the record to show that he moved for a new trial and his motion was overruled and he excepted to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2306, 2309.]

Error to Circuit Court, Monongalia County.

Action by William H. Freeburn, administrator, against the Baltimore & Ohio Railroad Company. There was a judgment for defendant, and plaintiff brings error. Writ dismissed as improvidently awarded.

Van A. Barrickman and E. M. Everly, both of Morgantown, for plaintiff in error. McClintic, Mathews & Campbell, of Charleston, and Moreland & Guy, of Morgantown, for defendant in error.

WILLIAMS, J. William H. Freeburn, administrator of Sarah E. Sterling, deceased, brought this action to recover damages for the unlawful death of his intestate, caused by the alleged negligence of defendant in running one of its trains upon and over her, at a public street crossing in the city of Morgantown. The case was tried by a jury. At the conclusion of plaintiff's evidence, the court, on motion of defendant, instructed the jury to find for it, which they did. Plaintiff objected and took a bill of exceptions embodying his evidence and the rulings of the court, but did not move for a new trial.

At the very threshold of an investigation of the alleged errors we are confronted with the question whether, under the rules of practice, a motion for a new trial is essential to the right to have errors reviewed by this court. That such a motion is a prerequisite to the right of review is a general rule of practice, well settled by numerous decisions in this state and in Virginia. *Hinton Milling Co. v. New River Milling Co.*, 88 S. E. 1079; *State v. Phares*, 24 W. Va. 657; and *Danks v. Rodeheaver*, 26 W. Va. 274. In the latter case, a well-considered one, it was held that, in order to entitle a party to a review of a case tried by a jury, two things are essential: (1) An exception to the erroneous ruling, taken at the time and embodied in a bill of exceptions; and (2) a motion to set aside the verdict must have been made and refused, and such refusal noted in the record. Failure to move for a new trial is held to be a waiver of all errors committed by the court during the progress of the trial, notwithstanding proper bills of exceptions were taken. The following cases are in point: *State*

v. Rollins, 31 W. Va. 363, 6 S. E. 923; *State v. Henaghan*, 73 W. Va. 706, 81 S. E. 539; *Newberry v. Williams*, 89 Va. 298, 15 S. E. 865; and *Town of Bridgewater v. Allemon*, 93 Va. 542, 25 S. E. 595. In jury trials, such seems to be the requirement in most of the states of the Union. 29 Cyc. 736. The rule does not apply in a case tried by the court, in lieu of a jury. *Capital City Supply Co. v. Beury*, 69 W. Va. 612, 72 S. E. 657; *Fisher, Adm'r, v. Bell*, 65 W. Va. 10, 63 S. E. 620; and *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890.

Neither does the general rule apply as in other cases, where a judgment is rendered on a demurrer to evidence. There a motion for a new trial is not necessary if the only purpose is to obtain a review on the sufficiency of the evidence. The demurrer presents that question, as one of law, for court decision. According to the earlier practice, the question was not presented on the evidence, but on the admitted facts, which were entered of record. The practice, however, soon grew up in Virginia of submitting all the evidence to the court on the demurrer. This made it necessary for the courts to determine the facts, which often depended upon conflicting evidence. The propriety of that practice was seriously questioned by some of the earlier judges, as the effect of it was to deny the right of jury trial, by withdrawing the case from the jury, often against the will of the demurree; he being obliged to join in the demurrer. But it has always been a litigant's right to demand the judgment of the court on the sufficiency of the facts to sustain his adversary's averments, the truth of which he was willing to admit. His adversary could have no ground to complain of a denial of his right of trial by jury, if the court should give to his evidence all the probative force and effect that a jury could possibly give it. Hence the courts adopted rules for determining the weight and value of demurree's evidence, which secure to him all the results he could hope to obtain from a trial by a jury. By thus withdrawing a case from the jury the demurrant assumes all the risk of an adverse decision on the law and deprives his opponent of none of the benefits of a jury trial.

But the sufficiency of the evidence to sustain a verdict is the only question this court can properly consider on writ of error to a judgment rendered on demurrer to evidence, unless there has been a motion for a new trial. The court is not bound, *ex mero motu*, to grant a new trial and thus subject plaintiff in error, perhaps against his will, to the risk of a more unfavorable verdict. *Riddle v. Core*, 21 W. Va. 530; *Proudfoot v. Clevenger*, 33 W. Va. 267, 10 S. E. 394; *City of St. Marys v. Locke*, 73 W. Va. 30, 80 S. E. 841; *Humphrey's Adm'r v. West's Adm'r*, 3 Rand. (Va.) 516; *Green v. Judith*, 5 Rand. (Va.) 1;

Briggs v. Hall, 4 Leigh, 484, 26 Am. Dec. 326; Newberry v. Williams, supra; Western Union Tel. Co. v. Paper Co., 87 Va. 418, 12 S. E. 755; and N. & W. Ry. Co. v. Dunnaway's Adm'r, 93 Va. 34, 24 S. E. 698. The case last cited overrules Railroad Co. v. Scott (Va.) 20 S. E. 826, which held that the appellate court was not authorized to consider the sufficiency of the evidence, on a demurrer thereto; no motion for a new trial having been made. The only case cited to sustain that decision is Newberry v. Williams, supra, which was not a case decided on demurrer to evidence, but was a case tried by a jury. The error complained of in Newberry v. Williams was the court's refusal to give certain instructions asked for by plaintiff in error, and the court held the error was not reviewable on appeal, because no motion had been made for a new trial.

It is contended that, as a directed verdict is analogous to and a substitute for a demurrer to evidence, a motion for a new trial is not necessary to entitle the party complaining to a review of the sufficiency of the evidence. But the analogy exists only to the extent of applying the same rules in ascertaining the facts proven by the evidence. The different methods of procedure produce results which are technically very different. A verdict, notwithstanding it has been directed by the court, is still regarded in law as a verdict of the jury on the evidence; but a demurrer to evidence takes the main issue in the case from the jury, and submits it to the court on a single question of law, to wit, the sufficiency of the evidence to prove a case. Originally the practice was, on a demurrer to evidence, to discharge the jury, and then impanel another to assess damages, if the decision of the demurrer was unfavorable to demurrant. But later the practice was introduced, as a matter of economy and convenience, of allowing the jury to render a conditional verdict. On the main issue, the right to recover anything, a directed verdict is, technically, a finding by the jury on the evidence, while a conditional verdict, on a demurrer to evidence, is no finding by them on the merits, but simply an assessment of damages or ascertainment of the amount in controversy. The merits depend upon the judgment of the court on the law applicable to a state of facts, practically admitted by the demurrant to be true. Technically there is no difference between a verdict, superinduced by erroneous instructions as to the law of the case, and a verdict rendered in obedience to a peremptory instruction. In either case the court's erroneous ruling is responsible for the verdict. Hence, if a motion for a new trial is essential to a review of the error in one instance, why not in the other also? We confess our inability to discover any good reason for making a distinction. By reference to the authorities

above cited, and to other cases decided by the courts of this state and of Virginia, we find that the settled rule of practice requires the record to show that a motion for a new trial has been made and overruled, before this court will review alleged errors of the court in giving and refusing instructions. We do not find that the exact question here presented has ever been passed on either by this court or the Court of Appeals of Virginia. But it has been held by the courts of other states, whose rules of practice in this respect seem to be similar to our own, that a motion for a new trial is necessary to authorize a review of the action of the trial court in giving a peremptory instruction. Witt v. Lexington & E. Ry. Co., 158 Ky. 401, 165 S. W. 399; Seymour v. Southern Ry. Co., 117 Tenn. 99, 98 S. W. 174; Brown & Bridgeman v. Western Casket Co., 30 Okl. 144, 120 Pac. 1001.

No motion for a new trial having been made in the lower court, we cannot consider the alleged errors. Therefore the writ of error will be dismissed as improvidently awarded.

(79 W. Va. 785)

SIGLER v. BOARD OF CANVASSERS OF MARSHALL COUNTY et al. (No. 3349.)

(Supreme Court of Appeals of West Virginia. March 13, 1917.)

(Syllabus by the Court.)

1. ELECTIONS \S 180(5)—BALLOTS—INTERPRETATION.

In the interpretation of ballots cast at an election it will be presumed that each elector intended to exercise his full right to vote for as many candidates as there are offices to be filled at such election.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 155.]

2. ELECTIONS \S 180(1)—BALLOTS—MARKS.

Where at an election there are two candidates to be elected for the same office, and upon one ticket there is only one candidate for such office, and upon another ticket there are two candidates therefor, and a voter marks his ballot by placing a cross in the circle under the emblem of the party having only one candidate for such office, and by placing a cross in the square before the name of the candidate of such other party directly opposite the name of the candidate of the party he has so selected by placing a cross in the circle under the emblem, it will be held that such voter intended to vote for the candidate for this office upon the ticket in the circle under the emblem of which he has placed a cross, as well as for the candidate on the other ticket in the square before whose name he has placed a cross.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 151.]

Petition by Harold Sigler for a writ of mandamus against the Board of Canvassers of Marshall County and others. Writ denied.

Jas. D. Parriott and Chas. E. Carrigan, both of Moundsville, for petitioner. Jas. F. Shipman and D. B. Evans, both of Moundsville, for respondents.

RITZ, J. There were two justices of the peace to be elected for Union district, in Marshall county, at the general election held in the month of November last. The petitioner and Paul Reidel were candidates upon the Republican ticket. Upon the Democratic ticket the respondent Robert G. Smith was the only candidate. His name was printed on the Democratic ticket under the designation "For justice of the peace" directly opposite the name of Paul Reidel, and petitioner's name was printed on the Republican ticket under the like designation below the name of Reidel. Upon the face of the returns respondent Smith and Paul Reidel were elected as such justices of the peace. Petitioner demanded a recount of the ballots cast at said election, and as a result of said recount it was ascertained and declared that respondent Smith and said Reidel were elected.

At said election there were 44 ballots cast the interpretation of which determines this controversy. These ballots were marked with a cross in the circle under the Democratic emblem, and with a cross in the square before the name of Paul Reidel as a candidate for justice of the peace on the Republican ticket. There are no other marks upon the 44 ballots in controversy. The board of canvassers counted these ballots for Robert G. Smith and for Paul Reidel. They were admittedly properly counted for Reidel, but the petitioner claims that they were improperly counted for Smith, his contention being that, inasmuch as Reidel's name was directly opposite that of Smith, the placing of the cross in the square before the name of Reidel had the effect to destroy the primary intention of the voter to cast a ballot for Smith as expressed by placing the cross in the circle under the Democratic emblem. If these ballots are rejected as votes for Smith, then Reidel and petitioner were elected as justices of the peace instead of Reidel and the respondent Smith.

[1] We have heretofore held that in the interpretation of ballots the canvassing officers are mandatorily required to give expression to the intention of the voter, if this intention can be fairly ascertained from the face of the ballot. We have also held in the case of *Shore v. Board of Canvassers*, 64 W. Va. 705, 63 S. W. 389, that it will be presumed that each voter intended to vote for the full number of candidates required to fill the offices for which there were candidates at the election. It must be borne in mind that not only is it the privilege of electors to vote for candidates for public office at all elections at which they are entitled to vote, but this is as well a high public duty, and it will be presumed that the intention of each elector, when he casts his ballot, is to perform his full duty in this regard.

[2] The cross in the circle under the emblem of the Democratic party upon each of the ballots in question expresses the clear

intent upon the part of the voters casting these 44 ballots to vote the Democratic ticket. They undoubtedly belonged to that party. There is no other mark on the tickets except the cross in the square before the name of Paul Reidel, a candidate for justice of the peace on the Republican ticket. This primary intention of the voter will be given effect in counting the ballot, unless it is inconsistent with some specific or particular designation of a candidate upon some other ticket. It is contended by the relator that the mark in the square before the name of Reidel expresses an intent inconsistent with the primary intent of the voter to cast his ballot for all of the candidates on the Democratic ticket. We think the question here is: How many names on the whole ballot were marked by these voters for the office of justice of the peace? The voter in each case expressed the clear and unequivocal intent to vote the Democratic ticket. Is this intent, so far as the office of justice of the peace is concerned, overcome by placing the mark in the square before the name of Reidel? There were two justices of the peace to be elected. Placing the cross in the circle under the Democratic emblem had the effect of only designating one candidate for justice of the peace. Placing the cross in the square before the name of Reidel had the effect of designating another candidate for justice of the peace. This was only a designation by the voter of two candidates for this office, and it is just the exact number that he was entitled to vote for. We do not think there is anything inconsistent in his designation of Reidel as a candidate for whom he desired to vote for justice of the peace with his primarily expressed intention to vote for all candidates upon the Democratic ticket, inasmuch as he could vote for all of the candidates on the Democratic ticket and one candidate on some other ticket before he had performed his full duty as an elector. The presumption that the elector intended to perform his full duty by voting for as many candidates as there were offices to be filled would be overcome if he stopped by simply voting the straight Democratic ticket, but if he supplemented that ticket by selecting a candidate for the office of justice of the peace upon another ticket, he had gone to the limit of his rights in voting for candidates for that office.

It is insisted that the rule laid down in the case of *Shore v. Board of Canvassers*, *supra*, has the effect to reject these ballots as votes for the respondent Smith. It must be borne in mind that in that case upon each of the tickets upon which marks were made there was a full complement of candidates, and under those conditions the court held, when a voter had selected a ticket which he desired to vote by placing a cross in the circle under the emblem at the head of the ticket, and then selected a candidate for justice of the

peace on another ticket by placing a cross in the square in front of his name, this expressed the intent of the voter not to vote for the candidate upon the ticket he had first selected whose name was directly opposite the name of the candidate specifically designated. To hold otherwise in that case would have had the effect of saying that the voter had designated three candidates for justice of the peace for whom he desired to vote, and, inasmuch as he was only entitled to vote for two, his vote would be counted for the one specifically designated and rejected as to the others. The interpretation the court gave to the ballot made effective the presumption that the voter intended to exercise his full right by voting for as many candidates as there were offices to be filled. To hold that the ballots in this case could not be counted for the respondent Smith would have exactly the contrary effect; that is, it would say that the voter only made a choice of one candidate, when the presumption is that he intended to vote for two.

We are of opinion that these ballots were properly counted, and the writ of mandamus is therefore refused.

(79 W. Va. 796)

SUTHERLAND v. MILLER, Judge, et al.
(No. 3331.)

(Supreme Court of Appeals of West Virginia.
March 13, 1917.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW §67—JUDICIARY—
POWERS OF.

In so far as sections 15 and 16, c. 27, Acts 1915 (section 8b, c. 5, Barnes' Code), purport to authorize a judge to whom application is made, as therein provided, to order a judicial inquiry, if in his opinion the interests of public justice require it, to ascertain whether a candidate for United States senator in person or by agents expended to secure his election money or other things of value in excess of the amount allowed in that chapter sufficient to influence materially the result of the election, and to require the judge to certify his opinion and determination and the evidence adduced before him upon such investigation "to the Governor [of the state] who shall transmit the same to the proper authorities of the United States government for such action as said authorities may deem proper," they are obnoxious to and conflict with article 5 of the Constitution of this state, in that they attempt to empower a member of the judiciary as such to exercise a volition to determine when, to what extent, or whether, a judicial inquiry into alleged corrupt practices shall be undertaken by him upon such application.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 123.]

2. CONSTITUTIONAL LAW §61—LEGISLATIVE
POWER—DELEGATION.

Such a statute is void also because it attempts to delegate a nondelegable power. Upon the Legislature the people have impliedly conferred authority to determine the exigencies or emergencies that warrant the exercise of police power to promote the general welfare of the citizens of the state; and it cannot redelegate to any one the ultimate right to determine when,

to what extent, and under what circumstances the power may properly be exercised in any given case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 103-107.]

3. UNITED STATES §14—ELECTION OF SENATORS—VALIDITY—DETERMINATION.

In the Senate of the United States, under an express declaration of the federal Constitution (article 1, § 5) vests the exclusive power and authority to judge of the election, returns, and qualification of its members, and no other power or body lawfully can interpose or in any wise attempt to control or influence the determination of these questions, or declare void an election held to select such a member.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 9.]

Petition by Howard Sutherland, for a writ of prohibition against Hon. James H. Miller, Judge, and others. Writ issued.

McClintic, Mathews & Campbell, of Charleston, for petitioner. A. M. Belcher and T. A. Bledsoe, both of Charleston, for respondents.

LYNOH, P. [1] As rival candidates in the general election held November 7, 1916, to fill the office of Senator of the United States for the state of West Virginia during the term beginning March 4, 1917, William E. Chilton received 138,585 votes and Howard Sutherland 144,243 votes, according to the returns as ascertained in the manner required by law. William E. Chilton, presumably acting upon the hypothesis that section 15, c. 27, Acts 1915 (section 8b15, c. 5, Barnes' Code) was competent to confer the requisite authority therefor, presented to James H. Miller, judge of the Ninth judicial circuit, a petition in which, after in general terms alleging, but not definitely pointing out, supposed violations by Howard Sutherland and his agents of the provisions of the act known as the Corrupt Practice Act (being chapter 27, Acts 1915), by the expenditure of money and other things of value in excess of the amount thereby permitted to be expended by a candidate for such official position, to such an extent as materially to affect the result of the election so held, prayed an investigation in the nature of a judicial inquiry into the correctness of the charges made in the petition, and the relief prescribed by the act if by proof the judge should think they were sustained. Sutherland, without appearing thereto for any purpose at the time and place named in the process issued upon the petition and served on him, applied to this court and obtained a rule in prohibition against Chilton and the judge to whom the petition was addressed, to require each of them to appear, and, if either of them can, to show good cause against the award of a writ to prohibit them from further proceedings upon the aforesaid inquiry. In response to the rule, they severally appeared, by demurrer and answer to the petition. Judge Miller, without assigning any cause of demurrer, answered thereto, in part in the language of the act, that, "be-

ing of the opinion that the interests of public justice required the judicial inquiry prayed for, he authorized such inquiry and directed process in accordance with the terms and provisions of the act," and averred the nonappearance of Sutherland to object to the petition or answer the charges it preferred. As cause of demurrer, Chilton assigned lack of sufficiency in the allegations of the petition of Sutherland to warrant the award of the prohibitive process, and the qualification and competency of his correspondent to entertain and determine the inquiry sought to be prohibited, and, for answer, reiterates in brief the charges made in the petition filed by him.

Thus is raised the only vital question: Whether, in view of the declaration of article 5 of the Constitution that "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time," the Legislature may delegate to any person empowered to exercise the functions of a judge the determination officially and ex parte of what "the interests of public justice require" or do not require. Such, as we perceive, is the very essence of the act (Acts 1915, c. 27, § 15 [Barnes' Code, c. 5, § 8b]) out of whose provisions this controversy has arisen. It reads:

"At any time within sixty days after any primary or other election, the Attorney General, any prosecuting attorney, any candidate voted for at such election, or any one hundred qualified voters, upon giving bond to indemnify the person whose election is contested, from all costs, attorneys' fee and expenses incurred by him in defending his title to office in the event that such person's title to his office is upheld, may present to any circuit judge a petition setting forth under oath, upon information or personal knowledge, that corrupt and illegal practices contrary to the provisions of this act, specifying the same, were committed in connection with such election, naming any candidate as defendant, and praying for a judicial inquiry into the alleged facts. If such judge shall be of the opinion that the interests of public justice require such a judicial inquiry, he shall authorize such inquiry. Such petition shall be tried without a jury; the petitioner or petitioners, and all candidates at such election, shall be entitled to appear and be heard as parties; and the court shall have power to compel the attendance of witnesses and the production of books and papers which are relevant and material, and all the evidence taken shall be properly certified and made a part of the record of such proceeding."

The apparent vice of the act, if invalid, reposes in that provision which says:

"If such judge shall be of the opinion that the interests of public justice require such a judicial inquiry, he shall authorize such inquiry."

The implication is irresistible that if he shall be of the opinion that the interests of public justice do not require such a judicial inquiry, he shall not authorize it. So that what the interests of public justice require is to be determined, not by that body in which the organic law has vested it, but by a member of a separate and distinct depart-

ment of the state government to whom the Legislature has sought to delegate the exercise of that function.

No authority definitely demarks the exact boundary line beyond which neither department may be deemed to intrude or impinge upon the exclusive prerogatives of either of the other co-ordinate governmental departments. Such limitation is impossible of delineation. In the enactment of any statute the Legislature, in a limited sense, necessarily and properly exercises judgment, discretion, and deliberation. It investigates the facts, conditions, and circumstances, and from the knowledge or information acquired in that process determines the necessity and propriety of the legislation the object of which is to promote the general welfare of the public whom it represents. Likewise, upon those upon whom the organic law has imposed the duty to execute the laws passed by the Legislature devolves the duty of exercising sound judgment in determining the time, place, manner, and method and the extent to which and the persons against or in whose favor the laws are to be enforced. Naturally and unavoidably, the exercise of these functions, whether legislative or executive, partakes somewhat of the characteristic quality of a judicial investigation, but does not effect a trespass upon the prerogatives of the judiciary in violation of the Constitution.

In the process of determining whether an act of the Legislature is invalid, because it falls within the inhibition of the Constitution, it is essential always to remember that if a doubt exists as to its legal competency or validity, the doubt must be resolved in support of the legislation. The presumption should be and is in favor of validity. It must be assumed that the law-enacting department, whose membership pledged themselves in solemn form to support the Constitution, has not lightly disregarded that pledge.

In the chapter cited, the Legislature prescribed the limits of expenditures it deemed sufficient to allow candidates for the different official positions to be filled by the electors in any primary or general election conducted in the state or any subdivision thereof, and the punishment to be imposed for an expenditure in excess of that amount. The expenditures or liability incurred by or on behalf of a candidate for membership in the Senate of the United States, in securing his nomination or election, shall not in the aggregate exceed the sum of \$75 for each of the 55 counties in the state; and the punishment to be inflicted for a violation of this provision is the ineligibility of the person convicted to hold the office he is elected to fill, and his disqualification during three years from the date of the conviction to vote or hold any public office or employment. Chapter 5, § 8b14, Barnes' Code. Further

more, in case of a judicial inquiry into corrupt and illegal practices connected with the election of a United States senator, attempted to be provided for in section 15, if the court shall decide that the successful candidate named in such petition in person or through his political agents has committed such practices sufficient to influence the result materially, the election shall be treated as void, in which event another election shall be ordered as required by the act.

In this manner, and as the necessary consequence of the exercise of the right conferred by that section if valid, the privilege of a successful candidate in an election to fill the office of United States senator is made to depend, in a large measure, in the first instance, upon the *ex parte* opinion of a single judge, one selected by a candidate defeated in the same election for the same office, supported, finally, it is true, by the conclusion of the judge, based upon the facts proved before him, subject, however, to the appeal allowed in section 19 of the chapter. The consequences arising out of that determination are drastic and conclusive, unless reversed on appeal. They avoid the election. This result necessarily flows from the conclusion of a single member of the judiciary, unaided by any express declaration of the Legislature enacting the provision as to what "the interests of public justice" may require, unless it be found elsewhere in the act. No such provision or combination of provisions is pointed out by counsel; and we perceive none. True, the act inveighs against corrupt practices in elections. It limits the expenditure of money to influence the choice of candidates for nominations in a primary and their election after the nominations are made. It definitely prescribes the punishment to be inflicted upon conviction for violation of its provisions against excessive expenditures of money and other things of value. Each provision has its complement in the punishment provided for its infringement. For every violation of the act, independently of the provision for a judicial inquiry, fixes a penalty, and conviction subjects the offender to the consequences flowing from the commission of the unlawful act. Nowhere does there appear to be a hiatus between violation and penalty. Without the section purporting to authorize a judicial inquiry, the act is certain, complete, unequivocal, and unambiguous. Nor anywhere in it is there any positive or explicit legislative definition or ascertainment as to what the "interests of public justice" do or do not require. That definition or ascertainment is left entirely subject to the *ex parte* opinion of the judge selected by the persons who under the supposed authority of the act may determine to put in motion the necessary movement to obtain the judicial inquiry. Such is the only permissible interpretation of the statutory provision. The

exercise of the power to determine the propriety of the proceeding is not merely discretionary. In quality it is legislative. It confers the power to determine what the interests of public justice require. What is required to promote justice may or may not be put into operation by a legislative enactment, but when declared by statute its enforcement is not optional when the circumstances demand its exertion by the tribunal to which its enforcement is committed.

Such a requirement results solely from the exercise of that indeterminate and indefinable power generally denominated the police power, which essentially inheres in all legislative agencies. It is exercised by the state to promote the health, safety, comfort, morals, and the general welfare of the public. What ever tends to promote these elements of human happiness, and to eradicate, so far as may be, noxious agencies that tend unnecessarily to impair the right to enjoy life, liberty, and property, fall within the broad scope of that power, as do all statutes that have for their legitimate object the repression of criminal conduct and the prevention of corrupt practices in elections. It is a term which has relation to a power to adopt a system of regulations that tend to promote health, order, convenience, and comfort of the public and the prevention and punishment of conduct, professions, trades, or callings injurious to society. It is the name given to that inherent sovereignty which it is the right and duty of the government to exercise whenever public policy in a broad sense demands for the benefit of society at large regulations to guard its morals, safety, health, order, or to insure, in any respect, such economic conditions as an advancing civilization of a highly complex character requires. 8 Cyc. 863. Though the courts may determine what fall within the control of that power, the Legislature only can decide when the exigency exists for the exercise of the power; and its determination is conclusive upon the judiciary. *State v. Gerhardt*, 145 Ind. 439, 44 N. E. 469, 33 L. R. A. 313; *Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315; *Boston Beer Co. v. Massachusetts*, 97 U. S. 35, 24 L. Ed. 989; *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302.

Although nondelegable because of its sovereign quality, it is firmly established, after repeated challenge, that the Legislature may expressly or by necessary implication delegate to municipal corporations to a limited extent the lawful exercise of the police power within their legitimate governmental sphere, the measure of the power conferred being subject to legislative discretion. *Morris v. Taylor*, 70 W. Va. 618, 74 S. E. 872. But wherever the legislative department has deemed it prudent to bestow on county courts in the establishment and maintenance of public highways, and on municipalities for the government of a limited territory, or on the

judiciary, as in the incorporation of towns and villages, it has, in each instance, definitely defined the circumstances and conditions necessary to serve as the basis for the exercise of the grant, and placed upon the grantee of the power the obligation to determine whether the conditions prescribed exist before attempting to exert the power. In each and every instance of the delegation, the right to exercise the power has vigorously been contested, on the ground of legislative incompetency to bestow upon another body or tribunal that which primarily inheres in it alone. And in no instance has the delegation been sustained where, when the conditions prescribed for the exercise of the grant exist, the exercise is made to depend upon the mere will or caprice of the grantee of the power.

These principles are illustrated by many decisions. The Supreme Court of the United States, in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, held invalid, because violative of the federal Constitution, a municipal ordinance designed to regulate the business of conducting public laundries in the city of San Francisco, in that it conferred arbitrary power "upon the municipal authorities at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected, for the carrying on of the business." A statute which contains a clause authorizing a county court at its pleasure to suspend the operation of the act after it takes effect is held unconstitutional and void, as an unlawful delegation of power, in *State v. Field*, 17 Mo. 529, 59 Am. Dec. 275. An act of the same state, conferring upon the board of railroad and warehouse commissioners authority to establish the time and place for the inspection of hay was held invalid in *State v. Carlisle*, 235 Mo. 252, 138 S. W. 513, as making the inspection to depend solely upon the opinion of the board. Although when circumscribed within definite valid limitations and restrictions powers conferred upon designated public officials to provide rules and regulations for the complete operation and enforcement of a law within its expressed general scope and purpose will be sustained because not unlawful, yet if it attempts to delegate the power to enact a law or modify it, or to exercise an unrestricted discretion in the application of the law, it will not be sustained, because these are nondelegable legislative functions. *State v. Railway Co.*, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639.

In so far as an act attempts to empower a person named therein to make and enforce, subject to the approval of certain designated commissioners, rules and regulations in the nature of quarantine for certain purposes, and to declare that a willful violation of the regulations shall be a misdemeanor, it is held in *Ex parte Cox*, 63 Cal. 21, to amount to a

delegation of legislative power, and as such is unconstitutional. "The Legislature had no authority to confer upon the officer or board the power to declare what acts shall constitute a misdemeanor." The same general doctrine is asserted in *Morrow v. Wipf*, 22 S. D. 146, 115 N. W. 1121, in interpreting a primary election law which attempted to authorize a county central committee to name delegates from such county, whenever two-thirds of its members should decide that there was not a sufficient contest over the election of delegates from the county to the state convention as would justify the expense necessary to be incurred in calling a county convention for such purpose. So changing the rules as to the time when the liability of a common carrier ceases and its liability as a warehouseman begins is held not to be an act of executive administration, but one involving a legislative question, and as such cannot be delegated to a railroad commission. *Jones Bros. v. Southern Railway Co.*, 76 S. C. 67, 56 S. E. 666.

A Tennessee Legislature, without in express terms or by implication repealing the law requiring a jury trying a felony case to remain during the trial in the custody of the sheriff, undertook to provide that:

"In all criminal trials, when the minimum degree of punishment for the crime charged in the indictment is not above one year in the penitentiary, it shall not be necessary * * * to place the jury in charge of an officer, but the jury may, in the discretion of the court, disperse as in other cases, and the state shall not be chargeable for their board." Acts 1887, c. 153.

The court in *King v. State*, 87 Tenn. 304, 10 S. W. 509, 3 L. R. A. 210, in discussing the act, said:

"It undertakes to confer upon each judge of the criminal and circuit courts the power to suspend the general law, the judge's discretion being the only rule for his conduct. The statute before us permits the judge to have one rule in one case and the opposite rule in another case in the same county and at the same term of court. Under it he may have a discretion to be exercised in one county and the reverse of that discretion in another county. There is nothing in the act defining, controlling, or limiting that discretion. He is not required to give or have a reason for its exercise the one way or the other, and therefore, when he says the jury in this criminal case may disperse, and the jury in that criminal case shall go under the rule, the question is settled. Whether he is influenced in the one case by personal considerations for one or more of the jury, or in the other by motives of public policy, can make no difference. He is the sole judge of the question, and his reasons are his own, and there is no authority anywhere to inquire into them. * * * The general law remaining, it must be enforced in all cases unless the judge shall, by this statute, be permitted to say, I suspend it. When he makes the order on his minutes to that end he has performed a legislative and not a judicial act—an act the law has not commanded; an act that was not law until he saw proper to declare it so; an act that he may do and undo at will. He may disperse the jury to-day, and put the same jury under rule to-morrow. He is bound to no rule of action, and accountable to no one for his action. He is a legislative and a judicial compound, something not recognized in our institutions."

[2] To prevent secrecy in operation and accounts and prevent the issuance and sale of fictitious or watered stock by public utility corporations created by a state, its Legislature may, in the exercise of its inherent power, enact statutes providing generally for what purposes and upon what terms and conditions such agencies may be permitted to increase their capital stock, and confer upon a commission the power and duty to supervise the exercise of the privilege granted, ascertain the facts on which the application for an increase is based, and authorize the increase if the Commission finds the facts that bring the case within the statute, otherwise to refuse it.

"Any statute, however, which attempts to authorize the Commission in its judgment to allow an increase of capital stock for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it, would be unconstitutional, as an attempt to delegate legislative power."

—in the view of the Supreme Court of Minnesota, as held in *State v. Great Northern Railway Co.*, 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250.

In the Northern Securities Company Cases (C. C.) 120 Fed. 721, 193 U. S. 351, 24 Sup. Ct. 436, 48 L. Ed. 679, both the federal Circuit Court and the Supreme Court said, what has pertinency in this connection, that in a suit to enjoin the prosecution of a design formed by a combination to prevent competition between parallel and naturally competing railroad lines, the court "cannot consider the question whether the combination may not be of greater benefit to the public than competition would be; that being a question of public policy, to be determined by Congress." "Most unquestionably those who make the laws are required, in the process of their enactment, to pass upon all questions of expediency and necessity connected therewith, and must therefore determine what is necessary" for the accomplishment and enforcement of the object and purposes for which they are intended. "The policy of a statute is legislative, not judicial, and it is the exclusive province of the Legislature to declare the scope and extent thereof by its prescription of measures of enforcement and otherwise." *George v. Board of Ballot Commissioners*, 90 S. E. 550. The rule is universal, well recognized, imperative, and everywhere understood that when exercised within its legitimate sphere the judgment of the Legislature, as expressed in its enactments as to the expediency and necessity of the enforcement of any given law, is conclusive, and that the sole function of the judiciary is one of construction, interpretation, and application to the facts presented for adjudication, independent of any question of expediency, necessity, propriety, or advisability as to its policy or enforcement. These questions the Legislature only possesses the requisite authority to settle. It cannot lawfully transfer to the judiciary the power to

exercise a discretion to determine in the first instance whether a statute ought or ought not to be given an operative effect in any given case logically within its legitimate scope and intentment. The powers of courts do not extend to mere questions of expediency or necessity. They do not inaugurate or establish the public policy of the state. That would be an infringement of article 5 of the Constitution. The Legislature alone possesses the authority to inaugurate or modify, and when it enacts a law, courts can only legitimately decide whether by the enactment the limitations of the Constitution have been infringed upon. Prohibitory Amendment Cases, 24 Kan. 700. A very apt illustration of these principles is found in several cases involving the same question, namely, whether it was the province of the Legislature or the court to determine, under the constitutional provisions applicable, whether a particular act was "necessary for the immediate preservation of the public peace, health or safety," and hence not suspended in its operation until the expiration of the 90-day period otherwise allowed for submission to the people for approval on referendum. And it was decided in each case that it was the exclusive province of the Legislature to determine the question of emergency, and its determination was conclusive upon the court. *State v. Bacon*, 14 S. D. 394, 85 N. W. 605; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222; *Oklahoma City v. Shields*, 22 Okl. 265, 100 Pac. 560; *Arkansas Tax Commission v. Moore*, 103 Ark. 48, 145 S. W. 199. The same holding, with reference to the same emergency clause excepting laws from the referendum provision, was made in *Hanson v. Hodges*, 109 Ark. 479, 160 S. W. 392; *In re Senate Resolution No. 4*, 54 Colo. 262, 130 Pac. 333.

The assumption is not permissible in any circumstances that the lawmakers intended an act sanctioned by them should conditionally be operative or effective, or suspended, if once in force. "That which purports to be a law of a state is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another in the same state. And whether it be a law or not a law is a judicial question, to be settled and determined by the courts and judges." *Town of Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Wilkes County v. Coler*, 180 U. S. 508, 21 Sup. Ct. 458, 45 L. Ed. 642.

[3] There is an additional reason for declaring the incompetency, ineffectuality, and lack of adaptability of the act to accomplish

the object or purpose sought to be controlled by it, a reason fully sustained by competent authority found in the decisions of courts of states wherein statutes containing similar provisions have been held to be invalid. By section 5, art. 1, of the Constitution of the United States, relating to the membership of the Senate and House of Representatives, "each house shall be the judge of the elections, returns and qualifications of its own members." The provisions of the act now being considered propose to intrude upon and supplement the exercise of the functions so conferred upon the upper branch of the federal Congress, because section 16 provides that:

"In the case of a judicial inquiry into corrupt and illegal practices connected with the election of * * * a United States senator * * * the evidence and the opinion and determination of the court shall be certified to the Governor, who shall transmit the same to the proper authorities of the United States government for such action as said authorities may deem proper."

In *Dinan v. Swig*, 223 Mass. 516, 112 N. E. 91, and *State ex rel. Smith v. District Court*, 50 Mont. 134, 145 Pac. 721, the Supreme Court of each state had before it an inquisition concerning the election of a member of the Legislature conducted under the provisions of a corrupt practice act similar to, but more definite than, ours, and in each case it held the act unconstitutional, because inconsistent with and violative of the express grant to each branch of the state Legislature to determine for itself, untrammelled by any enactment not authorized by the organic law, the election and qualification of its own members. Discussing the effect of the inquiry conducted under the supposed authority of the act of that state, the Massachusetts court said:

"The proceeding created by the instant statute does not emanate from either branch of the Legislature. It is set in motion only by the initiative of five or more voters. It may result in sending to the legislative branch, to which the defendant has been elected, a decree setting forth the determination of the judges that a corrupt practice has been committed. That decree may be ignored by the branch of the Legislature to which it is sent. There is no legal compulsion resting upon that branch to take action respecting such decree. Only its sense of self-respect and duty to the whole commonwealth to purge itself of a member unworthy of his office would impel it to pay heed to the decree. If action should be taken, it still would be open for that branch of the Legislature to exercise its constitutional prerogative and to examine the whole issue for itself and to decide whether the election and qualification of the member were such that he ought to be expelled and the election declared void. That decision, when made by the branch of the Legislature concerned, would stand as final and could not be disputed or revised by any court or authority. * * * The Constitution confers upon each branch of the Legislature by necessary implication the power to determine for itself the procedure as to settlement of controversies touching the election and qualification of its own members, and the ascertainment of all facts rel-

ative thereto, and to change the same at will. * * * This discretion to determine the method of procedure cannot, under the Constitution, be abrogated by * * * an earlier Legislature," because "it gives to each branch of each successive Legislature an untrammelled power to proceed in its own manner and according to its own judgment without seeking the concurrence or approval of the other branch, or of the executive."

The Montana case states the same general doctrine, and reaches the same conclusion. It says:

"At any time, and at all times during the term of office, each house is empowered to pass upon the present qualifications of its own members." The exercise of that power "is necessary to preserve the entire independence of the two houses. Being a power exclusively vested in it, it cannot be granted away or transferred to any other tribunal."

If the rationale of these cases is sound, when applied to the state whose Legislature enacts the law condemned, the decisions show more clearly the futility of an act attempting to enforce its provisions upon a body wholly beyond its legitimate jurisdiction.

The views expressed herein, sustained as they are by competent authority, constrain us to award the writ sought by the petitioner.

(19 Ga. App. 592)

HIND v. CENTRAL TRUST CO. OF MACON, GA. (No. 7842.)

(Court of Appeals of Georgia. March 20, 1917.
Rehearing Denied March 29, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR §—977(4)—DISCRETION OF TRIAL COURT — MOTION FOR NEW TRIAL — STATUTE.

Under section 6204 of the Civ. Code 1910, and repeated rulings of the Supreme Court and of this court, the first grant of a new trial will not be disturbed by the reviewing court, unless the plaintiff in error shows that the judge abused his discretion in granting it, and that the law and facts require the verdict notwithstanding the judgment of the trial judge. The law and the facts in this case do not require the verdict rendered, and the judge did not abuse his discretion in the first grant of a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3863.]

Error from City Court of Albany; Clayton Jones, Judge.

Action between J. C. Hind and the Central Trust Company of Macon, Ga. Judgment for the latter, and the former brings error. Affirmed.

Yoemans & Wilkinson, of Dawson, for plaintiff in error. Pope & Bennet, of Albany, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 591)

**FARMERS' & MERCHANTS' BANK OF
WARTHEN v. AMERSON.**
(No. 7801.)

(Court of Appeals of Georgia, Division No. 2.
March 20, 1917.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR \S 1078(6) — GROUNDS
OF MOTION FOR NEW TRIAL—ABANDONMENT.**

Grounds of a motion for new trial not referred to in the brief of counsel for the plaintiff in error will be treated as abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4261.]

**2. TRIAL \S 85 — ADMISSION OF EVIDENCE —
OBJECTION.**

The evidence of the witness Wells was not inadmissible for the reason stated in the motion for a new trial. Where a lengthy extract from the evidence was objected to as a whole and on several grounds, and some of it was admissible, the objection to the whole was properly overruled. *Great Southern, etc., v. Guthrie*, 13 Ga. App. 292, 79 S. E. 162.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225.]

3. SUFFICIENCY OF EVIDENCE.

There was evidence sufficient to support the verdict.

Error from City Court of Sandersville; B. T. Rawlings, Judge Pro Hac.

Action between the Farmers' & Merchants' Bank of Warthen, Georgia, and G. W. Amerson and others, administrators. Judgment for the latter, and the former bring error. Affirmed.

Evans & Evans, of Sandersville, for plaintiff in error. J. J. Harris, of Sandersville, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 558)

ROUCHE v. McCLOUDY. (No. 8092.)
(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

**1. MUNICIPAL CORPORATIONS \S 706(5) — USE
OF STREET—NEGLIGENCE—EVIDENCE.**

The plaintiff and the defendant were traveling along a public road in the same direction. The plaintiff was driving a mule hitched to a buggy, and the defendant was in an automobile. The defendant undertook to pass the plaintiff, who was immediately in front of him. According to the plaintiff's testimony his buggy was standing still, on the right side of the road, and the road at that point was wide enough to permit the defendant's automobile to pass him in safety, and the defendant's automobile, in passing, struck the buggy, throwing the plaintiff out and injuring him as set forth in his petition. According to the defendant's testimony the plaintiff suddenly jerked or turned his mule towards the car just as the defendant was in the act of passing, and this sudden turning of the mule caused the collision, which resulted in only slight injury to the plaintiff. Both as to the cause of the injury and as to its extent the evidence is in sharp conflict. *Held*, the evidence warrant-

ed the jury in finding that the defendant was negligent as alleged, and the verdict for \$75 in favor of the plaintiff is supported by the evidence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518.]

2. MOTION FOR NEW TRIAL.

The exceptions to the charge of the court are not of sufficient merit to warrant the grant of a new trial. The court did not err in overruling the motion for new trial.

Error from Superior Court, Cobb County; H. L. Patterson, Judge.

Action by John McCloudy against W. H. Rouché. Judgment for plaintiff, and defendant brings error. Affirmed.

Fred Morris, of Marietta, for plaintiff in error. J. T. Dorsey and J. Z. Foster, both of Marietta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, O. J., and LUKE, J., concur.

(19 Ga. App. 657)

BENTLEY v. JOHNS. (No. 8119.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

**1. APPEAL AND ERROR \S 211—REVIEW—RE-
FUSAL TO GRANT NONSUIT.**

Ordinarily an exception to the refusal of the court to grant a nonsuit will not be considered by this court when thereafter the case proceeded to a verdict and a motion for a new trial was made and overruled, and exceptions to the judgment overruling the motion were taken, which included the ground that the verdict was contrary to law and the evidence. Under the particular facts of this case, however, the exception to the refusal to grant a nonsuit will be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302.]

**2. FRAUDS, STATUTE OF \S 152(1)—DEFENSE—
PLEADING—MOTION TO NONSUIT.**

As a general rule, for the defendant to avail himself of the statute of frauds he must specially plead it. However, under the ruling in *Denmead v. Glass*, 30 Ga. 637 (which was cited and apparently approved in *Johnson v. Latimer*, 71 Ga. 470), in the absence of such a plea, the defendant can avail himself of this defense by a timely made motion to nonsuit the case. See, also, *Tift v. Wight*, 113 Ga. 681, 684, 39 S. E. 503.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 863, 864, 371, 372.]

**3. FRAUDS, STATUTE OF \S 158(4) — PROMISE
TO ANSWER FOR DEBT OF ANOTHER—WRIT-
ING—NONSUIT.**

In this case the plaintiff's evidence clearly showed a promise by the defendant to "answer for the debt, default, or miscarriage of another," and such promise being the basis of the suit, and the plaintiff's evidence further showing that this promise had never been in writing, the defendant's motion for a nonsuit should have been sustained.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 376.]

4. APPEAL AND ERROR ⇨843(1)—REVIEW—SCOPE—MATTERS NOT NECESSARY TO DETERMINE ON REVERSAL.

The error in the judgment upon the motion to award a nonsuit rendered the further proceedings in the case nugatory, and the remaining assignments of error are not passed upon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3335, 3337-3341.]

Error from Superior Court, Gordon County; A. W. Flite, Judge.

Action by J. Z. Johns against V. W. Bentley. Judgment for plaintiff, and defendant brings error. Reversed.

F. A. Cantrell, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. J. G. B. Erwin, Jr., of Calhoun, for defendant in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 495)

MCCLENDON v. WARD-TRUITT CO.
(No. 7676.)

(Court of Appeals of Georgia, Division No. 1.
March 19, 1917.)

(Syllabus by the Court.)

1. ACTION ⇨64—PROCESS ⇨167—COMMENCEMENT—PETITION—DEFECTS—CURE BY SUBSEQUENT PROCEEDINGS.

The filing of the petition is treated as the commencement of a suit only when followed by due and legal service. If there is no service of the petition and process, and the plaintiff is guilty of laches, the writ becomes abortive, and the court loses jurisdiction to amend the process and to have service perfected.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 725-734; Process, Cent. Dig. § 256.]

2. PROCESS ⇨167—DEFECTS—CURE BY SUBSEQUENT PROCEEDINGS.

If the plaintiff is active in his efforts to remedy the failure of the sheriff to make service of the petition and process, and endeavors to have service made at his first opportunity after he, in the exercise of due diligence, discovers that service has not been perfected, the jurisdiction of the court continues for the purpose of having service perfected after the first term.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 256.]

3. PROCESS ⇨167—DEFECTS—CURE BY SUBSEQUENT PROCEEDINGS.

The motion to amend the process and to perfect service upon the defendant in this case was properly allowed, and, the petition having been amended so as to meet the grounds of special demurrer, the court did not err in overruling the defendant's demurrer.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 256.]

Error from City Court of La Grange; Frank Harwell, Judge.

Suit by the Ward-Truitt Company against J. H. McClendon. Judgment for plaintiff, *fi. fa.* issued and levied, finding in favor of affidavit of illegality, demurrer to petition for order to perfect service overruled, and defendant brings error. Affirmed.

On February 22, 1913, Ward-Truitt Company filed suit on account in the city court of La Grange against J. H. McClendon. The sheriff of that court, on March 2, 1913, made an entry that he had served the defendant personally with a copy of the said suit and process. The case was marked in default, and on March 20, 1913, the court rendered judgment against the defendant. A *fi. fa.* on the judgment was issued on March 25, 1913, and was on December 30, 1914, levied on certain property of the defendant; and the defendant filed an affidavit of illegality, upon the ground that he had never been served with any notice of the suit, and had never had his day in court. The issue made by the affidavit of illegality was regularly continued to the October term, 1915, of said court, at which term the issue was submitted to a jury, and a verdict returned finding in favor of the illegality, whereupon, at the same term of the court, the Ward-Truitt Company filed its petition for an order to perfect service and to require the clerk to amend the process and make it returnable to the next November term, 1915. The petition alleged that the plaintiff had exercised all diligence in having service perfected, and recited the facts hereinbefore stated. The court heard evidence, found the facts to be as set forth in the petition, and ordered that the process be amended as prayed, and that service be perfected on the defendant. Thereupon the defendant waived service of the original suit, and of the petition and order to perfect service, process, copy, and copy process. At the November term, 1915, the defendant filed certain demurrers and pleas, and the demurrers were amended at the January term, 1916. Plaintiff amended its petition so as to meet certain special grounds of demurrer, and the court overruled the general demurrer, in which it was contended that the court was wanting in authority to order the process amended and service perfected on the defendant; that the cause of action accrued more than four years prior to the amendment of the process and the order to perfect service upon the defendant; and that the cause of action was therefore barred by the statute of limitations. The defendant brought the case to this court on exceptions to the overruling of the demurrer.

Mendors & Wyatt, of La Grange, for plaintiff in error. E. T. Moon, of La Grange, for defendant in error.

GEORGE, J. (after stating the facts as above). [1] The court had the right, and it was its duty, under the facts in this case, to grant the order to perfect service at the term subsequent to the appearance term. As soon as it came to the plaintiff's knowledge that service had not been perfected it moved to have service perfected, and it

should not suffer by the conduct of the sheriff, whose entry had misled the plaintiff. In *Branch v. Mechanics' Bank*, 50 Ga. 416, it was said by Judge Trippe that:

"Five terms of the court had passed after the filing of the declaration, and the return made by the sheriff of non est inventus and of the death of the president of the corporation. In the meantime no step whatever had been taken by the plaintiff. At the sixth term the motion was made to perfect service under section 3370 of the new Code. This, of course, involved the necessity of amending the process, or rather the issuing of a citation by the clerk, as required by that section. No legal reason was shown for such long delay. In fact, none whatever has been given."

The right to amend the process and to have service perfected was therefore denied.

In the case of *Brunswick Hardware Co. v. Bingham*, 110 Ga. 526, 35 S. E. 772, it was held that:

"It is too late for the trial judge to pass an order to perfect service on the defendant after seven terms of the court have elapsed since the filing of the declaration; when no legal reason is given for the delay."

In that case there was a return by the sheriff—

"to the effect that the defendant corporation had no public place of business in the county, nor any office nor any officer or agent upon whom service could be perfected."

At the appearance term, when the foregoing entry of the sheriff was made, the plaintiff undertook to make an affidavit as prescribed by the Code, in order to perfect service by publication. The so-called affidavit was sworn to before some one attesting it as a notary public of Wayne county, Mich. On the filing of this affidavit the court ordered that service be perfected by publication, and thereafter judgment by default was rendered against the defendant. At a subsequent term the defendant made a motion to set this judgment aside on the ground that the defendant had never been served according to law. At the March term, 1899, the Supreme Court held that no legal service had been made upon the defendant company, that the so-called affidavit should not be treated as such, because there was nothing to authenticate the official character of the person attesting it as a notary public, and that all subsequent proceedings were unauthorized. 107 Ga. 270, 33 S. E. 56. Attention is called to the opinion in that case (110 Ga. 527, 35 S. E. 772), in which it is said:

"No legal steps to perfect service were taken until the seventh term of the court after the declaration had been filed. It is true that an attempt was made to perfect service immediately after the return of the sheriff, but in this very case it was held that the proceeding was a nullity. Plaintiff and his counsel are chargeable with a knowledge of the law, and ought, therefore, to have known that an affidavit made before a notary public in Michigan, with nothing to authenticate his official character, could not in this state be the basis of any judicial action. Treating them as having knowledge of this, it can properly be said that they did not

ing to perfect service from August 13, 1896, to June 27, 1899."

In neither of the foregoing cases was proper diligence shown by the plaintiff. The rule announced in those cases is clearly based upon that fact. In *Allen v. Mutual Loan & Banking Co.*, 86 Ga. 74, 12 S. E. 265 (2), the Supreme Court, on the testimony of the plaintiff's counsel to the effect that he had made inquiry of the sheriff and had been by him informed that the declaration in that case had been served on the defendant, and that he was misled by this information and consequently did not move at the first term for an order to perfect service, ruled that the trial court properly granted an order at the second term of the case, allowing until the next term thereafter to perfect service, and announced that "the granting of such a motion is largely in the discretion of the court." The *Allen Case* is quoted and followed in *Lassiter v. Carroll*, 87 Ga. 731, 13 S. E. 825. We also understand the opinion by Justice Lamar in *Cox v. Strickland et al.*, 120 Ga. 104, 47 S. E. 912, 1 Ann. Cas. 870 (7, 8, 9, and 10), to support the ruling here made.

[2, 3] In the instant case the plaintiff duly filed its petition, to which process, regular in form, was attached, and caused it to be delivered to the sheriff for service. The sheriff made his return, reciting actual personal service upon the defendant, and upon the fact stated in this return the plaintiff had the right to rely. Every legal presumption was in favor of the truthfulness of the statement made in the entry of the sheriff, and, until attacked as provided by law, the plaintiff had a right to depend upon the presumption that the sheriff, as he so declared, had discharged his duty. Immediately upon the return of the verdict, finding that the defendant had not been served, the plaintiff asked for the order to perfect service. This order the court properly granted, and we understand it to be the duty of the trial court to make all orders which tend to the advancement of suits commenced within its jurisdiction, to the end that justice may be attained. Process having been amended and service perfected, there was no error in overruling the demurrer to the petition.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 544)

SOUTHERN RY. CO. et al. v. WILLIAMS.
(No. 7952.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §719(1)—EXCEPTIONS PENDENTE LITE—ASSIGNMENT OF ERROR.

Exceptions pendente lite upon which no assignment of error is made in the main bill of exceptions or by counsel in this court before

argument of the case will not be considered by this court, even though duly allowed by the trial judge or ordered filed as a part of the record. *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240; *Jones v. Ragan*, 136 Ga. 653 (7), 71 S. E. 1098; *Gainesville, etc., R. Co. v. Galloway*, 17 Ga. App. 702, 87 S. E. 1093; *Kent v. State*, 18 Ga. App. 30, 88 S. E. 913; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968, 2972, 2980, 2981, 3490.]

2. RELEASE \Leftrightarrow 52—FRAUD—EVIDENCE.

In an action against a railroad company for personal injuries to the plaintiff, occasioned by the negligent running of a train, where the company pleads that he released the company upon consideration of a draft on its treasurer for \$250, as an accord and satisfaction, it is competent for the plaintiff to allege and prove that the release was procured by fraud and at a time when he was not mentally capacitated to contract, and that he did not collect the draft, but tendered it back to the company before suit, and made a continuing tender of the unpaid draft. *Southern Ry. Co. v. Nichols*, 135 Ga. 11, 68 S. E. 789; *Georgia Southern Ry. Co. v. Adeeb*, 15 Ga. App. 831, 84 S. E. 823.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92.]

3. APPEAL AND ERROR \Leftrightarrow 728(2)—PRESENTATION OF GROUND OF REVIEW—ADMISSION OF EVIDENCE.

Where error is assigned upon the admission of evidence, the evidence must be set out with the objection to it in the assignment of error, and it must be shown that the objection was raised at the time the evidence was offered. *Pool v. Warren County*, 123 Ga. 205, 51 S. E. 328; *Franklin v. Fields*, 13 Ga. App. 463, 79 S. E. 366; *Gaskins v. State*, 17 Ga. App. 807, 88 S. E. 592.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3011.]

4. APPEAL AND ERROR \Leftrightarrow 302(1)—GROUNDS OF MOTION FOR NEW TRIAL—CONSIDERATION.

No ground of a motion for new trial which is not complete and understandable without resorting to an examination of the brief of evidence or the charge of the court will be considered as presenting a question for consideration by this court. *Head v. State*, 144 Ga. 383, 87 S. E. 273; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1744-1746.]

5. TRIAL \Leftrightarrow 257—REQUEST TO CHARGE.

An assignment of error in the following words: "Because, as movant contends, the court erred in refusing to charge the jury upon the written request of the defendants as follows" (setting out the charge requested)—will not be considered by this court, for the reason that it is not shown that the request was presented to the court before the jury had retired to consider the case. *Civ. Code 1910*, § 6084; *Seaboard Air-Line Ry. v. Barrow*, 18 Ga. App. 261, 89 S. E. 383.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 642-645.]

6. EVIDENCE \Leftrightarrow 119(1)—TRIAL \Leftrightarrow 136(1)—RES GESTÆ—DETERMINATION OF ADMISSIBILITY.

The ground of the motion for a new trial that the court erred in permitting the plaintiff to testify, "The train struck the automobile and killed my aunt and carried my uncle on the front of it until it stopped," is without merit, especially as the plaintiff was in the automobile

with his uncle and aunt at the time the train struck it, and the court, in overruling the objection to this testimony, said: "The court will allow that evidence to go to the jury on the ground that it appears to be a part of the res gestæ, happening at the time. I will caution the jury, however, that this plaintiff cannot recover for any damages or anything that occurred to some one else; if he recovers at all he must recover on what was done to him." As a general rule, whether statements claimed to be a part of the res gestæ are such is a question of law for the court. *Southern Ry. Co. v. Brown*, 126 Ga. 1, 54 S. E. 911.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 303; Trial, Cent. Dig. § 323.]

7. ERRORS AT TRIAL.

No error of law in the trial of the case is shown by any of the assignments of error, and the evidence abundantly authorized the verdict.

Error from City Court of Hall County; A. C. Wheeler, Judge.

Action by J. A. Williams against the Southern Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Edgar A. Neely, of Atlanta, J. O. Adams and Ed Quillian, both of Gainesville, and C. R. Faulkner, of Bellton, for plaintiffs in error. W. A. Charters, W. B. Sloan, and W. M. Oliver, all of Gainesville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 625)

KENNEDY v. STATE. (No. 8498.)

(Court of Appeals of Georgia, Division No. 1. March 23, 1917.)

(Syllabus by the Court.)

1. CRIMINAL LAW \Leftrightarrow 1129(1)—APPEAL—EXCEPTIONS PENDENTE LITE.

Exceptions pendente lite, on which no error is assigned in the main bill of exceptions, and no assignment made by counsel before argument of the case, will not be considered by this court, and this is true, even though such exceptions may have been duly allowed and ordered filed as a part of the record. *Shaw v. Jones*, 133 Ga. 446, 66 S. E. 240; *Smiley v. Smiley*, 144 Ga. 546, 87 S. E. 668; *Kent v. State*, 18 Ga. App. 30, 88 S. E. 913; *Southern Ry. v. Williams*, 91 S. E. 1001, decided at this term of this court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2954, 2962, 2964.]

2. CRIMINAL LAW \Leftrightarrow 1159(2)—VERDICT—REVIEW.

The other assignments of error are without merit, and there being some evidence upon which the jury could have found the verdict, which is approved by the trial court, the conviction of the defendant will not be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075.]

Error from City Court of Jesup; D. M. Clark, Judge.

T. E. Kennedy was convicted, and he brings error. Affirmed.

Jas. R. Thomas, of Jesup, for plaintiff in error. W. B. Gibbs, Sol., of Jesup, for the State.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 512)

BROOKS et al. v. HICKMAN. (No. 7802.)
(Court of Appeals of Georgia. March 19, 1917.)

(Syllabus by the Court.)

SALES \S 347(6), 354(5)—ACTION FOR PRICE—
DEFENSE—CONDITION PRECEDENT.

The court did not err in refusing to allow the defendants to introduce evidence in support of their pleas, or in thereafter directing a verdict in favor of the plaintiff for the full amount sued for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 970-972, 1014.]

Error from City Court of Tifton; R. Eve, Judge.

Action by C. W. Hickman against J. L. Brooks and others. Judgment for plaintiff on directed verdict, and defendants bring error. Affirmed.

Skeen & Murray and J. S. Ridgill, all of Tifton, for plaintiffs in error. McGehee & McGehee, of Talbotton, and R. D. Smith, of Tifton, for defendant in error.

BROYLES, P. J. The plaintiff brought suit against the defendants on a promissory note for \$1,000, dated January 27, 1906, and due October 1, 1909, payable to the order of J. Crouch & Sons, and bearing an entry of credit of \$134.03, dated December 20, 1909. The plaintiff introduced also the following written instrument, dated December 24, 1908:

"Guaranty on the American Bred Grade German Coach Stallion Ramo. We have this day sold the American bred grade German coach stallion Ramo to the Tifton German Coach Horse Company, of Tifton, Georgia, and we guarantee the said stallion to be a satisfactory, sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is and has proper care and exercise. If the said stallion should fail to be a satisfactory, sure breeder with the above treatment, we agree to take the said stallion back and give the said company another stallion of equal value in his place, provided the said stallion is returned to us at Lafayette, Indiana, at our expense, in as sound and healthy condition as he is now in and in good flesh by June 1, 1910.

"Accepted and signed: J. Crouch & Sons, J. J. L. Phillips, President, German Coach Horse Company, Tifton, Georgia."

It was admitted by counsel for the defendants that this guaranty referred to a second stallion furnished to the defendants by Crouch & Sons, and about which the defendants were pleading failure of consideration. It will be observed that this contract of guaranty was signed by J. Crouch & Sons, the sellers of the stallion, and J. J. L. Phillips, the president of the German Coach Horse Company of Tifton, Ga.; and under the facts

of the case, as shown by the record, it is evident that Phillips, when he signed this contract, represented not only himself, but all the other parties defendant, and that all are bound by it. The note sued upon and the guaranty contract should be construed together, and when so construed it is clear that before the defendants could be let into their defense of a failure of consideration, they must show that they had returned the stallion as the contract stipulated they must do. See *International Harvester Co. v. Dillon*, 126 Ga. 672, 55 S. E. 1034; *Case Threshing Machine Co. v. Cook*, 7 Ga. App. 631, 67 S. E. 890; *McCormick Harvesting Machine Co. v. Allison*, 116 Ga. 445, 42 S. E. 778; *Walker v. Malsby*, 134 Ga. 399, 67 S. E. 1039; *Fay v. Dudley*, 129 Ga. 314, 58 S. E. 826; *Brooks Lumber Co. v. Case Threshing Machine Co.*, 136 Ga. 754, 72 S. E. 40.

The law of implied warranty has no application to this case, as the stallion was sold under a contract of express warranty. *Malsby v. Young*, 104 Ga. 205, 30 S. E. 854. As the defendants could not rely upon any implied warranty, then until they showed a compliance with the terms and conditions of the express warranty contract, entered into between them and the sellers of the property, they could not plead a failure of consideration, either partial or total, and although the court had allowed them to file such pleas, it did not err in refusing to allow evidence introduced in support thereof. *Williams v. Warner*, 125 Ga. 408, 412, 54 S. E. 95.

Under our view of the case it is immaterial whether or not the note sued upon was transferred and indorsed to the plaintiff before or subsequent to its maturity, since the defendants had no defense good against the original payees of the note.

The court did not err in directing a verdict for the plaintiff for the full amount sued for. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 627)

ADAMS v. JERVIS. (No. 7852.)

(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)

(Syllabus by the Court.)

COURTS \S 488(4)—CITY COURT—CONCURRENT JURISDICTION—REINSTATEMENT.

Where the superior court and a city court in the same county have concurrent jurisdiction over a warrant for the eviction of a tenant holding over and the counter affidavit thereto, and the sheriff returns the papers to the clerk of the city court, and the judge of that court, upon the motion of counsel for the tenant, erroneously dismisses the proceeding and orders that it be transmitted to the superior court, and where the eviction proceeding is duly transmitted to the superior court of the county and entered upon the docket of that court and assigned by the judge of that court for trial, and where counsel for the landlord affirmatively acquiesces in the

removal of the case from the city to the superior court, after the adjournment of the term of the superior court, the judge of the city court has not the authority to reinstate the case in his court and order that it be there tried. The case having been duly transferred to the superior court, it properly remains in that court until legally disposed of there. The judge of the city court has no power to take the case from the files of the superior court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1322, 1323.]

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between John Adams and C. J. Jarvis. Judgment for the latter, and the former brings error. Reversed.

M. B. Eubanks, of Rome, for plaintiff in error. C. I. Carey and John W. Bale, both of Rome, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 483)

CENTRAL OF GEORGIA RY. CO. v. NAPIER. (No. 7768.)

(Court of Appeals of Georgia, Division No. 1. March 16, 1917.)

(Syllabus by the Court.)

1. GARNISHMENT \Leftrightarrow 100—ANSWER—NAME OF DEFENDANT.

The garnishee was required to answer what amount it owed to "E. B. Johnson," and at the time the summons was served it did in fact owe to E. B. Johnson more than the amount of the plaintiff's demand. The fact that it was only as "Ed Johnson" that the garnishee knew the defendant E. B. Johnson, and that his name was entered upon its books as "Ed Johnson," could not relieve the garnishee from the liability created by service of the summons, as the garnishee did in fact owe the person named therein, and there was enough to put it on notice and require it to ascertain whether the person designated in the summons as "E. B." Johnson was the person to whom the garnishee was indebted, known to it as "Ed" Johnson; and upon proper pleadings this issue could have been raised and determined at the trial.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. § 201.]

2. OVERRULING CERTIORARI.

No other question being raised by the petition for certiorari, the judge of the superior court did not err in overruling the certiorari.

3. APPEAL AND ERROR \Leftrightarrow 770(1)—APPEARANCE—FAILURE TO FILE BRIEFS.

Briefs not having been filed for the defendant in error in accordance with the order of January 16th, providing for the submission of this case on February 12, 1917, and stipulating that "no briefs will be received on behalf of defendants in error which are not filed within the time limited by this order," under the ruling announced in Savannah & Ry. v. McCoy, 17 Ga. App. 82, 84, 86 S. E. 282, no appearance for the defendant in error will be entered or allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106, 3107.]

Error from Superior Court, Bibb County; H. A. Mathews, Judge.

Action between the Central of Georgia Railway Company and B. T. Napler. Judgment for the latter, and the former brings error. Affirmed.

Deap Newman, of Macon, for plaintiff in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 649)

JONES et al. v. SHORES-MUELLER CO. (No. 7832.)

(Court of Appeals of Georgia, Division No. 2. April 3, 1917.)

(Syllabus by the Court.)

COURTS \Leftrightarrow 190(8)—CITY COURTS—REVIEW—SUFFICIENCY OF EVIDENCE—DENIAL OF MOTION FOR NEW TRIAL.

This case was tried before the court without a jury, under authority given by the act creating the city court for Floyd county. Exceptions are taken only upon the general ground that the judgment was contrary to evidence. There being ample evidence to sustain the finding, under the repeated rulings of this court the judgment of the trial judge refusing the motion for a new trial will not be disturbed.

Error from City Court of Floyd County; W. J. Nunnally, Judge.

Action between Mrs. L. A. Jones and others and the Shores-Mueller Company. Judgment for the latter, and the former bring error. Affirmed.

Eubanks & Mebane, of Rome, I. F. Mundy, of Rockmart, for plaintiffs in error. Lipscomb & Willingham and Nathan Harris, all of Rome, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 648)

WARREN v. GEORGIA FERTILIZER & OIL CO. (No. 7783.)

(Court of Appeals of Georgia, Division No. 2. April 3, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 1056(1) — WITNESSES \Leftrightarrow 154 — COMPETENCY — TRANSACTION WITH DECEASED AGENT—HARMLESS ERROR.

Defendant by his plea showed that he was indebted to plaintiff for fertilizers in a sum evidenced by a promissory note due October 1, 1914, and that on November 10, 1914, he delivered to plaintiff, as collateral security for this indebtedness, three bales of cotton, described in his plea, taking from the agent of plaintiff the following receipt therefor: "Received of A. J. Warren three bales of upland cotton to secure guano note. 11/10, 1914, J. A. Barrow." His plea sets forth that at the time this collateral security was given it was expressly agreed between defendant and the said agent for the plaintiff that the said cotton was not to be sold by the plaintiff until defendant should so agree. The plea set up that the said cotton having been

sold without his authority, he was entitled to the stated value thereof on a date named as prior to the bringing of the suit, and asked that the sum so named be allowed as a set-off against the amount owing on the note. The note shows an entry as follows: "By sale of cotton 1/8/1915, \$71.37." It was admitted that at the time of the trial Barrow, the agent of plaintiff corporation, was deceased.

Held, conceding that the plea set up a good defense (see *Pickett v. Andrews*, 185 Ga. 299, 69 S. E. 478; *Frost & Co. v. Powell*, 10 Ga. App. 95, 72 S. E. 719; *Wood v. Jones*, 10 Ga. App. 735, 73 S. E. 1099; *Georgia Sou. & Fla. Ry. Co. v. Knight*, 11 Ga. App. 489, 75 S. E. 823), still, under the provisions of Civil Code 1910, § 5858(3), the defendant was properly denied the right to testify in his own behalf as to the terms of the verbal agreement pleaded by him as having been made with the deceased agent of the plaintiff corporation; and since the terms of the alleged agreement are not otherwise proved, it does not appear that the refusal of the trial judge to allow him to testify that he had never purchased any fertilizer from Barrow individually, and was not individually indebted to him in any sum, resulted in his injury. Under the evidence in the case the judge did not err in directing a verdict for plaintiff. *Leffler Co. v. Pearson*, 17 Ga. App. 57(2), 86 S. E. 256; *Meinhard-Feirst-Doyle Co. v. De Loach*, 91 S. E. 446.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4207; Witnesses, Cent. Dig. § 661.]

Error from City Court of Quitman; Wm. H. Long, Judge.

Action by the Georgia Fertilizer & Oil Company against A. J. Warren. Judgment for plaintiff on directed verdict, and defendant brings error. Affirmed.

Bennet & Harrell, of Quitman, for plaintiff in error. Branch & Snow, of Quitman, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 548)

DUNN v. FAIRBANKS-MORSE CO.
(No. 7973.)

(Court of Appeals of Georgia, Division No. 1.
March 20, 1917.)

(Syllabus by the Court.)

1. PLEADING ~~§~~ 249(2)—AMENDMENT—TOET TO CONTRACT.

The plaintiff having elected to sue in tort, by action of bail trover, the action was not amendable by striking the trover suit and setting up a cause of action ex contractu. *Croghan v. New York Underwriters' Agency*, 53 Ga. 109(2); *Teem v. Town of Ellijay*, 89 Ga. 155, 15 S. E. 33(2); *Sharpe v. Columbus Iron Works*, 136 Ga. 483, 71 S. E. 787; *Hutchens v. Seaboard Air-Line Railway*, 144 Ga. 313, 87 S. E. 28(2). [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 707, 708, 711.]

2. RULING ON PETITION FOR CERTIORARI.

The court erred in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by the Fairbanks-Morse Company against R. I. E. Dunn. Judgment for plaintiff, and defendant appeals. Reversed.

M. Herzberg, of Atlanta, for plaintiff in error. Thos. H. Scott, of Atlanta, for defendant in error.

LUKE, J. Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 654)

SIKES v. EDWARDS. (No. 8037.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

AFFIDAVIT OF ILLEGALITY—DISMISSAL.

Under the facts of the case the court did not err in dismissing the affidavit of illegality.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Proceedings in *fi. fa.* by A. J. Edwards against G. S. Sikes. Affidavit of illegality dismissed, and defendant brings error. Affirmed.

J. Hartridge Smith, of Savannah, for plaintiff in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 654)

ADAMS v. GEORGIAN CO. (No. 8021.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

~~GUARANTY~~ ~~§~~ 27, 34, 85(1)—CONSTRUCTION—SUFFICIENCY OF PETITION.

"Against one who before the goods were sold and delivered guaranteed in writing payment therefor, on the faith of which guaranty the sale was made, a recovery may be had upon a petition setting forth the account, a copy of the contract of guaranty, a refusal to pay the account by the principal debtor, notice by the creditor to the maker of the guaranty, before the goods were sold and delivered, that the same was accepted, and alleging that on the faith of said guaranty the goods represented by the account sued on were sold and delivered as requested in said guaranty. This would be true whether said writing, called a guaranty in the suit, was technically a guaranty, or was a contract of suretyship. In either case there was a valid consideration for said contract; and it would be wholly immaterial, in determining the liability of the party who made the written obligation referred to, whether he did so as guarantor or as surety. Where the terms of a writ-

ten contract of guaranty, or suretyship, are ambiguous, they will be construed most strongly against the maker of the contract." *Small v. Claxton*, 1 Ga. App. 83, 57 S. E. 977. The contract sued on in this case, under the foregoing rule of construction, was one of continuing guaranty, and bound the maker thereof for all goods sold and furnished the principal under the terms of his contract with the plaintiff as guaranteed by the defendant. See, also, *Sims v. Clark*, 91 Ga. 302, 18 S. E. 158; *Manry v. Waxelbaum Co.*, 108 Ga. 14; *Musgrove v. Luther Pub. Co.*, 5 Ga. App. 279, 284, 63 S. E. 52; *Kalmon v. Scarboro*, 11 Ga. App. 547, 75 S. E. 846. The trial judge did not err in overruling the demurrer to the plaintiff's petition.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 28, 36, 99.]

Error from City Court of Albany; Clayton Jones, Judge.

Action by the Georgian Company against B. C. Adams. Demurrer to petition overruled, and defendant brings error. Affirmed.

R. J. Bacon and R. H. Ferrell, both of Albany, for plaintiff in error. L. L. Ford, of Albany, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 632)

ATLANTIC COAST LINE R. CO. v.
JENKINS. (No. 8201.)

(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)

(Syllabus by the Court.)

DAMAGES — 188(2) — KILLING ANIMALS —
MEASURE OF DAMAGES.

The railroad company had not the right to negligently reduce the plaintiff's hog to pork and pay for the hog on the basis of pork, since the value of a living hog is not necessarily confined to the market price of the meat which the hog would have produced. The railroad company admitted liability for the killing of the hog involved, and there was evidence, unobjected to upon the trial, to support the jury's finding that the hog was worth as much as \$9. Accordingly, the judge of the superior court did not err in overruling the certiorari and refusing the railroad company a new trial.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 511.]

Error from Superior Court, Worth County; E. E. Cox, Judge.

Action by T. B. Jenkins against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Perry & Williamson and R. S. Foy, all of Sylvester, for plaintiff in error. J. H. Tip-ton, of Sylvester, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 646)

DUFFEY v. HARRIS, Governor. (No. 7739.)
(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

1. ASSIGNMENTS OF ERROR.

The assignments of error in the bill of exceptions are sufficient to give this court jurisdiction. The motion to dismiss is without merit, and is overruled. *Roddenberry v. Patterson*, 136 Ga. 187, 71 S. E. 138 (1).

2. APPEAL AND ERROR — 518(4) — RECORD —
SCOPE AND CONTENTS — AMENDMENT.

While the general rule is that "where the court declines to allow an amendment which is offered, it does not become a part of the record in the case, and this court cannot consider what purports to be a copy of it, appearing in the transcript of the record" (*Wallace v. State*, 17 Ga. App. 434, 87 S. E. 681 (1)); yet both this court and the Supreme Court have held that an amendment can be allowed by an order and become a part of the record, though thereafter stricken by another order. There is no reason why the same end cannot be reached by one order covering both propositions. When such an order is passed it can be authenticated by the certificate of the clerk. Therefore, where an amendment is overruled and rejected, and the court enters and signs thereon an order as follows: "The foregoing amendment not allowed; let the same be filed and become a part of the record in said case"—and it is at once filed, it thereupon becomes a part of the record, and may be specified in the bill of exceptions as a part thereof. See *Schaeffer v. Central of Ga. Ry. Company*, 6 Ga. App. 283, 64 S. E. 1107.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2347.]

3. BAIL — 77(1) — PROCEEDING TO FORFEIT
BOND — SUFFICIENCY OF ANSWER.

An allegation in an answer to a rule nisi to forfeit a bond given for the appearance of a person charged with the violation of a criminal statute, that the defendant appeared at a certain term prior to the term at which the rule was issued, to answer the accusation in said case, and at that term was informed that he was discharged, together with all the witnesses, is not a sufficient ground to prevent the rule being made absolute against him, it not appearing that the person who gave the information had any authority to make such announcement. *Massey v. Allen*, 48 Ga. 21.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 335-340, 379.]

4. BAIL — 77(1) — EVIDENCE — 82 — TRIAL
— 15 — PROCEEDING TO FORFEIT — PLEA — OR-
DER OF TRIAL — PRESUMPTIONS.

It not being alleged that the case was called out of its order on the docket, there is no merit in a plea, filed in response to a rule nisi forfeiting a bond in a criminal case, "that at the call of said case, prior to the issuing of the rule nisi in said case, the solicitor of the said court did not announce ready for the state, nor were the state's witnesses there at that time." The rule is that "all causes shall be called and tried in the order in which they are docketed" (Civil Code of 1910, § 6284); and, unless it appears to the contrary, it will be presumed that the judge complied with this rule. A solicitor general is not required to announce ready when a case is called in its regular order. *Collins v. Smith*, 7 Ga. App. 654, 67 S. E. 847. The foregoing ruling is not in conflict with the statement in *Collins v. Smith*, 7 Ga. App. 654, 67 S. E. 847, as follows: "If, as a matter of fact, the accusation against the principal on the bond was called out of its order, and if the state failed to announce ready, this was a matter of

affirmative defense, and should have been set up in the answer," for the reason that the plea in the instant case does not urge that the case was called out of its order.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-340, 379; Evidence, Cent. Dig. § 104; Trial, Cent. Dig. §§ 34, 35.]

5. BAIL — 77(1) — APPEARANCE BOND — PROCEEDING TO FORFEIT — DEFENSE.

Where an accusation which seeks to charge a person with the violation of a criminal statute is void upon its face, advantage may be taken of the defect, by a plea to the rule nisi to forfeit the bond given for the appearance of the person accused, filed by one who signed the bond as security. *Cleveland v. Brown, Governor*, 141 Ga. 829, 82 S. E. 243 (2); *Williams v. Candler, Governor*, 119 Ga. 179, 45 S. E. 989. But when an accusation and the affidavit upon which it is based are perfect in form and substance, yet subject to attack by plea in abatement, this defense can be set up only by the defendant in person and in a direct attack on the accusation, and such an answer to a rule nisi to forfeit will not avail the security who fails to produce the defendant. In the instant case the accusation appears upon its face to be good, and the court did not err in striking the paragraph of the answer relating thereto. *Sharp v. Smith, Governor*, 59 Ga. 707(1).

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-340, 379.]

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceeding by N. E. Harris, Governor, against J. S. Duffey to forfeit a bail bond. Judgment for plaintiff, and defendant brings error. Affirmed.

Shirley O. Boykin and B. F. Boykin, both of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 648)

DUFFEY v. HARRIS, Governor. (No. 7740.)

(Court of Appeals of Georgia, Division No. 2. April 3, 1917.)

(Syllabus by the Court.)

FORFEITURE OF BAIL BOND.

This case is practically a counterpart of the case of *J. S. Duffey v. N. E. Harris, Governor* (No. 7739) 91 S. E. 1006, this day decided by this court; and the ruling in that case controls this.

Error from City Court of Carrollton; Jas. Beall, Judge.

Proceeding by N. E. Harris, Governor, against J. S. Duffey. Judgment for plaintiff, and defendant brings error. Affirmed.

Shirley O. Boykin and B. F. Boykin, both of Carrollton, for plaintiff in error. C. E. Roop, Sol., of Carrollton, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 541)

CHRISTO v. MACON GAS CO. (No. 7949.)

(Court of Appeals of Georgia, Division No. 1. March 20, 1917. Rehearing Denied April 5, 1917.)

(Syllabus by the Court.)

GAS — 20(2) — INJURY FROM EXPLOSION — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

On the material questions involved in this case the evidence was not in dispute, and the evidence introduced, with all reasonable deductions or inferences therefrom, demanded a verdict for the defendant; accordingly, the court did not err in so directing.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 16, 17.]

Error from City Court of Macon; Du Pont Guerrey, Judge.

Action by L. P. Christo against the Macon Gas Company. Judgment for defendant upon a directed verdict, and plaintiff brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error. Hatcher & Smith, of Macon, for defendant in error.

GEORGE, J. The facts alleged in the petition in the case appear in the opinion of this court reversing the judgment sustaining a demurrer thereto. *Christo v. Macon Gas Co.*, 18 Ga. App. 454, 89 S. E. 532. At the conclusion of the evidence the defendant moved the court to direct a verdict in its favor. The motion was granted, and the plaintiff excepted. On a careful consideration of this record we are convinced that the verdict was properly directed. The evidence did not prove the case as alleged, but on the contrary conclusively showed that the employes of the defendant did not turn the gas into the building—that it was turned on by the tenant on the second floor, without authority or knowledge of the defendant. The employes of the defendant, after connecting the gas with the premises of the tenant on the second floor, tested it for a few seconds only, and, detecting that there was a leak in the gas line at some point in the building above the second floor, at once turned the gas off by means of a cock placed within the building and between the meter and the defendant's gas line outside the building. According to the witness Miller, sworn for the plaintiff in error, this was a "perfectly safe method of turning off gas; that is the system that has been in use for the past 25 years; the kind that is commonly used." There were some circumstances in the plaintiff's evidence which, unexplained, would indicate that the defendant could have cut off the supply of gas from its pipe at the service cock in front of the building. The evidence of the defendant clearly shows that there was in fact no service cock on its gas line outside of and in front of the building. The testimony for the defendant on this point is positive, and the witness for the plaintiff admit-

ted that he made no examination for the purpose of ascertaining, and did not in fact know, whether a service cock had been placed by the defendant on the outside of the building. The gas was completely cut off by means of the meter cock placed within the building, and while this cock could be turned with a nail, spike, or wrench, some strength was required to open it. It is uncontradicted that the gas was cut off by the employees of the defendant, and the tenant on the second floor knew that the gas had been cut off because the agents of the defendant had discovered a leak in the building and above the second floor. This tenant, without knowledge, sanction, or authority of the defendant, but for his own convenience, with knowledge of all the facts, turned the gas into the building. He denied that the defendant's servants warned him not to use the gas until the leak in the gas line above the second floor was located and remedied, but admitted that he knew of such leak. On one possible theory only is there color for the contention that the defendant was negligent. It is insisted by the plaintiff that the defendant was negligent in failing to cut off the supply of gas at a point outside the building, or by means of a cap at some point in the building, and, if no means had been provided for this purpose, that the failure to provide such means was itself an act of negligence.

The plaintiff relies on the decision in *Chisholm v. Atlanta Gaslight Co.*, 57 Ga. 28. That case is distinguishable from this case on its facts. There the plaintiff, the owner of a house in the city of Atlanta, had notified the gas company that the house was vacant, and that the gas was no longer needed, and had ordered the defendant to cut off the gas, which was done on a date named by means of a meter cock in the plaintiff's cellar. Several days thereafter the plaintiff rented the house to some colored people for the purpose of having a supper there, and they did not use the gas, but used candles. An explosion followed, and it was thereafter discovered that the meter cock had been tampered with by somebody. The plaintiff in that case had no reason to suppose that any of the defendant's gas was on his premises after the defendant was notified to cut it off. If it had been cut off at the service cock under the curbstone, the gas company having in fact such service cock on its line, the explosion in the house could not have occurred. One essential difference between the facts in that case and the facts in the

case at bar is this: In that case the gas company was ordered, and did undertake, to permanently cut its gas out of the plaintiff's house. In the instant case, in the late afternoon or evening of the day preceding the day of the explosion, the defendant installed certain fixtures for the tenant, Johnson, who occupied a room on the second floor of the building. The meter indicating a leak in the gas pipes, above the second floor, the defendant's servants, not having access to the rooms in the building above the second floor, temporarily cut off the supply of gas by the use of an available and perfectly safe means. The gas was cut off for the purpose of enabling the defendant to locate and remedy the leak in the pipe. The defect had not been remedied, and the tenant, Johnson, who turned on the gas, had not been authorized by the defendant to use the gas. In the *Chisholm Case*, the defendant was under a duty to cut off the gas from the plaintiff's building; in the case at bar, the defendant was under the duty to turn the gas into the building occupied by the plaintiff. There were no facts in the evidence to warrant a finding by the jury that Johnson, the tenant on the second floor, was at liberty to use the gas at the time he turned same on, nor would the facts in this case warrant the inference that the defendant was negligent in failing to make the necessary repairs to the gas line prior to the explosion. The defendant company had the right to use the meter cock, which, so far as the facts in this case show, effectively and absolutely stopped the flow of gas into the building, and which afforded an available means of cutting the gas out of the building, and which was being used temporarily until the leak in the gas pipe could be remedied. It was not, under the evidence, responsible for the unauthorized act of the tenant, Johnson, in turning the meter cock. Under the uncontradicted evidence in this case upon the material and controlling questions, no finding of negligence on the part of the defendant could be upheld. Even if the plaintiff, under the facts of this case, was not guilty of such contributory negligence as would bar a recovery by him, the facts proved by him, with all reasonable deductions therefrom, are insufficient to support a verdict against the defendant. The court did not err in directing a verdict for the defendant.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(173 N. C. 337)

RAY et al. v. EASON et al. (No. 301.)

(Supreme Court of North Carolina. April 11, 1917.)

TRIAL \Leftrightarrow 356(1)—FINDINGS OF JURY—FAILURE TO ANSWER ISSUE—POWER OF COURT.

Where the jury in an action to recover land found that a deed was executed as security for a debt, but the amount thereof was not found or admitted, the court had no authority to find the amount of such indebtedness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 849.]

Appeal from Superior Court, Cumberland County; Winston, Judge.

Action by Mrs. L. P. Ray and others against John E. Eason and others. Judgment, declaring defendant Eason to be owner of land subject to a debt, and defendants except and appeal. Reversed, with directions.

This is an action by the heirs of N. W. Ray to recover land. The defendants filed an answer, in which they allege that the deed to N. W. Ray under which the plaintiffs claim was executed as a security for a debt of \$25, and they tender that sum, with interest from the date of the deed. The jury returned the following verdict:

"(1) Did N. W. Ray acquire title to the said lands described in the complaint as security for an indebtedness of Eason to him? Answer: Yes.

"(2) Are the plaintiffs the owners in fee simple of the land described in the complaint, and entitled to the immediate possession thereof? Answer: No.

"(3) Is the defendant in the unlawful possession of the said land? Answer: No.

"(4) What damages, if any, are plaintiffs entitled to recover of the defendants? Answer:

"(5) Were Eason and Beady Ann Bolling married at the date of the deed from Beady Ann Bolling to N. W. Ray? Answer: No.

"(6) Had Guthrie conveyed to Jackson Williams a described 90 acres of land before his execution of the conveyance to Ray? Answer: No.

"(7) Had Guthrie conveyed to Beady A. Bolling a described 197 acres of the lands before his execution of the conveyance to Ray? Answer: Yes."

"(8) Had Guthrie conveyed to Hector Williams a described 71 acres of the lands before his execution of the conveyance to Ray? Answer: Yes."

The defendants tendered a judgment, declaring that the plaintiffs are not the owners of the land in controversy, and that the defendants are not in the unlawful possession thereof, which his honor refused to sign, and the defendants excepted. His honor rendered judgment, declaring the defendant Eason to be the owner of the land, and subjecting it to a charge of \$125 in favor of the executrix of N. W. Ray, which amount he finds to be due on the purchase money, and the defendants excepted and appealed.

Davis & Sandrock, of Fayetteville, for appellants. Sinclair, Dye & Ray, of Fayetteville, for appellees.

ALLEN, J. The jury has found that the deed executed to N. W. Ray was a security for a debt, but there is neither a finding by the jury nor an admission by the defendants that the amount of the debt is \$125. Nor do we find in the record any evidence that this was the amount due, and the defendants have not consented that his honor might find the fact, or waived their right to a trial by jury.

It follows, therefore, that there was no authority in the judge presiding to find the amount of the indebtedness due to the estate of Ray, and for this reason the judgment must be reversed, with directions to make the executrix of N. W. Ray a party plaintiff, and to submit an additional issue to determine the amount of the indebtedness to be secured by the deed to Ray.

Error.

(173 N. C. 240)

MEADOWS v. POSTAL TELEGRAPH & CABLE CO. (No. 182.)

(Supreme Court of North Carolina. April 4, 1917.)

1. COMMERCE \Leftrightarrow 8(7)—STATE DECISIONS—INTERSTATE COMMERCE ACT.

Decisions of the courts of the state in conflict with Act Cong. June 18, 1910, c. 309, § 1(3), 36 Stat. 544 (U. S. Comp. St. 1913, § 8563), subjecting interstate telegraph and telephone companies to the rules and regulations of Interstate Commerce Act, Feb. 4, 1887, c. 104, 24 Stat. 379, are displaced by the statute.

2. TELEGRAPHS AND TELEPHONES \Leftrightarrow 54(6)—STIPULATION AS TO LIABILITY—INTERSTATE COMMERCE ACT.

Stipulation that a telegraph company transmitting an interstate message shall not be liable for mistakes in transmission or delivery beyond the sum received for sending it unless the sender orders it repeated at a cost of half as much again as the regular rate is reasonable and valid, under Act Cong. June 18, 1910, subjecting interstate telegraph and telephone companies to the rules and regulations of the Interstate Commerce Act in the particulars set forth, and recovery cannot exceed the amount agreed upon in the stipulation.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 44, 46.]

Appeal from Superior Court, Craven County; Lyon, Judge.

Action by J. A. Meadows against the Postal Telegraph & Cable Company. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff brought this action to recover damages for failure to transmit correctly and deliver the following telegram:

"J. A. Meadows, Newbern, N. C. Bot ten May Corn 49 one eighth.

"Gardner V. Va Ness."

The message was sent under the following contract, which was printed on one of the company's blanks:

"The Postal Telegraph Cable Company (Incorporated) transmits and delivers this message subject to the terms and conditions printed on

the back of this blank. Send the following message, without repeating, subject to the terms and conditions printed on the back thereof, which are hereby agreed to.

"The Postal Telegraph Cable Company (Incorporated) transmits and delivers the within message subject to the following terms and conditions: To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the message on the face hereof and the Postal Telegraph-Cable Company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeatable message, beyond the amount received for sending the same, nor for mistakes or for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages, viz.: One per cent. for any distance not exceeding 1000 miles and two per cent. for any greater distance. No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of this company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery. This company shall not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. This is an unrepeatable message and is transmitted and delivered by request of the sender under the conditions named above. Errors can be guarded against only by repeating a message back to the sending station for comparison. The above terms and conditions shall be binding upon the receiver as well as the sender of this message. No employé of this company is authorized to vary the foregoing. The same being delivered to the defendant at its office in Chicago to be delivered to plaintiff at New Bern, N. C."

As delivered to plaintiffs in Newbern, the message read as follows:

"J. A. Meadows, Newbern, N. C. Bot ten May corn 48 one eighth."

"Gardiner B. Vanness."

There was evidence of the plaintiff tending to show the above-stated facts, and also that plaintiffs bought the corn to fill an existing contract for the sale of meal, and that, while they made a profit on the meal transaction, they lost on the corn by reason of defendant's error in negligently transmitting the message. Defendant introduced no evidence. A preliminary motion was made in the superior court to dismiss on two grounds, but as the opinion of the court is with the defendant for another reason, this question is not considered.

The case originated in a justice's court, and was carried by appeal to the superior court, where the jury, under the evidence and the instructions of the court, returned the following verdict for the plaintiff:

"1. Did the defendant negligently fail to deliver the message sent to plaintiff by Gardiner B. Van Ness as alleged in complaint? Answer: Yes.

"2. What damage, if any, is plaintiff entitled to recover? Answer: One hundred dollars."

Judgment for the plaintiff and appeal by defendant.

D. E. Henderson, of Newbern, for appellant. Guion & Guion, of Newbern, for appellee.

WALKER, J. (after stating the facts as above). Plaintiff introduced all the evidence showing the message and the contract as above stated. This and other state courts have held that the stipulation as to repeating messages for a higher charge is one restricting the liability of the defendant for negligence and is void, as being against public policy. *Brown v. Telegraph Co.*, 111 N. C. 187, 16 S. E. 179, 17 L. R. A. 648, 32 Am. St. Rep. 793; *Hendricks v. Telegraph Co.*, 126 N. C. 304, 35 S. E. 543, 78 Am. St. Rep. 658. Other courts, including the highest federal court, hold that such stipulations are valid 37 Cyc. 1684 et seq., where the principal cases are collected in the notes. *Primrose v. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. We have held that sender and sendee are both bound by the valid stipulations of the contract, as, for instance, the one prescribing the time for bringing suit for damages, limiting it to 60 days after receipt of the telegram or knowledge of its nondelivery. But since this court and others have adjudged the stipulation, as to repeating messages, to be invalid, a radical change has been wrought in the control and management of carriers, telegraphs, and telephone companies doing an interstate business and traversing more than one of the states. Congress passed the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, §§ 8657-8665]), which is applicable to interstate railroads, and thereby materially changed the principles, upon which the liability of the employer to his employé, who is injured while at the time engaged in performing a duty in interstate commerce, is determined (*Fleming v. Railroad Co.*, 160 N. C. 196, 76 S. E. 212; *Lloyd v. Railroad Co.*, 166 N. C. 24, 81 S. E. 1003; *Tilghman v. Railway Co.*, 167 N. C. 163, 83 S. E. 315, 1090 [on writ of error, S. A. L. Railway Co. v. Tilghman, 237 U. S. 499, 35 Sup. Ct. 653, 59 L. Ed. 1069]; *Railway Co. v. Renn*, 241 U. S. 290, 36 Sup. Ct. 567, 60 L. Ed. 1006); and although an action is brought by the employé in the state court, the rule as to liability created by the act of Congress is the applicable one, in the trial of the case, except as to certain methods of practice and procedure (*Fleming's Case*, supra) in the local court. By an amendment to the "Act to regulate commerce" passed by Congress on June 18, 1910, interstate telegraph and telephone companies were made subject to the rules and

regulations of that act, in the particulars set forth by the amendment, and, as the courts, who have since considered the question, have held, Congress has occupied the entire field of interstate commerce, or traffic, with respect to such companies, and especially with reference to the transmission of messages from one state to another. The amendment of 1910 reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: Provided, that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeatable, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

Before the passage of the amendment of 1910, there had been no legislation by Congress affecting or conflicting with state statutes and other laws respecting the liability of telegraph companies for negligence in transmitting and delivering interstate messages, and therefore the local rule of law prevailed and was controlling in fixing such liability. *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Commercial Milling Company Case*, 218 U. S. 406, 31 Sup. Ct. 59, 54 L. Ed. 1088, 31 L. R. A. (N. S.) 220, 21 Ann. Cas. 815; *Crovo Case*, 220 U. S. 364, 31 Sup. Ct. 699, 55 L. Ed. 498. A neighboring state court, in reviewing the above cases and others, adopts the language of the court, by which they were decided and having final authority to declare the law upon the subject, and held, in substance, that where the state statute did not unfavorably affect or embarrass the telegraph company in the course of its employment, it would be held valid until Congress spoke on the subject. These decisions are based upon the fact that, at the time they were rendered, no congressional legislation existed on the subject. Such judicial utterances would mean nothing, unless they meant that when Congress did act, and undertake to regulate telegraph companies in the matter of the transmission and delivery of interstate messages, the statutes of the state on the subject would be superseded by the action. "It would be inconvenient, as well as unnecessary, to recite the detailed provisions of the act of Congress approved June 1, 1910. It is sufficient to say that by it Congress has occupied the field of regulation with respect to interstate telegrams, and hence the state statute imposing a penalty for failure to make prompt delivery can no longer be invoked in such cases. The act of Congress has ousted the state of jurisdiction over the subject." *Telegraph Co. v. White*, 113 Va. 421, 74 S. E. 174; *W. U. Telegraph Co. v. Billsoly*, 116 Va. 562, 82 S. E. 91. The

Virginia court was there dealing with a statute of that state imposing a penalty on the telegraph company for negligence in transmitting or delivering a message, though interstate in character, and held that since the amendment of 1910 was enacted by Congress, its former decisions in regard to the validity of that statute had no longer any force or effect, as they conflicted with the provisions of the new law. They were not, of course, reversed, but merely displaced by the new rule adopted by Congress for the determination of cases arising under its recent amendment to the Commerce Act.

[1] And so we must say with reference to our own decisions, which equally conflict with the act of Congress, as we have before said of those which had been rendered in cases before the Employers' Liability Act was passed, and which conflicted with it. The Supreme Court of Maine has recently had this question under consideration. It had held in the *Ayer Case*, 79 Me. 493, 10 Atl. 495, 1 Am. St. Rep. 353, that the stipulation, as to repeating messages, was against public policy and void, and that a mere mistake in the transmission of the words of a message raised a presumption of negligence. Referring to the amendment of 1910, to the Interstate Commerce Act, the same court in a later case (*Haskell Implement & Seed Co. v. Postal Telegraph Co.*, 114 Me. 279, 96 Atl. 219), said:

"Many changes have occurred in business and business regulation in the 28 years since the decision in the *Ayer Case* and the creation of the Interstate Commerce Commission. The decision stands, but the Commerce Act has expanded, until it comprehends and includes the questions involved in the case at bar, and, so including, it must perforce, being the supreme law, suspend the operation of any state statute or regulation, or the force and effect of any decision in opposition thereto, the *Ayer Case* among the rest, so far as they conflict with the act of June 18, 1910. This rule does no violence to any state, corporation, or individual, and is in keeping with the sentiment and reasons underlying sound public policy, the highest good, the best interest of all the people, not that of one state or one locality."

The court held that by the amendment of 1910 telegraph companies engaged in interstate business were subject now to the provisions of the federal statute regulating commerce between the states, and that the state courts are bound to recognize the change in the law and to decide in accordance therewith, and further that it is especially their duty to follow the construction placed on the contracts of telegraph companies as to repeating messages and so forth, which has been sanctioned by the highest of the federal courts. In *Williams v. W. U. Telegraph Co.* (D. C.) 203 Fed. 140, the court said:

"It is apparent that the Interstate Commerce Act expressly recognizes the right of the telegraph company to charge for repeated messages different rates from those charged for unrepeatable messages."

The same court in *Telegraph Co. v. Dant*, 42 App. D. C. 398, said in reference to the amendment of 1910:

"Messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages. * * * By this act express authority is given for the different classification of messages, and the charge of different rates for the different classes is also expressly authorized. Repeated and unrepeated messages were well known to the art, and, of course, it must be presumed that Congress intended the words to be given their ordinary meaning. Prior to the enactment of this statute, as we have seen, the court of last resort had ruled that, in the absence of state statutes to the contrary, it was competent for a telegraph company to make such classification of its messages. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. Congress, therefore, in express terms, has sanctioned the practice theretofore existing."

This whole subject, with special reference to the act of 1910, amending the interstate commerce law and bringing all interstate messages under the influence and control of federal legislation, has most recently been fully considered and exhaustively discussed in the two cases of *W. U. Telegraph Co. v. Billisoly*, supra, and *Boyce v. W. U. Telegraph Co.* (Va.) 89 S. E. 106, and in the former the court held that the sender who had not paid for the message could recover nothing for a mistake in it caused by negligence, as the message was not repeated, the requirement as to repeating messages, and the classification of messages contained in the contract being reasonable, since Congress had legislated with reference thereto, and in the latter case, it was held that the sender, for the same reason, could recover only the amount paid by him for the message. The Supreme Court of the United States had held before the passage of the Amendment of 1910 that a contract such as the one under which this message was sent was reasonable and valid. *Primrose v. W. U. Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883. As that decision has stated the governing rule in cases like this one, and must be followed by us, it will not be amiss to quote fully from it, so as to understand from the court's own language the reasons which had led the court to its conclusion that the contract is binding. The court said:

"In the earliest American case, decided by the Court of Appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: 'The public are admonished by the notice, that, in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company re-

sponsible, or to send it for a less price at his own risk. * * * If the message be important, he may be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur.' *Camp v. Western Union Tel. Co.*, 1 Metc. (Ky.) 164, 168, 71 Am. Dec. 461. * * * If the change of words in the message was owing to mistake or inattention of any of the defendant's servants, it would seem that it must have consisted either in a want of plainness of the handwriting of Tindall, the operator who took it down at Brookville, or in a mistake of his fellow operator, Stevens, in reading that writing, or in transmitting it to Ellis; or else in a mistake of the operator at Ellis, in taking down the message at that place. If the message had been repeated, the mistake, from whatever cause it arose, must have been detected by means of the differing versions made and kept at the offices at Ellis and Brookville. * * * The conclusion is irresistible that if there was negligence on the part of any of the defendant's servants, a jury would not have been warranted in finding that it was more than ordinary negligence, and that, upon principle and authority, the mistake was one for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message. Any other conclusion would restrict the right of telegraph companies to regulate the amount of their liability within narrower limits than were allowed to common carriers in *Hart v. Pennsylvania Railroad*, 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717]."

That case has been accepted by the subsequent decisions of the courts as settling once for all time the perplexing question, upon which so many courts had theretofore divided in opinion, whether such conditions and stipulations, as are contained in the contract now being considered, are reasonable and valid, so far, as least, as all cases coming within the purview and operation of federal legislation are concerned. The Virginia court, commenting on the *Primrose* Case, said in *Boyce v. W. U. Telegraph Co.*, supra:

"The conclusion of the Supreme Court in the foregoing case that a stipulation such as that in the case at bar, providing that the company shall not be liable for mistakes in transmission or delivery beyond the sum received for sending it, unless the sender orders it to be repeated, is reasonable and valid, and that the recovery cannot exceed the amount agreed upon in that stipulation has been followed in numerous cases which need not be cited. * * * So that telegraph companies have here the direct authority and sanction of Congress to classify their messages into repeated and unrepeated messages, and to charge different rates for each; in other words, to enter into the very contract which was made in this case. * * * We are, however, of opinion that the weight of authority and the better reason sustain the conclusion we have reached that the defendant company is entitled to the protection afforded it by the stipulation in question, and is only liable to the plaintiff for the cost of transmitting the unrepeated message sent by him. The plaintiff further contends that the classification and stipulation of

the company for interstate messages had never been submitted to the Interstate Commerce Commission, nor in any wise authorized. It is sufficient to say that the act of Congress bringing telegraph companies under the regulation of the Interstate Commerce Commission does not require them to file their contract forms or tariffs with the Commission."

The Boyce Case is so well considered, and covers this entire field of inquiry so completely, that we content ourselves with referring to it specially for the reasons controlling our decision, and also for any additional precedents. While it is sufficient for our purpose that the highest court in the federal jurisdiction has decided this question upon a contract identical with ours, it may yet be well to state one of the reasons it gives in the Primrose Case for its conclusion and in its own language:

"Even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that 'where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the [liability] and the freight he receives, and of protecting himself against extravagant and fanciful valuations.' *Hart v. Pennsylvania Railroad*, 112 U. S. 331, 343 [5 Sup. Ct. 151, 28 L. Ed. 717]. By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise."

And referring to *Tyler v. W. U. Telegraph Co.*, 60 Ill. 439, 14 Am. Rep. 38, and 74 Ill. 170, 24 Am. Rep. 279, where such a provision was held invalid, the court says:

"The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender, and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the nondelivery of a message."

It was held in *K. C. & C. Railway Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, that the Carmack Amendment brings contracts for interstate shipments under one uniform rule of law and withdraws them from state regulation, so that what is a reasonable rule or regulation of the carrier must be determined by the federal law. To the same effect, *Wells Fargo & Co. v. Neilman-Marcus Co.*, 227 U. S. 469, 33 Sup. Ct.

267, 57 L. Ed. 600; *Railway Co. v. Edwards*, 227 U. S. 265, 33 Sup. Ct. 262, 57 L. Ed. 506; *Adams Express Co. v. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; *Railway v. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; *G. N. Railway Co. v. O'Connor*, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703. The same was held with regard to the *Hepburn Act*. *Railway Co. v. Elevator Co.*, 226 U. S. 426, 33 Sup. Ct. 174, 57 L. Ed. 284, 46 L. R. A. (N. S.) 203; *Railway Co. v. Reid*, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257; and also as to the *Employers' Liability Act*, which we have already shown. *Mondou v. Railroad Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44. As to the *Hours of Service Law*, *Railway Co. v. State of Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237. As to penalties under state laws, *Railway Co. v. Lumber Co.*, 225 U. S. 99, 32 Sup. Ct. 657, 56 L. Ed. 1001.

Defendant also raises the question whether, as the message is in cipher or is obscure, there can be any recovery of damages, but we need not decide the point, as it is not necessary that we should do so.

[2] We are of the opinion, following the decision of the highest federal court upon the question involved (*Primrose Case*, *supra*) that the court should have granted the nonsuit, as plaintiff is not entitled to recover by reason of the fact that Congress has taken possession of the entire field of interstate commerce so far as it affects telegraph companies in their interstate business. Having declared upon a contract, with the terms of which there has been no compliance, he cannot recover. *Telegraph Co. v. Billsoly*, *supra*; *Lewis v. Telegraph Co.*, 117 N. C. 436, 23 S. E. 319. It follows that there was error in not so adjudging.

Reversed.

(173 N. C. 258)

SEABOARD AIR LINE RY. v. THOMPSON. (No. 257.)

(Supreme Court of North Carolina. April 4, 1917.)

1. RAILROADS — 114(5) — CONSTRUCTION — INJUNCTION.

An order granting a temporary injunction restraining defendant from interfering with the construction of a railway track pending a final hearing on the issue of plaintiff's right thereto based on a claim made in good faith will be affirmed, where it was not contradicted that pending the appeal the track had been constructed and trains were being operated thereon.

2. RAILROADS — 114(5) — TEMPORARY INJUNCTION — CONSTRUCTION OF RAILROAD.

A temporary injunction should not be granted to restrain defendant from interfering with the construction of a railroad track across part of the lot on which defendant's dwelling was situated, pending a determination of the validity of the railroad's claim of right of way, unless the railroad is likewise enjoined from proceeding with the construction.

Brown, J., dissenting in part.

Appeal from Superior Court, Wake County; Bond, Judge.

Suit by the Seaboard Air Line Railway against Martin Thompson. From an order continuing a temporary injunction against defendant until final hearing, defendant appeals. Affirmed.

Civil action heard at October term, 1916, upon motion to continue injunction to final hearing. His honor made the following findings and order:

After hearing the allegations of the complaint and considering the affidavits filed, the court finds that there is a bona fide controversy as to the rights of the plaintiff to enter upon land claimed by defendant for the purpose of constructing the additional track which it desires to construct. The right is asserted by the plaintiff and denied by the defendant. The court finds as a fact that the land is actually needed in good faith for railroad purposes.

Upon consideration of all of which, it is adjudged, ordered, and decreed that the defendant, his agents and servants, be, and they are hereby, restrained and enjoined until the final hearing of this cause from interfering with any of the operations of the plaintiff company upon any of the land claimed by both parties as far as 29 feet westwardly from the center of the present track of the plaintiff company, 7 feet of which 29 feet is to form the base of the slope, and 6 feet of it is to be used for ditch and leveling of track between where the 7 feet gives out and the westwardly side of the track is to be laid.

It is further considered and adjudged that the plaintiff shall leave safe and sufficient support for the underpinning of the house, in so far as any of it may be interfered with by the construction of the track, leveling and sloping as above provided for.

The court finds as a fact that the westward end of the cross-ties for some distance when laid as the plaintiff proposes to lay them will be inside of the yard inclosure of the defendant, Thompson, and, of course, the slope between the end of the cross-ties and the westward limit of said 29 feet.

It is further ordered and decreed that the plaintiff company shall execute bond in the sum of \$2,000 conditioned to pay to the defendant any and all sums which may be recovered as damages, if any, of the plaintiff in this action by reason of the granting of the restraining order and injunction and the wrongful appropriation, if any, of the defendant's land to the use which the plaintiff company proposes to make of it. Upon giving of said bond the plaintiff company is allowed to proceed with its work, and the defendant, his agents and servants, are restrained and enjoined until the final hearing of this action from in any way interfering with the operations of the plaintiff within the limits above provided for.

From this order the defendant appealed.

Upon the hearing in this court the following affidavit is offered by plaintiff:

"Vance Sykes, being duly sworn, says that he is a civil engineer in the employ of the Seaboard Air Line Railway Company and has been in charge of the work of constructing an additional track from Johnston street in the city of Raleigh to the Boylan Avenue bridge in said city; that he was in charge of said work at the time the restraining order was entered in this cause; that upon said restraining order being granted, the Seaboard Air Line Railway Company proceeded with the construction of its track upon the property involved in this action, and the construction of said track has since been completed and trains are now being operated over said track; that the track as now constructed is of a permanent character and is

permanently located upon the land involved in this action; that the said track has been constructed within the limits fixed by the restraining order granted by Judge Bond; that in the construction of said track it was found to be unnecessary to place any supports under the house occupied by the defendant in this action; that the use of the said track is necessary for the proper performance by the Seaboard Air Line Company of its duties to the public as a common carrier of passengers and freight, and is being used for such purposes."

It is not denied that, acting under the order of the superior court, the track has been completed, and that trains are in full operation over it.

W. C. Harris and Armistead Jones & Son, all of Raleigh, for appellant. Murray Allen, of Raleigh, for appellee.

BROWN, J. The plaintiff contends that the land in controversy is a part of its right of way, and that it has become necessary in the discharge of its duties to the public as a common carrier to occupy it for the operation of its train service.

The plaintiff contends that its predecessor, the Raleigh & Gaston Railroad Company, under the act of 1852, c. 140, is granted "the same means of purchasing or condemning land, etc., as are provided in the act incorporating the North Carolina Railroad Company," including the right to acquire title by failure of the landowner to apply for an assessment within two years after the track is finished. The plaintiff further contends that section 30 of chapter 82 of the Public Laws of 1848-49, incorporating the North Carolina Railroad Company, became a part of the charter of the Raleigh & Gaston Railroad Company by virtue of the enactment of section 18, ch. 140, of the Laws of 1852. Section 30 of the act incorporating the North Carolina railroad provides as follows:

"That all lands not heretofore granted to any person, nor appropriated by law to the use of the state, within one hundred feet of the center of said road, which may be constructed by the said company, shall vest in the company as soon as the line of the road is definitely laid out through it, and any grant of said land thereafter shall be void."

It is set forth in the complaint and not denied that at the time of the construction of the connection track by the Raleigh & Gaston Railroad Company, the property in controversy in this connection belonged to the state of North Carolina, and the effect of the above section was to vest in the Raleigh & Gaston Railroad, its predecessor, a right of way of the width of 100 feet on each side of the center of its track. The answer of defendant denies the principal allegations of the complaint, and admits the possession of the defendant. Upon considering the pleadings and affidavits offered, the judge made the findings and order above set out, holding that the construction of the road should not be enjoined until the final hearing, and requiring plaintiff to enter into an indemnifying bond.

[1] It appearing to us that since the order of the superior court was made the plaintiff has constructed its track according to the terms of said order and is now operating its trains over it, we are not disposed to reverse the order and dissolve the injunction, but will let the controversy over the land be settled upon a final hearing, and not upon an appeal from an interlocutory order. Serious injury to plaintiff and to the public may result from an interference now with the operation of the railway. Whatever damage that can be done to defendant has already been sustained, and to now dissolve the injunction would do defendant no good. His injury cannot be said to be entirely irreparable, and he is fully protected by a good and sufficient bond. Courts are loath to interfere with the construction and operation of railroads and other works of great public importance. Commenting upon the exercise of this jurisdiction, Mr. High (section 598) says:

"Courts of equity are frequently called upon to interfere by injunction with the construction of railroads in such manner or under such circumstances as would be productive of irreparable injury. In exercising its jurisdiction over cases of this nature a court of equity will, in the use of a sound discretion, balance the relative inconvenience and injury which is likely to result from granting or withholding the writ, and will be largely governed by such circumstances in determining upon the relief. And where an injunction restraining the use of a railway would not only be productive of great injury to the railway company and to the public, but would result in no corresponding advantage to any one, not even to the persons asking such relief, it will not be granted. So where the work of constructing a railway is of great magnitude and one involving large expense, if it is apparent that the injury which would result to defendant by granting the injunction in case the result should prove it to have been wrongfully granted would be greater than that which would result to complainant from a refusal of the injunction, in the event of the legal right being proved to be in his favor, the court will not interpose."

Again, the same writer says:

"From the peculiar nature of works of public improvement and the serious injury that may result from any unwarranted interference with their construction, the jurisdiction in restraint of such works is exercised with great caution, keeping constantly in view the damage that may result from improperly restraining their operation." High on Injunctions, § 615.

The same principle has been stated by our court, as follows:

"It is contrary to the policy of the law to use the extraordinary powers of the court to arrest the development of industrial enterprises or the progress of works prosecuted apparently for the public good as well as for private gain." Lewis v. Lumber Co., 99 N. C. 11, 5 S. E. 19.

There are other cases in which this salutary principle is recognized. Navigation Co. v. Emry, 108 N. C. 130, 12 S. E. 900. In this case the court further declares:

"The courts have in many cases, not unlike the present one, granted relief by injunction pending the action, and when the evidence has left the material matter in dispute in doubt, this court has generally directed the order granting such injunction to be affirmed. Here the defense alleged by the defendants is more than

doubtful, but we are not to be understood as expressing any opinion upon the facts, further than as may be proper in directing an affirmance of the order appealed from. Parker v. Parker, 82 N. C. 165; Lumber Co. v. Wallace, 93 N. C. 22; Lewis v. Lumber Co., supra; Evans v. Railroad, 96 N. C. 45 [1 S. E. 529]; Whittaker v. Hill [96 N. C. 2, 1 S. E. 639]."

The track having been already constructed in accordance with the order of the superior court, and the trains being in full operation over it, if we were to dissolve the injunction, the defendant could not remove the track and stop the operation of the trains by force; and, under the circumstances of this case, we would not consider it advisable to interfere until the facts are all established and the rights of the parties have been adjudicated upon final hearing.

Affirmed

HOKE, J. (concurring in part). [2] Plaintiff having entered within the boundaries of defendant's lot and completed its road before the appeal could be heard and the rights of the parties determined, there seems to be no present good to come from dissolving the injunction, but I am clearly of the opinion that such a process should never have been issued against defendant unless it had also run against the plaintiff and its avowed purpose to enter on and appropriate a part of the dwelling lot claimed by the defendant and where he and his family made their home. From the facts in evidence as I understand them, defendant and his family, as stated, claimed, occupied, and used as their home a house and lot in the city of Raleigh, adjacent to plaintiff's single track, now connecting Johnston street, its original terminal, with North Carolina Railroad and its own track, running from Raleigh to Cary; that plaintiff, having decided that it would be to its interest and facilitate the connection and proper operation of its trains at this point to have a double track for the purpose parallel to its former single track, ascertained that in order to construct such track would require a portion of defendant's lot. Under existent conditions, there was no likelihood that it could successfully condemn the property under the law, this being a part of defendant's dwelling lot. Pell's Revisal, § 2578, and plaintiff thereupon, having advanced a claim for a right of way of 100 feet on each side of its single track, from Johnston street through the city of Raleigh to the junction with its track leading to Cary, entered the present suit, setting up its claim and asking that defendant be enjoined from committing trespass or otherwise interfering with plaintiff's operations in extending its track and taking over a portion of the yard and lot occupied by defendant. The statute relied on by plaintiff to justify this claim seems rather to refer the method whereby, for certain purposes, plaintiff may be allowed to acquire property, and not to any specified amount or width of right of way, but, if it be conceded

that there is a bona fide controversy between these parties as to the existence of such right on the facts presented in this case, it was, to my mind, a most improvident order by which defendant was enjoined from any and all interference and plaintiff permitted to proceed and take over the property peaceably occupied and claimed by defendant as his home. There are many decisions with us to the effect that, when the principal purpose of action is to obtain an injunction and the facts are such as to present a serious controversy as to the rights of the parties, an injunction will be continued to the hearing. *Tise v. Whitaker*, 144 N. C. 508, 57 S. E. 210. But even in cases of that character, and this is not one of them, the principle only applies where the effect of the injunction is to maintain existent conditions until the right can be properly and finally determined. In the present case, the defendant was in the peaceable possession of the property, and the only move that threatened a disturbance was the proposed action of the plaintiff, and yet the process of the court was issued to stay the defendant and allow plaintiff to proceed, and the affidavit of defendant filed in the case here will disclose that plaintiff was prompt to take advantage of the conditions thus created. It is as follows:

"That after the order of Judge Bond, granting the injunction herein, the plaintiff took possession of a part of defendant's lot and proceeded to cut through the same for the purpose of double-tracking its line. That the edge of the cut at one point at the time the work was done was within 18 inches of one of the corners of defendant's house, and at another point about 30 inches from defendant's bedroom. That since the cut was made rains have washed away a part of the top of the cut and it is nearer now to defendant's said house. That the cut is almost perpendicular, and in such close proximity to defendant's house that it is dangerous, and defendant fears in a short time the safety of his house will be imperiled by the constant washing in of the sides of the cut. That under the order of the court it was required that the cut be sloped down and not perpendicular, and the defendant avers that plaintiff did not leave safe and sufficient support for the underpinning of his house. That the track of the plaintiff has not been completed entirely to the connection with the main line at Boylan bridge, and the condition of the track is of such character that it can be removed elsewhere, and there is nothing of permanency about it"

—and this on facts showing that defendant was in possession, and on a finding by his honor that there was a bona fide question of the rights of the parties. It is not required to look beyond our own decisions to show that no such order should have been made nor such untoward results permitted. In *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263, a contest about a right of way, it was held, among other things, Connor, Judge, delivering the opinion:

"Before a railroad company is entitled to invoke the injunctive power of the court, it must show clearly: (1) That it has a right of way over the lands in controversy; (2) the extent of such right; (3) that defendants are obstructing or threaten to obstruct its use. If there is a controversy in respect to any facts necessary to be proved to entitle the plaintiff to the injunction, both parties will be restrained from trespassing or interfering until a trial can be had."

And, in *Cobb v. Clegg*, 137 N. C. 153, 49 S. E. 80, opinion by Walker, Judge, it was said:

"It is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right in statu quo until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case on its merits and deprive plaintiff [here defendant] of all remedy or relief, even though he should afterwards be able to show ever so good a case."

In this case, as stated, defendant, in the peaceable possession of his home, has had his case practically prejudged contrary to our decisions and, in my opinion, the injunctive order should even be now so modified as to restrain plaintiff from entering or trespassing on the lot occupied and claimed by defendant until the issues can be tried and the rights of the parties properly determined. It is, no doubt, a correct proposition that when a railroad company has constructed its road and, in the exercise of its quasi public franchise, is operating its trains, its work should not be lightly interfered with in furtherance of individual or private interests, but this doctrine, wholesome as it is, has no proper application here, and, on the facts of the record as I understand them, I am of opinion, as stated, that both parties should be restrained till the hearing, and if, on a full and fair investigation, it should be determined that plaintiff had a right of way, it is well, and will be so adjudged, but if it shall be then established that plaintiff has wrongfully trespassed on defendant's rights of property, as he claims, it should be held to restore the lot to its former condition and make proper compensation to defendant for the injury inflicted upon him.

ALLEN, J., concurs.

CLARK, C. J., concurs with HOKE, J., that the court below should have enjoined both parties, and that it was erroneous to enjoin the defendant only, which permitted the plaintiff to proceed without hindrance to the detriment of the defendant. The matter should have been kept in statu quo till the facts were determined by a jury.

(173 N. C. 172)

McDONALD et al. v. McLENDON et al.
(No. 109.)

(Supreme Court of North Carolina. March 21,
1917.)

1. APPEAL AND ERROR \S 971(4)—**WITNESSES**
 \S 226 — **REVIEW — RECALLING WITNESS —**
DISCRETION OF COURT.

In a will contest, whether the judge would allow a witness for the caveators, whose testimony had been successfully objected to, to be recalled at close of the rebuttal evidence of the propounders, one of whom waived all objection to the evidence, was entirely within the court's discretion, which, when exercised without any gross abuse, the Supreme Court will not review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3856; Witnesses, Cent. Dig. \S 792-797.]

2. WILLS \S 322—**RECALLING WITNESS—CON-**
SENT OF COURT.

In a will contest, the privilege to recall a witness to offer testimony at the close of the rebuttal evidence of the propounders could not be exercised by the caveators without the consent of the trial court.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 762-765.]

3. APPEAL AND ERROR \S 659(1), 1106(4)—**RE-**
VIEW—REFUSAL TO PERMIT RECALL OF WIT-
NESS.

If there was any doubt or obscurity as to the reason for the court's ruling in refusing to permit the witness to be recalled, the proper method would have been to make the matter clear by a certiorari or remand, so that the trial judge could state whether he merely exercised his discretion or decided as he did for want of power to rule otherwise.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2834, 2835, 2837-2839, 4392, 4393, 4397.]

4. EVIDENCE \S 226(4)—**ADMISSION—BENEFI-**
CIARY IN WILL.

In a will contest, where there were two legatees, evidence that one of them had once said that testator's mind had weakened or failed from the use of medicine, and that he could hardly recollect anything, the effort being to attack the whole will, and to invalidate it as a whole, was incompetent, as affecting the other legatee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 821.]

5. APPEAL AND ERROR \S 664(3)—**CONFLICT**
BETWEEN RECORD AND CASE.

When the record and case conflict, the former controls.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2858.]

6. WILLS \S 164(7)—**UNDUE INFLUENCE—CIR-**
CUMSTANCES FOR CONSIDERATION.

Old age, bad health, and weakness of mind in testator are to be considered upon the issue of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. \S 414.]

Appeal from Superior Court, Lee County;
Bond, Judge.

Caveat to the will of M. C. Talbert by Mary McDonald and W. A. McDonald, probate being prayed by J. J. Edwards and Ella J. McLendon. From a judgment for propounders, the caveators appeal. No error.

This is a caveat to the will of M. C. Talbert, which was executed September 1, 1916.

Issues were submitted to the jury and answered, as follows:

"(1) Was the paper writing propounded, dated September 1, 1916, executed by M. C. Talbert according to the formalities of law required to make a valid last will and testament?"

"(2) At the time of signing and executing said paper writing, did said M. C. Talbert have sufficient mental capacity to make and execute a valid last will and testament?"

"(3) Was the execution of said paper writing propounded in this case procured by undue influence, as alleged?"

"(4) Is the said paper writing, referred to in issue 1, propounded in this case, the last will and testament of M. C. Talbert, deceased?"

And the jury having answered the first issue "Yes," the second issue "Yes," the third issue "No," and the fourth issue "Yes," the caveators proposed to ask their witness, W. A. McDonald, the following questions:

"(1) Did you ever hear McLendon (husband of devisee, Mrs. McLendon) say anything about Mr. Talbert's mind?"

"(2) Did you ever hear Mrs. McLendon, the daughter of Mr. Talbert, say anything about the old man's (M. C. Talbert's) mental condition while the old man was living?"

"(3) What did you hear Mrs. McLendon, his daughter and chief beneficiary under the will, say in regard to his mental condition?"

The court sustained objections of the propounders to the questions, and caveators excepted. There were only two beneficiaries named in the will, Mrs. Fannie Byrd and her sister, Mrs. McLendon, they being the daughters of the testator. He gave Mrs. Byrd \$500 and to Mrs. McLendon he gave the residue of his estate, reciting in the will that he had theretofore given to Mrs. Byrd \$500 and to each of his children, Thomas Talbert, Mrs. Mary McDonald, and Mrs. McLendon, \$1,000. It is further stated that he had given Mrs. McLendon the largest share of the estate because she had lived with him at his home "and provided for his personal needs." At the close of the testimony of the propounders offered in rebuttal of that of the caveators, the latter introduced their witness W. A. McDonald, and proposed to ask him the same questions which had already been excluded by the court, Mrs. Byrd stating in open court, through her counsel, that she waived all objection to the evidence, which was offered by the caveators, as above set forth, and excluded by the court, and agreed that it might be introduced as affecting the validity of the will, and caveators asked that they be permitted to recall the witness W. A. McDonald in order that this evidence might be heard. The court refused to do so and caveators excepted. There was an exception to the charge which will be noticed hereafter. Judgment was entered upon the verdict, and the caveators appealed.

Manning, Kitchin & Gavin, for appellants.
Seawell & Milliken, of Sanford, for appellees.

WALKER, J. (after stating the facts as above). [1] Whether the judge would allow the witness W. A. McDonald to be recalled was a matter entirely within his discretion and when it is exercised, without any gross abuse, which is not even suggested here, we will not review it. The propounders opened the case by introducing their evidence, or so much as they thought sufficient to sustain their side of the issues. The caveators were then given ample opportunity to put in their evidence and all of it, including that which they afterwards proposed to introduce. The propounders then introduced evidence in rebuttal and closed their case.

[2] The privilege, at this stage of the trial, of recalling a witness for the purpose of offering testimony could not be exercised without the consent of the judge, which he might grant or withhold at his discretion. The case of *In re Will of Andrew Abree*, 148 N. C. 273, 59 S. E. 700, is so directly applicable that we content ourselves with this single citation. That was a contest as to the validity of a will, and the caveators requested of the court that they be permitted to recall a witness for further examination. The request was denied, and this court said in affirming the ruling:

"Our decisions are to the effect that this matter of recalling witnesses for further examination is in the discretion of the judge presiding at the trial, and his action in this respect is not open to review. *Sutton v. Walters*, 118 N. C. 496, 24 S. E. 357; *Olive v. Olive*, 95 N. C. 485."

[3] This record shows that the judge merely refused to recall the witness W. A. McDonald to the stand for the purpose of reopening a closed case and reversing his former ruling by allowing the questions to be answered. If there was any doubt or obscurity as to the reason for his ruling, the proper method would have been to make the matter clear by a certiorari or remand, so that the judge could state the fact; that is, whether he exercised his discretion merely or decided as he did for want of power to rule otherwise. *Holton v. Lee*, 91 S. E. 602, at this term. It appears that the judge thought the caveators had sufficient opportunity to make their request before they closed their case, and that it was too late then for it to be considered, or for the case to be reopened, for any purpose, but whatever may have been his reason, as he was merely exercising his discretion, his ruling must be left as he made it. It is hardly to be supposed, after so many decisions to the contrary, and after the law has been so thoroughly settled in that respect, that the judge would decide he had no power to recall the witness. If, therefore, any fair doubt existed as to the nature of the ruling, we would still incline to the view that the judge exercised his discretion. If he had said that he denied the motion for a want of power, a different question would arise.

Pannell v. Scoggin, 58 N. C. 408, merely

holds that where an executor was made competent as a witness in a will contest, it makes no difference whether he appears on the record as plaintiff or defendant. It has no bearing on this case. Mrs. Byrd was not the witness, but McDonald was. The question here is, Was she a beneficiary at the time the first questions were asked, and a respondent, whether her name appears in the record on one side of the case or the other?

[4] This brings us to the other question of evidence, whether the testimony of W. A. McDonald was competent. There were two devisees or legatees in the will, Mrs. Byrd and Mrs. McLendon. The offer was to prove that Mrs. McLendon had once said that her father's mind had weakened, or failed, from the use of medicine, and that he could hardly recollect anything. It appears, therefore, that the effort was to attack the whole will and to invalidate it as a whole. This could not be done under the decision in *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709, 10 Ann. Cas. 596, and *In re Fowler*, 156 N. C. 340, 72 S. E. 357, 38 L. R. A. (N. S.) 745, Ann. Cas. 1913A, 85, as the declaration of Mrs. McLendon would, of course, affect the other beneficiary, and, as said in those cases, this would be manifestly unjust. The issues here were so drawn as to present the single question as to the validity of the will as a whole, and not as to the validity of the gift to Mrs. McLendon.

It is suggested incidentally, in the appeal bond, case on appeal and brief, that Mrs. Byrd is a caveator, but this must be an inadvertence, as the record shows clearly that she was not, Mr. and Mrs. McDonald being the only caveators, and this was the state of the record when the issues were made up and the case tried. There is no order of the court making her a party to the caveat, nor does any application for that purpose, appear in the record. On the contrary, she is described as a respondent, the citation having issued against Ella J. McLendon, Fannie Byrd, and T. W. Talbert, at the request of the caveators of the will of Mrs. M. C. Talbert. It is apparent that she was not a party when this evidence was first offered, and if she became a party afterwards, or at any stage of the proceedings, it should appear in the record. The motion of the caveators, after the evidence was closed, to recall the witness, W. A. McDonald, implies that she was not a caveator when the first questions were asked.

[5] When the record and case conflict, the former controls. *Threadgill v. Commissioners*, 116 N. C. 616, 625, 21 S. E. 425. If the evidence, as offered in this case, was competent at all, under the principles stated and discussed, with citation of authority, in *Linebarger v. Linebarger*, supra, it is certainly not competent, under the circumstances, as, when it was tendered it would, on its face, have been prejudicial to the legatee other than Mrs. McLendon. If the waiver of Mrs.

Byrd made the evidence competent, it should have been entered in apt time and regular order.

It was suggested at the hearing in this court that the evidence was competent on the question of undue influence, but that can invalidate a will as a whole just as much as a want of mental capacity, and it was submitted in that way to the jury. It is also suggested that the legacy to Mrs. McLendon might have been considered as a separate gift and set aside upon the ground of undue influence or fraud practiced by her, without annulling the entire will. The answer is that this view, if allowable, was not suggested or properly raised, and the issues, submitted without objection, did not present any such aspect of the case, and there is no such exception, but the inquiry was as to the validity of the whole will. *Gash v. Johnson*, 28 N. C. 289. The judge could have submitted the general issue *devisavit vel non*, or a special issue, so that the jury might pass upon the validity of the whole will or of any part of it. It was said in *Gash v. Johnson*, *supra*, 28 N. C. at page 291:

"The court ordered an issue of *devisavit vel non* to be made up and submitted to a jury. The issue, which was made up under the order of the court, was probably framed in such a manner as to confine the response of the jury (will or no will) to the said paper in toto. Whereas, the court might have directed the issue to have been drawn up specially, for the jury to find whether the paper writing, propounded as the last will of Reuben Johnson, deceased, was in fact his will, or any part of it, and which part. Frequently this special mode of framing the issue will be found most advisable. Then the jury may respond that one or more of the legacies or devises mentioned in the paper is or are not any part of the last will; and that the residue of the paper writing is the last will of the supposed testator" (citing *Trembistown v. Alton*, 1 Dow & Clark, N. T. 95).

And finally it is argued that a separate issue should be ordered as to the undue influence exerted by Mrs. McLendon in obtaining her own legacy, as was done in *Linebarger's case*. This is answered by what we have already said, viz. that there was no such request made, and besides, in the *Linebarger Case* there was a new trial, and the court did not order such a separate issue, but merely stated that "it could see no reason why a special issue might not be submitted to the jury as to the interest of Hosea." It was left to the judge to do so on the next trial. We cannot sustain the exception to the charge. When the instruction to which exception was taken is read in connection with the others given, several of them at the request of caveators, there was no error in stating the law of the case to the jury. The charge was, perhaps, not as strong as it might have been for the propounders. In the case of *In re Abree*, *supra*, where it was contended that there was no evidence of undue influence, Judge Hoke said:

"It is established with us that, in order to avoid a will on this ground, the influence com-

plained of must be controlling and partake to some extent of the nature of fraud. *Marshall v. Flinn*, 49 N. C. 199; *Wright v. Howe*, 52 N. C. 412; *Paine v. Roberts*, 82 N. C. 451. As held in *Wright v. Howe*, *supra*: "The influence which destroys the validity of a will is a fraudulent influence, controlling the mind of the testator so as to induce him to make a will which he would not otherwise have made." It would serve no good purpose to go into any extended or detailed statement of the testimony. We have carefully read and considered it as given in the case on appeal, and we fully concur with the trial judge that there is no evidence tending to show undue influence, and are of opinion that the judgment establishing the validity of the will should be affirmed."

[6] The record does not purport to set out all of the evidence, but if that which was omitted is no stronger in character than the part inserted, there was, perhaps, enough to carry the case to the jury, but it did not furnish any clear, or decisive, indication of undue influence. Old age, bad health, and weakness of mind are circumstances to be considered upon such an issue, but there is practically no evidence of actual fraud, or that Mrs. McLendon took advantage of her father's condition to unduly overcome his will or subject it to her own. The case would hardly have been any stronger with her declarations as to his mental condition super-added, as there already was full evidence on this phase of the case.

We find no error in the record.
No error.

(173 N. C. 250)

NORTH CAROLINA STATE BOARD OF HEALTH et al. v. COMMISSIONERS OF TOWN OF LOUISBURG. (No. 250.)

(Supreme Court of North Carolina. April 4, 1917.)

1. PLEADING \S 214(3) — DEMURRER — ADMISSIONS — SCOPE.

In a suit to enjoin the discharge by a town of untreated sewage into a river from which public water supply was taken in violation of the provisions of Revisal 1905, \S 3051, in which the defendant alleged that the sewage did not contaminate the river a sufficient distance to affect lower towns who used the water, while a demurrer to the answer might be taken as an admission that the water of the river reached the lower towns without appreciable contamination from defendant's sewage, it was not an admission which would justify a denial of relief, when the statute explicitly and absolutely forbids the discharge of untreated sewage into the stream, and as another section makes such act a misdemeanor and in effect declares such conduct and conditions thereby created an indictable nuisance, since although, for the purpose of presenting the legal question involved, a demurrer is construed as admitting relevant facts well pleaded, and ordinarily relevant inferences of fact necessarily deducible therefrom, such principle is not extended to admitting conclusions or inferences of law, or admissions of fact contrary to those of which the court is required to take judicial notice, and more especially when such imposing facts and conditions are declared by a valid statute applicable to and controlling the subject.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 530-532.]

2. CONSTITUTIONAL LAW §70(1) — POLICE POWER—PUBLIC WATER SUPPLY.

As the conservation and protection of the public water supply are entirely within the discretion of the Legislature, unless it clearly offends against some constitutional principle, the Legislature having by Revisal 1905, § 3051, forbidden discharge of untreated sewage into certain rivers, its decision on the facts presented must be accepted as final, and all persons and municipalities required to conform to the requirements of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137.]

3. NUISANCE §66 — ADVERSE USER AS AGAINST PUBLIC.

A town could not, by adverse user, create the right as against the public to pollute a stream by discharging untreated sewage into it.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 139.]

4. CONSTITUTIONAL LAW §92—POLICE POWER—VESTED RIGHTS.

A vested interest cannot, because of conditions once obtaining, be asserted against the proper exercise of police power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237.]

5. NUISANCE §60—POLICE POWER—POLLUTION OF WATERS.

The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified nuisances which are not nuisances per se are to be deemed nuisances in fact and law.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. § 137.]

6. WATERS AND WATER COURSES §196—POLICE POWER—PUBLIC HEALTH.

Revisal 1905, § 3051, prohibiting pollution of streams, is a valid exercise of the police power.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270.]

7. INJUNCTION §114(2)—JOINER OF NECESSARY PARTIES—EFFECT.

As Revisal 1905, § 3051, provides that a suit for injunction thereunder may be obtained on the "application of any person," where the secretary of the state board of health brought suit in his own name, the fact that the board was also joined as a party plaintiff, even if it was without power to sue, does not prevent the efficient maintenance of the action, since the joinder of an unnecessary party is without material effect except as to the matter of cost.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 203-210.]

8. WATERS AND WATER COURSES §196 — STATUTES — CONSTRUCTION AS MANDATORY OR DIRECTORY.

The provisions of Revisal 1905, § 3051, are peremptory, and those desiring to use streams from which a public water supply is taken for the discharge of untreated sewage are made primary actors, and it is their duty to confer with the state board of health before resorting to such streams for such purpose.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 270.]

Appeal from Superior Court, Franklin County; Bond, Judge.

Suit for injunction by the North Carolina State Board of Health and W. S. Rankin, its secretary and ex officio State Health Officer, against the Commissioners of the Town of Louisburg. Judgment for the plaintiffs,

and defendant excepts and appeals. Affirmed.

Civil action heard on demurrer to answer and by consent September 28, 1916.

The action was instituted to restrain the defendants from discharging raw sewage into Tar river a short distance below the town without having the same properly treated as required by statute. Public Laws 1911, c. 62, § 83.

In the complaint, it is, among other things, alleged that defendant, a town of several thousand people situate on Tar river, maintains waterworks and a sewerage system, the latter consisting of five principal sewer lines and their ramifications, extending through the business district and a large part of residential section of the town, discharging the sewage into the Tar river and without having the same subjected to any treatment whatsoever for the purification thereof, etc. (2) "That, basing this allegation upon the approved teachings of modern sanitary science applied to physical conditions, such as have been hereinbefore set out, and likewise upon the conclusions arrived at, after mature consideration by the individual plaintiff above named and by those members of the North Carolina State Board of Health who, in the proper discharge of their official duties, have been called upon to take under advisement the problem in sanitation presented by continued contamination of the waters of Tar river by the discharge of raw sewage into the same above the point of intake of the waterworks system of the city of Rocky Mount and the towns of Tarboro and Greenville, as set out in the preceding paragraph of this complaint, these plaintiffs aver that such contamination of the waters of said river, owing to the above present danger of the bacterial pollution thereof, in the event of an epidemic of typhoid fever or other like communicable diseases in the town of Louisburg, constitutes a continuing menace to the public health of the city of Rocky Mount and in a lesser and diminishing degree, to that of the towns of Tarboro and Greenville." That below Louisburg on said stream the towns of Rocky Mount, Tarboro, and Greenville draw their municipal water supply therefrom, and also have a sewerage system discharging into said stream below after same has been subjected to treatment as required by law. That on complaint of the authorities of Rocky Mount, and with a view of protecting the water supply of that city from contamination, plaintiff board, etc., had, by resolution duly passed and communicated, and otherwise, endeavored to induce a compliance with the law on part of defendant town and had made repeated and insistent demands thereto, but the latter had thus far failed and refused to comply, asserted their right to discharge the untreated sewage into said stream,

and expressed the purpose to continue so to do. In connection with these allegations, a report of an expert was submitted, giving a description of the stream and its tributaries, the fall, volume of water, etc., and stating the sources of contamination that could be reasonably apprehended. Defendants, admitting that they were discharging their sewage into the river without any treatment looking to its purification, and that the municipalities below were now obtaining their water supply from the river, answer the complaint and allege that they have now maintained their water supply and sewer system for 13 years, commencing long before the cities mentioned began taking their water supply from the river; that the nearest of these towns, Rocky Mount, was by actual measurement and as the river winds 75 miles below Louisburg, and on account of the comparatively small amount of their sewage, the volume and flow of the water, etc., there was absolutely no danger of pollution to the inhabitants of the lower towns, but that the water by the time it reached them, or either of them, was as well purified as it could possibly be by any known method of treatment; that this was not only true as a scientific fact, but defendant had caused the same to be tested by experts at points not more than halfway down the stream and it was thereby ascertained that the waters of the river were as free from noxious germs, etc., as they were above Louisburg and before any sewage was discharged into the river. Defendants denied that plaintiffs, or any of them, had any legal right to maintain the suit, and averred, further, that they had never been given any proper hearing before the board of health and that the latter had never made or supplied any plan or system to be pursued by defendants, and by means of which the sewage could be properly treated, etc. To this answer plaintiff demurred, and, the matter having been heard on the pleadings attached thereto, the court gave judgment that defendants be restrained, unless a proper system of sewage treatment was installed and put in operation within 90 days, etc. From which judgment defendant town accepted and appealed.

Wm. H. Ruffin and Yarbrough & Beam, all of Louisburg, for appellant. L. V. Bassett, of Rocky Mount, for appellees.

HOKE, J. (after stating the facts as above). In section 83, Laws 1911, c. 62, a statute to collect and amend the laws more directly appertaining to the public health, it is enacted that:

"No person, firm, corporation, or municipality shall flow or discharge sewage above the intake into any drain, brook, creek or river from which a public drinking water supply is taken, unless the same shall have been passed through some well-known system of sewage purification approved by the state board of health; and the continued flow and discharge of such sewage may be enjoined on the application of any person."

This same provision enacted in 1903 (chapter 159, § 13) and contained in Revisal 1906, § 3051, has been very fully considered and upheld in several decisions of the court (*Shelby v. Power Co.*, 155 N. C. 196, 71 S. E. 218, 35 L. R. A. [N. S.] 488, Ann. Cas. 1912C, 179; *Durham v. Cotton Mills*, 144 N. C. 705, 57 S. E. 465, 11 L. R. A. [N. S.] 1163; *Durham v. Cotton Mills*, 141 N. C. 615, 54 S. E. 453, 7 L. R. A. [N. S.] 321); and it appearing from the statements and admissions in the pleadings that defendant town has been for several years past, and is now, discharging its raw sewage into Tar river, and that below, on said stream and beginning not more than 75 miles as the river winds, several other towns are drawing their public drinking water supply therefrom," the case is one coming directly within the provisions of the law, and we are of opinion that defendant has been properly enjoined.

[1] It is urged for defendant that, plaintiffs having demurred to the answer, it is thereby admitted that the water supply of the lower towns are entirely beyond the danger zone, and that, owing to the natural conditions prevailing, the distance, the volume and flow of the stream, etc., the water supply of the lower towns is as free from pollution as if it had been subject to any kind of known purification, etc. It is fully recognized that for the purpose of presenting the legal question involved a demurrer is construed as admitting relevant facts well pleaded, and ordinarily relevant inferences of fact necessarily deducible therefrom, but the principle is not extended to admitting conclusions or inferences of law nor to admissions of fact when contrary to those of which the court is required to take judicial notice, and more especially when such opposing facts and conditions are declared and established by a valid statute applicable to and controlling the subject. *Prichard v. Com'rs*, 126 N. C. 908-913, 36 S. E. 353, 78 Am. St. Rep. 679; *Hopper v. Covington*, 118 U. S. 148-151, 6 Sup. Ct. 1025, 30 L. Ed. 190; *Equitable Assurance v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682; *Groff v. Equitable Insurance*, 160 N. Y. 19, 54 N. E. 712, 49 L. R. A. 288, 73 Am. St. Rep. 659; *Griffin v. Railroad*, 72 Ga. 423; *Branham v. Mayor*, 24 Cal. 585; 6 Pl. & Pr. 336-338; 31 Cyc. 333-337. While a demurrer might be taken as an admission that the water of Tar river reaches the lower towns without appreciable contamination from defendant's sewage and, in proper instances, such an admission would justify a denial of any interference by court process, it may not have that effect when a statute, explicit in terms and plain of meaning, absolutely forbids the discharge of untreated sewage into the stream, in another section makes its act a misdemeanor and in effect declares such conduct and the conditions thereby created an indictable nuisance. True, in the cases up-

holding the law heretofore cited, the distances between the upper and lower points on the river were 17 and 25 miles, respectively, and the distance here is said to be 75 miles as the river winds, but this difference, in our opinion, may not be allowed to affect the result.

[2] The conservation and protection of the public water supply are peculiarly within the police power of the state, referred very largely to the legislative discretion, entirely so with us, unless it clearly offends against some constitutional principle; and, the Legislature, in the exercise of such powers, having forbidden the use of such stream for the purpose and in the manner described, its decision on the facts presented must be accepted as final, and defendants required to conform to the requirements of the law. *Skinner v. Thomas*, 171 N. C. 98, 87 S. E. 976, L. R. A. 1916E, 338; *State v. Railroad*, 169 N. C. 295-304, 84 S. E. 283; *Daniels v. Homer*, 139 N. C. 219, 51 S. E. 992, 3 L. R. A. (N. S.) 997.

[3] And the same answer, we think, will suffice to a kindred position insisted on, that the defendant town, situate on the river, had installed its present system long before the lower towns had resorted to the stream for their public water supply, and has operated same in the present manner for at least 13 years without hindrance or question on the part of the health authorities or any others, and, to compel defendants now to make this radical change in their system at a burdensome and unnecessary cost would be an unwarranted interference with defendant's riparian and vested rights, etc. In so far as the mere question of time is concerned, and as between individuals, it requires an adverse user of 20 years to create a right of this character (*Tise v. Whitaker*, 146 N. C. 374, 59 S. E. 1012), and, in reference to this statute, it was expressly held in *Shelby v. Power Co.*, supra, that no length of time will justify the maintenance of a nuisance of this kind as against the public. On this question, *Brown*, Judge, delivering the opinion, said:

"There are authorities to the effect that as against a private individual lower down on the stream the right to pollute it to a greater extent than is permissible at common law may be acquired by prescription by an upper riparian owner. But we are not now dealing with the rights of riparian owners, but with the rights of the public at large as represented by the General Assembly. It is well settled that, unless by legislative enactment, no title can be acquired against the public by user alone, nor lost to the public by nonuser. *Commonwealth v. Moorehead* [118 Pa. 344, 12 Atl. 424], 4 Am. St. Rep. 601, and cases cited, Am. & Eng. 1190. Public rights are never destroyed by long-continued encroachments or permissive trespasses. If it is in the power of the General Assembly, in the exercise of its police power, as we have held in the *Durham Case*, to enact this law and make its violation a misdemeanor, it necessarily follows that the defendant could not acquire a right by prescription which would exempt it from the operation of the statute."

And even vested rights having reference to the ordinary incidents of ownership must yield to reasonable interference in the exercise of police power. In that field, as stated, the judgment of the Legislature is, to a great extent, decisive, and must be upheld unless the statute in question has no reasonable relation to the end or purpose in view and is manifestly an arbitrary and palpable invasion of personal and private rights. *Skinner v. Thomas*, supra; *State v. Railroad*, supra; *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. Ed. 348; *Chicago, etc., Railroad v. Tranbarger*, 238 U. S. 67-77, 35 Sup. Ct. 678, 59 L. Ed. 1204; *Reinman v. City of Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; *Mo. Pac. R. R. v. Omaha*, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157; *McLean v. Arkansas*, 211 U. S. 539-547, 29 Sup. Ct. 206, 53 L. Ed. 315. In *Skinner's Case*, supra, speaking of the police power, *Allen*, Judge, delivering the opinion of this court, said:

"It is the power to protect the public health and the public safety, to preserve good order and the public morals, to protect the lives and property of the citizens, the power to govern men and things by any legislation appropriate to that end" (citing from 9 Ency. of U. S. Reports 473, and again from the *Slaughterhouse Cases*, 16 Wall. 36, 21 L. Ed. 394). "Upon it depends the security of social order, the life and health of the citizens, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property"

—and, further:

"The exercise of this power is left largely to the discretion of the lawmaking body, and the authority of the courts cannot be invoked unless there is an unnecessary interference with the rights of the citizens, or when there is no reasonable relation between the statute enacted and the end or purpose sought to be accomplished."

[4, 5] In *Hadacheck's Case*, supra, in upholding a city ordinance prohibiting the manufacturing of brick in certain localities of the city of Los Angeles, it was held, among other things, as follows:

"While the police power of the state cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of government and one of the least limitable—in fact, the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised. A vested interest cannot be because of conditions once obtaining be asserted against the proper exercise of the police power; to so hold would preclude development. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204. There must be progress, and in its march private interests must yield to the good of the community. The police power may be exerted under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances per se (such as livery stables, as in *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900, and brickyards, as in this case) are to be deemed nuisances in fact and law."

In *Mo. Pacific v. Omaha*, supra, it was said:

"In the exercising of the police power, the means to be employed to promote the public

safety are primarily in the judgment of the Legislature, and the courts will not interfere with duly enacted legislation which has a substantial relation to the purpose to be accomplished, and does not arbitrarily interfere with "personal and "private rights."

[6] In recognition of these well-established principles and on the admissions appearing of record that three populous and progressive towns lower down on the same stream are now taking their drinking water supply from the river beginning within a distance of 75 miles, and adverting to the sworn statements of the board of health and its dutiful, trained, and capable secretary that, under the conditions presented and especially in times of epidemic, the discharge of untreated sewage by defendant imports a menace to the inhabitants of the lower towns, we are of opinion that the statute in question is a valid law, and that the defendant must be held to comply with its provisions.

[7] It is further contended that plaintiffs are not proper parties to maintain a suit of this kind, but the position cannot be sustained. We are inclined to the opinion that plaintiff board, as a public quasi corporation charged with the duty of looking after the public health and of the statutes promotive of such purpose, have a right in their quasi corporate name to resort to the courts of the state in enforcement of these statutes and of regulations pursuant thereto having the force of law (*Salt Lake City, etc., v. Golding*, 2 Utah, 319; 28 Cyc. 131), but the question is not necessarily presented, as the secretary of the board, in his individual name, is also a party, and, by the express provision of the law, an injunction may be obtained on the "application of any person." It is the accepted rule with us that the joinder of unnecessary parties is without material effect except as to the matter of cost. *Ormond v. Insurance Co.*, 145 N. C. 142, 58 S. E. 997. The presence of the board of health, therefore, even without the power to sue, does not prevent the efficient maintenance of the action. And the further position must be also overruled that the board of health have prescribed no stated method of purification informing defendant as to how they must proceed. By the terms of the statute, expressly forbidding the discharge of the sewage unless treated, etc., the defendants, and others in like case desiring to use the stream, are made primarily actors in such cases, and it is their duty to confer with the board and ascertain a proper method before resorting to the river for the purpose. It is to the interests of municipalities desiring to make use of a stream that no arbitrary or fixed method or system should be established in advance for, no doubt, in many instances, a modification from the more exact-

ing method may be found reasonable, permitting the maintenance of a less burdensome and less costly system.

[8] In any event, the statute bearing on the conduct of defendant is peremptory, and they must at once confer with the board of health and obtain and follow the reasonable requirements prescribed for the conditions presented.

We find no error in the judgment below, and this will be certified that judgment be entered restraining defendant from discharging their untreated sewage into Tar river unless, within a definite time stated, the time fixed to be reasonable for the purpose, the method of treatment looking to the purification of the sewage shall be installed and put in operation as required by law.

Affirmed.

CLARK, C. J., concurs in the opinion in every respect and calls attention to the fact that according to the official reports of the state, of which the court takes judicial notice, there are already 98 cities and towns in North Carolina which have public waterworks and 10 more are now being built. This number includes 58 county seats and nearly every town in the state of over 1,000 population according to the last census. The town of Belhaven with 2,863 population was the last town of over 2,000 population without such public facilities. Comparatively few between 1,000 and 2,000 in population remain without such public waterworks, while Saluda with 235 population, Franklin with 379, and 10 other under 1,000, have already installed such plants.

That the state has been comparatively free of late years from epidemics of typhoid fever and others of a water-borne origin is due to the general interest that has been taken in the protection of public water supplies and the supervision of sewerage.

The number of public water plants and of towns having sewerage will steadily increase, and with it the importance of preventing the pollution of our streams and waterways. The act of the Legislature for this purpose is very carefully drawn and should there be, on experience, any defect found it will be remedied by legislation. The province of the courts is to construe such legislation in accordance with its intent and in favor of the most careful enforcement in behalf of the health of the people at large.

With the growth of the state in population and wealth legislation of this kind, which was unknown, if not unneeded, in an earlier day, has become a necessity. *Salus populi suprema lex*. The public welfare is the highest law.

(173 N. C. 346)

GRAY v. LENTZ. (No. 353.)

(Supreme Court of North Carolina. April 11, 1917.)

1. MARRIAGE §25(4)—MARRIAGE LICENSES—DUTY OF REGISTER.

Revisal 1905, § 2088, provides that the written consent of the parents to a marriage shall be filed with the register where either of the parties is under 18 years of age, while section 2090 provides that the register of deeds who shall knowingly or without reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any legal impediment, or where either of the persons is under the age of 18 years without the consent required by law, shall forfeit and pay \$200 to any parent, guardian, or person standing in loco parentis who shall sue for the same. *Held*, that the two sections which were intended to prevent hasty and improvident marriages must be construed together, and the register, before issuing a marriage license, should demand the production of the written permission of the parent or act with great caution and care in ascertaining the ages of the parties, as a man of ordinary prudence would in making decisions in important affairs of his own.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 35.]

2. MARRIAGE §25(6)—LICENSES—PENALTIES.

In an action for the penalty prescribed by Revisal 1905, § 2090, for issuing a marriage license for the marriage of a person under 18 years of age, the question of what is a reasonable inquiry by the register of deeds is one of law for the court, where the facts are undisputed.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 35.]

3. MARRIAGE §25(5)—LICENSES—PENALTIES.

In an action under Revisal 1905, § 2090, against a register of deeds for the penalty prescribed for issuing a marriage license for the marriage of a girl under 18 years of age, the register, though he might have communicated with the parent of the girl who came from another county, issued a license on the oath of the prospective bridegroom and another that she was over 18, though another man who had stated that he knew her and that she was over 18 refused to make the oath. *Held*, that where it appeared that one witness as to the girl's age had probably been drinking, and as the register acted upon statements of persons unknown to him, he cannot be deemed to have exercised due diligence in making the inquiry, and so is liable to the penalty.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 34.]

Appeal from Superior Court, Forsyth County; Long, Judge.

Action by S. C. Gray against J. M. Lentz. From judgment for defendant, plaintiff appeals. Reversed, and new trial directed.

The action was brought to recover the penalty of \$200, allowed by Revisal, §§ 2088, 2090, for issuing a marriage license contrary to the provisions of those sections.

The material facts are that one Charles Stanley applied to defendant on August 28, 1915, for a license to marry Myrtle Gray, daughter of plaintiff, who was, at the time, 16 years and about 4 months old. Stanley went to the defendant's office with John Hull, who was asked by the defendant, according to Hull's evidence, if he knew the age of the

girl, to which he replied that he had known her all his life, and that "to the best of his knowledge, or the best he could find out, she was about 18 years old—looked like a girl about 18." The defendant told him he would have to swear to her age, and he said, "I could not do that;" and defendant then said, "You can't get the license." Criss Edwards was then brought to the office, who John Hull testified looked like he was drunk, was drinking the day before, and was drunk on the train and fighting the night of August 28th. Defendant stated that he did not appear to have been drinking when in his office in the afternoon. Criss Edwards stated to the defendant that he knew Myrtle Gray's age, was her first cousin, and had known her all her life, and that she was 18 years old on her last birthday. Defendant then warned both Stanley and Edwards as to the seriousness of the oath they were about to take, and they replied, "We can take that oath all right; we know what we are doing." The oath was administered and signed by them and the license issued. Defendant testified:

"Q. Told you where Mr. Gray lived? A. Yes; and I asked Mr. Stanley about phoning, and he said they had no phone. Q. You knew there was a telegraph station here and at Mt. Airy? A. Yes; but he said Mr. Gray lived out in the country. Q. The truth of the whole matter is, that you relied solely on what Chris Edwards and Charlie Stanley said? A. No. Q. I will ask you if you didn't rely solely on the statements and information furnished you by Charlie Stanley and Chris Edwards, and the affidavit furnished you and on the license. A. Of course, that's what I had to do. Q. And nothing else but that? A. No; had to rely on what they all said. Q. You didn't phone Mr. Gray? A. No, sir. Q. You didn't telegraph? A. No, sir. Q. Didn't make any inquiry except from Chris Edwards and Charles Stanley? A. Mr. Hull. Q. Oh, well, that was in the morning. You didn't go out and see anybody in town about it? A. No, sir. Q. Did you know Chris Edwards and Charlie Stanley up until that time—until they came in your office that day? A. No, sir. Q. Had you ever seen them? A. I don't know; I might have. Q. To know them? A. No, not to know them. Q. You didn't know what kind of character either one of them had? A. No, sir."

The defendant knew that Charles Stanley and the Grays lived in Surry county, and that Stanley had come to Forsyth county for a marriage license. Defendant further testified:

"Q. Isn't this the truth about it: After you had found a man that would swear to the affidavit—Chris Edwards and Charlie Stanley, after they had agreed to swear to that affidavit—you issued the license; isn't that the truth? A. No; after he brought Mr. Edwards in, and I explained the oath to them, and they both took it, I issued the license."

There was some evidence given by defendant's witness, W. A. Mickle, that when Stanley came back in the afternoon, he showed him an unsigned note which he said was from the father and mother of the girl, but that he told him it would not do, as there was no evidence that it was genuine, and when defendant came in he spoke to him

about it, and added that "he had turned it down," whereupon defendant said, "It was the same parties who had been in that morning and did not have sufficient evidence of the girl's age." The witness W. A. Mickie testified further that the license was issued on the affidavit of Stanley and Edwards as shown on its face. There was evidence of the bad character of Charles Stanley and Criss Edwards, and that Edwards is not related to the girl, and is not known by her family, and was not heard of before. He is a cousin of the Allens of Hillsville, Va. The girl lived with her parents in Mt. Airy, and the family had access to a telegraph station near by and a phone across the street, though there is no phone in their home. The marriage took place on August 30, 1915, after the license was issued, but the father did not know that the license had been issued until Monday, August 30th, when he read the notice of it in the newspaper. He then wrote to the court clerks in the adjoining counties, "and fought against it." He wrote to Stuart and Hillsville in Virginia, but did not wire or phone to Mr. Lentz, because he did not think Charles Stanley would leave his own county and go to another in the same state for a license. The parents had not consented to the marriage of their daughter. Defendant inquired of Stanley why they had come from Surry county for a license, but what he or they said in answer to his inquiry does not appear. None of the parties, John Hull, Charles Stanley, and Criss Edwards, was known by defendant, but they were absolute strangers to him. There were telephone and telegraph lines connecting Mt. Airy with Winston-Salem.

The court charged the jury, in part, as follows:

"The law requires that a register of deeds should make such inquiry as a prudent business man, acting in the most important affairs of life, would make; to make such inquiry, not as a mere matter of form, but carefully and conscientiously and as a prudent business man—I will quote again—acting in the most important affairs of life, would make. Now, if he did make such inquiry as I have explained to you that the law requires him to make, then you would answer the second issue in his favor, 'No.' If he failed to make such inquiry, then you answer the issue in favor of the plaintiff Gray, 'Yes.' The evidence shows, although the register of deeds had no information to that effect, that Stanley and Edwards, or at least there is evidence to the effect that Stanley and Edwards were men of bad character. The evidence, if believed, shows that all three of these men—Stanley, Edwards, and Hull—were strangers to the register of deeds, and that he had no information in regard to them from any person outside of themselves, and that he made no attempt to get in communication with the parents of the girl, but that he issued the license from information, obtained from these three men, and that is all the information that he had. It is for you to say whether or not he discharged his duty under the rule of law as I have laid down to you. It is for you to say whether or not he made reasonable inquiry. The plaintiff contends that he did not make the inquiry that a man of ordinary prudence would make in the dis-

charge of important business affairs, but relied upon the statements of men who were utter strangers to him. On the other hand, the defendant contends that, all things considered, he was taking the affidavit of two of the men—one of them, as he was informed, being her cousin, although the evidence introduced by the plaintiff, if believed, shows as a matter of fact that he was not her cousin, and also upon the statement of Mr. Hull; all of the parties stating to the register of deeds that they had known the girl practically all their lives, or her life, and that that was sufficient to convince a man of ordinary prudence, in the discharge of important business affairs, that he could safely rely and act upon their statement, upon information laid before him in issuing the license."

The jury returned the following verdict:

"(1) Was Myrtle Gray at the time of the issuing of the marriage license under the age of 18 years, as alleged in the complaint? Answer: Yes.

"(2) Did the defendant knowingly or without reasonable inquiry as to the unlawful impediment issue a marriage license to Charley Stanley and Myrtle Gray, as alleged in the complaint? Answer: No.

"(3) If so, what sum, if any, is the plaintiff entitled to recover as penalty therefor? No answer."

Judgment for defendant upon the verdict, and plaintiff appealed.

E. C. Bivens, of Mt. Airy, and Manning & Kitchin, of Raleigh, for appellant. L. M. Swink and Gilmer Korner, Jr., both of Winston-Salem, for appellee.

WALKER, J. (after stating the facts as above). [1] There is no real controversy about the material facts in this case, and if they are considered in the view most favorable to the defendant, our opinion is that there was not reasonable inquiry by the defendant, so that it could appear to him that the parties were 18 years old or probable that there was no legal impediment to the marriage between them. Revisal, §§ 2088, 2090, which provides that:

A register of deeds "who shall knowingly or without reasonable inquiry, personally or by deputy, issue a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of 18 years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or * * * person standing in loco parentis who shall sue for the same." Section 2090.

It is provided by section 2088 that written consent of the parent to the marriage shall be filed with the register where either of the parties is under 18 years of age; but the two sections have generally been construed together as they relate to the same subject. The statute is an exceedingly important one, and was enacted to prevent hasty and improvident marriages. It is remedial in its nature, as it furnishes the means, and the remedy for the forestalling of all evasions or violations of its provisions by the tricks and contrivances of the ardent and artful lover, and should be construed and enforced so as to suppress the mischief and advance the remedy. The duty of the register is to demand the produc-

tion of the written permission of the parent, or to act with care and caution in ascertaining the age of the parties, by a reasonable and proper inquiry, such as a man of ordinary prudence would make in important affairs of his own.

[2, 3] It has been held that when the facts are not disputed, what is a reasonable inquiry is a question of law. *Joyner v. Roberts*, 114 N. C. 389, 19 S. E. 645; *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970. Some rules have been formulated for our guidance in cases of this kind, and they will be found in the last-cited case. They are founded upon prior decisions of this court, and are deemed to be sound and firmly settled. We need not restate them here, but simply refer to several cases where, as we think, the law has been stated directly contrary to the charge of the court, upon the vital and decisive question involved in this appeal. Justice Merrimon said:

"The license shall not be issued as of course to any person who shall apply for it—the register is charged to be cautious and to scrutinize the application; it must appear probable to him upon reasonable inquiry, when he has not personal knowledge of the parties, that the license may and ought to be issued. The probability upon which the register should act is not such as arises from conjecture, * * * but * * * from inquiry of trustworthy persons known to the register who can and do give pertinent information called out by similar inquiry presently or within a reasonable time, from the examination of pertinent records and entries, from inquiry as to like events, and from the like inquiries; and the evidence thus elicited should render it probable—more likely than the contrary—that the license should be issued in pursuance of the application for the same. * * * To issue a license to marry 'without reasonable inquiry,' without care and scrutiny, and when it does not appear probable to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose, and oftentimes brings distress and ruin upon individuals and families. To prevent such evils the statute provides heavy penalties. * * * Surely such inquiry in respect to such a matter was not reasonable, nor did the inquiries, and the information so unsatisfactory, make it appear probable that the female was of the age of 18 years. The mere personal appearance of an entire stranger was not evidence to create such probability; it was scarcely ground for conjecture. That an entire stranger, not vouched for, should make such an application was rather ground of suspicion that it was not made in good faith, and this should have prompted further and satisfactory inquiry before issuing the license. *Coley v. Lewis*, 91 N. C. 21; *Bowles v. Cochran*, supra [98 N. C. 398].” *Williams v. Hodges*, 101 N. C. 300, 7 S. E. 786.

The rule is well stated in *Trolinger v. Boroughs*, 133 N. C. 315, 45 S. E. 662, by Justice Connor, as follows:

"While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of

care. It is said that if the register fails to issue the license upon a proper application he is liable to the penalty. Certainly this statute would not be construed to impose such penalty unless it was made to appear that such information was furnished the register as would induce a man of ordinary prudence upon reasonable inquiry to issue it."

The facts in this case which are claimed to show reasonable inquiry are certainly no stronger than those in *Trolinger v. Boroughs*, and we do not think they are as strong. In *Cole v. Laws*, 104 N. C. 651, 10 S. E. 172, the rule is thus stated in the syllabus:

"When a register of deeds issues a license for the marriage of a woman under 18 years of age, without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman, without making any further inquiry as to his sources of information, held, that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect."

Likewise in *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521, it was held that:

"In an action against a register of deeds to recover the penalty under Revisal, § 2060, for issuing a marriage license contrary to its provisions, where the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction that as a matter of law defendant failed to make reasonable inquiry as to the age of plaintiff's daughter."

The present Chief Justice said in *Laney v. Mackey*, 144 N. C. at page 634, 57 S. E. at page 387:

"The application was made by a man whose name was not known to the defendant, whom he does not show to have been trustworthy, and as to whom the only evidence is that his general character is bad. Such inquiry as the defendant made in this case was not reasonable. It was purely perfunctory and did not furnish the security against a violation of the law required by a proper observance of the requirements of the statute."

The same rule was adopted by the court in *Agent v. Willis*, 124 N. C. 29, at page 33, 32 S. E. 322, at page 323, where Justice Montgomery says:

"The defendant seemed to think that an oath on the part of anybody was all that was necessary to authorize him to issue the license. But the character of the witness and accuracy of information are the things that the register of deeds should look to when he issues a license for marriage, in cases where there is doubt about the age of the parties."

The language of Justice Brown, in *Morrison v. Teague*, 143 N. C. 186, 55 S. E. 521, follows closely the facts of our case, and is very suggestive of the real principle and established rule which should control the decision of it:

"The learned counsel for the defendant, Mr. Gwaltney, most earnestly contended in his argument that upon a fair interpretation of the words 'reasonable inquiry,' the charge of his honor should be sustained. Notwithstanding we find ourselves unable to reconcile this view with very recent decisions of this court, we agree with counsel that upon the evidence in the

record the question was one of law, and that his honor was correct in so holding. The uncontradicted evidence shows that the register took the word of the prospective bridegroom and his friend as to the age of the young lady, and made no further inquiry of any one; that the register did not know either Kennedy or his friend. The register's suspicions seem to have been aroused, for he inquired why they applied for license in Taylorsville, as the girl lived in Iredell; nevertheless, he made no further inquiry."

Chief Justice Smith said in *Cole v. Laws*, 104 N. C. 656, 10 S. E. 172, when referring to facts not substantially dissimilar to those in this case:

"In a matter involving such grave consequences and fixing her future life, did the deputy make any reasonable effort to inform himself of the fact, and act with a prudent regard to a parent's rights in granting, and so soon following the license by consummating the marriage itself? The case cited for the defendant (*Bowles v. Cochran*, 93 N. C. 398) is not at variance with the view taken of the facts of the present case. There a paper, without signature, however, was produced before the register, giving the age, by one known to him to be of good character and trustworthy, and the applicant stated that he knew her age to be that stated in the writing—18 years. There was nothing calculated to awaken suspicion in the register's mind of the truthfulness of the representations, and it was held that the penalty had not been incurred (in this case). No such favoring circumstances attend the action of the deputy to excuse his precipitate action. He manifests an inexcusable indifference to the results of his action, and risks the well-being of others upon representations, not themselves suspicious, which have no outside support. The case is not like that of *Williams v. Hodges*, 101 N. C. 300 [7 S. E. 788], * * * in which more diligence was shown, in finding out the facts and the true age of the infants, and yet it was held that the register had been remiss and culpably careless in issuing the license. In the opinion, *Merrimon, J.*, says: 'To issue a license to marry, without reasonable inquiry, without care and scrutiny, and where it does not appear probable to the register that it may and ought to issue, as the law contemplates, is a perversion of the statute, disappoints its just purpose, and oftentimes brings distress and ruin upon individuals and families. To prevent such evils, the statute provides heavy penalties.'"

In *Furr v. Johnson*, 140 N. C. 157, 52 S. E. 664, Justice Connor repeated the rule in language which we take from the fourth head-note:

"While the court may not prescribe any rule for the guidance of the register it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register."

The case of *Joyner v. Harris*, 157 N. C. 295, 72 S. E. 970, while in some respects not like this one, is yet, in principle, not unlike it. It referred to the rule, which, as we have said, had been settled for some time in several decisions of this court, that the register should have some reliable information before he issues the license and not act blindly or too confidently upon the statements of mere strangers, and especially those who are directly interested and under a strong temptation to falsify, as here. We adopted and applied the familiar rule formulated in previ-

ous cases and held that sufficient inquiry had not been made. It is true that in *Joyner v. Harris* we treated the information given as to her age as practically a statement of the girl herself, but the case is otherwise decisive of this one. It was there said:

"If we should hold that a register of deeds can satisfy himself as to the essential facts upon such an inadequate investigation as was made in this case, we would defeat the very object and purpose of the statute to throw safeguards about the young and inexperienced, who would, by reason of their youthful impulses, be liable to enter into so solemn and serious a relation lightly or unadvisedly, and not soberly, discreetly, and reverently, as they should do and as the best interests of society require should be done."

The fact that the register administered an oath to the applicant and his friend does not, of itself, exonerate him. He is permitted by the statute to do so that he may the better elicit the facts, and his doing so, or failing to do so, would be but a circumstance for the jury to consider. *Furr v. Johnson*, supra. The defendant relied upon *Bowles v. Cochran*, 93 N. C. 399, *Walker v. Adams*, 109 N. C. 481, 13 S. E. 907, and especially on *Harcum v. Marsh*, 130 N. C. 154, 41 S. E. 6. It appeared in *Bowles v. Cochran* that "the person who produced the paper [as to the age] was known by the register to be a man of good character and reliable, and he stated that he knew the statement in the paper to be true"—not at all like this case, but comes directly within the correct rule. *Walker v. Adams* was a case of the same kind. The party was well known to the register, and there was nothing against his character, and this was treated by the court as some evidence of his good character and reliability upon which the register might depend. The last case (*Harcum v. Marsh*), while not exactly like this case, there being at least a legal shade of difference, has been criticized and its weight and authority as a precedent greatly diminished and impaired, if the case has not been disapproved. Referring to that case in *Trolinger v. Boroughs*, 133 N. C. at page 315, 45 S. E. at page 663, Justice Connor said:

"It may not be easy to reconcile the opinion of the court, that the defendant in that case was not liable, with several cases in our reports defining the term 'reasonable inquiry.'"

And again (133 N. C. at page 318, 45 S. E. at page 664):

"Without reviewing the several cases, we think that they, certainly with the exception of *Harcum v. Marsh*, supra, lead to the conclusion that the defendant did not make reasonable inquiry."

Besides, Justice Merrimon said in *Williams v. Hodges*, supra (101 N. C. at page 304, 7 S. E. 788):

"The mere personal appearance of an entire stranger was not evidence to create such probability (as to there being no legal impediment); it was scarcely ground for conjecture."

If those cases are in conflict with the ones we have cited, as stating the correct rule, we would not regard them as controlling.

In this case the evidence shows that the defendant relied exclusively upon the statements of mere strangers, who proved to be men of bad character. They either knew nothing of the girl's age, or if they did know it, they swore falsely as to the fact, for she was just 14 years old at the time. John Hull had put the defendant on his guard by refusing to swear to her age, or even that it was about 18 years, though he had known her, he stated, all her life. Criss Edwards, who turned out to be a perjurer, and appears to have been a bad man generally, was not calculated by his demeanor, even if not drunk, to inspire confidence in his statements. His manner was not altogether that of a trustworthy man. But when the evidence is sifted, we find nothing but the bare statements of entire strangers upon which the defendant based his action in issuing the license, and we hold that there was no "reasonable inquiry" within the meaning and intent of the law. If a register is justified in issuing a license for a marriage of two young persons, under the circumstances disclosed in this record, the statute would be of no practical value; its main object would be defeated, and it had just as well be repealed, because there is no ordinary man, who could not make as good a showing, and sometimes with little effort, as we find in this evidence. The convenient and accommodating friend is not always hard to find. The statute was passed to prevent this kind of imposition upon the register. The trial court should have charged the jury, as requested by the plaintiff, that there was no reasonable inquiry, if the facts were as stated by the witnesses.

There was error in affirming the judgment of the county court, and it will be so certified to the end that proper proceedings be taken to set aside the judgment and verdict, so that there may be a new trial.

Error.

(173 N. C. 329)

THOMAS v. SANDLIN. (No. 299.)

(Supreme Court of North Carolina. April 11, 1917.)

1. CONSTITUTIONAL LAW §50—LEGISLATIVE POWER OF GENERAL ASSEMBLY—CONSTITUTION.

In North Carolina, under the Constitution, the General Assembly, so far as the constitution is concerned, is possessed of full legislative power, unless restricted by express constitutional provision or necessary implication.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 48, 49.]

2. HUSBAND AND WIFE §6(2) — MORTGAGE OF HOUSEHOLD AND KITCHEN FURNITURE—JOINDER BY WIFE—STATUTE—CONSTITUTIONALITY.

Revisal 1905, § 1041, providing that a chattel mortgage by the husband on the household and kitchen furniture shall be void unless the wife join therein and her privy examination be taken in the manner prescribed by law as on conveyances of real estate, is not unconstitutional as an interference with the husband's jus dis-

ponendi, but is a valid exercise of the police power.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 16.]

3. HUSBAND AND WIFE §6(2)—MORTGAGE OF HOUSEHOLD AND KITCHEN FURNITURE—JOINDER BY WIFE—PIANO—STATUTE.

A piano purchased by a husband for the use of his wife and daughters, and so used by them in their home, was within the terms and meaning of Revisal 1905, § 1041, providing that a chattel mortgage by a husband on the household and kitchen furniture shall be void unless the wife join therein and her privy examination be taken.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 16.]

Appeal from Superior Court, New Hanover County; Bond, Judge.

Action by J. H. Thomas against L. E. Sandlin. From a judgment for plaintiff, defendant appeals. Judgment set aside, and action dismissed.

Civil action to recover a piano on which plaintiff held a chattel mortgage, executed by the defendant to secure a debt of \$153, due September, 1914. On the hearing, the relevant facts agreed upon by the parties were as follows:

"(1) L. E. Sandlin, defendant, is a married man residing with his wife and daughters. (2) He purchased a piano, and had the same placed in his house to be used by his wife and daughters, and it was used by them. (3) That L. E. Sandlin mortgaged the piano subsequent to the passage of section 1041 of the Revisal of 1905." "(5) That the mortgage was not signed by the wife of the defendant, nor was her privy examination taken as required under section 1041 of the Revisal of 1905. (6) That the defendant was indebted to the plaintiff in the sum of \$153, which was secured by said mortgage, less a credit of \$21.08, leaving a balance due of \$131.92, with interest from June 5, 1914."

Upon these facts, the court, reversing the action of the recorder, entered judgment for plaintiff, the pertinent portions of said judgment, after reciting that the piano was purchased by defendant subsequent to passage of section 1041, being as follows:

"Upon the foregoing facts, the court being of the opinion that a piano is an article of household and kitchen furniture under section 1041 of the Revisal of 1905, but that said section is an unwarranted interference with defendant's jus disponendi, and that said section is unconstitutional and is void; that the said mortgage is a valid and subsisting lien upon said piano, and it is therefore, upon motion of counsel for plaintiff, ordered, adjudged, and decreed that the said mortgage is a valid and subsisting lien on said piano; that the plaintiff recover of the defendant the said piano, which is hereby condemned for sale," etc.

J. C. King, of Wilmington, for appellant. L. J. Poisson and J. O. Carr, all of Wilmington, for appellee.

HOKE, J. (after stating the facts as above). The statute enacted in 1891 and appearing in Revisal 1905, § 1041, provides that a chattel mortgage by the husband on the household and kitchen furniture shall be void unless the wife join therein and her privy exami-

nation be taken in the manner prescribed by law as on conveyances of real estate. In the present instance, the wife did not join in the conveyance as required, and unless the statute is unconstitutional or the plano does not come within its descriptive terms, a recovery by plaintiff cannot be sustained. While the *jus disponendi* is fully recognized with us as a substantial incident of ownership coming under the constitutional guaranties for the protection of private property, it is also established in this jurisdiction that neither this nor any other proprietary right is absolute in its nature, but the same is enjoyed and held subject to legislative regulation in the reasonable exercise of the police power.

It has been properly said that no adequate or satisfactory definition of police power can be given; for, as our civilization and social conditions become more advanced and complex, the extent and inclusive character of this power is being more and more illustrated, and in the later decisions has been held to embrace, not only governmental regulations appertaining to the good order, health, and morals of a community, but also such as are considered promotive of its economic welfare and public convenience and comfort. In reference to the ownership of property, the exercise of this power may be extended to measures affecting its acquisition, use, transfer and devolution, the latter certainly so far as the disposition of property by will is concerned, being, under our decisions, in the absolute control of the Legislature, and, as to all other features of ownership, the legislative will must prevail unless clearly in contravention of some express constitutional provision; the recognized position being that the statute will, in all cases, be upheld unless it has no substantial relation to the purpose sought to be attained and is an arbitrary and manifest invasion of personal and private rights. Speaking to the subject in 6 *Ruling Case Law*, 193, the author says:

"All property within the jurisdiction of a state, however unqualified may be the title of the owner, is held on the implied condition or obligation that it shall not be injurious to the equal right of others to the use and benefit of their own property. In other words, all property is held subject to the general police power of the state so to regulate and control its use in a proper case as to secure the general safety, the public welfare, and the peace, good order, and morals of the community. Accordingly it is a fundamental principle of the constitutional system of the United States that rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in it by the Constitution, may think necessary and expedient. And to these ends, the Legislature under its police power may pass laws regulating the acquisition, enjoyment, and disposition of property, even though in some respects these may operate as a restraint on individual freedom or the use of property. The subordination of property rights to the just exercise of the police power has been said to be as complete as is the subjection of these rights to the proper exercise of the taxing power; and it is held that this implied condition is quite

irrespective of the source or character of the title. This principle is, in effect, an application of the maxim which underlies the police power, '*Sic utere tuo ut alienum non laedas.*'"

And authoritative cases on the subject are in full support of this statement of the principle. *Chicago & Alton R. R. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. Ed. 1204; *Reinman v. City of Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548-558, 34 Sup. Ct. 364, 58 L. Ed. 721; *Mutual Loan Co. v. Martell*, 222 U. S. 225-236, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529, affirming same case in 200 Mass. 482, 86 N. E. 916, 128 Am. St. Rep. 446; *McLean v. Arkansas*, 211 U. S. 539-547, 29 Sup. Ct. 206, 53 L. Ed. 315; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 883, 42 L. Ed. 780; *Bushnell v. Loomis*, 234 Mo. 371, 137 S. W. 257, 36 L. R. A. (N. S.) 1029; *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 53 S. W. 955, 56 L. R. A. 316, 76 Am. St. Rep. 682, affirmed in 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55. In *Atlantic Coast Line v. Goldsboro*, supra, Associate Justice Pitney, delivering the opinion, said, among other things (232 U. S. 558, 34 Sup. Ct. 368, 58 L. Ed. 721):

"For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise" (citing *Slaughterhouse*, 16 Wall. 36, 21 L. Ed. 394, and other cases).

And, in *McLean v. Arkansas*, Associate Justice Day for the court, said:

"The Legislature, being familiar with local conditions, is primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the Legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act * * * is unmistakably and palpably in excess of legislative power."

Our own decisions are in accord with these cases, chiefly interpretative of the federal Constitution. *Board of Health v. Town of Louisburg*, 91 S. E. 1019, present term; *Skinner v. Thomas*, 171 N. C. 99, 87 S. E. 976, L. R. A. 1916B, 338; *Glenn v. Express Co.*, 170 N. C. 286, 87 S. E. 136; *State v. Railroad*, 169 N. C. 295, 84 S. E. 283.

[1] All the more so that, in this state, under our Constitution, the General Assembly, so far as that instrument is concerned, is possessed of full legislative powers unless restrained by express constitutional provision or necessary implication therefrom. *State v. Lewis*, 142 N. C. 626, 55 S. E. 600, 7 L. R. A. (N. S.) 669, 9 Ann. Cas. 604; *Black on Constitutional Law* (3d Ed.) 357. In *Lewis Case*, supra, it was held:

"The Legislature of North Carolina has full legislative power, which the people of this state can exercise as fully as the Parliament of Eng-

land or any other legislative body of a free people, save only as there are restrictions imposed by the Legislature by the state and federal Constitutions."

Among the authorities heretofore cited, the case coming nearer probably to the one before us is *Mutual Loan v. Martell*, supra, in which an act of the Legislature of Massachusetts provided that no order for assignment of wages to be earned in amount less than \$200, should be valid unless accepted in writing by the employer, and, in case of a married man, no such order should be valid unless the written consent of his wife was attached thereto. The statute was upheld by the Supreme Court of Massachusetts and the decision was sustained by the Supreme Court of the United States (*Mutual Loan Co. v. Martell*, 222 U. S. 225, 32 Sup. Ct. 74, 56 L. Ed. 175, Ann. Cas. 1913B, 529), both tribunals making distinct reference to the requirement as to the wife's signature. In the opinion of the United States Supreme Court, by Associate Justice McKenna, it was held, among other things:

"The validity of police regulations depends upon the circumstances of each case, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose. *Chicago, Burlington & Quincy Ry. Co. v. Illinois*, 200 U. S. 591 [28 Sup. Ct. 350, 50 L. Ed. 596, 4 Ann. Cas. 1175]. The power of the state extends to so dealing with conditions existing in the state as to bring out of them the greatest welfare of its people. *Bacon v. Walker*, 204 U. S. 311 [27 Sup. Ct. 289, 51 L. Ed. 490]. Public power is but another name for the power of government; it is subject only to constitutional limitations which allow a comprehensive range of judgment, and it is the province of the state to adopt by its Legislature such policy as it deems best. Legislation cannot be judged by theoretical standards, but must be tested by the concrete conditions inducing it. A state may, as a police regulation, make assignments of future wages invalid except under conditions that will properly restrict extravagance and improvidence of wage-earners. A state may, under conditions justifying it, prescribe that an assignment by a married man of wages to be earned by him in future shall be invalid unless consented to by his wife. This court recognizes the propriety of deferring to tribunals on the spot, and will not oppose its notions of necessity to legislation adopted to accomplish a legitimate public purpose. *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358 [30 Sup. Ct. 301, 54 L. Ed. 515]. A state has power to prescribe the form and manner of execution and authentication of legal instruments in regard to property, its devolution and transfer. *Arnett v. Reade*, 220 U. S. 311 [31 Sup. Ct. 425, 55 L. Ed. 477, 36 L. R. A. (N. S.) 1040]. There are many legal restrictions that may be placed by a state on the liberty of contract, and this court will not interfere except in a clear case of abuse of power. *Chicago, Burlington & Quincy R. R. v. McGuire*, 219 U. S. 549 [31 Sup. Ct. 259, 55 L. Ed. 328]."

The influences that proceed from a well-ordered home are among the chiefest bulwarks of our social order; and if these various statutes, restrictive of the right of contract and of the ordinary use and enjoyment of property, can be upheld as a valid exercise of the police power, assuredly a statute of this kind, designed and calculated to maintain the peace and comfort of the home and

to protect the wife and children therein from the ill-considered action of an improvident husband, may be sustained and referred to the same beneficent principle, our own decisions requiring the joinder of the wife to a valid conveyance of an allotted homestead (*Joyner v. Sugg*, 132 N. C. 580, 44 S. E. 122), and that her privity examination must be taken in order to a valid conveyance of her own realty. *Southerland v. Hunter*, 93 N. C. 310 and *Ferguson v. Kinsland*, 93 N. C. 337, are in general affirmance of the position. The state decisions to which we were referred by counsel (*Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437, and *Bruce v. Strickland*, 81 N. C. 267, and others of like kind) are to the effect merely that statutes in general restraint of the right of alienation will not, as a rule, be upheld, and have no necessary application to a case of this kind where the limitation on the rights of ownership is restrictive in its nature and designed and well calculated to promote a laudable purpose, one peculiarly within the influence and protection of the police power of the state.

In regard to the property conveyed, a piano coming within the descriptive terms of the statute, "household and kitchen furniture," the facts show that it had been placed in the home to be used by defendant's wife and daughters, and was so used by them, and, on these facts there is nothing which tends to show that the statute does not embrace it. The statutory terms should be held to include property dedicated to the convenience and comfort of the home which is adequate and adapted to the purpose, having due regards to the owner's means and station in life, and, so defined, it is usually held to extend to a piano. *Von Storch v. Winslow*, 13 R. I. 23, 43 Am. Rep. 10; *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53; *McCoy v. Thompson* (Tex. Civ. App.) 138 S. W. 1062.

[2, 3]. On the facts agreed upon, we are of opinion that the statute in question is valid; that the piano is well within its terms and meaning, and the attempted conveyance by plaintiff without the joinder of the wife is void, as the statute declares. This will be certified that the judgment awarding recovery be set aside and the action dismissed.

Reversed.

CLARK, C. J. (concurring). It is well settled by our own decisions, and everywhere else, that the Legislature of a state possesses the lawmaking power as absolutely as the people themselves can exercise it if they could assemble in one place, except where that power is restricted by some provision of the state or federal Constitution. There is no provision in either that has disabled the Legislature of North Carolina from enacting Revisal, § 1041.

Prior to the Constitution of 1868 a married woman, by the fact of marriage itself, lost not only the *jus disponendi*, but the en-

tire ownership of her personal property, and of her real estate during the life of her husband, and the power to dispose of it by will, or any conveyance. The Convention of 1868 modernized our Constitution by putting husband and wife on an equality in this respect, save only the restriction that in the conveyance of her realty the wife must have the written consent of her husband. Since the Constitution of 1868 the husband cannot convey his "allotted" homestead without the joinder and privy examination of his wife. Const. art. 10, § 8; *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988. It would be strange, therefore, if the Legislature could not forbid him to convey his household and kitchen furniture without the same joinder and privy examination of the wife, for there is no prohibition against such enactment by the General Assembly. The house would be of small use to her without furniture and kitchen utensils.

The same public policy which requires the joinder of the wife in a mortgage by the husband of his household and kitchen furniture (Revisal, § 1041) is also shown in the legislation which requires the joinder of the wife to relieve the husband's realty from the dower right of the wife (Revisal, § 3085). Dower exists only by virtue of the statute of 1868-69 (Revisal, § 3064), and if the Legislature can require the joinder of the wife in the conveyance of the husband's realty, in order to make a full and perfect conveyance of it, it has authority to impose the same requirement upon a conveyance by the husband of his household and kitchen furniture.

From 1784 up to the act of 1868-69 such dower right did not exist as to lands conveyed by the husband, for the wife was entitled to dower only in the real estate of which the husband "died seized and possessed." This was not changed by the Constitution of 1868, but by the act of 1868-69, which required the joinder of the wife in the husband's conveyance of "all the lands, tenements, and hereditaments whereof her husband was seized and possessed at any time during the coverture." Revisal, §§ 3064, 3085. The General Assembly showed its absolute power over the whole subject by dispensing with the joinder of the wife in certain cases (Revisal, § 959). It is simply a matter of public policy, which is vested in the sovereignty of the people to be exercised by their representatives in the General Assembly subject to review, not by the courts, but only by the people themselves in the election of new representatives.

The courts have no control over the public policy of the state, its social legislation or exercise of the police power. If the courts had any control over such matter, and their views, and not those enunciated by the law-

making powers, should govern, then, as has been well said—

"the selection of the judges must be frankly based upon the political and social outlook of candidates for judicial position, and the ultimate sovereignty over the public policy of the state and Union would lay with the judges and not with the people."

The requirement that the wife must join in the conveyance of the husband's realty, in the conveyance of his allotted homestead, and in a mortgage of his household and kitchen furniture, and that the husband must give his written assent to the conveyance by the wife of her realty, are all of a piece as a declaration of public policy. Two of these are statutory, and can be changed, repealed, or added to at the will of the Legislature.

The requirement of the privy examination of the wife has come down to us from a distant and barbarous past, and was based upon the conception of the inherent inferiority and incompetence of the woman, the presumption that the husband would bully her, and that she could be bullied by him. Originally such examination was in court, but became useless when made by a magistrate selected by the husband. It must be admitted that there was some ground for this examination as long as we continued to hold that a husband had the right to whip his wife "if he did not use a switch larger than his thumb." But this doctrine was repudiated here in 1874 in *State v. Oliver*, 70 N. C. 61, and probably before that everywhere else, and hence the privy examination has long since been abolished in England, in all our adjoining states (Virginia, South Carolina, Georgia, Tennessee, and West Virginia), and indeed in all the states of the Union except North Carolina and four others. However antiquated and unnecessary the privy examination has now become, it cannot be questioned that the General Assembly can require it as to all conveyances made by the husband in which the wife is required to join. It is otherwise as to conveyances by the wife of her realty as to which the Constitution has guaranteed that the property of the wife shall remain hers as fully as if she were unmarried, and that she may convey it, requiring only "the written assent of the husband." The addition of the privy examination, therefore, in conveyances by her is contrary to this stipulation in the Constitution. Revisal, § 1041, applies only to conveyances by the husband of the household and kitchen furniture, and the requirement of the privy examination of the wife in giving her assent thereto is within the power of the General Assembly, and is in line with the same requirement in the Constitution as to the joinder of the wife in the conveyance of the allotted homestead—the only instance in which the Constitution recognizes such requirement.

(173 N. C. 339)

HOWARD v. WRIGHT. (No. 324.)
(Supreme Court of North Carolina. April 11, 1917.)

1. MASTER AND SERVANT \S 206, 226(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

Defense of assumption of risk grows out of contract of employment, and extends only to ordinary risks naturally and usually incident to the work that an employé undertakes to perform, but does not include risks incident to the employer's failure to perform nondelegable duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 550, 659, 660.]

2. APPEAL AND ERROR \S 1006 — HARMLESS INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE.

Conduct of an employé in continuing work in presence of dangerous conditions, caused by a breach of nondelegable duties on the part of the employer, is referable to contributory negligence, so that, where the issue of contributory negligence was decided adversely to the employer, failure to charge definitely on assumption of risk was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4220.]

3. EVIDENCE \S 127(1) — DECLARATIONS — HEALTH.

Where the servant fell and was injured, his statements while ill, which had a reasonable tendency to show his health and condition, are admissible, although they may be self-serving, or are made post litem motam, or the declarant has since died.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 377, 378.]

4. EVIDENCE \S 127(4) — DECLARATIONS — PAIN.

Where the servant fell and was injured, his statement that he was suffering very great pain and that he would never get over it, made some days after the accident, was admissible, as in effect a declaration as to the character and intensity of the hurt.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 381.]

5. TRIAL \S 85—OBJECTIONS TO EVIDENCE.

Though a particular part of the answer of a witness to a question was incompetent, objection only to the entire answer, part of which was competent, was properly overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 222-225.]

6. APPEAL AND ERROR \S 662(1)—SCOPE OF REVIEW—RECORD—SUFFICIENCY.

In case of conflict as to occurrences at the trial, the record will prevail.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2850.]

Appeal from Superior Court, Durham County; Daniels, Judge.

Action by Maud L. Howard, administratrix, against R. H. Wright. Judgment for plaintiff, and defendant excepts and appeals. Affirmed.

Civil action to recover damages for death of plaintiff's intestate, caused by alleged negligence of defendant's employés. There was evidence on part of plaintiff tending to show that, in the fall of 1915, defendant was having a dwelling house built in said county by his own employés and under the supervision and direction of W. C. Gibson; that on September 10, 1915, intestate, one of the em-

ployés, while engaged in said employment, fell from a scaffold or platform prepared for carrying on the work and received severe physical injuries, from which he subsequently died; that the platform, erected under the supervision of the said foreman, was improperly constructed and made of improper and inferior material, "common, knotty stuff," and, while intestate was on same in course of his duty, a weak plank broke, throwing intestate to the ground, causing injuries, as stated. On denial of liability, there was evidence on part of defendant tending to show that intestate was an alert, capable, experienced man, who had every opportunity to observe and note the conditions of the platform and the material of which it was made. There was evidence to the effect, further, that intestate did not die of his injuries, as claimed by plaintiff, but that his death was the result of typhoid fever, subsequently contracted.

On issues submitted, the jury rendered the following verdict:

"(1) Was the death of plaintiff's intestate, L. A. Howard, caused by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"(2) Did the plaintiff's intestate, L. A. Howard, by his own negligence contribute to his injuries, as alleged in the answer? Answer: No.

"(3) Did the plaintiff's intestate, L. A. Howard, assume the risk and danger incident to his employment, as alleged in the answer? Answer: No.

"(4) What damages, if any, is the plaintiff entitled to recover? Answer: \$5,000.00."

Judgment, and defendant excepted and appealed.

Fuller, Reade & Fuller, of Durham, for appellant. Brawley & Gantt, of Durham, for appellee.

HOKE, J. There was ample evidence of negligence in respect to the platform, both as to the material of which it was made and the manner in which it was built; two of the witnesses testifying that, when it was being put up, one of the employés said to the foreman, "You are fixing a trap there to throw men down and break their necks;" and the foreman replied, "Let the men look where they walk, and if they fall the ground will catch them."

[1] Defendant, however, contends that there was error in the proceedings below as to the assumption of risk on the part of the intestate, in that his honor did not lay down any rule of law to guide the jury in the determination of that issue, but only stated the differing positions of the parties in reference to it. The statements of his honor on these questions were so full and direct that we might well hold the jury were sufficiently instructed on the issue; but, if it be conceded that this objection to the charge is well taken, it could not be held for revers-

ible error on this record. Under the rule prevailing in this jurisdiction, the defense of assumption of risk is one growing out of the contract of employment, and extends only to the ordinary risks naturally and usually incident to the work that an employé has undertaken to perform. It does not include risks and dangers incident to a failure on the part of the employer to perform his own nondelegable duties. These are usually considered as extraordinary risks, which an employé does not assume, and which are not available as a defense, unless they are of such kind and character as to render an employé guilty of contributory negligence who knowingly continues to work on under the conditions they present. This position has been repeatedly approved in our decisions, and may be taken as the established rule for the trial of causes controlled by the principles prevailing in this jurisdiction. *Yarborough v. Geer*, 171 N. C. 335, 88 S. E. 474; *Norris v. Holt-Morgan Mills*, 154 N. C. 474-485, 70 S. E. 912; *Pressly v. Yarn Mills*, 138 N. C. 410, 51 S. E. 69; *Marks v. Cotton Mills*, 138 N. C. 401, 50 S. E. 769, 3 Ann. Cas. 812; *Hicks v. Manufacturing Co.*, 138 N. C. 319-327, 50 S. E. 704. In *Yarborough's Case*, it was held:

"The rule that the servant assumes the risks incident to the nature of a dangerous employment has no application to injuries directly resulting from the negligence of the master in failing in his duty to furnish him a safe place to work, or that of another to whom the master had delegated this duty."

In *Norris' Case* it was said:

"The charge of the jury was, we think, in some respects more favorable to the defendant than it was entitled to, and particularly as to the doctrine of assumption of risk, as the employé never assumes the risk of an injury caused by the failure of the employer to perform a duty which he cannot delegate, and the duty to provide a reasonably safe place to work is one of them."

In *Pressly v. Yarn Mills*, *supra*, it was held:

"While an employé assumes all the ordinary risks incident to his employment, he does not assume the risk of defective appliances, due to his employer's negligence, unless such defect is obvious, and so immediately dangerous that no prudent man would continue to work on and incur the attendant risks."

And in *Hicks v. Manufacturing Co.*, it was said:

"To have such effect—that is, to bring the knowledge of such observed conditions of increased hazard imputable to the master's negligence into the class of ordinary risks which the employé is said to assume—the danger must be obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would incur the risk which the conditions disclose"—citing *Labatt on Master and Servant*, §§ 279a, 296, 297, 298, 298a; *Beach on Cont. Neg.* § 361; *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19; *Lloyd v. Hanes*, 126 N. C. 359, 35 S. E. 611; *Patterson v. Pittsburg*, 76 Pa. 389, 18 Am. Rep. 412; *Kane v. Railroad*, 128 U. S. 95, 9 Sup. Ct. 16, 32 L. Ed. 339.

[2] It will thus be seen that the conduct of an employé, in working on in the presence of

dangerous conditions, caused by breaches of nondelegable duties on the part of the employer, the present case being one of them, is referred by our law to the principle of contributory negligence, and the question, in this aspect of the matter, having been determined against defendant on a separate issue, the second, and under a charge free from any valid exception, there has no harm come to defendant in the alleged failure to charge more definitely on the third issue as to the assumption of risk.

[3] It was further objected that in the evidence of the administratrix, testifying as to the effect of the fall on her husband and his condition following it, the plaintiff was allowed to ask witness as to the husband's declarations; the objection, and the form in which presented, and the answer to it, appearing in the record as follows: The witness, testifying, as stated, among other things, said:

"He always went bent with his stick—never was straight again, like he was before. He had a cough; he would cough real often; he would cough often during the day and night, and always spit up blood in what he spit, and called my attention to that. He continued to cough from the time he fell until he died. I never noticed him ever coughing before he was injured. Q. State what your husband said, if anything, about his condition, as to his suffering. (Objection in apt time by defendant, as declaration of a dead man is not competent. Objection overruled, the court saying:) I guess the declaration of a patient, when sick, is competent. (Exception by defendant.) He said he was hurt, and he believed he was hurt inside somewhere, because he always hurt there, and he said it was going to kill him; he would never get over it. He showed me the back of his head, neck, and breast, where it hurt him. He was 35 years old in November. He died December 6th, a few days after his birthday. Some of the blood he vomited was thin and some thick—seemed to be clotty. He vomited about a small cup full on two occasions—one the afternoon of the injury and the other the following night."

It is very generally held that, when the physical condition of a person is the subject of inquiry, his declarations as to his present health, the condition of his body, suffering and pain, etc., are admissible in evidence. Some of the courts elsewhere, and especially in the later decisions, have shown a disposition to restrict the reception of such testimony; but others are more liberal in reference to it, our own court being among them. All of the cases here and elsewhere hold that such declarations must not be narrative in their nature, either as to a past condition or the cause of it. *Lush v. McDaniel*, 35 N. C. 485, 57 Am. Dec. 566; *Jones on Evidence*, p. 345. But when, as stated, a man's physical or mental condition is a circumstance involved in the issue, his declarations, having a reasonable tendency to show his present health, condition, etc., will be received as pertinent evidence, and, when admissible on this ground and for this purpose, the fact—the mere fact—that they may be self-serving, or that they are made post litem motam,

or that the declarant may be dead, will not affect the principle. *State v. Harris*, 63 N. C. 1; *Biles v. Holmes*, 33 N. C. 16; *Quaife v. Chicago & N. W. R. R.*, 48 Wis. 513, 4 N. W. 658, reported also in 33 Am. Rep. 821; *Central R. R. v. Smith*, 76 Ga. 209, 2 Am. St. Rep. 31; *Bagley v. Mason*, 69 Vt. 175, 37 Atl. 287; *Northern Pacific Ry. v. Urlin*, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977; *Keyes v. City of Cedar Falls*, 107 Iowa, 509, 78 N. W. 227; *Indiana R. R. v. Maurer*, 160 Ind. 25, 66 N. E. 156; 15 A. & E. (2d Ed.) 315; 4 Chamberlayne, *Modern Law Ev.* §§ 2627-2635; 1 Elliott on Evidence, § 523 et seq. When declarations of this kind are self-serving, they have been rejected altogether in one or two jurisdictions. In others, they are admitted only when made to a physician, consulted about the case. This is said to be the rule in Massachusetts.

But, while in the instance of self-serving declarations a judge may properly admonish a jury that the declarations should be received with cautious scrutiny, our cases hold that the considerations suggested only go to the weight of the evidence, and not to its competency, and that the declarations must be submitted to the jury. In *State v. Harris*, supra, a declaration of deceased as to existence of a burn on the abdomen, Reade, Judge, delivering the opinion, said:

"The declarations of the deceased, as to the condition of his body and health at the time when the declarations were made, fall under the head of natural evidence. Such declarations are admissible in the very nature of things. No physician would undertake to prescribe for a patient without inquiring of him 'how he felt,' 'where were his pains,' and the like. What weight the physician will give to the patient's declarations must be for his consideration, and so what weight the jury will give is for their consideration."

And in *Biles v. Holmes*, declarations of a slave as to his having headache and his inability to work, Pearson, Judge, for the court, said:

"The object of the plaintiff was to show the condition of his slave; that he had not recovered from the effect of the blow and was permanently injured. For this purpose it was competent to prove how he acted, how he looked, and of what he complained. In fact, this is almost the only kind of evidence by which the condition of body or mind can be ascertained; it is natural evidence or the evidence of facts, as distinguished from personal evidence or the testimony of witnesses. Best on the Principles of Evidence. The declarations of a patient to his physician are strong evidence of the state of his health, and only differ from his declarations to a third person, because it is less probable that he will feign or state falsehoods to one by whom he hopes to be relieved; but this consideration only affects the degree of credit due to such declarations and does not affect their admissibility. Whether expressions of pain are real or feigned, must be determined by the jury. 1 Greenleaf, Ev. 126. If it be material to ascertain the mental condition of an individual, his conversation at different times is admissible. Upon the same ground, it being material to ascertain the bodily condition of the slave, his complaints of headache, when exposed to the sun, and his declarations that he was unable to work in the sun, or to endure hard labor, are

admissible. True, one may feign the language of a madman, or may utter false complaints of pain; but the law does not on this account exclude what may be the only mode of proof. It is left to the good sense of the jury, connecting the declarations with the acts and looks of the party and other circumstances, to say how far such evidence is to be relied on."

In *Northern Pacific v. Urlin*, supra, Associate Justice Shiras, delivering the opinion, quotes with approval from Greenleaf on Evidence, as follows:

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence, and whether they were real or feigned is for the jury to determine. So, also, the representations by a sick person of the nature, symptoms, and effects of the malady under which he is suffering at the time are original evidence. If made to a medical attendant, they are of greater weight as evidence; but, if made to any other person, they are not, on that account, rejected." Greenleaf, Ev. (14th Ed.) § 102."

A very correct and inclusive statement as to declarations of this kind, deducible from the better considered decisions on the subject, is contained in a note to *Quaife v. Railroad*, 33 Am. Rep. at page 829, as follows:

"The conclusion therefore is: First. That the complaints and statements of the injured party at the very time of the occurrence, not only as to bodily suffering, but as to the circumstances of the occurrence, are admissible as *res gestæ*. Second. That the statements of the injured party subsequently, and not substantially at the time of the occurrence, as to the circumstances of the occurrence, are not admissible, whether made to a physician or to a nonexpert. Third. Complaints and statements of the injured party as to his present physical condition, although subsequently to the occurrence, and indeed after suit is brought for the injuries, are admissible, whether made to a physician or to one who is not an expert."

In some courts, too, it is held that, when the declarant is alive, the statutes enabling a party to testify should have the effect of precluding the admissions of such declarations; but this is said, by an intelligent writer on the Law of Evidence, to be against the weight of authority. 1 Elliott, § 526, citing many authorities in support of his view, and quoting more especially from Board, etc., v. Leggett, 115 Ind. 544, 547, 548, 18 N. E. 53.

[4, 5] Applying the principle of these cases, the question certainly was competent, and this was all that the record shows was objected to. Much of the answer is properly responsive, and also admissible. We are inclined to the opinion that all of it is so, for the declaration that the hurt was going to kill him and he would never get over it, when considered in reference to the entire answer and the attendant circumstances, may be very properly interpreted as only and in effect a declaration as to the character and intensity of his pain or hurt. But, even if this particular part of the answer should be held incompetent, as giving the inference

of the witness, there was no objection made to it on that ground, and no motion to strike it out; and the objection being to the entire answer, part of which was competent, it would be necessarily overruled. *Goins v. Indian Training School*, 169 N. C. 736, 86 S. E. 629; *Carmichael v. Tel. Co.*, 162 N. C. 333, 78 S. E. 507, Ann. Cas. 1915A, 983; *Smathers v. Toxaway*, 167 N. C. 469, 83 S. E. 844; *State v. Ledford*, 133 N. C. 722, 45 S. E. 944; *Ricks v. Woodard*, 159 N. C. 647-650, 75 S. E. 735.

[6] In fact, as heretofore stated, the objection, as disclosed by the record, was only to the question, which was entirely proper, and only the assignment of error making objection to the answer. It is well understood that, in case of conflict, the record will prevail. *McDonald v. McLendon*, 91 S. E. 1017, at the present term.

We find no error in the trial, and the judgment in plaintiff's favor must be affirmed.

No error

(173 N. C. 286)

MOSELEY v. TAYLOR. (No. 260.)

(Supreme Court of North Carolina. April 11, 1917.)

PARTNERSHIP — 306 — DISSOLUTION — DIVISION OF ASSETS — REPAYMENT OF CAPITAL.

A partnership agreement recited that S. has this day put in \$5,000 to operate said business, and the said T. is to manage said business for his part, the profits to be equally divided after all necessary expenses are paid. T. put in no capital. After six months S. died. The original capital put in by S. had been impaired. After T. had paid all partnership debts, there remained in his hands of the firm assets less than \$5,000. *Held*, that amount in hands of T. belonged to estate of S. under rule that capital invested by partners must be returned to the ones who invested it before there are profits to divide.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 706-709.]

Appeal from Superior Court, Wake County; Devin, Judge.

Action by T. B. Moseley, administrator of J. W. Stephenson, deceased, against Will Taylor, surviving partner of said deceased, to recover partnership assets remaining in his hands after payment of all partnership debts. From a judgment for plaintiff, defendant appeals. Affirmed.

A jury trial being waived, the court found the facts and rendered judgment as follows:

"That the defendant, Will Taylor, as surviving partner and individually, is indebted to the plaintiff in the sum of \$3,676.50, with interest thereon from the 25th day of February, 1916, until paid, and also for the promissory notes described in the complaint, and being those set out in the final report of Will Taylor, surviving partner of the said firm of Will Taylor & Co., filed in the office of the clerk of the superior court of Wake county, N. C., on February 25, 1916, and which is recorded in Docket I, p. 271, in said office."

Armistead Jones & Son and Douglass & Douglass, all of Raleigh, for appellant. R. N. Simms, of Raleigh, for appellee.

BROWN, J. The decision of this appeal depends upon the construction of the following contract:

"This agreement is made and entered into between J. W. Stephenson and Will Taylor has gone (?) into copartnership in horse and mule business at Raleigh, N. C., and the said J. W. Stephenson has this day put in \$5,000 (five thousand dollars) to operate said business. The said Will Taylor agrees to manage the said business for his part. After all necessary expenses is paid, the profit shall be equally divided. This partnership business is to run twelve months, or longer if all parties are satisfied.

"[Signed] J. W. Stephenson.

"[Signed] Will Taylor.

"December 30th, 1912."

It is admitted that the partnership was dissolved on June 26, 1913, by the death of Stephenson. The surviving partner, Taylor, settled up the partnership business, and, after paying all the expenses and the partnership debts, there remains in his hands the sum of \$3,676.69, together with certain uncollected notes aggregating \$398.63, as set out in the decree.

It is admitted that the original capital put in by Stephenson has been impaired, and that his estate must sustain a loss in any event. The plaintiff claims that all of the remaining assets in hands of the surviving partner should be applied to the repayment of the capital invested. Defendant contends that under the terms of the contract of partnership he is the owner of one-half of the capital, and therefore, entitled to one-half of the remaining assets. We concur with the learned judge below that under the proper construction of the contract the capital of \$5,000, put in by Stephenson, must be repaid, and as that will more than exhaust the assets, the defendant is entitled to nothing.

The defendant, admitting that he put in no cash, contends that he was to contribute his services for the period of the partnership, which is fixed at 12 months, at a valuation equal to the \$5,000 put in by Stephenson. We do not think the contract can fairly be so construed. Such construction is neither within the letter or spirit of the agreement. In fact, it is a most unreasonable construction, and ought not to be adopted unless it is the plain import of the language used. Such construction would give the defendant \$2,500 in cash for his services for 12 months in addition to one-half of the net profits. It is the same thing as if Stephenson had handed defendant \$2,500 in money for defendant to pay in on the capital of \$5,000, and then paid in the remaining \$2,500 himself, and at same time agreed to pay defendant half the profits, all for his personal services. Under his contention, if the partnership had been dissolved by the death of Stephenson, the next day after it was formed, the defendant would have made \$2,500, and Stephenson's estate would have lost \$2,500, and this in the face of the fact that the agreement provided that Taylor should have but one-half of the

profits; that is, that the profits should be divided equally.

It is uniformly held that after the debts of a partnership are paid, the capital must be returned to the partners who invested it before there are profits to divide, and even those authorities which hold that the capital upon being invested becomes joint property, nevertheless also hold that the relative rights of the partners therein created by the proportions respectively advanced by them are not disturbed when it comes to a settlement of the partnership. Mr. Bates says in his treatise on Partnership, vol. 1, § 181:

"The capital of a partnership is to be treated as if a debt and to be first paid before the profits are divided, and in case of impairment to be paid less the equalization of losses."

And again (section 256):

"The capital, in whatever shape contributed, becomes at once the property of the firm, and is no longer individual property. * * * The fact that one partner is to, and does, contribute all the capital and the other services only does not affect the rule nor should it. Even if in such case the partners dissolve the day after the contribution to capital was made, the capital is joint property, but the interests in it may be in the proportion of all to nothing, whether the partnership be regarded as a joint ownership in different proportions, or the firm be considered a conventional entity distinct from its constituent members, and the members' interest a mere claim upon a share of surplus. The rules of distribution on winding up, which require repayment of capital to the respective partners after equalizing losses before distribution between them, prevents any inequality arising from the cessation of individual ownership in the contribution of capital."

The fact that one partner has furnished all the capital and the other all the services does not alter the rule. The loss of capital is like any other loss, and the partner who contributes his services and loses them is debtor to the other for such share of the capital as represents the amount of loss he is to bear. Bates, § 815, giving a number of illustrations. The same author (section 813) further says:

"If there are no profits and the capital has been impaired or wholly lost, in dividing losses the deficit must be repaid like any other loss, for impairment of capital is a loss the same as any other, and is not to be reimbursed out of the profits merely. That the capital has been contributed unequally and losses are to be equal makes no difference, or if the capital has been wholly paid by one partner, the other contributing services and skill, the latter, who has lost his time, owes to the former the same proportion of a loss of capital that he would be chargeable with had the losses not reached the capital, but had simply diminished the profits."

Many pertinent cases are cited in the notes. Thus in *Norman v. Conn*, 20 Kan. 159, the capital was unequally contributed, and profits were to be equally divided. It was held that the total of the expenditures are to be deducted from the total of the capital and receipts, the capital is then to be paid, and the balance is to be divided equally as profits.

In *Livingston v. Blanchard*, 130 Mass. 341, 342, L. had put in all the capital \$3,300; the

other partner, B., was to receive a salary as part of the expenses. On dissolution, the whole assets sold for \$3,718.26. The salary had been paid, and of the proceeds \$3,300 was paid to L. as his capital, together with one-half the profits, less one-half the depreciation in value of the fixtures, and the balance to B. This was held to be as favorable to B. as he was entitled to.

The judgment of the superior court is affirmed.

(173 N. C. 359)

LAWRENCE v. NISSEN et al. (No. 356.)
(Supreme Court of North Carolina. April 11, 1917.)

1. MUNICIPAL CORPORATIONS — 605 — ORDINANCE PROHIBITING HOSPITALS — POWER OF BOARD OF ALDERMEN.

Under the charter of the city of Winston-Salem, conferring power to define and condemn nuisances, and to grant permits for the construction of buildings and other structures, and to prohibit the construction of any building or structure which, in the judgment of the board of aldermen, may be a nuisance or of injury to adjacent property or to the general public, the board of aldermen had power to enact an ordinance declaring the construction, operation, and maintenance of a pay hospital, etc., within the corporate limits of the city and within 100 feet of a house used as a residence, to be a nuisance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1333, 1340.]

2. MUNICIPAL CORPORATIONS — 63(2) — ORDINANCES — INVALIDITY — POWER OF COURT.

The power of a court to declare a city ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed power of the corporation merely.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1384.]

3. MUNICIPAL CORPORATIONS — 63(2) — ORDINANCE — VALIDITY.

In order that Supreme Court may uphold as valid a city ordinance prohibiting the building or maintenance of a pay hospital within the city and within 100 feet of a residence, the court need not find that conditions actually exist requiring its enactment; it being sufficient if a state of facts could exist which would justify it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1384.]

4. NUISANCE — 3(8) — HOSPITAL.

A pay hospital may become a nuisance per se because of its location, or by reason of the manner in which it is conducted.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 20-22.]

5. CONSTITUTIONAL LAW — 208(10) — UNLAWFUL DISCRIMINATION — ORDINANCE PROHIBITING HOSPITALS.

An ordinance of the city of Winston-Salem, declaring the construction, operation, and maintenance of a pay hospital within 100 feet of a building or house used as a residence to be a nuisance, was not violative of the Fourteenth Amendment of the federal Constitution, as being unduly discriminative, in that it applied only to hospitals established for profit, and not for charity, since the discriminations which are open to objection are those where persons engaged in the same business are subjected to different restric-

tions, or are held entitled to different privileges under the same conditions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 859.]

Walker and Allen, JJ., dissenting.

Appeal from Superior Court, Forsyth County; Harding, Judge.

Mandamus proceeding by C. S. Lawrence against H. E. Nissen and the Board of Aldermen of Winston-Salem. From a judgment dismissing the proceedings, plaintiff appeals. Affirmed.

Hastings, Stephenson & Whicker, of Winston-Salem, for appellant. Manly, Hendren & Womble, of Winston-Salem, for appellees.

BROWN, J. The object of this proceeding is to compel the defendants to issue to plaintiff a building permit for the erection of a private hospital upon a certain lot within the corporate limits of the city of Winston-Salem. The court finds that the building is to be erected on a lot belonging to plaintiff and used as a private hospital to be conducted for pay, that it is for surgical cases only, and that patients suffering with contagious or infectious diseases will not be admitted. The west side of the building will be 6 feet from the property line on west side, and 12 feet from the east side of the residence occupied by Thomas Patterson. The charter of the city confers power:

"To define and condemn nuisances. * * * To grant permits for the construction of buildings and other structures, and to prohibit the construction of any building or structure which, in the judgment of the board of aldermen, may be a nuisance or of injury to adjacent property or to the general public." "To regulate and control the character of buildings, which shall be constructed or permitted to be, or remain, in any part of the City of Winston-Salem, with a right to declare the same a nuisance or unsafe, and cause their demolition or removal."

Pursuant to this grant of power, the board of aldermen enacted an ordinance as follows:

"Be it ordained that the construction, operation or maintenance of a hospital, or place or institution of like character where sick or diseased persons are treated or surgical operations performed, for pay, within the corporate limits of the city of Winston-Salem, and within one hundred feet of a building or house used or occupied as a residence, is hereby declared to be a nuisance, or injury to adjacent property, and to the general public, and the same is hereby prohibited."

It is contended by plaintiff that the ordinance is void: (1) Because it is unreasonable and the municipal authorities cannot declare that to be nuisance which is not so at common law or made so by statute. (2) Because the ordinance is discriminative. Courts are slow to declare municipal ordinances invalid, especially where enacted in pursuance of valid legislative authority. There is a strong presumption in favor of their reasonableness. Judges may not agree with the municipal authorities always in thinking an ordinance wise, but such repre-

sentatives of the people may be trusted to understand their own requirements better than the courts. It is not necessary that we hold that a hospital is per se a nuisance. We are not asked by adjacent residents to restrain from building it upon that ground. We are asked to compel defendants to issue a permit to erect the hospital upon the ground that the ordinance prohibiting it is unreasonable and beyond the power of the municipality to enact.

[1] The enactment of such an ordinance is plainly within the powers conferred by the Legislature, for the aldermen are vested with power, not only to grant building permits, but to prohibit the construction of buildings or structures that may be a nuisance or injurious to adjacent property. Having the authority to enact the ordinance, the reasonableness of it is not a matter for us. *State v. Rice*, 158 N. C. 640, 74 S. E. 582, 89 L. R. A. (N. S.) 286.

[2] The power of a court to declare an ordinance unreasonable, and therefore void, is practically restricted to cases in which the Legislature has enacted nothing on the subject-matter of the ordinance, and consequently to cases in which the ordinance was passed under the supposed power of the corporation merely. *Coal-Float v. Jeffersonville*, 112 Ind. 15, 19, 18 N. E. 115. This distinction has been noted and observed in this state. *State v. Ray*, 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634, 92 Am. St. Rep. 795; *State v. Thomas*, 118 N. C. 1221, 1225, 1226, 24 S. E. 535. Says Mr. McQuillin (2 Mun. Corp. §§ 724, 725):

"In brief, if passed by virtue of express power, an ordinance cannot be set aside by a court for mere unreasonableness, since questions as to the wisdom and expediency of a regulation rest alone with the law-making power."

[3] Neither is it necessary that we should find that conditions actually exist that require the enactment of the ordinance. It is sufficient if a state of facts could exist which would justify it. As said by the Supreme Court of the United States in the case of *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77:

"For our purposes we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state; but if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the Legislature is the exclusive judge."

This ordinance is preventive in character and intended to protect the comfort, health, and safety of the citizens. As said in *Shelby v. Power Co.*, 155 N. C. 201, 71 S. E. 220, 35 L. R. A. (N. S.) 488, Ann. Cas. 1912C, 179:

"Such legislation is preventive, and to limit it to cases where actual injury is shown to have occurred would be to deprive it of its most effective force. To be of value such laws must be able to restrain acts which have a tendency to produce public injury."

[4] A hospital may not be a nuisance *per se*, but it may become such because of its location, or by reason of the manner in which it is conducted. *Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, 39 Ann. Cas. 126, notes. Discussing this subject, the Supreme Court of Kansas in *Stotler v. Rochelle*, 83 Kan. 86, 109 Pac. 788, 29 L. R. A. (N. S.) 49, said:

"However carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities."

In sustaining the validity of an act, similar in its purport to the ordinance under consideration, the Supreme Court of Pennsylvania said:

"That the prohibition of hospitals, therefore, in crowded communities, has a real and substantial relation to the protection of the public health in general, must also be admitted. Whether the relation is or is not so close as to justify the prohibition of the building of a hospital is a matter purely for legislative determination, and cannot be reviewed by the courts." *Commonwealth v. Hospital*, 198 Pa. 279, 47 Atl. 984.

In *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. Ed. 900, the Supreme Court said:

"Therefore the argument that a livery stable is not a nuisance *per se* * * * is beside the question. * * * It is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment."

The same principle of law is recognized by the English courts. In *White v. Morley*, 2 Q. B. 34, it is said:

"Where a thing is of a character that it can be a nuisance, then it is almost always for the local authority, which has the power to make the by-law, to say whether it shall be declared a nuisance and an annoyance in the particular locality in respect to which they make the by-laws. The court will say the by-law may be unreasonable if they think the act forbidden cannot be a nuisance; but they will not as a rule, if they think it could be a nuisance, interfere with the discretion of the local authority as to whether or not it should be forbidden in that particular locality."

[5] The other objection to the ordinance is that it is unduly discriminative, in that it applies only to hospitals established for profit, and not for charity, and thus violates the Fourteenth Amendment. We are not impressed by the force of the objection. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws. This is the rule laid down by the Supreme Court of the

United States in *Soon Hing v. Crowley*, 113 U. S. 709, 5 Sup. Ct. 730, 28 L. Ed. 1145. It is those restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, that impair the equal right which all can claim in the enforcement of the laws. In *Barbler v. Connolly*, 113 U. S. 32, 5 Sup. Ct. 360, 28 L. Ed. 923, Mr. Justice Field said:

"Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Upon this principle, the Supreme Court of Pennsylvania in *Philadelphia v. Brabender*, 201 Pa. 574, 51 Atl. 374, 58 L. R. A. 220, sustained an ordinance prohibiting the casting of advertisements, handbills, and circulars into the vestibules of dwelling houses, and did not prohibit the casting of newspapers and addressed envelopes containing advertisements. The court quoted largely from *Soon Hing v. Crowley*, *supra*, and said:

"Nor can we see that an invidious discrimination is made against any one by the ordinance. All persons are treated alike and subject to the same restrictions. True, the ordinance exempts from its operation newspapers and addressed envelopes, but evidently not for the purpose of favoring those who advertise in that way, but because, in the judgment of the municipal authorities, there was not the same necessity for prohibiting the delivery of newspapers and addressed envelopes to the persons for whom they are intended in that way. This discriminates against no persons or class of persons, and surely it is not for the defendant to say that the ordinance is void because it does not prohibit other acts equally as mischievous as the acts prohibited."

This court, in *State v. Medlin*, 170 N. C. 682, 86 S. E. 597, following the same line of authority, held that an ordinance permitting drug stores to remain open on Sunday, and to sell cigars, tobacco, and soft drinks, was not an unlawful discrimination in favor of druggists against other persons engaged in general merchandise, who sold such articles on week days, but were required to close their places of business on Sundays.

The establishment and conduct of hospitals for pay is now a recognized and established business. It is rare to find a city or town of any size without such institutions. These hospitals are generally established, owned, and conducted by members of the medical profession for their own convenience and profit. No one is engaged in the business of establishing and conducting hospitals for charity. There are public hospitals in large cities with charity wards as well as pay wards in them, established and conducted by the municipal government or by trustees of some endowment fund donated by philanthropy, but the establishment of charitable hospitals is in no sense a recognized business. For this reason it is probable the board of aldermen did not consider it necessary or important to embrace charity hospitals within

the ordinance, deeming the erection of one by some local philanthropist a remote possibility, which could be attended to in the future if application for a building permit should be made.

The judgment of the superior court is affirmed.

WALKER and ALLEN, JJ., dissent.

(173 N. C. 356)

CLINARD et al. v. CITY OF WINSTON-SALEM. (No. 355.)

(Supreme Court of North Carolina. April 11, 1917.)

1. TRIAL \S 360 — FINDING — SURPLUSAGE — CONCLUSION OF LAW.

In an action for damages and a mandamus because of defendant city's refusal to issue a building permit, though the issue, "Did the defendant unlawfully refuse to issue the permit for building the house?" was found in the affirmative, the word "unlawfully" must be treated as surplusage, for that was a conclusion of law, and not justified by the evidence any further than meaning that the plaintiff was entitled to have a license issued, which should have been the form of the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 861.]

2. MUNICIPAL CORPORATIONS \S 723 — MANDAMUS — REFUSAL OF BUILDING PERMIT — GOVERNMENTAL FUNCTION — DAMAGES.

A city's exercise of power to grant or refuse license to erect a building was a governmental function; and, if the reason given for the refusal of license was erroneous, plaintiff's remedy was by mandamus, but the city was not liable in an action for damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545.]

3. MUNICIPAL CORPORATIONS \S 744 — OFFICERS — CORRUPTION OR OPPRESSION — ACTION FOR DAMAGES.

If city officers charged with exercise of the duty to issue building permits should have corruptly or oppressively refused a license asked, an action for damages on behalf of applicant might have been laid against them individually.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1565.]

4. MUNICIPAL CORPORATIONS \S 747(1) — LIABILITY FOR ACT OF OFFICERS.

A city whose officials charged with the duty to issue building permits acted corruptly or oppressively in refusing a license was not liable in damages for such conduct on the part of the officials.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570, 1571, 1577.]

5. MUNICIPAL CORPORATIONS \S 747(1) — ACTION IN GOVERNMENTAL CAPACITY — LIABILITY FOR DAMAGES.

Where a city in a governmental capacity exercises legislative, judicial, and discretionary powers and duties, the corporation is liable to an action for damages resulting from the conduct of its agents only where a statute imposes such liability.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1570, 1571, 1577.]

Appeal from Superior Court, Forsyth County; Long, Judge.

Action for damages and mandamus by B. C. Clinard and others against the city of Winston-Salem. From a judgment for plain-

tiffs for the mandamus and damages, defendant appeals. Error.

Manly, Hendren & Womble, of Winston-Salem, for appellant. L. M. Swink, David H. Blair, Gilmer Korner, Jr., all of Winston-Salem, for appellees.

CLARK, C. J. This is an action for damages and a mandamus because of the refusal of the defendant to issue a building permit. The defendant had issued a permit to put up an additional room to a building, but, it subsequently coming to the knowledge of the authorities that it was claimed that the location was part of an alley, withdrew the permit. Whether the additional room sought to be built would be within the bounds of the alley depended on whether the alley had been widened by dedication and user. The alley had originally been laid off in 1890, 15 feet wide, but it was claimed that subsequently the heirs to the property, in the partition thereof, had set the houses back and made the alley 18 feet wider, and that it had been recognized and used by the public as of that width, adversely and of right, for more than 20 years. There was evidence to that effect, and the city revoked the license until this matter could be determined.

[1] In this action the jury found that the width of the alley had not been increased, and while the issue, "Did the defendant unlawfully refuse to issue the permit for building the house?" was found in the affirmative, the word "unlawfully" must be treated as surplusage, for that was a conclusion of law, and not justified by the evidence any further than meaning that the plaintiff was entitled to have such license issued, which should have been the form of the issue.

The second issue, "Were plaintiffs prevented from using and building on their property by threats of indictment arbitrarily made by defendant?" the court should have instructed the jury to answer, "No." The evidence was that O. B. Eaton, the witness for the defendant, told the plaintiffs' foreman that the permit to build the additional room had been withdrawn, and that it would be a violation of the ordinance to proceed with the building until the matter was settled and would make him liable for indictment, which was correct. The charter of the defendant provides:

"The board of aldermen should have the power to enact ordinances in such form as they may deem advisable as follows: * * * To grant permits for the construction of buildings and other structures, and to prohibit the construction of any building or structure which in the judgment of the board of aldermen may be a nuisance or of injury to adjacent property or to the general public; * * * to regulate and control the character of buildings which shall be constructed or permitted to be and remain in any part of the city of Winston; * * * to define and establish fire limits and prevent the location of wooden or other buildings within said fire limits and in any part of the city where

they may increase the danger of fire; to regulate and describe what character of buildings shall be constructed within the said limits, and provide for the conditions under which such buildings may be erected."

In pursuance of this authority, the defendant enacted the following ordinance:

"Erecting Building without Permit.—It shall be unlawful for any person, firm or corporation to erect any building within the corporate limits of the city of Winston without first submitting the plan of the same to the mayor and chairman of the street committee and receiving a written or printed permit signed by the mayor and said chairman to erect the same. Any person, firm or corporation violating the foregoing ordinance shall be fined twenty-five dollars; and in case any person, firm or corporation in violation of said ordinance persists in the erection of any building after notice is served on him, signed by the mayor of the city of Winston, notifying him to suspend the building thereof, each day or part of a day that such person, firm or corporation so persists in building shall constitute a separate offense."

[2] The exercise of the power to grant or refuse the license to erect a building was a governmental function, and if, as a jury finds in this case, the reason given for the refusal of the license was erroneous, the plaintiffs' remedy was by a mandamus, which has been awarded them, but in no aspect would the city be liable in an action for damages, and a nonsuit should have been granted on the third issue, for no cause of action had been stated in that respect.

[3, 4] If the officials charged with the exercise of the duty should have corruptly or oppressively refused the license asked, an action might have been laid against them individually, but there is no such allegation in the pleadings. They are not parties individually, and there is no proof tending to sustain such charge against them if it had been made. The city, even in that event, would not be liable in damages for such conduct on the part of its officials. *McIlhenney v. Wilmington*, 127 N. C. 146, 37 S. E. 187, 50 L. R. A. 470 (see Anno. Ed.). These principles are elementary law, and need not be reiterated. *Price v. Road Trustees*, 172 N. C. —, 89 S. E. 1066.

[5] A municipal corporation has a double character. In one aspect it is a representative of the sovereign charged with certain governmental, legislative, judicial, and discretionary powers and duties; in the other it is similar to a private corporation, with duties purely ministerial, corporate, or private, with powers granted of a business nature for the especial emolument or benefit of the municipality. The rule is well settled that in the former capacity the corporation is liable for an action for damages resulting from the conduct of its agents only where a statute imposes such liability. When such officers are discharging a governmental duty, or exercising the police power, or acting in a matter committed to their discretion, the municipality is not liable. *McQuillin on Municipal Corporations*, §§ 889, 894, pp. 5414,

5416, 5417. For instance, no liability attaches for the wrongful refusal to issue a permit. *Butler v. Moberly*, 131 Mo. App. 172, 110 S. W. 682.

To allow damages for an erroneous or even arbitrary determination in the field of municipal activities is contrary to well-settled law. In *Burford v. Grand Rapids*, 53 Mich. 98, 18 N. W. 571, 51 Am. Rep. 105, Judge Cooley said that the decision of the town authorities had been—

"made in the exercise of its [powers in its] discretionary and governmental authority over a subject confided by the state to its judgment, and is presumptively correct. But, whether correct or not, no appeal from the judgment to court and jury has been provided for, and therefore none can be had. An indirect appeal by suit against the city to establish a liability against it for an erroneous legislative determination is not only not provided for, but it would be opposed to a principle as well settled and as familiar as any in government."

To the same purport are our own decisions above cited or referred to. While the first issue is incorrect in form, the fact seems to have been properly determined by the jury that the alleyway was only 15 feet wide, and the judgment for the mandamus is not reversed. But the other exceptions are sustained. The plaintiff is not entitled to recover any damages, and will pay the costs of this appeal.

Error.

ALLEN, J. I concur in the result holding that the defendant is not liable in damages on the facts appearing in the record, but I do not wish to be understood as agreeing that the ordinance under consideration is valid. On the contrary I think it comes under the condemnation of *State v. Tenant*, 110 N. C. 609, 14 S. E. 387, 15 L. R. A. 423, 28 Am. St. Rep. 715, which has been approved in *Rosenbaum v. Newbern*, 118 N. C. 97, 24 S. E. 1, 32 L. R. A. 123; *State v. Eubanks*, 154 N. C. 631, 70 S. E. 466; *State v. Lawing*, 164 N. C. 495, 80 S. E. 69, 51 L. R. A. (N. S.) 62.

WALKER, J., concurs in the above opinion of Justice ALLEN.

(107 S. C. 51)

DE WITT v. DOWLING et al. (No. 9656.)

(Supreme Court of South Carolina. March 27, 1917.)

1. COVENANTS — 100(1) — GENERAL WARRANTY—BREACH—INCHOATE DOWER.

If an outstanding or inchoate right of dower exists against the title when the general warranty is made by the grantor, subsequent ripening of the dower right and its successful assertion constitute a breach of warranty.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 145.]

2. COVENANTS — 102(2)—GENERAL WARRANTY—BREACH—DOWER.

An assessment against the purchaser for dower to the grantor's wife amounts to an eviction pro tanto, in violation of general warranty, in diminution of the value of the land, but nev-

ertheless is consistent with the passing of the fee.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 160-168.]

3. FRAUDULENT CONVEYANCES —271(3)—ACTION TO SET ASIDE—BURDEN OF PROOF.

In an action against a grantor's widow and children by a purchaser of land under warranty, where plaintiff alleged as breach the recovery of dower by the grantor's widow, and that after the warranty the grantor conveyed other property to defendants without consideration in fraud of plaintiff, and asked that such conveyances be set aside, defendants denying the allegation, burden rested upon plaintiff to prove the conveyances were fraudulent.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 798, 799.]

4. FRAUDULENT CONVEYANCES —286(1)—ACTION TO SET ASIDE—ISSUES—BREACH OF WARRANTY—NOTICE TO PURCHASER OF OUTSTANDING CLAIM.

Where a grantor gave general warranty of land and subsequently deeded other property to his wife and children, and on his death the wife established dower in the land granted to the purchaser, the fact that the purchaser had no notice of the dower claim until it was demanded and established was irrelevant in the purchaser's action against the widow and children alleging breach of warranty, and asking that the conveyances to them be set aside as without consideration and in fraud of creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 822, 825, 831.]

5. APPEAL AND ERROR —839(1)—SCOPE OF REVIEW—MATTERS NOT NECESSARY TO DECISION.

The court on appeal need not decide a question of law, however interesting, which is not raised.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3279.]

Appeal from Common Pleas Circuit Court of Bamberg County; Geo. E. Prince, Judge. Suit by Guillema De Witt against Laura C. Dowling and others. Decree for defendants, and plaintiff appeals. Affirmed.

Plaintiff's exceptions referred to are as follows:

(1) Because the circuit judge erred in not holding that an outstanding claim of dower was such an incumbrance as was covered and guarded against by the covenants of warranty in the deed from E. H. Dowling to plaintiff herein, which claim was in existence at the time of the execution of the deed in question.

(2) Because his honor erred in not holding that to the extent of the amount assessed against the plaintiff as dower, that the plaintiff was to that extent evicted from the premises which she was holding and enjoying under the express warranty of the said E. H. Dowling, and in not holding that the right of dower claimed and recovered was a diminution of the value of the land, but consistent with the passing of the fee.

(3) Because his honor erred in not holding that in the allotment of dower, or a sum of money in lieu thereof, amounts to actual eviction and ouster, and an action on the breach of the covenants in the deed cannot be maintained until after the eviction, in this case the payment of the sum of money assessed in lieu thereof.

(4) Because his honor erred in not holding that the contingent right of dower in the wife whose husband is living at the time of the conveyance, is an incumbrance against which the general warranty is intended to protect the vendee, in this case the warranty of E. H. Dowling to the

plaintiff, his vendee, was a protection against the outstanding claim of dower of the wife of the said E. H. Dowling.

(5) Because his honor erred in holding that plaintiff had failed to show that the estate of E. H. Dowling at the time of his death, 1906, was not sufficient to satisfy all claims against said estate, when, it is respectfully submitted, he should have held that until dower was demanded and recovered, that then and only then did the plaintiff have any notice of the claim of dower in the lands conveyed by the husband of the demandant.

Mayfield & Free, of Bamberg, for appellant. W. H. Townsend, of Columbia, for respondents.

GAGE, J. This cause is the sequel to *Dowling v. De Witt*, reported in 96 S. C. 435, 81 S. E. 173. The suit for dower established in that case is the occasion of this action. The instant action is to set aside two deeds, one from E. H. Dowling to his wife Laura, and one from E. H. Dowling to his children, Spann, Decania, and Lana; upon the ground they are voidable as against the plaintiff's claim against the estate of E. H. Dowling, because made without consideration, and operated as a fraud upon the plaintiff. These deeds were made in December, 1905. Before that, in January, 1890, E. H. Dowling had conveyed to the plaintiff here a parcel of land, with general warranty.

E. H. Dowling died in October, 1906. In 1914, Laura, the widow of E. H. Dowling, sued the plaintiff for dower in the lands conveyed to plaintiff by her husband in 1890, and recovered. That is the breach of the warranty which E. H. Dowling made the plaintiff, and which is now set up by the plaintiff against the widow and children of E. H. Dowling as a claim against Dowling's estate, that was existing when he made the alleged voluntary deeds. The court decreed for the defendants: (1) Because it did not appear by testimony that when E. H. Dowling made the two deeds in 1905, he did not then retain sufficient property to pay his debts; and (2) because the obligation from E. H. Dowling to the plaintiff, arising out of the breach of warranty, did not exist when the aforementioned voluntary deeds were made by E. H. Dowling to his wife and children; and (3) because there was not proven an intent by E. H. Dowling when he made the deeds to his wife and children to defraud his creditors; and because the transaction did not amount to a constructive fraud by E. H. Dowling. These embrace all of the conclusions of the circuit court, except those conclusions upon record matters of fact about which there is no dispute.

[1] There are five exceptions. Let them be reported. The first four charge omissions to find; the last charges an erroneous finding and an omission to find. As to the first, it is true that if an "outstanding claim of dower"—an inchoate right of dower—exist

against the title when the general warranty is made by the grantor, then the subsequent ripening of the dower right and its successful assertion constitutes a breach of the warranty. So much is the first clause of the first exception, and the postulate is true; but it is not determinative of the case.

The second clause of that exception suggests an issue upon which the court did find; and we take it this clause challenges that finding. The finding was that the warranty was not a claim against the warrantor existent when the warranty was made. The exception is that the warranty was such a claim. To that issue we shall hereinafter revert.

[2] The second exception lays down the postulate that the assessment of some \$1-100 against the plaintiff for dower to Laura amounted to an eviction pro tanto, in violation of the warranty, in diminution of the value of the land, but consistent with the passing of the fee. That is true; but the deciding of it by the circuit court was not necessary to a determination of the case. No doubt the court assumed the postulate to be correct.

The same is true of the third exception, and of the fourth exception.

The fifth exception is to the court's holding that the plaintiff failed to prove that the estate of E. H. Dowling, at his death in 1906, was insufficient to satisfy all claims against it, and to the court's not holding that the plaintiff had no notice of the claim of dower until the same was demanded and recovered. This exception makes the real question in the case.

We think the first clause of the fifth exception fairly makes the question, that the plaintiff did show by the testimony that when E. H. Dowling made the deeds in 1905 he did not reserve enough property to pay his debts. That clause of the exception charges that the court erred in holding the contrary.

The second clause of the exception seems to indicate the fact which negatives the court's conclusion, to wit, that the plaintiff did not and could not have notice of the claim of dower until the same was demanded and recovered. The circuit judge's decree recites that "the cause was heard * * * upon the testimony contained in the printed case * * * of Dowling v. De Witt," the dower suit before referred to. That testimony is not printed in the case for this appeal, and it was not supplied the court. The only testimony in this appeal is four deeds. The counsel for respondents asserts in his printed argument that the testimony was not so printed and supplied, because "the appellant is not here questioning the findings of fact in the court below."

[3] If the fifth exception questions the fact of insufficiency of assets to pay debts, there

is no testimony to sustain the exception. There is not a line of testimony before us to show that E. H. Dowling did not reserve a sufficient amount of property in December, 1905, to pay any debts which he may have then owed, or then contracted for and to become due upon uncertain future contingencies. Indeed paragraph 3 of the complaint alleges that "at the time of the death of the said E. H. Dowling he was owner in fee of large real estate holdings in the county. * * * together with very valuable personal property." And the deeds to his wife and children show on their face that the grantor reserved to himself a limited estate in the property granted. On the contrary, paragraph 10 alleges that in December, 1905, E. H. Dowling "conveyed all his property to his widow * * * and children. * * *" And "said conveyance to the said parties * * * was without consideration."

The defendants denied that the conveyances of December, 1905, were voluntary, and alleged they were made upon valuable consideration; and they denied that E. H. Dowling thereby conveyed away all the property he then had. It was incumbent on the plaintiff to prove that which she alleged; the circuit judge found she had not done so, and we concur with him. The first clause of the fifth exception is therefore overruled.

[4] The second clause of the fifth exception may be true; but it is irrelevant to the issue we have decided.

[5] We need not inquire into the other very interesting question which has been argued and which the circuit court decided, to wit: Was the warranty that was made of such a character that the subsequent breach of it imputed to the warranty the character of an existing debt as of the date of its making? That question, if decided by us, would be dictum, for the testimony does not create the question.

The other questions made by the exceptions are irrelevant; for, granting them to be as contended for, they do not affect the result, if our conclusion upon the issue decided be correct.

The decree below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

(107 S. C. 25)

DEAN v. SOUTHERN RY. CO. (No. 9629.)
(Supreme Court of South Carolina. March 2, 1917.)

CARRIERS \Rightarrow 32(2)—CARRIAGE OF LIVE STOCK
—NOTICE OF DAMAGE—WAIVER.

The provision of a bill of lading for an interstate shipment of horses that any claim for damages must be made before the horses were removed or intermingled with other stock cannot be waived by the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84.]

Appeal from Common Pleas Circuit Court of Spartanburg County; Mendel L. Smith, Judge.

Action by E. B. Dean against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Sanders & De Pass, of Spartanburg, for appellant. Bomar & Osborne, of Spartanburg, for respondent.

HYDRICK, J. Defendant appeals from judgment for plaintiff for \$210.50 damages for alleged negligent injury to some horses and mules in interstate transportation. As a defense to the action, defendant alleged and the proof showed that plaintiff had not given written notice of his claim for damages in compliance with the following stipulation in the bill of lading:

"That as a condition precedent to any right to recover any damage for loss or injury to said live stock, notice in writing of the claim therefor shall be given to the agent of the carrier actually delivering said live stock wherever such delivery may be made, and such notice shall be so given before said live stock is removed or is intermingled with other live stock."

Against objection of defendant, the court admitted testimony which plaintiff offered to show waiver of the written notice required by the stipulation, and instructed the jury that, although the stipulation was valid and binding upon the parties, nevertheless it might be waived by the defendant and submitted to them the question whether, in fact, it had been waived, and instructed them, further, that unless they found from the evidence that it had been waived, their verdict should be for the defendant.

While the exceptions challenge the correctness of other rulings and instructions, we need consider only the one above stated, as that will be decisive of the case. This court held in *Crawford v. Railway*, 101 S. C. 522, 86 S. E. 19, that such a stipulation might be waived. But more recent decisions of the Supreme Court of the United States, whose decisions are controlling, show that such a stipulation in an interstate bill of lading, if valid and applicable, cannot be waived. *Southern Ry. v. Prescott*, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; *Northern Pac. Ry. v. Wall*, 241 U. S. 87, 36 Sup. Ct. 493, 60 L. Ed. 905; *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948; *Chesapeake & Ohio Ry. Co. v. McLaughlin*, 242 U. S. 142, 37 Sup. Ct. 40, 61 L. Ed. —. In *Railway Co. v. Blish Milling Co.*, supra, the court said, with respect to such a stipulation:

"The action is in trover, but, as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App. 147 [82 S. E. 787]. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But

the parties could not waive the terms of the contract under which the shipment was made pursuant to the federal act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *Chi. & Alt. R. R. v. Kirby*, 225 U. S. 153, 166 [32 Sup. Ct. 648, 56 L. Ed. 1033, Ann. Cas. 1914A, 501]; *Kansas Southern Ry. v. Carl* [227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683]; *A., T. & S. F. Ry. v. Robinson*, 233 U. S. 173, 181 [34 Sup. Ct. 556, 58 L. Ed. 901]; *Southern Ry. v. Prescott*, supra. We are not concerned in the present case with any question save as to the applicability of the provision and its validity, and as we find it to be both applicable and valid, effect must be given to it."

In *Kansas Southern Ry. v. Carl*, 227 U. S. 639, 654, 33 Sup. Ct. 391, 396 (57 L. Ed. 683), it was held that:

"To the extent that such limitations of liability are not forbidden by law, they become, when filed, a part of the rate."

It is settled by numerous decisions that an interstate carrier cannot alter or waive the rate filed with the commission. Having held that the stipulation was valid and applicable, the court erred in admitting evidence to show waiver of the provisions, and in instructing the jury that the carrier could waive them.

Judgment reversed.

GARY, C. J., and WATTS, FRASER, and GAGE, JJ., concur.

On Petition for Rehearing.

PER CURIAM. The only point decided by this court was that, having held the stipulation valid and applicable, the circuit court erred in holding that it could be waived. Neither the validity nor applicability of the stipulation was before this court, and, of course, the decision does not adjudicate either point.

(107 S. C. 21)

FOWLER v. NEW YORK LIFE INS. CO.
(No. 962L.)

(Supreme Court of South Carolina. Feb. 10, 1917.)

1. EVIDENCE §—472(1)—OPINIONS—TRUTH OF APPLICATION FOR INSURANCE.

In action on a life policy, it was improper to permit cross-examination by plaintiff as to whether insured told the truth when he answered questions in the application.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186, 2191.]

2. APPEAL AND ERROR §—1048(5)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error of permitting cross-examination by plaintiff as to whether insured truthfully answered questions in application was rendered harmless where one witness did not answer, and the other only "reckoned."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4143, 4151, 4158, 4159.]

3. INSURANCE ~~669~~(7) — ACTION ON LIFE POLICY—INSTRUCTIONS.

There was no error in charging jury that gist of defense in action on life policy was that insured was addicted to excessive use of liquor; "not that he did not totally abstain from its use, else few people could not obtain effective insurance," total abstinence not being in issue, the language at most being irrelevant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1774-1776.]

4. APPEAL AND ERROR ~~994~~(1)—REVIEW—CREDIBILITY OF WITNESSES.

In a law case, the Supreme Court has no power to weigh and consider accuracy, credibility, and bias of witnesses, being questions primarily for the jury, and secondarily for the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901, 3906.]

5. APPEAL AND ERROR ~~1002~~—REVIEW—DIRECTED VERDICT—CONFLICTING EVIDENCE.

Where evidence was conflicting as to whether insured was a confirmed drunkard when he took out life policy, stating in the application that he never used liquor to excess, a refusal to direct verdict for insurer will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937.]

Appeal from Common Pleas Circuit Court of Florence County; Thos. S. Sease, Judge.

Action by A. J. Fowler, as administrator of Mary E. Miles, against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

J. H. McIntosh, of New York City, and Thomas & Lumpkin, of Columbia, for appellant. J. D. Gilland, of Florence, for respondent.

GAGE, J. Action upon a contract, whereby the New York Life Insurance Company insured the life of Samson D. Miles. The policy is for \$2,000, and the beneficiary named in it was the wife of the insured, dead since her husband. The defendant elected to return the premium it had received, and rescind the policy, and its action was based upon the alleged fraud of the insured in procuring the policy. In his application for insurance the deceased stated that his daily consumption of spirits was nil, and that it had been so in the past, and that he had never used alcohol to excess. The defendant alleges that as it turned out these answers were untrue, and Miles knew them to be untrue; that the company relied on the answers and accepted them to be true, and issued the policy on the faith of them. The jury found for the plaintiff, and the defendant has appealed.

There are four exceptions, but there is really only one question in the case; and that is, Ought the court to have directed a verdict for the defendant, and that upon the ground that the only reasonable inference to be drawn from the testimony is that Miles did make untrue answers in his application and did commit a fraud on the company?

We shall consider that question presently; but we shall pause now to dispose of two minor issues made by the third and fourth exceptions.

[1, 2] The counsel for plaintiff did ask the witnesses Matthews and Turner, on cross-examination, if Miles had told the truth when he answered the questions in the application. Those were improper questions, and the practice which permits them is bad; but the record shows that one witness did not answer the questions, and the other only "reckoned." Nevertheless an error of that character, of so small essence, would not work the reversal of a judgment.

[3] The court charged the jury in substance that the gist of the defense was that Miles was addicted to the excessive use of liquors; not that he did not totally abstain from its use, else few people could not obtain effective insurance under such a policy. The last clause of the sentence is that excepted to. At most the language was irrelevant, for in the instant case there was no declaration by Miles of past total abstinence, and no pretense by the company that their patrons were held to such conduct. There was no error of law in the charge.

The first and second exceptions make the prime issue before adverted to. No question but that there was full proof that the company relied on Miles' answers in the application touching his use of liquor; but the real issue is, Were such answers untrue, known to be so, and made to deceive the company?

[4] The appellant's counsel charge in the exception that "the uncontradicted testimony shows conclusively" that Miles was a confirmed drunkard when he applied for policy. Yet on that issue five witnesses testified for the company, and six witnesses testified for the plaintiff. In this court, in a law case, there is no power to weigh and consider the accuracy, the credibility, and the bias of a witness. Those are questions primarily for the jury, and secondarily for the trial judge.

[5] We have considered the whole printed testimony; that of one side, on this issue, is so repugnant to that of the other side that it would be a plain violation of our power to judge betwixt the witnesses. Bing v. Railroad, 86 S. C. 530, 63 S. E. 645. For us to usurp the power of a jury and a trial judge, to accomplish ideal justice, would itself be a violation of law.

The judgment below is affirmed.

GARY, C. J., and HYDRICK, WATTS, and FRASER, JJ., concur.

Petition for Stay of Remittitur and for Rehearing.

PER CURIAM. We were mindful that the defendants' witnesses testified to acts of insobriety, and the plaintiffs' witnesses testi-

ded to a negative; yet it was the jury's province to judge betwixt them.

The petition is dismissed, and the order staying the remittitur is revoked.

(19 Ga. App. 503)

GEORGIA NORTHERN RY. CO. v. SHARP.
(No. 7919.)

(Court of Appeals of Georgia. March 19, 1917.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ⇨209(3)—ACTION BY WIFE—RECOVERY OF DAMAGES.

The marriage of a woman after receiving an injury in a railroad wreck does not divest her of the right to recover damages for the total or partial loss of her earning capacity. In such case the right of action accruing to the woman before marriage is complete in her, and after marriage the husband has no right of action for the diminished or destroyed capacity of the wife to labor and to earn money. Although the injury may be permanent in character, the right to sue arises immediately on the infliction of the injury, and remains in the person having the right of action at that time.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 768, 908, 978.]

2. ASSIGNMENTS OF ERROR.

The assignments of error do not warrant judicial interference with the verdict in this case.

(Additional Syllabus by Editorial Staff.)

3. RELEASE ⇨55 — PLEADING — BURDEN OF PROOF.

In an action against a railroad for personal injury where it pleaded a release executed in plaintiff's minority, which plaintiff denied, the burden was on the railroad to show the execution of the release by a preponderance of the evidence.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 94-100.]

4. APPEAL AND ERROR ⇨731(1) — ASSIGNMENT OF ERROR—CONSTRUCTION.

A complaint that the verdict was contrary to the charge amounts only to a complaint that the verdict was contrary to law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3017.]

5. APPEAL AND ERROR ⇨1068(4)—INSTRUCTION—MEASURE OF DAMAGES.

In an action for personal injury, an instruction that it was entirely discretionary with the jury to allow the full amount sued for, though inapt, did not require a new trial, where there was no contention that the verdict was excessive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228.]

Error from City Court of Albany; Clayton Jones, Judge.

Action by Mattie Sharp against the Georgia Northern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walters & Redfearn, of Albany, for plaintiff in error. R. R. Marlin and W. H. Gurr, both of Dawson, for defendant in error.

GEORGE, J. Mattie Sharp sued for personal injuries received while a passenger on a train of the Georgia, Northern Railway Company, and upon the trial obtained a

verdict for \$500. The railway company excepts to the overruling if its motion for a new trial.

1. Exception is taken to the following charge of the court:

"Mattie Sharp, the plaintiff in this case, has instituted legal proceedings, in which she seeks to recover damages for certain alleged injuries which she claims caused her physical pain and suffering and mental anguish and the loss of earning capacity, and which were received in a wreck while plaintiff was a passenger on a train negligently operated by the defendant company."

The company insists that this charge, and especially the latter portion, amounted to an expression of opinion by the court that the plaintiff was injured by it, and that its train was negligently operated. The court was here stating the contentions of the plaintiff, and this instruction could not have been misunderstood by the jury. If the trial court is required to preface every contention made by the parties with the statement that "it is contended" thus and so, the charge would become unintelligible to the average jury. In this case the subsequent instructions given by the court made sufficiently plain to the jury that the court did not intend to express any opinion upon the issues in the case, but that the burden remained with the plaintiff to establish every fact alleged by her.

[3] 2. In the second ground of the amendment to the motion for a new trial it is contended by the company that the court, in its charge, placed upon the company the burden of showing that the accord and satisfaction pleaded by it was not made at a time when the defendant in error was mentally or legally incapacitated to make the contract. Without inquiry into the merits of this contention, we think it sufficient to say that the undisputed testimony in the case shows that, at the time of the alleged accord and satisfaction and the execution of the written release specially pleaded by the company, the plaintiff was a minor. She denied the execution of the release, and the burden was certainly upon the company to show the execution of the release, by the preponderance of the evidence. Acting upon the theory that the jury might find that an accord and satisfaction had been made, the plaintiff pleaded her minority and tendered to the company the consideration of the same. Under the charge of the court on the question of the validity of a release executed by a minor (to which no exception is taken), there was but one finding that could result. Since this is true, it is unnecessary to determine whether the charge is in all respects technically correct.

[4] 3. The excerpt from the charge in the third ground of the amendment to the motion for a new trial is conceded to be a correct statement of a principle of law, but it is complained that the verdict is contrary to the

charge there quoted. This assignment, under the rulings of this court and of the Supreme Court, amounts only to the complaint that the verdict is contrary to law.

[5] 4. In his instructions the judge reminded the jury that the plaintiff could not recover unless the defendant company was negligent in one or more of the ways alleged in the petition. He then said to the jury:

"Neither can she recover a larger amount than that actually sued for, yet it is entirely discretionary with the jury to allow her the full amount sued for, or a part of the amount sued for; or they may find for the defendant, which of course would mean that the plaintiff would be allowed no amount whatever."

He then instructed the jury on the measure of damages for the alleged pain and suffering, and for the alleged diminution of earning capacity claimed by the plaintiff. The language of the court, in the charge above quoted, to wit, "that it is entirely discretionary with the jury," does not furnish the jury a correct legal guide, and is inapt. In *Central of Ga. Ry. Co. v. Brinson*, 18 Ga. App. 113, 88 S. E. 1003, it was held:

"Where, in an action for damages, there is no contention that the plaintiff, if entitled to recover at all, is not entitled to recover as much as the amount of the verdict rendered in his favor, the instructions of the court upon the measure of damages become immaterial. He who asserts that such error has been committed as requires the grant of a new trial must not only designate the error, but must also show that the error worked to his injury."

If this statement of the rule be correct, the exceptions to the instructions on the measure of damages in the instant case are without merit. There is no contention that the verdict for \$500 is excessive. The railway company contends that the plaintiff is not entitled to recover at all, but it is nowhere claimed that, if she is entitled to recover, she has recovered a sum in excess of her legal damages. It is true that the injury to the plaintiff is not conceded, but under any view of the evidence in this case, a verdict for an amount of damages even larger than the amount returned by the jury would have been warranted, if she is entitled to recover at all, and the railway company does not contend otherwise. We, however, do not commit ourselves to the rule in the *Brinson Case*, supra. We think the rule there stated is unsound, but in the case at bar the charge of the court does not require a new trial.

[1] 5. The evidence disclosed that at the time of the filing of the suit and at the time of trial the plaintiff was a married woman, having a living husband. It is further contended by the railway company that the right of action for the decreased earning capacity of the plaintiff, if any existed, was in the husband, and that the court erred in submitting to the jury the question as to recovery for decrease of her earning capacity. We think this contention fallacious. We might rest our conclusion upon the fact that such damages were claimed in the petition,

and there was no demurrer by the railway company. However the record shows that the plaintiff was at the time of her injury an unmarried woman. Her injury was sustained in October and she married in the following April. The husband could not recover for an injury sustained by the wife prior to the marriage, because he lost nothing on account of her disability. At the time of the marriage her capacity to earn money had already been impaired by the negligence of the defendant, and consequently he had no cause of action for such impairment. The loss in this respect is that of the wife. On the infliction of the injury she was vested with a complete right of action against the railway company. In law this right of action must be considered as already reduced to money on the date of her marriage. Certainly this is true in the present state of our law, because the separate estate of the wife is neither lost nor affected by the fact of marriage. A negligent injury to an unmarried woman, permanently decreasing her capacity to earn money, no parental rights being involved, is an injury for which she alone may recover, and this right is not lost by the fact that she thereafter enters into a marriage contract. The injury sustained by her may have affected her ability to contract marriage, in the first place, and to contract an advantageous marriage in the second place. Her subsequent marriage affords no more consolation to the wrongdoer than any other contract made by the woman after the injury. The wrong being against her, and the right of action being in her, a subsequent contract entered into by her is of no concern to the wrongdoer. See *Reading v. Penn. R. Co.*, 52 N. J. Law, 264, 19 Atl. 321. In one of the briefs it is stated that this is an open question in Georgia. We have neither the time nor the disposition to thoroughly examine the reports of this state to see if this conclusion of counsel is correct. Attention is called, however, to the case of *Wrightsville & Tennille Railroad Co. v. Vaughan*, 9 Ga. App. 371, 71 S. E. 691, which, in our opinion, settles this controversy. It is there said:

"When a man marries a woman in this state, he is entitled to her earnings, domestic and otherwise, so far as she is able and willing to exert herself to perform them for his benefit, and if a wrongdoer thereafter comes along and impairs the existing earning capacity, a right of action in the husband's favor arises because of the wrong which has thus been done; but if the woman he marries has already converted her earning capacity into cash, or into property, or into a chose in action, he takes only what is left of the earning capacity for his own, and she remains the owner of the cash or the property, or of the chose in action as the case may be."

[2] The evidence is sufficient to sustain the verdict, and nothing appears to warrant judicial interference therewith.

Judgment affirmed.

WADE, O. J., and LUKE, J., concur.

(19 Ga. App. 638)

ST. MARK'S METHODIST CHURCH v. GEORGIA POWER CO. (No. 8288.)(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)*(Syllabus by the Court.)***1. PARTIES ¶95(1)—RIGHT TO SUE—AMENDMENTS.**

Suit can only be maintained by or in behalf of a natural person or an artificial person. The plaintiff in the present case was neither; and, the action being a suit by no one having capacity to sue, there was nothing in the petition to amend by, and hence the court did not err in refusing to allow the proposed amendment. *Mutual Life Insurance Co. v. Inman Park Presbyterian Church*, 111 Ga. 677, 36 S. E. 880, and cases there cited; *Roberts v. Tift*, 136 Ga. 904, 72 S. E. 234.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 160.]

2. CORPORATIONS ¶516—PARTIES ¶67—PLAINTIFF—CORPORATION—AMENDMENT.

If a suit is brought in a name which is neither that of a natural person, a corporation, nor a partnership, it is a mere nullity. In a suit by a corporation in fact, where the petition fails to so aver, an amendment is proper, alleging that the plaintiff is a corporation. *W. & A. B. Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978; *Collins v. Armour Fertilizer Works*, 18 Ga. App. 533 (1a), 89 S. E. 1054.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2029, 2046; *Parties*, Cent. Dig. § 190.]

3. PARTIES ¶59(1)—RIGHT TO SUE—AMENDMENT—STATUTES.

The amendment, which the trial court refused to allow, averred that the St. Mark's Methodist Episcopal Church "is not a corporation, and has never in any way been authorized to sue in its own name," from which it necessarily follows that the suit was a nullity, under the authorities cited above. The provision contained in section 5689 of the Civil Code of 1910, as follows: "And when it becomes necessary for the purpose of enforcing the rights of such plaintiff, he may amend by substituting the name of another person in his stead, suing for his use"—does not apply in this case, because the suit as originally brought did not proceed in the name of any person, natural or artificial. If the suit were in the name of an actual plaintiff, the right given in the Code section quoted would exist. The court properly dismissed the petition upon demurrer.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 90.]

Error from Superior Court, Campbell County; C. W. Smith, Judge.

Suit by St. Mark's Methodist Church against the Georgia Power Company. Judgment for defendant, dismissing the petition upon demurrer, and plaintiff brings error. Affirmed.

W. A. James, J. S. James, J. F. Gollightly and J. R. Bedgood, all of Atlanta, for plaintiff in error. King & Spalding, of Atlanta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 536)

BRYANT v. ATLANTIC COAST LINE R. CO. (No. 7924.)(Court of Appeals of Georgia, Division No. 1.
March 20, 1917. Rehearing Denied
April 4, 1917.)*(Syllabus by the Court.)***1. CARRIERS ¶415—ACCOMMODATIONS — ACTION FOR DAMAGES — SUFFICIENCY OF PETITION.**

The plaintiff's petition sets forth a cause of action, and the court erred in dismissing it on demurrer. *Southern Ry. Co. v. Wood*, 114 Ga. 161, 39 S. E. 922; *Central of Georgia Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1590-1600.]

2. CARRIERS ¶415—ACCOMMODATIONS — ACTION FOR DAMAGES—VENUE.

The suit is by a passenger against a railroad company, the alleged cause of action being the tortious and continuous failure to provide for the plaintiff's comfort while a passenger, the journey commencing at a point within this state and terminating at a point without this state. *Held*, the county in which the transportation and the alleged injuries commenced is not a wrong venue for the action. Civ. Code 1910, § 2798; *Southern Ry. Co. v. O'Bryan*, 112 Ga. 127, 37 S. E. 161; *Central of Georgia Ry. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024; *Atlantic Coast Line R. Co. v. Powell*, 127 Ga. 805, 56 S. E. 1006, 9 L. R. A. (N. S.) 769, 9 Ann. Cas. 553; *Owens v. Nichols*, 139 Ga. 475, 77 S. E. 635; *Friedman v. S. A. L. Ry.*, 124 Ga. 472, 52 S. E. 763.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1590-1600.]

3. PLEADING ¶192(5)—DEMURRER—IRRELEVANT MATTER.

Where a petition sets forth matter which is not legally necessary to plead, but which is nevertheless pertinent to the alleged cause of action and which would upon the trial be proper matter for proof, such matter is not subject to general demurrer on the ground that it is irrelevant. What is germane cannot be irrelevant, even though it may not be essential to plead it. The trial court therefore erred in sustaining the several grounds of demurrer not in accord herewith. *Reese v. Reese*, 89 Ga. 645, 15 S. E. 846; *S. C. & Ga. Ry. v. Southern Ry. Co.*, 111 Ga. 420, 36 S. E. 593; *Wilder v. Wilder*, 133 Ga. 574, 75 S. E. 654.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 414, 415.]

4. CARRIERS ¶410, 415—TICKET AGENT — RELIANCE ON AUTHORITY.

Where the ticket agent of a railroad company, while acting within the apparent scope of his authority, negotiates with a prospective passenger for transportation and for sleeping car berths on one of the company's trains regularly affording such service and comforts to the public, the passenger may rely upon the agent's apparent authority, and is not required to first communicate with the principal and verify the agent's actual authority. The petition in this case having alleged such a transaction between passenger and agent, it was not subject to demurrer on the ground that it was not made to appear that the agent's acts were in fact within the scope of his authority. Civ. Code 1910, § 3595; *Milledgeville Water Co. v. Edwards*, 121 Ga. 555, 49 S. E. 621; *Central of Georgia Ry. Co. v. Gortatowsky*, 123 Ga. 366, 51 S. E. 469.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1576, 1590-1600.]

5. GROUNDS OF DEMURRER.

The other grounds of the demurrer are without merit.

Error from City Court of Blakely; R. H. Sheffield, Judge.

Action by T. J. Bryant against the Atlantic Coast Line Railroad Company. Judgment for defendant on sustaining a demurrer to the complaint and dismissing the suit, and plaintiff brings error. Reversed.

Glessner & Collins, of Blakely, for plaintiff in error. Pope & Bennet, of Albany, for defendant in error.

LUKE, J. The suit was instituted in the city court of Blakely, in the county of Early. The defendant filed a demurrer, which the trial judge sustained, dismissing the suit, and the plaintiff excepted.

The petition shows the following facts: The defendant company operates a line of railroad from Montgomery, Ala., to Jacksonville, Fla., passing through the town of Jakin, in Early county, Ga., at which point the company maintains a station in the charge of a local agent, whose office is open during the day and closed at night. One of the regular passenger trains operated by the company over this line of road, and scheduled to arrive at Jakin at 11:30 o'clock at night, carries a sleeping car, wherein, upon paying additional fare, passengers are afforded additional comforts. The plaintiff, who was 61 years old, feeble and suffering from hay fever, hoped to improve his health by a trip to Homestead, Fla., provided he could obtain the additional comforts afforded by the sleeping car from Jakin to Jacksonville in taking the contemplated journey, and desired like accommodations for his sister, 64 years of age, who was to accompany him as nurse. He applied to the local agent at Jakin for such transportation and accommodations, making known to the agent that he would not take the trip unless he could obtain the additional comforts afforded by the sleeping car. The agent replied that, as the train in question passed Jakin at night while his office was closed, he could not sell the desired tickets, but that if the plaintiff would make application in the forenoon, he (the local agent) would telegraph the company's agent at Montgomery, and have two berths in the sleeping car reserved, and that the plaintiff could then pay the regular fare and the sleeping car fare to the conductor on board the train. On the following morning the plaintiff made such an application, and the local agent telegraphed the Montgomery agent, who replied that the two berths desired by the plaintiff had been reserved and would be held for him. Relying on these assurances, the plaintiff and his sister boarded the train, which stopped only upon being flagged and only long enough for them to board it. He then gave the conductor his name, and told the conductor of the agreement with the local agent, tendered the

stipulated fare, and demanded the two berths which he had been assured would be reserved for him. The conductor refused to accept the sleeping car fare, or to allow the plaintiff the benefit of its comforts, claiming that no berths had been reserved, and that all berths were occupied by other passengers, which claims were untrue, the berths having in point of fact been reserved by the Montgomery agent, but having been sold by the conductor to other passengers while en route from Montgomery to Jakin. The plaintiff was accordingly forced to go into one of the ordinary day coaches of the defendant and sit up during the night and until the arrival of the train at Jacksonville, about 8 o'clock on the following morning, and, as a result, suffered intense pain and agony during the long journey, his malady being greatly aggravated by the fatigue and exposure incident to the long ride in the day coach, without any opportunity for sleep or needful rest or composure. Other injuries are specially pleaded. It is alleged that the defendant's wrongful failure and refusal to furnish the plaintiff with a berth in its sleeping car, as it had through its said agents contracted with him to do, was not only the result of gross and inexcusable negligence on its part, but was due to the wanton, willful, and malicious conduct of its sleeping car conductor.

The grounds of the demurrer were: (1) No cause of action is set out. (2) No jurisdiction is shown. (3) Various specified portions of the petition are "irrelevant." (4) The eleventh paragraph as to the plaintiff's being forced to go into an ordinary day coach was demurred to on the ground that it is not alleged how or why the plaintiff was so forced. (5) The sixteenth paragraph, as to the defendant's having through its agents contracted to furnish the plaintiff a berth, and as to negligence, was demurred to on the ground that it is not alleged through what agent the contract was made, or what negligence is referred to; and the allegation as to the conduct of the sleeping car conductor being wanton was demurred to on the ground that it is not shown wherein said conduct was wanton. (6) It does not appear that the said local agent at Jakin was acting within the scope of his authority. (7) It is not alleged where the transaction between the plaintiff and the sleeping car conductor occurred.

[1-5] 1-5. The petition set forth a cause of action, and was not subject to demurrer on any of the grounds stated. Authorities in point appear in connection with the headnotes. The demurrer should have been overruled upon each and every ground thereof, and the court erred in sustaining the demurrer and dismissing the suit.

Judgment reversed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 652)

CLARKE v. ALLEN. (No. 8009.)

(Court of Appeals of Georgia, Division No. 2.
April 8, 1917.)

(Syllabus by Editorial Staff.)

1. **APPEAL AND ERROR** ⇨637—**RECORD—CERTIFICATE TO BILL OF EXCEPTIONS—STATUTE.**
Under Civ. Code 1910, § 6187, the failure of the trial judge to certify the bill of exceptions within the time provided by the statute will not cause a dismissal of the case, unless such failure is occasioned by act of plaintiff or his counsel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2784, 2829.]

2. **APPEAL AND ERROR** ⇨356—**RECORD—CERTIFICATE TO BILL OF EXCEPTIONS—STATUTE.**

Where the writ of error, though originally presented in time, was returned by the judge to counsel, but was considered as presented on that day, and where the judge held motion court each subsequent week at the residence of counsel, a failure to present the writ to the judge for his certification for nearly three months, without showing cause for such failure, required the granting of a motion to dismiss the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927.]

Error from Superior Court, Hall County;
J. B. Jones, Judge.

Action between M. L. S. Clarke and H. W. Allen. Judgment for the latter, and the former brings error. Writ of error dismissed.

A. C. Wheeler and W. M. Oliver, both of Gainesville, for plaintiff in error. Wm. M. Johnson, of Gainesville, for defendant in error.

PER CURIAM. Motion to dismiss is made in this case on the ground that the judge failed to certify the bill of exceptions within the statutory time.

[1] It is well settled, by numerous decisions of our Supreme Court and of this court, that failure of the judge to certify the bill of exceptions within the time provided by the statute will not cause a dismissal of the case, unless such failure be occasioned by the act of the plaintiff or his counsel. Civil Code, § 6187; Walker v. Equitable Mortgage Co., 100 Ga. 84, 28 S. E. 75 (1); Jones v. State, 100 Ga. 579, 28 S. E. 396 (2); Moore v. Kelly & Jones Co., 109 Ga. 798, 35 S. E. 168 (1); Thomson v. Stephens, 138 Ga. 205, 75 S. E. 136 (1); Nation v. Jones, 3 Ga. App. 83, 59 S. E. 330; Bennett v. Ralf, 4 Ga. App. 484, 61 S. E. 887; Harnage v. State, 7 Ga. App. 573, 67 S. E. 694; Acts of 1896, p. 45.

[2] But the certified facts of this case are similar to those in Parkman v. Dent, 109 Ga. 289, 34 S. E. 559, and Sutton v. Valdosta Guano Co., 115 Ga. 794, 42 S. E. 94. In those cases the writ was dismissed where it appeared that it had been returned by the judge to the movant's counsel for correction and was held out by them for an extended and unnecessary length of time. In this case the writ, though originally presented in time, was returned by the judge to counsel, be-

cause at the time the writ was handed to him he was engaged in another case; he then making the statement that he would take it up later and consider it as presented on that day. Nearly three months elapsed before counsel for the plaintiff again presented the writ to the judge for his certification, though it is stated in his certificate that on each subsequent Saturday he had held motion court in the town of the residence of said counsel. It thus appearing that there had been ample time to present same in reasonable time, and no cause being shown to the contrary, this court feels compelled to grant the motion to dismiss, and it is ordered accordingly.

Writ of error dismissed.

BROYLES, P. J., and JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 650)

BREMEN FOUNDRY & MACHINE WORKS
v. McLENDON et al. (No. 8003.)

(Court of Appeals of Georgia, Division No. 2.
April 8, 1917.)

(Syllabus by the Court.)

1. **PARTIES** ⇨95(1)—**PLAINTIFF—ACTION IN TRADE-NAME—AMENDMENTS.**

An individual can, in an assumed or trade name, maintain a suit. The words "Bremen Foundry & Machine Works, by L. E. Bailey owner and manager thereof," import an individual doing business under a trade-name, and are sufficient to support an amendment alleging that the Bremen Foundry & Machine Works is "a trade-name under which L. E. Bailey does business."

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 160.]

2. **RULING ON DEMURRER.**

The court erred in sustaining the demurrer and dismissing the petition.

3. **PLEADING** ⇨221—**ERRONEOUS RULING ON DEMURRER—EFFECT.**

The error in the ruling upon the demurrer being controlling, the rendition of a judgment against the plaintiff for the costs of the suit was nugatory.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 567.]

Error from Superior Court, Haralson County; A. L. Bartlett, Judge.

Action by the Bremen Foundry & Machine Works, etc., against J. W. McLendon and others. Judgment for defendants, and plaintiff brings error. Reversed.

Taylor Smith, of Bremen, and C. E. Moore, of Buchanan, for plaintiff in error. M. Bulard and Griffith & Matthews, all of Buchanan, for defendants in error.

BROYLES, P. J. [1, 2] The petition in this case was brought in the name of the "Bremen Foundry & Machine Works, by L. E. Bailey, owner and manager thereof." The defendants interposed a demurrer setting up that there was no proper or legal party plaintiff to the suit, as the name "Bre-

men Foundry & Machine Works, by L. E. Bailey, owner and manager thereof," imported "neither a corporation, a partnership, or an individual." The plaintiff offered an amendment to his petition, striking the words "L. E. Bailey, owner and manager thereof," and inserting in lieu thereof the following words: "The same being a trade name under which L. E. Bailey does business." The court sustained the demurrer and dismissed the petition, and the plaintiff excepted.

To sustain this judgment of the court counsel for the defendants in error rely mainly upon the case of *Western & Atlantic Railroad Co. v. Dalton Marble Works*, 122 Ga. 774, 50 S. E. 978. We do not think, however, that the instant case is controlled by that decision. In that case the suit was brought in the name of the "Dalton Marble Works", and, upon demurrer, the plaintiff amended the petition by inserting after the words "Dalton Marble Works" the words "H. B. Colvard, proprietor," and the ruling made by the Supreme Court was that, even if the name "Dalton Marble Works" could be construed as importing a corporation or partnership, the admission made in the amendment showed that in fact it was neither, and that therefore the suit as brought was a nullity, and there was nothing to amend by, and the lower court erred in allowing the amendment. It was not held in that case that the petition as amended did not show a real party plaintiff; it was held merely that the original petition did not, and therefore could not legally be amended. In the instant case the original petition contains in principle substantially the same words as the amended petition in the *Dalton Marble Works* Case, and hence a vital distinction between the two cases is clearly apparent. In our opinion, the words "Bremen Foundry & Machine Works, by L. E. Bailey, owner and manager thereof," import an individual doing business under a trade-name, and the court erred in not allowing the amendment which set up that it was "a trade-name under which L. E. Bailey does business." An individual can, in an assumed or trade name, maintain a suit. *Charles v. Valdosta Foundry Company*, 4 Ga. App. 733, 62 S. E. 493. In that case this court held that the word "company," as used in the name of the plaintiff, imported a corporation, and that an amendment similar to the one in the case at bar should have been allowed, although it was held that, as the name of the plaintiff, as set out in the petition, imported a corporation, no amendment was really necessary. Likewise, in our judgment, as the words "Bremen Foundry & Machine Works, by L. E. Bailey, owner and manager thereof," import an individual doing business under a trade-name, no amendment to the

petition was essential, although when offered it should have been allowed.

Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 658)

SWEARINGEN v. VIRGINIA-CAROLINA CHEMICAL CO. (No. 8188.)

(Court of Appeals of Georgia, Division No. 2
April 3, 1917.)

(Syllabus by the Court.)

1. ADMISSION OF EVIDENCE.

When considered in connection with the explanatory note of the judge, no error was committed in admitting the note in evidence.

2. HUSBAND AND WIFE ~~25~~(5)—PURCHASE BY HUSBAND—LIABILITY OF WIFE.

"The evidence demanded a verdict for the plaintiff for the value of the guano which was the consideration of the note, whether the note was signed by the defendant, or its execution authorized or not, since it showed that she knowingly received the property for which the note was given, and accepted the benefits thereof. This amounted to a ratification of the purchase of the guano, and raised on her part an obligation to pay therefor." *Home Fertilizer & Chemical Co. v. Dickerson*, 12 Ga. App. 149, 76 S. E. 1040.

Error from Superior Court, Dooly County; W. F. George, Judge.

Action by the Virginia-Carolina Chemical Company against Mrs. D. R. Swearingen. Judgment for plaintiff, and defendant brings error. Affirmed.

Busbee & McDonald, of Vienna, for plaintiff in error. Powell & Lumsden, of Vienna, for defendant in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 490)

CITIZENS' BANK OF WAYNESBORO v. TIMMONS et al. (No. 7663.)

(Court of Appeals of Georgia, Division No. 1.
March 16, 1917. Rehearing Denied
April 5, 1917.)

(Syllabus by the Court.)

1. ASSIGNMENTS ~~23~~, 73, 100, 131—EXECUTORY CONTRACT — RIGHTS OF ASSIGNEE — PLEADING.

"A contract with a building contractor stipulated that he should be paid a specified sum for the work, payable in monthly installments in such sums as the architects might in writing certify to be due. The owner reserved the right to withhold the payment of any installment when necessary to protect himself against any outstanding claims or liens for either labor or material. Held: (1) When the architects issued a certificate that a specified sum was due under the terms of the contract, the certificate was assignable, and the assignee could enforce it in a court of law, as a legal assignment of a particular fund. (2) In such a suit by the assignee, it was not necessary that the petition should negative the existence of liens for labor or mate-

rial. This was matter of defense." *Timmons v. Citizens' Bank*, 11 Ga. App. 69, 74 S. E. 798.

(a) The plaintiff in error acquired from the contractor, by assignment, a certificate signed by the architect to the effect that he was entitled to \$1,200 as a payment under the terms of the building contract, which was broad enough to include by its language, not only perfected and recorded liens, but any valid "claims" for labor or material used in the construction of the building by the contractor.

(b) The certificate was assignable, but, not being a negotiable instrument, the transferee occupied no better position than the contractor, and the claim in its hands was subject to all the defenses that could have been interposed if suit had been brought by the contractor.

(c) The undisputed evidence showed that the contractor abandoned his contract, leaving unpaid claims for material furnished and labor done that were potential liens and debts assumed (not barred by statute when assumed) for an amount which, added to sums already paid under the contract, largely exceeded the contract price. There was no averment or proof that the work had been performed in accordance with the conditions of the contract, or that full performance was in any manner waived.

[Ed. Note.—For other cases, see *Assignments*, Cent. Dig. §§ 40, 41, 139-142, 177, 180, 220-226.]

2. RULING ON MOTION FOR NEW TRIAL.

The judgment rendered by the court without the intervention of a jury was authorized by the evidence, and the court therefore did not err in overruling the motion for a new trial, based on the general grounds only.

Error from City Court of Tifton; R. Eve, Judge.

Action between the Citizens' Bank of Waynesboro and W. W. Timmons and others, trustees. Judgment for the latter, and the former brings error. Affirmed.

H. J. Fullbright, of Waynesboro, and R. S. Foy, of Sylvester, for plaintiff in error. Fulwood & Hargrett and J. H. Price, all of Tifton, and J. J. Murray, of Hahira, for defendants in error.

WADE, C. J. Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 657)

ATKINS NAT. BANK v. HARMON. (No. 8073.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 957(1)—WRIT OF ERROR—BILL OF EXCEPTIONS—DISMISSAL—CONSTITUTIONAL PROVISIONS.

The bill of exceptions in this case was filed in the office of the clerk of the lower court on January 25, 1916, and should have been transmitted (with the record) to the March term, 1916, of the Supreme Court, but was not so transmitted until September 28, 1916, upon which date it was filed in the office of the clerk of the Supreme Court. The bill of exceptions having reached the Supreme Court after the close of the term to which it was returnable, the writ of error must be dismissed. The fact that the delay was not occasioned by the fault of the

plaintiff in error or its attorneys is not sufficient to change the rule. *Earnhart v. Atlanta & West Point R. R. Co.*, 133 Ga. 59, 65 S. E. 138.

(a) The constitutional amendment of 1916 (Acts 1916, p. 19), changing the appellate jurisdiction of the Supreme Court and of the Court of Appeals, as to certain classes of cases, does not affect this ruling. This case was dead when it reached the Supreme Court, and its lifeless body only was transmitted to this court, and the order transferring it had no miraculous power to restore life to the dead.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2747, 2749.]

Error from Superior Court, Banks County; O. H. Brand, Judge.

Action between the Atkins National Bank and Esther Harmon. Judgment for the latter, and the former brings error. Writ of error dismissed.

W. A. Charters and H. H. Perry, both of Gainesville, for plaintiff in error. A. J. Griffin, of Homer, C. R. Faulkner, of Belton, and W. W. Stark, of Commerce, for defendant in error.

BROYLES, P. J. Writ of error dismissed

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 650)

A. W. TEDCASTLE & CO. v. J. T. BREWER & CO. et al. (No. 7929.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 957(1)—DISCRETION OF TRIAL COURT—OPENING DEFAULT—STATUTE.

Section 5656 of the Civil Code of 1910, providing for the opening of defaults, should be given a liberal construction, in the promotion of justice and the establishment of the truth; and the discretion of the trial judge in opening a default and permitting the defendant to plead will not be interfered with by this court unless manifestly abused, to the injury of the plaintiff. *Thompson v. Kelsey*, Adm'x, 8 Ga. App. 23, 68 S. E. 518; *Base v. Doughty*, 5 Ga. App. 460, 63 S. E. 516; *Brawner v. Maddox*, 1 Ga. App. 337, 58 S. E. 278; *Polarek v. Gordon*, 102 Ill. App. 356; *Tucker v. Harris*, 13 Ga. 2, 58 Am. Dec. 488; *Gray v. McNeal*, 12 Ga. 424; *Davis v. Bray*, 119 Ga. 224, 46 S. E. 90; *Burch v. Pope*, 114 Ga. 334, 40 S. E. 227.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3823.]

2. OPENING DEFAULT—DISCRETION.

This court cannot say that in this case the trial judge abused his discretion in opening the default and in allowing the defense to be filed.

3. RULING ON MOTION FOR NEW TRIAL.

There was evidence to support the verdict, and the trial judge did not err in overruling the motion for a new trial.

Error from City Court of Elberton; W. D. Tutt, Judge pro hac.

Proceeding between A. W. Tedcastle & Co. and J. T. Brewer & Co. and others. Judg-

ment for the latter, and the former bring error. Affirmed.

Z. B. Rogers, of Elberton, for plaintiffs in error. J. T. Sisk, of Elberton, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 631)

POOLE v. ELBERTON & E. RY. CO.
(No. 8060.)

(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)

(Syllabus by the Court.)

1. EVIDENCE \S 441(8) — PAROL EVIDENCE — CONVEYANCE OF RIGHT OF WAY.

A written contract of conveyance of a right of way to a railroad company duly and properly executed and delivered by an owner of land cannot be varied by oral testimony to the effect that he executed and delivered the contract upon agreement by the agent of the railroad company that the company would so construct its railroad as to not interfere with the use of his land on either side of the right of way for pasturage purposes.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1778.]

2. RAILROADS \S 67(2) — RIGHT OF WAY — ACTION FOR BREACH OF CONTRACT.

The plaintiff's evidence did not establish a cause of action as pleaded, and the court properly granted a nonsuit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 158.]

Error from Superior Court, Wilkes County; J. B. Park, Judge.

Suit by B. W. Poole against the Elberton & Eastern Railway Company. Judgment of nonsuit, and plaintiff brings error. Affirmed.

J. M. Pitner and Colley & Colley, all of Washington, Ga., for plaintiff in error. Z. B. Rogers, of Elberton, and W. A. Slaton, of Washington, Ga., for defendant in error.

LUKE, J. [2] The plaintiff sued the railway company for its failure, as he contended, to carry out a contract relating to certain land. The petition alleged:

"They desired a right of way across the above-described premises. Petitioner told them that he was willing for them to have a right of way, but that he was using said premises for a pasture, and wished to continue that use of the same. The agent of said railway company taking the contract for a right of way and representing the company agreed that his rights and his use as to the said premises for the purpose of pasturage should be fully protected, that they would install good and sufficient cattle guards in connection with said premises so as to allow him to safely place his stock within the same and that his use of the same should not be impaired or interfered with. The said railway company also agreed that, as they would have to have a considerable embankment across said premises, and one which could not be surmounted by his cattle, they would provide him with a safe passageway across his pasture so that his stock could use the pasture on either side of said right of way. * * * Said railway com-

pany has entirely failed to carry out the said agreement and contract. No cattle guards of efficient kind have been placed or provided for, nor has any passageway, as agreed in said contract, been prepared."

The plaintiff further alleged that by reason of the failure of the defendant to carry out its contract he had been damaged \$75 each year for the three years next preceding the filing of the suit. The testimony discloses that the plaintiff had executed and delivered a warranty deed to the defendant, conveying fee-simple title, upon the consideration of \$1, to a right of way 100 feet wide across the land described in the plaintiff's petition. The deed made no such reservation and agreement as alleged by the plaintiff, and the court refused, over objection, to permit the plaintiff to vary the terms of the deed by testifying that it was a part of the contract of conveyance that the defendant was to erect certain cattle guards. At the conclusion of this evidence the court granted a nonsuit, and the plaintiff excepts.

[1] It is clear that the plaintiff sought by his evidence to vary the written contract. The promise of the agent before the execution of the written contract could not be admitted in evidence for the purpose of varying the terms of the contract. There is nothing to show that there is an ambiguity in the deed, or that fraud was practiced upon the plaintiff by the defendant. There is nothing appearing which brings the written contract within any one of the exceptions that would permit of the introduction of parol evidence. To have permitted the plaintiff to testify as proposed would be a plain violation of section 5788 of the Civil Code of 1910, wherein it is provided that:

"Parol contemporaneous evidence is inadmissible generally to contradict or vary the terms of a valid written instrument."

See Murray County v. Wilson, 140 Ga. 639, 79 S. E. 783, and cases there cited.

The court did not err in granting the nonsuit.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 635)

HARVEY v. LEWIS. (No. 8039.)

(Court of Appeals of Georgia, Division No. 2.
April 3, 1917.)

(Syllabus by the Court.)

LANDLORD AND TENANT \S 328(5) — RENTING ON SHARES — LIEN ON CROPS.

Where a landlord makes a contract with a cropper, under which the landlord is to furnish the land and fertilizer, and the cropper is to do "all the work in connection with planting, making, and gathering the crop," the cropper, as a laborer, has no legal right to have a laborer's lien issued before the completion of his contract, unless for some good and sufficient legal reason he is prevented from carrying out the contract.

Error from Superior Court, Evans County; W. W. Sheppard, Judge.

Suit by W. H. Lewis against P. N. Harvey. Judgment for plaintiff, motion for new trial refused, and defendant brings error. Reversed.

P. M. Anderson, of Claxton, for plaintiff in error. Daniel & Daniel, of Claxton, for defendant in error.

BLOODWORTH, J. Lewis, a cropper, made an affidavit that he was employed by Harvey, the landlord, "as a laborer and cropper for the year 1915, to prepare, plant, cultivate, and gather the crop on a farm" which he described; that he had "completed said contract of labor and earned the sum of \$375," which he alleged was a fair valuation of one-half of the crop which he was to receive for his services, and that "he has demanded payment of the same from the said P. N. Harvey since the same has become due, and the same has been refused." Execution was issued and levied, and a counter affidavit filed denying indebtedness. The trial resulted in favor of the plaintiff. The defendant moved for a new trial on the general grounds; it was refused, and he excepted. The plaintiff testified that, under the contract the defendant was to furnish the land and fertilizer, and he (the plaintiff) was to do all of the work in planting, making, and gathering the crop. The evidence of the defendant as to the terms of the contract was practically the same as that of the plaintiff. The plaintiff further swore that:

"In pursuance to this contract plaintiff went to work on said land, planted and made said crop, and partly gathered same; that after he had gathered a part of said crop he abandoned it and left it with the defendant, P. N. Harvey; that when he abandoned said crop there was yet ungathered about two bales of cotton, about four acres of corn, and about four acres of fodder; the reason he abandoned said crop was because he had nothing on which to support his family, and the defendant, P. N. Harvey, would not furnish him any supplies; that witness furnished his own supplies during the whole year and never failed to get credit any time he sought it. P. N. Harvey was not bound under the contract to furnish any supplies to witness. Witness could have gotten all the supplies he wanted, and it was not necessary for him to abandon the crop to get supplies."

He testified, further, that he had not received his portion of the crop, and this was one reason for the abandonment, and that the defendant refused to make an accounting for his portion of the crop. It appears that after the cropper abandoned the crop it was levied on by an execution against the landlord, who gave bond and gathered the remainder of the crop.

The reasons alleged by the cropper for abandoning the crop are not sufficient to show that the landlord had breached the contract, and would not legally authorize the cropper to abandon it. The cropper elected to enforce his rights by a laborer's lien, and his right

to recover must be determined by the law applicable to such proceedings. Before a laborer can enforce his lien under the laws of this state it must be alleged in the affidavit, and the evidence must show, that he has fully completed his contract. "Liens of laborers shall arise upon the completion of their contract of labor." Civ. Code 1910, § 8339. In *Walls v. Rutherford*, 60 Ga. 441, it is said: "Not a single day before completion does the lien have any existence."

The evidence of the plaintiff himself shows that he contracted to do all the work in connection with gathering the crop. Until the crop was gathered his contract would not be completed, and he would therefore have no lien. When he swore that he abandoned the crop, and this was before all of the crop was gathered, and showed no legal reason for so doing, his own evidence destroyed his right to recover under a laborer's lien. What is here decided is not in conflict with the decision in *Lewis v. Owens*, 124 Ga. 228, 52 S. E. 333 (2). In that case the cropper was prevented from completing the contract, by the levy of a valid process against the landlord. In the instant case the cropper had abandoned the crop before the levy was made. As the evidence shows that the plaintiff abandoned the crop before it was gathered, and as he had no lien at that time, a verdict for the defendant was demanded, and the court erred in refusing to grant a new trial. *Walls v. Rutherford*, supra; *Tanxley v. Lampkin*, 113 Ga. 1007, 39 S. E. 473; *Faircloth v. Webb*, 125 Ga. 230, 53 S. E. 592(5).

Judgment reversed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 627)

SEABOARD AIR LINE RY. v. McDONALD.
(No. 7996.)

(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)

(Syllabus by the Court.)

1. RAILROADS — 405 — KILLING DOG — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under the provisions of the act of 1912 (Acts 1912, pp. 46 and 47), a dog is personal property, and a railroad company is liable for any damage done to a dog by the running of the locomotives or cars or other machinery of such a company, or for damage done by any person in its employment or service, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1393-1398.]

2. APPEAL AND ERROR — 1001(1) — RAILROADS — 446(1) — REVIEW — VERDICT — SUFFICIENCY OF EVIDENCE — KILLING DOG — NEGLIGENCE — QUESTION FOR JURY.

Whether or not the presumption of negligence in this case, created by proof of the killing of the dog by the running of the locomotive and cars of the defendant company, was rebutted, was essentially for determination by the jury;

and since there was testimony from which the jury might have inferred a lack of proper diligence on the part of the engineer in charge of the defendant's train, this court cannot set aside the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3933; Railroads, Cent. Dig. § 1627.]

Error from Superior Court, Liberty County; W. W. Sheppard, Judge.

Action by H. L. McDonald against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

N. J. Norman, of Savannah, for plaintiff in error. O. C. Darsey, of Hinesville, for defendant in error.

WADE, C. J. [1] 1. The act of 1912 (Acts 1912, pp. 46, 47) expressly provides that:

"All dogs are hereby made personal property and shall be given in and taxed as other property of this State is given in and taxed."

Before the passage of this act it had been held several times by the Supreme Court and this court that a railroad company was not liable for the negligent killing of a dog, and that no presumption would arise against the company upon proof that a dog was killed by a railroad train, as in case of injury to persons or property, but that the owner might maintain an action for trespass *vi et armis* for the wanton and malicious killing of his dog. See *Seaboard Air Line Ry. v. Parrish*, 16 Ga. App. 254, 85 S. E. 200; *Alabama Great Southern Railroad Co. v. Price*, 17 Ga. App. 762, 88 S. E. 692, and cases there cited. In *Seaboard Air Line Ry. v. Parrish* and in *Alabama Great Southern Railroad Co. v. Price*, supra, the suits proceeded on the ground that the defendant had wantonly killed the dog for which a recovery was had; and in passing upon those cases it was held not necessary to decide how far the act of 1912, supra, might affect the previous rulings of the Supreme Court touching the right to recover for the negligent killing of a dog by the train of a railroad company, or to determine whether, upon proof of the killing of a dog by a railroad train, a presumption of negligence would arise, as in cases of injury to person or property.

The Constitution of Georgia—article 7, section 2, paragraph 1 (Civil Code of 1910, § 6553)—authorizes the General Assembly to impose a tax upon "such domestic animals as, from their nature and habits, are destructive of other property," and thus impliedly recognizes dogs as property, though this power to tax differs from the uniform *ad valorem* system of taxation. Nevertheless, the Constitution clearly includes by its terms the dog as a domestic animal. It was held in the case of *Graham v. Smith*, 100 Ga. 434, 28 S. E. 225, 40 L. R. A. 503, 62 Am. St. Rep. 323, that the owner of a dog has such a property in it as will enable him to maintain an action of trover for its recovery, in case of

its wrongful conversion; and it has long been the law of this state that a dog might be the subject of simple larceny. Penal Code of 1910, § 161. The act of 1912, by its precise terms, declares that a dog shall be personal property, and makes it subject to *ad valorem* taxation on the same basis prescribed for other property. It would appear, therefore, that since the passage of that act a dog is property in more than the "qualified sense" referred to in *Jemison v. Southwestern Railroad*, 75 Ga. 444, 58 Am. Rep. 476, and therefore the same rule which is applied where a railroad company kills or injures other live stock or domestic animals would apply in the case of a dog. A dog is now a subject of larceny, may be recovered by an action of trover, and must be returned for taxation at its actual value, just as other property is returned; and no reason appears why any other or different rule should now exist touching its injury or destruction by the negligent running of a railroad train than that prescribed for other animals. Section 2780 of the Civil Code provides:

"A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company."

We hold, therefore, that this section applies to the killing of a dog, precisely as it applies to the killing of a horse, cow, or other domestic animal, and the same presumption, therefore, arises upon proof of the killing or injury as where the damage is to stock or other property.

[2] 2. The evidence in this case does not indicate that the killing of the dog was caused by the wanton, malicious, or intentional act of an agent of the railroad company, for there is no testimony that would authorize the inference that the engineer even saw the dog in time to prevent the killing, and therefore it becomes necessary to determine whether, under the testimony, it can be held, as a matter of law, that the presumption of negligence arising upon proof of the killing of the dog was completely rebutted by the evidence or explanation offered by the engineer in charge of the train of the defendant company. There was testimony that the track was straight, and the dog could have been seen thereon for a considerable distance before the locomotive reached the spot where he was struck and killed. There was also testimony, though this was disputed, that the train was running at a speed of from 50 to 60 miles per hour; and it does not appear that any attempt was made to slacken or check the speed of the train. The engineer testified that he saw no dog on the track, and that, if his train killed a dog, he did not know it at the time, and did not know it yet.

The engineer did not testify that he saw the dog approaching the track, or near the track, but said that he never saw it on the track; and the jury may have legitimately inferred, from the fact that the track was straight and the view apparently unobstructed, and from the undisputed testimony that the dog was killed by the locomotive, that the engineer was not in fact looking out at or before the time the dog was killed, and therefore that he was negligent, for, had he been looking, he would have discovered the dog approaching, near or on the track, and could have then lessened the speed of his train so as to prevent injury to the dog, or in the exercise of proper care and diligence he would have blown the whistle of the engine and thus prevented the dog from coming upon the track, or induced it to leave the track in time to prevent killing it. At least, the jury were authorized to find that the presumption of negligence, created by proof of the killing, was not successfully rebutted. The determination of the question whether the presumption created by law upon proof of the killing of a domestic animal has been rebutted by testimony from the agents and employes of the railroad company in charge of the train is so peculiarly a matter for the jury that we cannot interfere with the verdict as being unsupported by evidence, unless it clearly appears, from all the circumstances in proof and all the testimony in the case, that the presumption of negligence was effectually and completely rebutted. In this case, while the testimony which tends to establish negligence on the part of the railroad company is somewhat weak, we cannot say that it requires a finding in favor of the railroad company; for under the conditions shown by the evidence to have existed at the time the dog was killed, the jury were authorized to find (and evidently did find) that the engineer was not keeping a proper lookout, and hence, through his negligence, the presence of the dog on or near the track was not discovered in time to save it from destruction, or that the presumption of negligence was not rebutted.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 708)

LEWIS v. SAVANNAH CHEMICAL CO.
(No. 8043.)

(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ~~588~~—BRIEF OF EVIDENCE—CONSIDERATION.

The record in this case is in the following state: The paper purporting to be the brief of evidence sets forth, first, the testimony of the defendant, and immediately under this testimony is the following approval of the trial judge: "The above and foregoing is approved as a true

and correct brief of the oral and documentary evidence introduced on the trial of the case, and the same is ordered filed, as a part of the record thereof, Aug. 31, 1916. At chambers. Walter W. Sheppard, Judge, S. C. A. J. C." Following this approval of the trial judge is another purported brief of evidence, which contains the oral testimony of the attorney for the plaintiff, but this last "brief" is not approved or authenticated in any manner by the trial judge, and therefore cannot be considered by this court. Neither can we consider the three pages of purported documentary evidence which are set forth in the record, but not attached as exhibits, four or five pages after the second purported brief of evidence, and which are not approved or authenticated in any manner by the trial judge.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2607-2610.]

2. NEW TRIAL GRANTED.

The evidence of the defendant, as set forth in the approved brief of evidence, did not authorize the verdict rendered for the plaintiff, and accordingly a new trial must be granted.

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action by the Savannah Chemical Company against Zach Lewis, administrator. Judgment for plaintiff, and defendant brings error. Reversed.

W. R. Hewlett, of Savannah, for plaintiff in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 713)

BISHOP v. CALHOUN NAT. BANK.
(No. 8110.)

(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)

(Syllabus by the Court.)

1. TRIAL ~~295~~(1)—ERRONEOUS INSTRUCTIONS—CURE BY OTHER INSTRUCTIONS.

The instructions excepted to, although subject to some slight criticism when standing alone, do not require a new trial when considered in the light of the charge of the court as a whole, which was a full and fair presentation of the issues of the case and of the law applicable thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703, 704, 713, 714, 717.]

2. SUFFICIENCY OF EVIDENCE.

The verdict was authorized by the evidence, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Gordon County; A. W. Fite, Judge.

Action between W. E. Bishop and the Calhoun National Bank. Judgment for the latter, and the former brings error. Affirmed.

F. A. Cantrell, of Calhoun, and Maddox, McCamy & Shumate, of Dalton, for plaintiff in error. Starr & Paschall, of Calhoun, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 674)

GEORGIA LANDOWNERS' CO. v. GAZA-WAY. (No. 8269.)(Court of Appeals of Georgia, Division No. 1.
April 4, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR §216(2)—GROUNDS OF REVIEW—REQUEST FOR INSTRUCTIONS.**

The complaint contained in a number of grounds of the motion for a new trial is to the effect that the court erred in failing to charge certain principles of law involved in the case, under the pleadings and under the evidence. On a careful examination of the whole charge it appears that the court covered substantially all the issues involved; and, in the absence of an appropriate and timely request for more specific instructions, none of the assignments of error are meritorious.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628.]

2. SUFFICIENCY OF EVIDENCE.

The evidence is sufficient to sustain the verdict, and the court did not err in overruling the motion for a new trial.

Error from Superior Court, Fulton County; C. W. Smith, Judge.

Action between Georgia Landowners' Company against C. G. Gazaway. Judgment for the latter, and the former brings error. Affirmed.

Jas. L. Key, of Atlanta, for plaintiff in error. W. H. Terrell, of Atlanta, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 685)

BROOKSHIER v. WILLIAMS. (No. 8104.)(Court of Appeals of Georgia, Division No. 1.
April 5, 1917.)*(Syllabus by the Court.)***1. RIGHT OF ACTION — MALICIOUS PROSECUTION.**

"An arrest under process of law, without probable cause, when done maliciously, gives a right of action to the party arrested." Civ. Code 1910, § 4450. "A criminal prosecution, maliciously carried on, without any probable cause, whereby damage ensues to the person prosecuted, gives him a cause of action." Civ. Code 1910, § 4439.

2. PROSECUTION—IMPRISONMENT.

An inquiry before a committing court or a justice of the peace amounts to a prosecution. Civ. Code 1910, § 4445. Any unlawful detention of the person of another, for any length of time, whereby he is deprived of his personal liberty, constitutes false imprisonment. Civ. Code 1910, § 4447.

3. WANT OF PROBABLE CAUSE.

"Want of probable cause" is the same in actions for malicious arrest as in actions for malicious prosecution. Civ. Code 1910, § 4452. Want of probable cause is a question for the jury, under the direction of the court. Civ. Code 1910, § 4440.

4. ERRONEOUS GRANTING OF NONSUIT.

The evidence in the present record was sufficient to carry the case to the jury on the counts for illegal arrest, false imprisonment, and malicious prosecution. The defensive facts developed on cross-examination of the plaintiff

were not sufficient to authorize the trial court to find, as a matter of law, that probable cause existed for the arrest, imprisonment, and prosecution of the plaintiff. The court therefore erred in granting a nonsuit.

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by G. B. Brookshier against W. S. Williams. Judgment of nonsuit, and plaintiff brings error. Reversed.

J. R. Johnston, of Ringgold, for plaintiff in error. W. C. Martin and Wm. E. Mann, both of Dalton, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 688)

CONTINENTAL AID ASS'N v. HAND.

(No. 7988.)

(Court of Appeals of Georgia, Division No. 1.
April 4, 1917.)*(Syllabus by the Court.)***1. JUSTICES OF THE PEACE §162(1)—JURISDICTION—EFFECT OF APPEAL.**

Where suit was brought in a justice's court, and, after judgment for the plaintiff, he, being dissatisfied with the amount thereof, entered an appeal to a jury in that court, the subsequent entry of an appeal to the superior court by the defendant did not serve to remove the case from the justice's court, or to divest it of its jurisdiction, even though both appeals were entered within the time allowed by law for entering such appeals.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 600, 603.]

2. RULING ON CERTIORARI.

The evidence authorized the verdict and judgment in the justice's court, and accordingly the court did not err in overruling the certiorari.

Error from Superior Court, Floyd County; Moses Wright, Judge.

Suit by Charles Hand against the Continental Aid Association. Judgment for plaintiff, and defendant brings error. Affirmed.

Harris & Harris, of Rome, for plaintiff in error. L. H. Covington, of Rome, for defendant in error.

LUKE, J. [1] Suit was instituted in a justice court, and the plaintiff obtained a judgment against the defendant on February 3, 1916. The plaintiff was dissatisfied with the amount of the judgment, and on February 4th entered his appeal to a jury in the justice's court. Subsequently (February 7th) the defendant entered its appeal to a jury in the superior court. The question for determination is: Which appeal is good in law? This case is controlled by the "miller's rule." Section 4741 of the Civil Code of 1910 provides:

"In all cases in a justice's court where an appeal can be entered to a jury in the superior court, it shall be lawful for such appeal to be entered to a jury in either the justice court or the superior court; any case appealed to a jury in

one court shall not be appealed to a jury in the other court."

The plaintiff selected the court of proper jurisdiction in which to submit his cause, and exercised the right of appeal first, and appealed his case to a jury in the same court. The appeal of the plaintiff took precedence of the appeal entered to a jury in the superior court. This ruling is not in conflict with that in the case of McDougald v. Chattanooga Medicine Co., 10 Ga. App. 653, 73 S. E. 1089.

The precise question raised in the present case is decided in the case of East Tennessee, Virginia & Georgia Railway v. Miles, 72 Ga. 252.

[2] The case as appealed was submitted to the proper court, the evidence authorized the verdict, and the court did not err in overruling the certiorari.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 660)

VAUGHN v. AMERICAN NAT. INS. CO.
(No. 7993.)

(Court of Appeals of Georgia, Division No. 1.
April 4, 1917.)

(Syllabus by the Court.)

PAYMENT OF INSURANCE PREMIUMS.

It was not error to rule out the testimony of the plaintiff as to the custom of the defendant company in allowing the plaintiff to become in arrears in the payment of his insurance premiums; the evidence of the plaintiff did not authorize a verdict in his favor, and the court did not err in overruling the certiorari.

Error from Superior Court, Fulton County; Geo. L. Bell, Judge.

Action by C. C. Vaughn against the American National Insurance Company. Judgment for defendant and plaintiff brings error. Affirmed.

H. A. Allen and T. J. Lewis, both of Atlanta, for plaintiff in error. Willis M. Everett, of Atlanta, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 675)

FALLIGANT v. BLITCH. (No. 7999.)

(Court of Appeals of Georgia, Division No. 2.
April 4, 1917.)

(Syllabus by the Court.)

1. ATTACHMENT §90 — AFFIDAVIT — VALIDITY.

An attachment issued upon an affidavit administered by a clerk of the superior court is absolutely void, and consequently cannot be the basis of a judgment in attachment as against the specific property seized thereunder. Heard v. National Bank of Ill., 114 Ga. 291, 40 S. E. 266; Bruce v. Conyers, 54 Ga. 678.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 224-230.]

2. ATTACHMENT §276 — DECLARATION — DISMISSAL.

But, though such an attachment be absolutely void, this is no ground for dismissing a declaration therein, praying for judgment in personam, where the declaration has been properly filed and the defendant duly cited to appear, and general appearance has been made therein. McAndrew v. Irish-Am. Bank, 117 Ga. 510, 43 S. E. 858; Cincinnati, N. O. & T. P. Ry. Co. v. Pless & Slade, 3 Ga. App. 400, 60 S. E. 8.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 973-978.]

Error from Superior Court, Bryan County; W. W. Sheppard, Judge.

Action between Isaih Falligant and C. G. Blitch. Judgment for the latter, and the former brings error. Reversed.

J. Hartridge Smith, of Savannah, for plaintiff in error.

JENKINS, J. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 639)

LOACH v. CITY OF LA FAYETTE.
(No. 8499.)

(Court of Appeals of Georgia, Division No. 1.
April 3, 1917.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §592(2)—ORDINANCES—OFFENSE.

An act penalized by a law of the state may be penalized also by a municipal ordinance, if there is in the municipal offense some essential ingredient not essential to the state offense, or if the municipal offense lacks some ingredient essential to the state offense.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1312.]

2. MUNICIPAL CORPORATIONS §592(2)—ORDINANCE—OFFENSES—STATE OFFENSE.

A municipal ordinance which prohibits keeping open any store or other place of business within the corporate limits of a city on the Sabbath day for the purpose of selling or vending any article of merchandise is not subject to attack on the ground that it penalizes an act forbidden by section 416 of the Penal Code (1910), which declares that "any person who shall pursue his business, or the work of his ordinary calling, on the Lord's Day, works of necessity or charity only excepted, shall be guilty of a misdemeanor." Pursuing one's business, or the work of his ordinary calling, on the Sabbath is distinct from keeping open a place of business within a municipality for the purpose of carrying on such ordinary work or calling.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1312.]

Error from Superior Court, Walker County; Moses Wright, Judge.

W. A. Loach was convicted before the mayor of the City of La Fayette of the offense of keeping open place of business on the Sabbath day for the purpose of selling goods in violation of an ordinance, and he brings error. Affirmed.

W. M. Henry, of Rome, and Rosser & Shaw, of La Fayette, for plaintiff in error. Shattuck & Shattuck, of La Fayette, for defendant in error.

WADE, C. J. The plaintiff in error was tried before the mayor of the city of La Fayette for the offense of "keeping open place of business on the Sabbath day for the purpose of selling goods in violation of city ordinance." It appears, from the answer of the mayor, that the ordinance upon which this charge was based is as follows:

"Be it ordained by the mayor and council of the city of La Fayette, and it is hereby ordained by the authority of the same, that, from and after the passage of this ordinance, it shall be unlawful for any person, firm, or corporation to keep open any store, stall, market shop or other place of business within the corporate limits of said city on the Sabbath day for the purpose of selling or vending any article of merchandise, soft drink, or anything kept or sold in a market; or by offering for sale any article of merchandise or soft drink, or by following any usual business or occupation on any Sabbath day, the same not being an act of charity or necessity. Any person or persons violating this ordinance or any part thereof shall be punished as prescribed in section 22 of the Code of the City of La Fayette—adopted October 22, 1903."

A judgment of guilty was rendered and a fine of \$25 imposed. The defendant sued out certiorari, the certiorari was overruled, and he brought the case to this court.

Eliminating from our consideration the assignments of error expressly abandoned in the brief of counsel for the plaintiff in error, or not specifically argued, and hence, under the rulings of this court, in effect abandoned (*Rounsaville v. Camp*, 19 Ga. App. 336, 91 S. E. 446, and cases there cited; *Mills v. State*, 19 Ga. App. —, 91 S. E. 918), the only questions remaining for determination are whether the ordinance under which the accused was convicted is a valid ordinance; and, if so, whether the evidence supports the judgment of guilty thereunder. The rule laid down in *Kassell v. Savannah*, 109 Ga. 491, 35 S. E. 147, that a municipal corporation cannot, without express legislative authority so to do, enact a valid ordinance for the punishment of an act which constitutes an offense against the penal statutes of the state, is so well fixed by repeated adjudications of the Supreme Court and this court as to require no more than bare mention, and it only remains to determine whether the ordinance under which the defendant was convicted in this case attempts to punish an act made penal by a statute of the state.

[1, 2] Section 416 of the Penal Code of 1910 declares that:

"Any person who shall pursue his business, or the work of his ordinary calling, on the Lord's Day, works of necessity or charity only excepted, shall be guilty of a misdemeanor."

The ordinance under review in this case attempts to penalize several different and distinct acts. It declares that it—

(1) "Shall be unlawful for any person, firm, or corporation to keep open any store, stall,

market shop or other place of business within the corporate limits of said city on the Sabbath day for the purpose of selling or vending any article of merchandise, soft drink, or anything kept or sold in a market."

And it further penalizes:

(2) "Offering for sale any article of merchandise or soft drink, or * * * following any usual business or occupation on any Sabbath day, the same not being an act of charity or necessity."

The defendant in this case was convicted of keeping open his place of business on the Sabbath day for the purpose of selling goods in violation of the city ordinance. We are therefore only concerned with the offense covered by the first division of the ordinance; and as to the second division it is enough to say that if the acts thereby prohibited should come within the scope of the ordinary vocation of any person prosecuted thereunder, no conviction could legally be had in the municipal court. The state law prohibits any person from pursuing his business or the work of his ordinary calling on the Sabbath, "works of necessity or charity only excepted," and the first division of the ordinance we are considering makes it an offense against the city of La Fayette to keep open any store, etc., or other place of business within the limits of that city on the Sabbath day "for the purpose of selling or vending any article of merchandise, soft drink or anything kept or sold in a market." It is apparent that a radical difference exists between the offense penalized by the state law and that penalized by the division of the city ordinance under which the defendant was convicted.

It seems to be well settled that:

"An act penalized by a law of the state may be penalized also by a municipal ordinance, if there is in the municipal offense some essential ingredient not essential to the state offense, or if the municipal offense lacks some ingredient essential to the state offense." *Morris v. State*, 18 Ga. App. 684; ¹ *Howell v. State*, 13 Ga. App. 74, 76, 78 S. E. 859; *Oallaway v. Mims*, 5 Ga. App. 9, 62 S. E. 654; *Athens v. Atlanta*, 6 Ga. App. 245, 64 S. E. 711; *Alexander v. Atlanta*, 6 Ga. App. 329, 64 S. E. 1105; *Oallaway v. Atlanta*, 6 Ga. App. 354, 64 S. E. 1106; *Dorn v. Atlanta*, 6 Ga. App. 529, 65 S. E. 254.

The test to be applied in determining whether or not the state law and the municipal ordinance cover the identical offense is whether the one can be violated without violating the other. It was said in *Karwisch v. Atlanta*, 44 Ga. 205, that:

"The Christian Sabbath is a civil institution older than our government, and respected as a day of rest by our Constitution; and the regulation of its observance as a civil institution is within the power of the Legislature, as much as any regulations and laws having for their object the preservation of good morals, and the peace and good order of society. [*Lindenmuller v. People*] 33 Barb. [N. Y.] 548; [*State v. Meyer*] 1 Speers [S. C.] 306. And it is within the right of the city of Atlanta to punish keeping open doors by dealers generally, in the limits of the city upon Sunday, for the purpose of preventing the violation of the state laws, as well as preserving the public respect for the Lord's Day."

In that case an ordinance which prohibited any dealer in any commodity or thing from keeping open his doors on Sunday was under review, and the court held that, although the city could not pass an ordinance upon any violation of the Sabbath day which was punished by state law, it was—

“competent for the city, by its ordinances, to compel all dealers to keep the doors of their houses of business shut on the Sabbath. This in itself constitutes an offense. * * * The party may not be engaged in his ordinary calling, or he may. The ordinance leaves his guilt on these matters to the state laws, but punishes the keeping of such stores open as an act independent of the violation of the state laws or Sunday statutes.”

The ordinance now under review is apparently somewhat different from the ordinance construed in the *Karwisch Case*, supra, in that it declares that it shall be unlawful to keep open any store, etc., “for the purpose of selling or vending any article of merchandise,” etc. In other words, it is apparently not a violation of the ordinance to keep open a store unless it is kept open for the purpose of effecting the sale of merchandise. It becomes, therefore, necessary to determine whether the evidence disclosed that the store of the defendant was kept open on Sunday for the purpose of selling articles or things prohibited by the ordinance.

The entire evidence was delivered by the city marshal, who testified in substance as follows: I know the defendant's place of business, and was about his place on “yesterday, the 19th day of March.” His place was open, and he was selling merchandise other than medicine. He conducts a drug business, but I saw him sell Coca-Cola, and also saw him sell cigars, and saw him sell some medicine. All that I saw him sell was in the line of his usual everyday business; just what he sells every day. It appears to be conceded that the day testified about was the Sabbath, and at least there is no contention to the contrary. Under the provisions of the state law it is clear that necessary drugs may be dispensed on Sunday, and therefore a municipality could not make it criminal so to dispense them. Whether a drug store might therefore keep open its doors to the general public for the sole purpose of dispensing drugs or other such like articles of necessity, notwithstanding a municipal ordinance declaring that no doors to any place of business within the limits of such municipality shall be kept open on the Sabbath, need not be decided. In this case not only does the ordinance penalize the keeping open of a place of business solely where it is kept open for the purpose of selling merchandise, but the testimony authorizes the conclusion that the drug store of the defendant was not kept open for the sole purpose of dispensing drugs or other such merchandise as would constitute articles of necessity within the meaning of the state statute. In other words, under a strict

construction of the ordinance, or of that part thereof with which we are concerned, the keeping open of any store, etc., within the limits of the city of La Fayette is prohibited only where such store is so kept open for the purpose of selling or vending any article of merchandise, etc.; and, giving a reasonable construction to the ordinance, the articles of merchandise therein referred to, and which one may not keep open a store for the purpose of selling or vending, must be held to be such articles of merchandise as would not come within the clear exception provided for in section 416 of the Penal Code. That is, the merchandise must not be such merchandise as can be legally sold or dispensed in furtherance of works of necessity or charity on the Sabbath. Clearly one may sell necessary medicines on Sunday without violating the state law, and could not be punished therefor under a municipal ordinance penalizing such an act, since the state law itself expressly authorizes such sales. So, too, since it is practically necessary to keep open a drug store on Sunday in order that the general public in need of necessary medicines may have ready access thereto, it would seem to follow that notwithstanding an ordinance which prohibited the keeping open of all stores or places of business on Sunday for the purpose of vending any article of merchandise, a drug store might be kept open on Sunday without violating the ordinance, provided it is so kept open for the sole purpose of dispensing medicines or selling other articles of necessity or charity. Where, however, it appears that one sale of an article not coming within the exception in the statute which authorizes the dispensing of necessary medicines or the sale of necessary articles was in fact made on the Sabbath day, and that the doors of the store where the sale was effected were kept open when the sale was made, it can be legally inferred that the doors were so kept open for the purpose of effecting a sale or sales declared to be unlawful by the state law; and, under a proper ordinance, the keeping open for such a purpose can be punished by a municipality.

A municipality cannot punish for the sale of whisky, since such an act is penalized by the state law, but prior to the adoption of the prohibition act of 1915 (Laws Ex. Sess. 1915, p. 77), whatever may be the present status of the law, an ordinance, penalizing the keeping of liquor for the purpose of sale, could be adopted by a municipality without infringing upon the state statute prohibiting sales. In fact our courts have frequently recognized a distinction between a state statute prohibiting the keeping of intoxicants at the place of business of the defendant and municipal ordinances penalizing the keeping of such liquors anywhere (including the defendant's place of business) for the purpose of sale. It has often been held that in prosecutions under municipal ordinances for the storage

of whisky for the purpose of sale, proof of one sale was sufficient to establish the purpose for which at least the whisky sold was kept. Coming, therefore, to the evidence in the case under consideration, in order to apply it to the ordinance, we find that on the Sabbath day the defendant kept open his place of business in the city of La Fayette; that his place of business was a drug store, and on the day in question he not only dispensed drugs, but also sold cigars and soft drinks. If the purpose in storing whisky can be inferred from one sale of whisky, so likewise can the purpose in keeping open a place of business on Sunday be inferred from proof of one sale of an article or thing, the sale of which on that day is prohibited by law. In the case of *Penniston v. Newnan*, 117 Ga. 700, 45 S. E. 65, it is held that a sale of tobacco and cigars on the Sabbath does not constitute a work of necessity; and it may be said, in passing, that nothing in that case (which is based on a different ordinance) is opposed to the ruling made in this case. It has been often held that every person is presumed to intend the natural and necessary consequences of his acts, and that every criminal act is presumed to rest on criminal intent, though such presumption may of course be rebutted. In fact our statute itself declares (Penal Code, § 32):

"Intention will be manifested by the circumstances connected with the perpetration of the offense."

Where one, therefore, keeps open the doors of a drug store and sells cigars and soft drinks it may be fairly inferred that his store was kept open for this exact purpose, notwithstanding he may have also sold drugs or other articles or things which under the law he had a right to sell. At all events, the mayor, passing upon the facts, was authorized to find that the purpose of the defendant in keeping open his store was in part at least to effect sales of various articles, the sale of which on the Sabbath was not authorized by law, and to declare him guilty of a violation of the ordinance which made it an offense against the city to keep open a store on that day for the purpose of vending or selling any article of merchandise other than articles of necessity. As already said, any fair construction of the ordinance must read into the language thereof the proviso that works of necessity or charity are excepted; and, so construed, the statute does not prohibit the sale of articles of necessity within the meaning of the law.

The whole matter may be thus summed up: A municipality may by ordinance penalize an act performed by one for the purpose of enabling him to accomplish another and distinct act which itself constitutes a violation of a state statute.

Judgment affirmed.

GEORGE and LUKE, JJ., concur.

(19 Ga. App. 630)

NATIONAL BISCUIT CO. v. FUTRELL.
(No. 7954.)

(Court of Appeals of Georgia, Division No. 1.
April 5, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT § 258(7)—ACTION FOR INJURY—SUFFICIENCY OF PETITION.

A petition by a minor alleged that on March 5, 1915, he was employed by the defendant company in the capacity of delivery wagon driver; that it was his duty to drive a wagon and horse of the defendant and deliver goods of the defendant in the city of Macon; that it was the duty of the company to furnish him with a wrench with which he could keep the nuts on the ends of the axle spindles tight, and thereby prevent them from getting loose and coming off; that under the rules of the defendant its officers were charged with the duty of furnishing each wagon driver with such a wrench; that the nuts would come off and allow the wheels of the wagon to come off, and this was well known to the officers and agents of the defendant company, but unknown to plaintiff, and the danger of driving the wagon without having the nuts tightened was not apparent to him; that he often requested the officers and agents of the defendant to furnish him with the wrench, but they failed to furnish it, and on the contrary stated to him that the wheels of the wagon would not come off; that it was safe for him to drive the wagon and to go on with his work, and that they would give him a wrench to tighten the nuts in time, and that he would not be injured in driving the wagon until they could obtain the wrench; that the officers and agents making these promises and assurances were the alter ego of the defendant, and that the plaintiff relied upon the promises and assurances of said company and continued to operate the wagon, believing that he would not be injured or damaged thereby; that on the date named, while in the discharge of his duty in the city of Macon, a wheel of the wagon came suddenly off, and he was thrown violently to the pavement, and sustained certain injuries set forth in his petition; and that he was in the exercise of ordinary care and diligence, and could not have avoided the consequences to him caused by the negligence of the defendant, which is specified as follows: (a) In failing to furnish him with a wrench with which to tighten the nuts; (b) assuring him that he would be furnished with such a wrench, and that he would not be injured by driving the wagon without having the nuts tightened; (c) furnishing him with a wagon to drive which was not reasonably safe and so defective as to injure him while he was at work with it in an ordinarily careful and prudent manner. *Held*, the petition set forth a cause of action. It cannot be held, as matter of law, that the negligence alleged was not the proximate cause of the injury, or that the plaintiff's injury was due to his own negligence, or that he assumed the risk due to continued use of the wagon, or that the consequences of the defendant's negligence could have been avoided by the exercise of ordinary care on the part of the plaintiff. The grounds of special demurrer are without merit. *Moore v. Dublin Cotton Mills*, 127 Ga. 616, 56 S. E. 839, 10 L. R. A. (N. S.) 772; *Mitchell v. Schofield's Sons Co.*, 91 S. E. 275, decided October term, 1916, and cases there cited.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 821.]

2. MASTER AND SERVANT § 219(4)—MASTER'S LIABILITY—ASSUMPTION OF RISK.

The employé is deemed to accept the risk ordinarily incident to his employment, notwithstanding the promise of the employer to furnish a necessary tool, where the danger is great, ob-

vious, or immediate—such as a reasonably prudent man would not encounter. The court did not err in overruling the demurrer to the petition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 613.]

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by L. B. Futrell, by next friend, against the National Biscuit Company. Judgment for plaintiff, and defendant brings error. Affirmed.

R. Curd and Hardeman, Jones, Park & Johnston, all of Macon, for plaintiff in error. Walter De Fore and Jas. C. Estes, both of Macon, for defendant in error.

GEORGE, J. Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 701)

HERRING v. CRAWFORD et al. (No. 7788.)
(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1140(5)—USURY \S 117—SUFFICIENCY OF EVIDENCE—MODIFICATION OF JUDGMENT.

Where usury was pleaded to a suit on a note payable to the Farmers' State Bank for the principal sum of \$124, dated October 2, 1914, due December 1, 1914, and bearing interest from maturity at 8 per cent. per annum, and the defendant, who was the only witness, testified as follows: "I gave the Farmers' State Bank a note for \$124 in October or November of 1914. On the day I gave note I borrowed \$118 or \$119. There were some odd cents. The amount I borrowed did not exceed \$119. I do not know the exact amount." Asked, on cross-examination, if he did not borrow as much as \$121, the witness answered that he did not. "It was not more than \$119. I cannot tell the exact amount. I do not know how much I got. I only made the one loan from them." Held, that the testimony was of sufficient certainty to establish the fact that a sum not exceeding \$119 was received by the defendant from the plaintiff in the loan. This holding is not in conflict with the ruling made in the case of Equitable Mortgage Co. v. Watson, 116 Ga. 879, 43 S. E. 49. In that case nothing positive as to the amount received was testified to. Since the note does not purport to recite what amount was deducted for interest prior to its maturity, and the defendant offered the only testimony upon this subject, the judgment for the amount sued for was erroneous, and it is ordered that the judgment of the court below be affirmed on condition that the plaintiffs shall, within 20 days after the remittitur from this court is made the judgment of the court below, write off from the judgment the usury therein, so that the judgment shall include only the principal sum of \$119, with interest thereon at 8 per cent. per annum from the date of the note. If the plaintiffs shall fail to comply with this condition, it is ordered that the judgment be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4467; Usury, Cent. Dig. §§ 328-340.]

Error from City Court of Cairo; W. J. Willie, Judge.

Suit by W. T. Crawford and others, receiv-

ers, against O. Herring. Judgment for plaintiffs, and defendant brings error. Affirmed on condition.

S. P. Cain, of Whigham, for plaintiff in error. M. L. Ledford and Claude Christopher, both of Cairo, for defendants in error.

JENKINS, J. Judgment affirmed, upon condition.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 705)

JONES v. DONALDSON, Deputy Sheriff.
(No. 7965.)

(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)

(Syllabus by the Court.)

1. ESTOPPEL \S 18—FORTHCOMING BOND—ACTION—DEFENSES.

Where, upon the levy of a fi. fa. on personal property, the defendant executes a forthcoming bond, in which the quantities of the property levied on are set forth and a valuation of each article of property is stated and specifically agreed upon by the parties to the bond; and where the defendant in fi. fa., by reason of the levying officer's acceptance of the bond, acquires a substantial benefit thereunder, he will not thereafter, in a suit on the bond, be permitted to deny the existence of the property set forth in the bond, by entering a plea to that effect, alleging that the levying officer did not measure the articles so enumerated, but only guessed at the quantities as therein stated; nor should he be permitted to deny the valuations of the property as set out and agreed to by the terms of such bond. Stroud v. Hancock, Sheriff, 116 Ga. 332, 42 S. E. 496.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 24.]

2. ESTOPPEL \S 18—FORTHCOMING BOND—VALUATION OF PROPERTY.

While, under section 6043 of the Civil Code of 1910, in such a suit the measure of damages is the value of the property at the time of the delivery, with interest thereon, up to the amount due the plaintiff in execution, with interest and cost, and not the penal sum named in the bond (Hatton v. Brown, Sheriff, 1 Ga. App. 747[6], 57 S. E. 1044), yet where the bond signed by defendant in fi. fa. and under which he obtained possession of the property sets forth in detail the agreed valuations of the specific properties therein enumerated, the defendant, in the absence of special facts alleged to the contrary, should be bound thereby. The court did not err in sustaining the demurrer to defendant's plea.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 24.]

Error from City Court of Statesboro; Remer Proctor, Judge.

Suit by D. B. Donaldson, Deputy Sheriff, for use, etc., against J. T. Jones. Demurrer to defendant's plea sustained, and he brings error. Affirmed.

Anderson & Jones, of Statesboro, for plaintiff in error. Brannen & Booth, of Statesboro, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 706)

THOMASVILLE LIVE STOCK CO. v. BURNLEY et al. (No. 7906.)(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)*(Syllabus by the Court.)***1. APPEAL AND ERROR \S 282, 780(1) — MOTION TO DISMISS — BILL OF EXCEPTIONS — MOTION FOR NEW TRIAL.**

The motion to dismiss the bill of exceptions in this case is denied because: (a) The fund for distribution was raised by the levy of the execution of the plaintiff in error, and the rule and notice thereof served by the sheriff on the plaintiff in error made him a party. Civ. Code 1910, \S 5348; Crawford v. Williams, 76 Ga. 792 (1); Morrison Heard & Co. v. Ponder, 45 Ga. 167 (3); Mattox v. Barry, 136 Ga. 183 (2), 71 S. E. 155; De Vaughn v. Byrom, 110 Ga. 904 (1), 906, 36 S. E. 267; Orr v. Webb, 112 Ga. 810, 38 S. E. 98. (b) The case having been passed upon by the judge without the intervention of a jury, a motion for a new trial was not necessary. Gleason v. Traynham & Ray, 111 Ga. 887, 36 S. E. 969.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1662-1665, 3121.]

2. EXECUTION \S 326 — JUDGMENT \S 248 — DISTRIBUTION OF PROCEEDS—RELIEF.

The Thomasville Live Stock Company was the owner of a mortgage on realty. It did not foreclose the mortgage, but obtained a general judgment on the debt secured by it, and the property embraced in the mortgage was sold by the sheriff. Burney, another creditor, who had a judgment younger than the mortgage, but older than the judgment of the Thomasville Live Stock Company, brought a rule against the sheriff for distribution of the funds realized from the sale of the property. In answer thereto the sheriff admitted the levy and sale, and alleged that the judgment of Burney was older than the judgment of the Thomasville Live Stock Company, but that the latter judgment was based upon a mortgage older than the judgment of Burney, and asked the court's direction in the distribution of the fund. The record does not show that the Thomasville Live Stock Company ever filed any pleading, equitable or otherwise, in answer to the rule; nor was it shown that the mortgagor consented to the sale of the entire estate, or that there was anything in the pleadings or the evidence to show that the entire estate was sold or brought its value, and there was no allegation of insolvency of the defendant, or that the holder of the younger judgment was otherwise remediless. The fund was therefore properly awarded to the older of the two judgments. "When the claimant alleges and proves such facts only as entitle him to strict legal rights, the court will enforce only his legal rights, and these according to the strict rules of law; but when he alleges and proves such facts as entitle him to equitable relief, the court will enforce his equitable rights." *Berrie v. Smith*, 97 Ga. 785, 26 S. E. 757, 758; *Baker and Hall v. Gladden*, 72 Ga. 469; *National Bank v. Exchange Bank*, 110 Ga. 696, 36 S. E. 265; *De Vaughn v. Byrom*, 110 Ga. 904, 36 S. E. 267(5); *Hughes v. Mt. Vernon Bank*, 4 Ga. App. 23, 60 S. E. 809; *Bryan v. Madison Supply Co.*, 135 Ga. 171, 68 S. E. 1106(4).

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 966-973; Judgment, Cent. Dig. \S 434.]

Error from City Court of Thomasville; W. H. Hammond, Judge.

Rule by the Thomasville Live Stock Company against J. G. Burney and others, for the distribution of a fund in the possession

of the sheriff. Judgment for the latter, and the former brings error. Affirmed.

Merrill & Grantham, of Thomasville, for plaintiff in error. Titus, Dekle & Hopkins and W. I. MacIntyre, all of Thomasville, for defendants in error.

BLOODWORTH, J. Judgment affirmed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 706)

POWERS v. BRUNSWICK-BALKE-COLLENDER CO. (No. 7982.)(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)*(Syllabus by the Court.)***1. SALES \S 201(4) — SHIPMENT — TITLE TO GOODS.**

There was some evidence which authorized an inference that the goods in question were shipped "order notify." If the goods were so shipped, then, under the other facts of the case, the plaintiff below had title to them at the time of the execution of the retention of title contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. \S 535, 536.]

2. CORPORATIONS \S 35 — PRINCIPAL AND AGENT \S 136(8)—SALES \S 52(3), 66, 469, 480(6) — CHARTER — AGENTS — CONDITIONAL SALE—TITLE—EVIDENCE.

A corporation cannot exist before its charter has been granted. Until the breath of life has been breathed into it by the law it is nothing—not even a corpse; for a corpse is the remains of something that once lived, and an embryo corporation has never even lived. Such an embryo corporation cannot be a principal in any transaction, and, of course, not being a principal, cannot have agents. In this case, the corporation not then being in existence, E. H. Spiro, the individual who attempted to act as its agent in purchasing the property in question, could not legally so act, and, under such circumstances, it must be held that the words following his name in the receipt and invoice, to wit, "in behalf of Macon Billiard Parlor," are mere descriptive persons or surplage. It was a legal impossibility for a nonexistent corporation to become the purchaser of the property. An attempted sale of the personal property to such a "corporation," made to an individual who claims to be an agent of the corporation, but who gives his individual promissory notes for the balance of the purchase price of the property, and who signs his individual name to a retention of title contract (which is duly and properly recorded), is in law a sale to the individual, and, until the purchase price is paid, the title remains in the vendor, and the latter, by a suit in trover, can recover the property or its value from an innocent third person who has possession of the property and who purchased the same at a sheriff's sale, the goods having been sold as the property of "the Macon Billiard Parlors," a corporation not in existence at the time of the execution of the retention of title contract. This is true, although there may have been an attempt in the first instance to sell the property to the individual as the agent of the embryo corporation, and although part of the purchase price thereof was paid from a general fund put up by this individual and the other persons who were petitioning for the grant of the corporation's charter. The corporation not then being in existence, this fund was not

the money of the corporation, but merely the money of the individuals. The fact that a charter was granted to the corporation shortly after the retention of title contract had been duly and properly recorded (in Spiro's name) is immaterial, the controlling question in the case being, under the law: Was the property sold to the "Macon Billiard Parlors," the corporation not then in existence, or to E. H. Spiro, the individual who purported to buy the property as agent of such "corporation," but who gave his individual notes for the balance of the purchase price of the property, and who individually signed the retention of title contract for the purchase of the property? See *Florida Coca-Cola Bottling Co. v. Ricker*, 136 Ga. 411(2), 416, 71 S. E. 734; *Greenfield v. Stout*, 122 Ga. 303, 50 S. E. 111; *McCandless v. Inland Acid Co.*, 112 Ga. 291, 294, 37 S. E. 419; *Atkinson v. Brunswick-Balke-Collender Co.*, 144 Ga. 694, 87 S. E. 891.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 103; *Principal and Agent*, Cent. Dig. §§ 485, 486; *Sales*, Cent. Dig. §§ 126, 181, 1357, 1448.]

3. APPEAL AND ERROR ⇐1004(1), 1013 — SALES ⇐480(6)—BURDEN OF PROOF—VALUE OF PROPERTY—CONCLUSIVENESS OF VERDICT.

Upon the trial the plaintiff elected to take a money verdict for the value of the property sued for, and there was evidence which authorized the finding of the trial judge, sitting by consent without the intervention of a jury, as to the value of the property. While the burden is upon the plaintiff to establish such value by a preponderance of the evidence, the finding of a jury, or of the court sitting without the intervention of a jury, upon this question, will not be disturbed by this court where there is any evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3944, 3946, 3993-3995; *Sales*, Cent. Dig. § 1448.]

4. OVERRULING MOTION FOR NEW TRIAL.

The special grounds of the motion for a new trial are merely amplifications of the general ground that the verdict is contrary to law and the evidence, and the court did not err in overruling the motion for a new trial.

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by the Brunswick-Balke-Collender Company against F. H. Powers. Judgment for plaintiff, and defendant brings error. Affirmed.

Hardeman, Jones, Park & Johnston, of Macon, for plaintiff in error. W. C. Turpin, Jr., of Macon, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 714)

NAYLOR v. CHICAMAUGA QUARRY & CONSTRUCTION CO. (No. 8027.)

(Court of Appeals of Georgia, Division No. 1. April 9, 1917.)

(Syllabus by the Court.)

DEMURRER TO PETITION.

The petition did not set forth a cause of action, and the court did not err in sustaining the demurrers. *Cowart v. Southern Marble Co.*, 144 Ga. 254, 87 S. E. 282; *Wadley Southern Ry. Co. v. Durden*, 142 Ga. 361, 82 S. E. 1055.

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Frank Naylor against the Chicamauga Quarry & Construction Company. Judgment for defendant on sustaining demurrer to petition, and plaintiff brings error. Affirmed.

David S. Atkinson, of Savannah, for plaintiff in error. Osborne, Lawrence & Abrahams, of Savannah, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 681)

PUSHA v. OCEAN S. S. CO. (No. 8022.)

(Court of Appeals of Georgia, Division No. 1. April 5, 1917.)

(Syllabus by the Court.)

MASTER AND SERVANT ⇐259(3)—ACTION FOR INJURY—SUFFICIENCY OF PETITION.

The petition did not set forth a cause of action, and the court did not err in sustaining a general demurrer thereto.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 839.]

Error from City Court of Savannah; Davis Freeman, Judge.

Action by Ben Pusha against the Ocean Steamship Company. Judgment for defendant, and plaintiff brings error. Affirmed.

David S. Atkinson, of Savannah, for plaintiff in error. H. W. Johnson, of Savannah, for defendant in error.

LUKE, J. The petition of the plaintiff is substantially as follows: The Ocean Steamship Company owns, controls, and operates a line of ships. On June 29, 1916, the plaintiff, as a laborer, was employed to help load the ship. The gang of laborers with which plaintiff was working were under a foreman, and were engaged in loading lumber, 3x10, 30 feet long, on the upper deck toward the stern of the ship, against No. 4 hatch on the port side, and were storing the lumber so that it would come in contact with the forward end of the hatch on its left-hand side. The lumber was heavy, each piece weighing about 800 pounds. There were nine men in the gang of laborers in which the plaintiff was working, but, under a rule of the company, and in this instance at the direction of the stevedore, the gang were split, five men were put to work on the other side of the ship, and the remaining four men, of whom the plaintiff was one, were put to work loading the lumber on the port side of the ship. When they were loading the lumber and as they were putting a heavy stick of the lumber up on the top tier in accordance with the rules of the company, the plaintiff and Joe Barnwell raised the end next to the hatch, up on the tier, and in accordance with the said rule while petition-

er held the end up, Barnwell left him and went to the other end to assist the other two men in raising that end on the tier. The rule of the company in regard to storing this lumber was in substance as follows:

"As many men as are necessary lift one end of the lumber up on the tier. This end is to be held in place by a laborer or laborers, and as many men as are necessary lift the remaining end up on the tier."

In this instance two men were not strong enough to lift the other end, and it became necessary under the said rule of the company for Barnwell to go to the other end to assist in lifting it. This action, under the said rule, left the plaintiff to hold the end which had been placed up on tier. As the lower end of the lumber was being lifted by the three men the strain on the plaintiff became so great that he was unable to hold his end of the lumber on the tier, and it fell off, striking him and knocking him into the open hatch. He did not know the lumber was too heavy for him to hold. He was earnestly engaged in his work, which required the concentration of all of his faculties, and he assumed that the defendant would not place him in a dangerous position. When it became apparent to him in the exercise of ordinary care that he could not hold the lumber it was too late to recall Barnwell to his assistance. He could not by jumping backwards, avoid the lumber striking him, because there was donkey engine of the defendant directly back of him, and the only way to escape death was to jump toward the open hatch and this he did, the lumber at the same time striking him, and knocking him into the hatch, and he fell to the lower "between decks," a distance of about 28 feet, breaking both of his forearms and injuring his hip. The four men, who, under the rule of the defendant, were placed at the work of storing this lumber, were not sufficient to handle it. The lumber was too heavy for them to handle, and too heavy for him to hold up on the top tier.

The defendant was negligent in having the hatch open through which he could fall in case the lumber fell on him or towards him, and the only place he had to go in case the lumber did fall was upon this hatch or into it. The work was strenuous and arduous, and required his attention. He assumed that his employer would not put him at a dangerous place to work without warning him or without proper rules to govern the work, or without sufficient men to handle the lumber. He did not know, and, because of his earnest work, in the exercise of ordinary care, could not know that the lumber was too heavy for him to hold, or that the hatch was open. When he did learn that the lumber was too heavy for him to hold it was about to fall on him. It was after Barnwell had turned loose and started toward the other end of the lumber, in accordance with the rules of the company, and the plaintiff did not have an

opportunity to get out of the way of the lumber or to call Barnwell back to help him hold it, for the lumber quickly fell upon him, knocking him into the open hatch. The lumber was placed on the ship under the supervision of the stevedore, and the stevedore was familiar with the handling of lumber and with its weight, and he and the defendant knew, or could have known in the exercise of ordinary care, that the lumber was too heavy for four men to handle and store in the manner required by defendant. They knew, or in the exercise of ordinary care could have known, that the plaintiff could not hold one end of the heavy stick of lumber up on a high tier, as required by said rule of the defendant; that the hatch through which the plaintiff fell was open, and that if a stick of timber fell it would knock him, or other laborers who were in his position, into the open hatch; and that if the hatch had been covered his injuries would have been slight.

It is alleged that defendant was negligent: (1) In having a rule to split up a gang so that only four laborers should store lumber of a weight and size of the lumber which the plaintiff and his gang were storing; (2) in not having an additional man to assist the plaintiff in holding his end of the lumber on the tier; (3) in having a rule which required the man with whom the plaintiff was working, in lifting the end of the heavy and large piece of lumber up on the tier, to leave the plaintiff to hold the said lumber and go to the other end of the stick of lumber to raise the same, thus, through the working of the rule, leaving the plaintiff in this dangerous position; (4) in having the hatch open next where the plaintiff was working, this being the only retreat left open to him in case of the falling of the lumber as it did fall in this instance. It is alleged that each of these acts concurred in causing the injury, and that the plaintiff did not know of the same and did not have equal means with the defendant of knowing of the same; that he was where he had a right to be, and that he assumed that the defendant would furnish him a safe place to work and would have safe rules governing the conduct of the work.

The court sustained a general demurrer to the petition, and the plaintiff excepts.

This case is clearly distinguishable from the case of *Brown v. Rome Foundry Co.*, 5 Ga. App. 142, 62 S. E. 720. In the *Brown* Case one of the three men carrying the ladle was called away by an officer of the company, and Brown and his coemployé were directed by the alter ego of the company to proceed, and, without the help of the employé so called away, the load carried was too burdensome for the two to carry. In the instant case the rule pleaded required that a sufficient number of men stand at each end of the timber to manage the weight. The plaintiff and Barnwell complied with the

rule, and were holding one end of the lumber. Barnwell, a fellow servant, despite the rule, and with the knowledge and not against the advice of the plaintiff, violated the rule and left the plaintiff to hold the lumber, while he volunteered to assist other coemployes at the other end of the lumber. The facts set forth in the petition do not show that the injury to the plaintiff is attributable to the negligence of the defendant. The court did not err in sustaining the general demurrer.

Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 716)

PITMAN v. McKEON. (No. 8056.)

(Court of Appeals of Georgia, Division No. 1, April 9, 1917.)

(Syllabus by the Court.)

1. LANDLORD AND TENANT \S 311—DISPOSSESSORY WARRANT—AMENDMENT—STATUTE.

A dispossessory warrant and affidavit may be amended by adding to and making more full the description of the property from which it is sought to evict the defendant. Civ. Code 1910, \S 5706. In this case the court did not err in allowing the amendment, or in overruling the motion to dismiss the proceeding.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 1322-1324.]

2. ASSIGNMENT OF ERROR.

There is no merit in the assignment of error upon the excerpt from the charge of the court.

3. VERDICT—SUFFICIENCY OF EVIDENCE.

The evidence authorized the verdict in favor of the plaintiff.

Error from Superior Court, Tallahassee County; B. F. Walker, Judge.

Action by W. P. McKeon against H. W. Pitman. Judgment for plaintiff, and defendant brings error. Affirmed.

J. A. Beazley, of Crawfordville, for plaintiff in error. Hawes Cloud, of Crawfordville, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 660)

SHOEMAKER v. REESE. (No. 8002.)

(Court of Appeals of Georgia, Division No. 1, April 4, 1917.)

(Syllabus by the Court.)

JUSTICES OF THE PEACE \S 206(1)—CERTIORARI—ANSWER—DISMISSAL.

The answer of the justice of the peace to the writ of certiorari denied the truth of the allegations of the petition, and the judge of the superior court did not err in entering the following judgment in the cause, to wit: "The traverse to the answer of the magistrate having been found in favor of the answer, and the answer not showing that any plea was ever filed or tendered, I do not think the court committed any error in entering judgment for the plaintiff in this case. The suit was upon an itemized, verified account, and personal service on the defendant. It is ordered and adjudged that the

certiorari be and the same is hereby, overruled and dismissed."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. \S 802-806.]

Error from Superior Court, Carroll County; R. W. Freeman, Judge.

Action between J. H. Shoemaker and D. S. Reese. Judgment for the latter, and the former brings error. Affirmed.

Buford Boykin, of Carrollton, for plaintiff in error. H. C. Strickland, of Carrollton, for defendant in error.

LUKE, J. Judgment affirmed.

WADE, C. J., and GEORGE, J., concur.

(19 Ga. App. 676)

RUSSELL et al. v. GILLILAND. (No. 8113.)

(Court of Appeals of Georgia, Division No. 2, April 4, 1917.)

(Syllabus by the Court.)

1. HOMESTEAD \S 169—WAIVER—SALE.

"A homestead which has been regularly set apart can neither be waived nor renounced by the head of the family so as to authorize a levy upon, and sale of, the property so set apart, under an execution issued upon a judgment rendered against him; and if, pending the existence of the homestead, such property be levied upon under such an execution and sold, the sale is void, and a purchaser thereat acquires no title, even though the judgment upon which the execution issued is based upon a promissory note containing a stipulation in which the head of the family does solemnly waive and renounce the benefit of the homestead." *Rodgers v. Baker*, 96 Ga. 800, 22 S. E. 585. In the instant case the "pony" homestead was set apart in 1905, and the "waiver" note was executed by the head of the family in 1914.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 335.]

2. EXEMPTIONS \S 54—ACCRETIONS—STATUTE.

The accretions of homestead property are exempt from levy and sale. Civ. Code 1910, \S 3398; *Powers v. Rosenblatt & Co.*, 113 Ga. 559 (3), 39 S. E. 969.

(a) The provisions of Code, \S 3398, supra, apply to the statutory or "short" homestead as well as to the constitutional homestead. *Kupferman v. Buckholts*, 73 Ga. 778.

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. \S 76.]

3. NEW TRIAL \S 162(4)—HARMLESS ERROR—AMOUNT OF RECOVERY—INTEREST.

The court having required the plaintiff to write from the verdict the item of \$1.60 interest, the error in the charge, that if the jury found in favor of the plaintiff he would be entitled to recover the value of the cows, together with hire and interest, was corrected.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 327.]

4. APPEAL AND ERROR \S 639(2), 1136—RECORD—BRIEF OF EVIDENCE—GROUNDS OF MOTION FOR NEW TRIAL—CONSIDERATION—AFFIRMANCE.

The general grounds of the motion for a new trial, that the verdict is contrary to law and the evidence, cannot be considered, as such grounds require a review of the evidence; and that which purports to be a brief of the evidence shows on its face that it is incomplete, and raises a legitimate inference that it does not contain all the material evidence adduced

on the trial. Under such circumstances, there being no merit in any of the special grounds of the motion for a new trial, the judgment of the lower court must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2787, 3247-3486.]

Error from Superior Court, Catoosa County; A. W. Flite, Judge.

Action by J. J. Gilliland against G. E. D. Russell and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Wm. E. Mann, of Dalton, for plaintiffs in error. M. L. Harris, of Ringgold, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 877)

REID v. TYSON. (No. 8202.)

(Court of Appeals of Georgia, Division No. 2.
April 4, 1917.)

(Syllabus by the Court.)

1. TRIAL \Leftrightarrow 139(1)—NONSUIT—STATUTE.

A nonsuit should not be granted unless "the plaintiff fails to make out a prima facie case, or if, admitting all the facts proved and all reasonable deductions from them, the plaintiff ought not to recover." Civ. Code 1910, § 5942.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

2. TRIAL \Leftrightarrow 139(1)—NONSUIT—EVIDENCE—ERROR.

In this case, there being evidence upon which a jury could have based a verdict for the plaintiff, the trial judge erred in granting a nonsuit. *Bryan v. Walton*, 20 Ga. 480 (5); *E. & W. R. Co. of Ala. v. Sims*, 80 Ga. 807 (2), 6 S. E. 595; *Vickers v. A. & W. P. R. Co.*, 64 Ga. 307.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341.]

Error from Superior Court, Calhoun County; E. E. Cox, Judge.

Action by H. M. Reid against A. J. Tyson. Judgment of nonsuit, and plaintiff brings error. Reversed.

W. S. Collins, of Morgan, and B. W. Fortson, of Arlington, for plaintiff in error.

BLOODWORTH, J. Judgment reversed.

BROYLES, P. J., and JENKINS, J., concur.

(19 Ga. App. 660)

BACON v. HOWARD. (No. 8035.)

(Court of Appeals of Georgia, Division No. 1.
April 4, 1917.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \Leftrightarrow 303 — MOTION FOR NEW TRIAL—VERIFICATION.

The general grounds of a motion for new trial; that is: (1) The verdict is contrary to the evidence and without evidence to support it; (2) the verdict is decidedly and strongly against the weight of evidence; and (3) the verdict is contrary to law and the principles of justice and equity—contain no recital of fact that requires a formal verification by the trial judge

in order to authorize the Court of Appeals to entertain and consider such grounds. *Harris v. State*, 120 Ga. 196, 47 S. E. 573.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756.]

2. APPEAL AND ERROR \Leftrightarrow 303 — MOTION FOR NEW TRIAL—VERIFICATION—SUFFICIENCY.

If formal approval of the general grounds of the motion for a new trial were necessary, the order of the trial judge, entered thereon, containing the following clause: "This defendant, Berry Bacon, having made a motion for new trial in said case on the grounds therein stated, said grounds having been approved by the court," etc., would appear to be sufficient to authorize this court to entertain and consider such grounds.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756.]

3. APPEAL AND ERROR \Leftrightarrow 303—AMENDMENT TO MOTION FOR NEW TRIAL—VERIFICATION.

An order in the usual form, approving the recitals of fact contained in an amendment to the motion for a new trial, and signed, "Walter W. Sheppard, Sup. Cts. Atlantic Circuit," is a verification by the trial judge of the recitals of fact in the amendment, especially where the motion for a new trial recites that it is made in a case tried in Evans superior court, and where the rule nisi issued thereon is signed, "Walter W. Sheppard, judge of the Superior Courts of the Atlantic Circuit," and where the signature of the judge to his order overruling the motion for a new trial is followed by the words, "Judge S. Cts. Atlantic J. C. of Ga.," and where the bill of exceptions, duly certified by the judge of the superior courts of the Atlantic circuit, recites that the movant "presented to the said presiding judge for an approval an amendment to his original motion for new trial, setting forth additional grounds thereof, which * * * amendment to said motion for new trial was * * * approved by said presiding judge and is of file as a part of the record in said case," and where such amendment is certified and sent up in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1756.]

4. EVIDENCE \Leftrightarrow 44 — JUDICIAL NOTICE — JUDGES.

The Court of Appeals will take judicial cognizance of the fact that his honor Walter W. Sheppard was judge of the superior courts of the Atlantic judicial circuit of Georgia at the date of the order approving the recitals of fact contained in the grounds of the amendment to the motion for new trial. Compare *Jossey v. Brown et al.*, 119 Ga. 758, 765, 47 S. E. 350; *Perry v. State*, 113 Ga. 936, 39 S. E. 315.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 66.]

5. LANDLORD AND TENANT \Leftrightarrow 294 — SUMMARY EVICTION—STATUTE.

The relation of landlord and tenant is indispensable to the maintenance of the proceeding authorized by section 5385 of the Civil Code of 1910, for the summary eviction of a person as a tenant holding over. Although there was sufficient evidence to warrant the jury in finding that the tenant entered into the possession of the premises during the lifetime of the intestate, under a contract of rental, nevertheless the evidence was undisputed that after the death of the landlord the tenant took possession of the premises under a deed from six of the nine heirs at law of the intestate.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1270.]

6. EXECUTORS AND ADMINISTRATORS \Leftrightarrow 130(2) — POSSESSION OF REAL PROPERTY—ACTIONS.

Ejectment in some one of its forms, and not the proceeding in Civ. Code 1910, § 5385, supra.

is the appropriate remedy for the administrator to pursue in order to recover the possession from the heir or any person who may have succeeded, either by operation of law or by purchase, to the rights and possession of the heir. *Cassidy v. Clark*, 62 Ga. 412; *Powell on Actions for Land*, 537, § 405. Compare *Watson v. Toliver et al.*, 103 Ga. 123, 29 S. E. 614, and *Williams et al. v. Seale*, 103 Ga. 801, 30 S. E. 644.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 538-540.]

7. EXECUTORS AND ADMINISTRATORS ⇐130(1)
—POSSESSION OF REAL PROPERTY—RIGHTS OF HEIRS—STATUTE.

"Upon the death of the owner of any estate in realty, which estate survives him, the title vests immediately in his heirs at law." Civ. Code 1910, § 3929. The heirs at law are entitled to the possession of lands owned by an intestate at the time of his death until it is needed by the administrator for the purpose of administration; that is, for the purpose of paying debts and making legal distribution to the heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 537.]

8. EXECUTORS AND ADMINISTRATORS ⇐130(2)
—POSSESSION OF REALTY BY HEIRS—SUMMARY EVICTION—FORM OF ACTION.

The evidence disclosed that the defendant in the eviction proceeding was holding possession of the land under his son, who had succeeded to the interest of certain of the heirs at law of the plaintiff's intestate. The deeds executed by the heirs at law were unimpeached, and the administrator was not authorized to recover the possession of the premises in this proceeding. The trial court therefore erred in overruling the motion for a new trial.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 538-540.]

Error from Superior Court, Evans County; *W. W. Sheppard*, Judge.

Action by *Henry Howard*, administrator, against *Berry Bacon*. Judgment for plaintiff, and defendant brings error. Reversed.

Way & Burkhalter, of Reidsville, for plaintiff in error. *Strange & Metts*, of Statesboro, and *J. P. Moore*, of Claxton, for defendant in error.

GEORGE, J. Judgment reversed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 675)

JOHNSON v. PACIFIC FIRE INS. CO.
(No. 8025.)

(Court of Appeals of Georgia, Division No. 2.
April 4, 1917.)

(Syllabus by the Court.)

1. INSURANCE ⇐634(1)—ACTION ON POLICY—PETITION—DEMURRER.

The policy of fire insurance upon personal property on which the suit was based contained the following stipulation: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of insurance be personal property and be or become incumbered by a chattel mortgage." The petition as amended showing upon its face that the personalty covered by the contract of insurance was so incumbered at the time the policy was issued, and it not being alleged that the insurance company knew of this incumbrance, or that it had, by indorsement on the policy or by addition thereto, abrogated or

waived the stipulation mentioned, the court properly dismissed the petition on oral demurrer. *Alston v. Phenix Insurance Co.*, 100 Ga. 287, 27 S. E. 981; *Hartford Fire Insurance Co. v. Liddell*, 130 Ga. 8, 60 S. E. 104, 14 L. R. A. (N. S.) 163, 124 Am. St. Rep. 157. See also, *Finleyson v. Liverpool, etc., Ins. Co.*, 16 Ga. App. 51, 84 S. E. 311; *Nowell v. British-American Assurance Co.*, 17 Ga. App. 46, 85 S. E. 498; *Liverpool, etc., Ins. Co. v. Hughes*, 145 Ga. 716, 89 S. E. 817.

(a) This ruling is not in conflict with section 2484 of the Civil Code of 1910, which reads as follows: "An alienation of the property insured, and a transfer of the policy, without the consent of the insurer, voids it; but the mere hypothecation of the policy, or creating a lien on the property, does not void." This section, when properly construed, means that the mere act in itself of creating a lien on the property insured does not avoid the policy. It does not mean that the policy cannot be avoided by the creation of a lien on the property insured where there is an express stipulation in the policy itself that such an act will void it. Neither is our ruling in conflict with the decision in *Clay v. Phoenix Insurance Co.*, 97 Ga. 44, 25 S. E. 417, for there the insurance company, through its agent, knew that the property was mortgaged when the policy was issued, but nevertheless issued the policy and accepted the premiums therefor; and the Supreme Court held that by such conduct the insurance company was estopped from pleading a forfeiture of the policy under the stipulations therein.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1593, 1596, 1598.]

2. ASSIGNMENTS OF ERROR.

The ruling made in the preceding paragraph being controlling, it is unnecessary to consider the remaining assignments of error.

Error from City Court of Hall County; *A. C. Wheeler*, Judge.

Action by *W. B. Johnson* against the *Pacific Fire Insurance Company*. Judgment for defendant, and plaintiff brings error. Affirmed.

Jos. G. Collins and *Luther Roberts*, both of Gainesville, for plaintiff in error. *Smith, Hammond & Smith*, of Atlanta, and *W. A. Charters*, of Gainesville, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 713)

LEXINGTON BREWING CO. v. SMITH.
(No. 8102.)

(Court of Appeals of Georgia, Division No. 2.
April 5, 1917.)

(Syllabus by the Court.)

INTOXICATING LIQUORS ⇐327(3)—BILLS AND NOTES — DIRECTED VERDICT — CONFLICTING EVIDENCE.

The controlling question in this case was whether the consideration of the notes sued on was the sale of intoxicating liquors, and the renting of a saloon and fixtures for the purpose of retailing such liquors, in the city of Chattanooga, Tenn., in violation of the laws of that state. There was an acute conflict in the evidence as to this question, and therefore the

court erred in directing a verdict for the defendant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 471.]

Error from Superior Court, Dade County; A. W. Flite, Judge.

Action by the Lexington Brewing Company against T. F. Smith. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed.

Whitaker & Foust and Payne & Hale, all of Chattanooga, Tenn., for plaintiff in error.

BROYLES, P. J. Judgment reversed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 704)

DREW v. CONE. (No. 7955.)

(Court of Appeals of Georgia, Division No. 2. April 5, 1917.)

(Syllabus by the Court.)

1. BROKERS \Leftrightarrow 54—ACTION FOR COMMISSION—SUFFICIENCY OF SERVICES.

Where a petition shows that the plaintiff entered into a contract with the defendant whereby the plaintiff, as broker, was to receive a commission of \$1,000 for his services in procuring a purchaser of certain corporate stock belonging to the defendant, on terms which, upon being first submitted to the defendant, should be declared acceptable to him, and where, from the plaintiff's evidence, it appears that under such an arrangement the plaintiff submitted to the owner an offer of purchase, whereby it was proposed that the stock be exchanged for certain real estate, but that the offer was declined by the owner, and the only acceptance shown was based upon the condition that the broker should receive his compensation from the purchaser, held that, under the provisions of the contract of employment and under the facts as here outlined, the commission claimed was not earned upon the theory that the broker had furnished a purchaser ready, able, and willing to buy, and who had actually offered to buy, on the terms stipulated by the owner. Civil Code 1910, § 3587; Gray v. Lynn, 139 Ga. 294, 77 S. E. 156; Phinizy v. Bush, 129 Ga. 479, 59 S. E. 259.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 75-81.]

2. BROKERS \Leftrightarrow 55(1)—ACTION FOR COMMISSION—RECOVERY.

On such a trial, it was not error to award a nonsuit, although the defendant owner of the stock may have subsequently effected an exchange of the property through different persons, where it further appeared that the plaintiff broker had not been given the exclusive sale of the stock, and there was nothing to indicate that the negotiations between the broker and purchaser had not been terminated. In the instant case, the terms submitted by the broker never having been agreed to by the owner, it differs from the case of Fenn v. Ware & Owens, 100 Ga. 563, 28 S. E. 238. It is distinguished from Hill & Moultrie v. Wheeler, 2 Ga. App. 349, 58 S. E. 502, and Graves v. Hunnicutt, 8 Ga. App. 99, 68 S. E. 558, in that the contract of employment in both of those cases specified the terms of sale, and in both of them there was evidence to show that the negotiations between the broker and the purchaser had not been terminated at the time the owner interfered, and solely by means of a reduction of price consummated the trade of which the broker was

otherwise the procuring cause. In the instant case no such question of good faith on the part of the owner is raised.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 82-84.]

Error from City Court of Macon; Du Pont Guerry, Judge.

Action by B. H. Drew against C. H. Cone. Judgment of nonsuit, and plaintiff brings error. Affirmed.

Julian F. Urquhart, of Macon, for plaintiff in error. Martin & Martin, of Macon, for defendant in error.

JENKINS, J. Judgment affirmed.

BROYLES, P. J., and BLOODWORTH, J., concur.

(19 Ga. App. 681)

CENTRAL OF GEORGIA RY. CO. v. SWANN. (No. 8297.)

(Court of Appeals of Georgia, Division No. 1. April 5, 1917.)

(Syllabus by the Court.)

1. DEATH \Leftrightarrow 18(2)—NEGLIGENT HOMICIDE—RECOVERY BY MOTHER—STATUTE.

In order for a mother to recover, under the provisions of section 4424 of the Civil Code of 1910, for the negligent homicide of her minor son, it must appear both that at the time of the homicide she was dependent upon the child and that the child contributed substantially to her support. The degree of dependence may be either total or partial, and the contribution by the child may be either in part or in full support of the mother.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20.]

2. DEATH \Leftrightarrow 18(3)—NEGLIGENT HOMICIDE—RIGHT OF RECOVERY.

In such a case the mother may recover, notwithstanding the father of the child be in life and in such a state of health as to enable him to perform labor. The right of action in favor of the mother is created by the fact of contribution and dependence, and not by the legal obligation to contribute to her support. The contribution may be either in labor or in money, or both.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20.]

3. DEATH \Leftrightarrow 18(3)—NEGLIGENT HOMICIDE—RIGHT TO RECOVERY—CONTRIBUTION.

If the father, the mother, and the minor son reside together and are mutually dependent upon the labor of the family for support, the minor son, whose labor, or the proceeds of it, go to the family support, is to be considered as contributing substantially to the support of the mother.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 20.]

4. DEATH \Leftrightarrow 57—NEGLIGENT HOMICIDE—PLEADING.

In a suit against a railway company for the negligent homicide of the plaintiff's son, it is necessary that the cause of action be plainly and distinctly set out, and the plaintiff cannot recover on account of acts of negligence not alleged in the petition.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 74.]

5. DEATH ~~§~~58(1)—NEGLIGENT HOMICIDE—PRESUMPTION.

In such a suit, if it be shown by evidence that the injury on account of which the suit was brought was caused by the running of an engine or cars of the defendant, the presumption arises that the company or its agents were guilty of the acts of negligence alleged in the petition.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 76.]

6. DEATH ~~§~~99(3) — NEGLIGENT HOMICIDE — EXCESSIVE DAMAGES.

A verdict for \$4,000, returned 4 years after the negligent homicide of plaintiff's son, who at the time of his death was 14 years of age, and who contributed substantially to the support of the mother, is not excessive.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125, 126, 128.]

7. RULING ON MOTION FOR NEW TRIAL.

The evidence in the present record warranted the verdict, and the exceptions to the charge of the court are without substantial merit. The court did not err in overruling the motion for a new trial.

Error from Superior Court, Washington County; R. N. Hardeman, Judge.

Action by Naomi Swann against the Central of Georgia Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Saffold & Jordan, of Swainsboro, for plaintiff in error. Samul H. Sibley, of Union Point, for defendant in error.

GEORGE, J. [1] The act of 1887 (Acts 1887, p. 45) codified in section 4424 of the Civil Code (1910), provides that:

"A mother, or, if no mother, a father, may recover for the homicide of a child minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child."

The language of this statute is that the recovery may be had either when the parent is dependent *or* when the child contributes to the parent's support; but it is settled, both by the decisions of the Supreme Court and of this court, that, in order to authorize a recovery, there must have been both dependency and contribution to the parent's support.

[3, 4] In the case of Clay v. Central Railroad & Banking Co. of Georgia, 84 Ga. 345, 10 S. E. 967, it was held:

"That the Legislature did not intend to give to a mother or father, under the circumstances stated, the right to recover for the homicide of a child, unless the mother or father was dependent upon such child for a support *and* such deceased child contributed to the support or maintenance of the mother or father."

And it was accordingly there ruled that the disjunctive "*or*," as used in this clause of the act, should be read as "*and*." This act was given the same construction in Smith v. Hatcher, 102 Ga. 158, 29 S. E. 162, and Augusta Southern Railroad Co. v. McDade, 105 Ga. 134, 31 S. E. 420 (7), and in many other decisions of the Supreme Court. Although in each Code adopted since the passage of that act, the Legislature has continued to use the disjunctive "*or*" as it appeared in the original

act of 1887, the courts of this state have continued to read the conjunctive "*and*" into the statute. Compare Fuller v. Inman, 10 Ga. App. 680, 74 S. E. 287 (1).

It is well settled that the statute with which we are now dealing, being in derogation of the common law, must be strictly construed. The act is partly punitive and partly compensatory, according to the opinion by Mr. Justice Lumpkin in Georgia Railroad & Banking Co. v. Spinks, 111 Ga. 571, 36 S. E. 855. However, the statute seems to be mainly compensatory. Indeed, this doctrine is fixed in the law of the state, and must have influenced the court in declaring that the Legislature meant to use the conjunctive "*and*" where the disjunctive "*or*" appears in the statute.

[2] While in a suit by a mother for the tortious homicide of her minor son, it is necessary to prove both dependence and material contribution to the support of the mother, it is equally well settled that this dependence may be either total or partial, and that the contribution to her support may be either in full or only in part. Since the decision delivered by Chief Justice Bleckley in the case of Augusta Railway Co. v. Glover, 92 Ga. 132, 18 S. E. 406, it has been recognized in this state that contribution by a child to a common stock out of which the family is supported constitutes such partial dependence and substantial contribution as will authorize the mother to recover for his negligent homicide, although the father be alive and able to labor. See Fuller v. Inman, *supra*; City of Thomasville v. Jones, 17 Ga. App. 625, 87 S. E. 923. In the present case the mother testified as follows:

"He [the son] gave his money to me, and I used it for the family, to help support the family. * * * Of course, I needed the child's money. * * * I needed the boy's money to assist us in the support of the family, because we had a right large family, and I needed it to help support the family."

It appears that the husband, who was a guard at the state convict camp, earned \$45 per month, but that when he was unable to labor a proper deduction was made for his lost time. The evidence discloses that the deceased was a bright boy, and was 14 years old at the time of his death, and that prior to his death he was earning \$15 a month by his labor, beyond the services directly performed for the mother. His monthly earnings were delivered to the mother, and were by her used to help support the family.

[5-7] The court clearly and repeatedly instructed the jury that, before the mother could recover, it must appear, by a preponderance of the evidence, both that she was dependent upon her deceased son and that he substantially and materially contributed to her support. The instructions to which exceptions are taken here did not confuse the jury, and the evidence is sufficient to sustain

their verdict, and the verdict is not excessive.

The petition alleged that the defendant company was negligent in failing to secure or fasten the rear door of the coach on which the plaintiff's minor son was riding as a passenger, and in leaving this rear door open without chains or other protection to keep any one from falling from the coach, and in disconnecting the coaches immediately attached to the coach in which her son was riding, without notice or warning to him, and in negligently locking and fastening the closet door in the rear end of the coach in which he was riding, and in running its train at a high and reckless speed, giving it a violent lurch when he was attempting to pass from the coach in which he was riding to the coaches which he supposed to be in the rear; it being, for reasons set forth in the petition, necessary for him to do so. No one saw him as he went out of the rear door of the coach. The facts and circumstances in the record are sufficient to authorize the jury to conclude that he did pass out of the rear door of the coach in which he was riding, and that he was killed by the operation of the defendant's train. The defendant offered no evidence. The presumption that the company was guilty of the acts of negligence specifically alleged in the petition is sufficient to authorize the recovery. Compare *G. S. & F. Ry. Co. v. Thornton*, 144 Ga. 483, 484, 87 S. E. 388.

The court did not err in overruling the motion for a new trial, and his judgment is therefore affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 674)

SIKES v. HURT. (No. 7971.)

(Court of Appeals of Georgia, Division No. 2
April 4, 1917.)

(Syllabus by the Court.)

1. EXECUTION \S 166—RES JUDICATA—AFFIDAVIT OF ILLEGALITY.

The court did not err in sustaining the demurrer to the affidavit of illegality, and in striking the affidavit, and in ordering that the execution proceed against the property of the defendant. The questions raised in the affidavit of illegality were substantially the same ones that the plaintiff in error had previously raised in a motion to set aside the verdict and judgment in the case, which motion was overruled, the judgment overruling the motion was not excepted to, and the time for excepting thereto had expired before the affidavit of illegality was filed. Under such circumstances the former judgment of the trial court was res judicata as to the issues raised in the affidavit of illegality. The defendant had had his day in court, and could not go behind the judgment by an affidavit of illegality. *Civ. Code 1910, §§ 4335, 4336, 5311; Rodgers v. Evans*, 8 Ga. 143(3), 146, 52 Am. Dec. 390; *Field v. Sisson*, 40 Ga. 68, 70; *Parker v. King*, 43 Ga. 299; *Brown v. Wilson*, 59 Ga. 605; *Manning v. Weyman*, 99 Ga. 57, 28 S. E. 58; *Southern Ry. Co. v. Daniels*, 103 Ga. 541, 29 S. E. 761; *Brock v. Brock*, 104 Ga. 10, 30 S. E. 424; *Fitzgerald Granitoid Co. v. Alpha Portland Cement Co.*, 15 Ga. App. 176, 82 S.

E. 774; *Harris v. Exchange Bank of Fort Valley*, 19 Ga. App. 185, 91 S. E. 211.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 485, 486.]

2. AFFIDAVIT OF ILLEGALITY—DISPOSITION.

Under the facts of the case it was not error for the trial judge, in passing upon the affidavit of illegality and the demurrer thereto, to consider the entire record in the original case (which had been tried by him) and his own judgment therein adjudicating the points at issue. See *Harris v. Exchange Bank*, supra.

3. OTHER ASSIGNMENTS.

The assignments of error as to other matters are without merit.

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by C. D. Hurt against W. J. Sikes. Judgment for plaintiff, and defendant brings error. Affirmed.

J. S. James & J. R. Bedgood, of Atlanta, for plaintiff in error. Geo. T. Northen, R. E. L. Cone, and Owens Johnson, all of Atlanta, for defendant in error.

BROYLES, P. J. Judgment affirmed.

JENKINS and BLOODWORTH, JJ., concur.

(19 Ga. App. 662)

DENHAM et al. v. TEXAS CO. et al.

(No. 8156.)

(Court of Appeals of Georgia, Division No. 1.
April 4, 1917.)

(Syllabus by the Court.)

1. DEATH \S 31(8)—NEGLIGENT HOMICIDE—RIGHT OF ACTION.

Minor children residing with their father cannot maintain an independent and separate suit for the negligent homicide of their mother, under section 4424 of the Civil Code of 1910, which provides that "the husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately * * * with the right of survivorship as to said suit if either die pending the action."

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 44, 45.]

2. DEATH \S 31(8)—NEGLIGENT HOMICIDE—RIGHT OF ACTION—MINOR CHILDREN.

The failure and refusal of the husband and father to join in the suit with the children for the negligent homicide of the mother will not authorize a separate suit by the children.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 44, 45.]

3. DEATH \S 46—NEGLIGENT HOMICIDE—PETITION.

The court did not err in sustaining the general demurrer to the petition.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. § 60.]

Error from Superior Court, Baldwin County; J. B. Park, Judge.

Action by C. E. Denham and others, by next friend, against the Texas Company and another. Judgment for defendants, and plaintiffs bring error. Affirmed.

C. E. Denham and others, by their next friend, filed suit against the Texas Company

and A. S. Denham, alleging the following facts: Plaintiffs are the minor children of A. S. Denham and Patty N. Denham. The Texas Company is a corporation nonresident of this state, and A. S. Denham is, and was at the time of the injury complained of, the company's agent in charge of its office in the county of the suit. On June 10, 1915, Mrs. Patty N. Denham, the mother of the plaintiffs, at the invitation of said A. S. Denham, agent of the Texas Company, and with the knowledge and assent of the Texas Company, occupied a seat and was riding in an automobile then being used by the Texas Company in the conduct of its business in said county. The said automobile was being then operated by A. S. Denham in the performance of his duties as the agent of said Texas Company. While the plaintiffs' mother was so riding, as the result of the negligence of A. S. Denham, her husband, in causing said automobile to collide with another vehicle, she was thrown from the automobile and killed. The specific negligence alleged was the operation of the automobile at a high and dangerous rate of speed, in violation of a valid municipal ordinance of the city of Milledgeville, and in violation of the rules of the road, and in violation of the law of the state, the failure to check the speed of the automobile on approaching a street crossing in the city of Milledgeville, and the failure to sound a horn or whistle or to give any warning in approaching the said street crossing. Mrs. Patty N. Denham, at the time of her death, was capable of earning \$60 per month, she was 34 years of age, and had a reasonable expectancy of 35 years of life, and the full value of her life was \$7,500. The petitioners are her only heirs at law. By amendment it was alleged that the car furnished by the Texas Company was defective, in that its brakes were out of order and would not operate, and could not be applied to stop the car when it was in motion; that the failure to have the car equipped with a proper brake was negligence, and contributed to the injury complained of; and that A. S. Denham, the father of the plaintiffs, refused to sue for the death of his said wife; and the prayer for judgment against him was stricken.

The Texas Company demurred to the petition, on the following grounds: (1) The allegations of the petition set out no cause of action against the defendant; (2) the petition shows on its face that the injury and death of the plaintiffs' mother was attributable to the negligence of their father, at whose invitation their mother was riding at the time; (3) the petition shows on its face that the father of the plaintiffs was living at the time the suit was filed, that the right of action for the homicide of the wife and mother was in the husband and father, and not in the children, and that during the lifetime of the father no right of action for the homicide of the mother exists in the chil-

dren. The court sustained the demurrer and dismissed the petition.

Hirtes & Vinson, of Milledgeville, for plaintiffs in error. Allen & Pottle, of Milledgeville, for defendants in error.

GEORGE, J. (after stating the facts as above). [1, 2] The principal, and perhaps controlling, question presented here is whether minor children can recover for the negligent homicide of their mother when the husband and father is living and refuses to sue. If the plaintiffs can recover at all, they must do so by authority contained in section 4124 of the Civil Code of 1910. This section first appeared in the Code of 1863 as section 2913, and in the Irwin revision as section 2920. See, also, section 2971 of the codes of 1873 and 1882. Section 2913 of the Code of 1863, *supra*, contains only the first sentence of the present section, which is as follows:

"A widow, or if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children."

This section of the Code of 1863 is codified from the act of 1850 (Cobb's Digest, 476) and the act of 1856 (Acts 1855-56, p. 155). The act of 1856 was an act to enlarge and extend the liability of railroad companies for injury to persons or property, and section 4 therein provided:

"If any one shall be killed by the carelessness, negligence or improper conduct of any of said railroad companies, their officers, agents or employes, by the running of the cars or engines of any said companies, that the right of action to recover damages, shall vest in his widow, if any, if no widow, it shall vest in his children if any, and if no child or children, it shall vest in his legal representatives."

In *Miller v. Southwestern Railroad Co.*, 55 Ga. 143, the court said:

"In providing in the Code who might recover damages for the homicide of another, it is limited to the widow and children of the husband or parent; the words in the act of 1856, 'if no child or children, it shall vest in his legal representative,' are omitted, and as the Legislature, in adopting the 2971st section, as it found it in the Code [1873], were dealing with the same subject-matter as contained in the fourth section of the act of 1856, we are bound to presume that the words 'if no child or children, it shall vest in his legal representative,' were intentionally omitted."

By the act of 1878 (Acts 1878-79, p. 59) it was provided:

"The plaintiff, whether widow or child or children, may recover the full value of the life of the deceased as shown by the evidence. In the event of a recovery by the widow, she shall hold the amount recovered, subject to the law of descents just as if it had been personal property descending to the widow and children from the deceased."

And it was there further provided:

"That no recovery had under the provisions of this act, and the law of which it is amendatory, shall be subject to any debt or liability of any character of the deceased husband or parent."

The first sentence of section 4424 of the present Code was considered and construed in *Atlanta & West Point Railroad Co. v. Venable*, 65 Ga. 55, and it was there held that the word "parent" meant either father or mother, and that the section gave a right of action to the minor children for the homicide of the mother, and did not restrict them to recovery for the homicide of the father. In that case it was not expressly decided, but in the argument sustaining the court's view it was intimated that the right of the child to recover for the death of its mother exists because the death of the father casts the burden of supporting the child on the mother, and the child thus becomes interested in the life of the mother. In *Mott v. Central Railroad*, 70 Ga. 680, 48 Am. Rep. 595, it was held that the adult son of the father, who died without widow or minor child, could not maintain a suit against the wrongdoer to recover damages for the homicide. The opinion in that case recognizes that the right of action is given the child for the negligent homicide of the husband or parent, but confines the right to a dependent member of the family at the time of the homicide of the parent, and confirms the intimation expressed in the argument in the *Venable Case*, supra. In *Scott, Next Friend, v. Central Railroad*, 77 Ga. 450 (2), it was unequivocally held:

"Where a husband and father is dead, a right of action arises in favor of the children for the homicide of their mother, but they have no such right of action where their father is alive."

That case was decided on November 23, 1886. In 1887 the Legislature further amended the section of the Code now under consideration, by inserting, after the words "surviving child or children," the following:

"The husband may recover for the homicide of his wife, and if she leave child or children surviving, said husband and children shall sue jointly and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or if no mother, a father, may recover for the homicide of a child, minor, or sui juris upon whom he or she is dependent, or who contributes to his or her support, unless said child leave a wife, husband or child. Said mother or father shall be entitled to recover the full value of the life of said child. The word 'homicide' under this section shall be held to include all cases where the death of a human being results from a crime or from criminal or other negligence." Acts 1887, p. 43.

Since the passage of this act no case involving the right of the child to recover for the negligent homicide of the mother, where the husband and father is in life and fails or refuses to join in the action, has been before the Supreme Court of this State, so far as we know.

Counsel for the plaintiffs in error contend that the amendment of 1887, supra, gives to the children a substantial interest in the life of the mother, even in the lifetime of the husband and father, and that the provision of that amendment requiring the join-

der of the children with the husband and father in the suit is merely a rule of practice, in no wise limiting the substantial right of the children to sue for the negligent homicide of the mother. It is urged that this provision aims to prevent a multiplicity of suits, but does not deny the right of the child or children to sue in the event the father and husband refuses to join in the action. It must be remembered that prior to the act of 1887 the father could not sue for the homicide of the mother. In the case of *Georgia Railroad & Banking Co. v. Wynn*, 42 Ga. 332, it was ruled that the husband has no right, under the common law or the statute law of Georgia, to maintain an action to recover damages for the homicide of his wife. While the act of 1887 was passed at the session of the Legislature next after the decision in *Scott v. Central Railroad*, supra, we are not by that fact persuaded that the Legislature intended to give to the child a right of action for the homicide of the mother if the husband and father were living. The plain language, "the husband may recover for the homicide of his wife" (the first clause of the amendment) would indicate that the Legislature intended to give the right of action to the husband for the homicide of his wife, a right theretofore denied the husband under the laws of the state.

Prior to the act of 1887, on the authority of the decisions of the Supreme Court cited above, the children had a right of action for the homicide of the mother, the husband and father being dead, but the husband had no right of action at all. The father and husband being in life, no one could recover for the homicide of the mother and wife. We think that this amendment intended to confer upon the husband the right of action for the homicide of his wife, but qualified this right by the provision that the action should be brought jointly in his name and in the name of the children, if any. If the amendment of 1887 affects the decision in the *Scott* and *Venable Cases*, supra, it simply put in the form of a statute the decisions of the court to the effect that during the life of the father the children had no separate cause of action in their own right. Our conclusion is influenced by the rule of strict construction always applied to the provisions of section 4424 of the present Code. The statute is in derogation of common law, and is strictly construed. It is not remedial and subject to liberal construction. The right to maintain a civil action for a negligent homicide has been restricted by the repeated decisions of the Supreme Court of this state to those persons expressly named or by necessary implication included in the terms of the statute. Moreover, it must be remembered that the right of civil action for a negligent death is founded upon the theory of compensation. The beneficial interest in the life of the deceased is the basis upon which the right

of recovery exists. So it is ruled in this state that a father cannot maintain an action for damages on account of the homicide of his infant child, who was at the time of its death incapable of rendering him any services. The mother cannot recover for the homicide of her son, unless she is able to allege and prove facts showing a pecuniary damage to her in the death of the son. While our statutes may be and are in certain instances punitive, they are largely compensatory. If a penalty were intended to be inflicted upon the wrongdoer, the Legislature might easily so provide, and then the wrongdoer could never escape for want of a party plaintiff. In conferring the right of action for a mere negligent homicide, the Legislature did not intend thereby to punish the wrongdoer.

Our attention is directed to the hardships that may and will often result to the children of the deceased mother, if they be not given the right of a separate action for her death. It is said that the father and mother may separate. It is said that the father may divorce the mother. At the present day this is too often true. It is said that the father may abandon his family, and that his whereabouts may be unknown to his children. We do not think that such injustice will flow from the construction we have here placed upon section 4424 of the Code. If the father is separated from the mother, and if the burden of supporting the children is cast upon the mother, she in legal effect is the head of the family, and for her wrongful death under such circumstances the children may have the right to sue. If the father be divorced, and if the mother be given the custody of the children, the provision of our law which compels her to support the children during their minority might confer upon them such a beneficial interest in her life as would enable them to maintain a suit in their own names for the death of the mother, but we do not so decide. If injustice to the children result in exceptional cases by reason of the construction here given to section 4424, that matter should be brought to the attention of the Legislature. In the present case the decision is certainly in no wise unjust to the children. The father is in life. The children are living with him. The civil law places upon him the duty to support his children, and the criminal law compels him to discharge this duty. His negligence caused the death of his wife, the mother of the plaintiffs. Certainly he cannot recover. The law gives to him the benefit of the wife's services during her life. If another wrongfully destroys the earning capacity of the wife, the right of recovery is in the husband. If her death is due to the negligence of another, the right of action, by the plain language of the Code section, is in the husband. If she leave child or children surviving, the husband and children must sue jointly, and not separately.

Conceding that the children have the joint right of action for the negligent homicide of the mother when the father is in life, a strict construction of the Code section confines them to a joint action against the wrongdoer. The section, by its terms, does not authorize a separate suit by the children; the father being in life. If this section be not given the construction here placed upon it, in a case where the homicide of the wife is caused by the negligence of one other than the husband, it is conceivable that the children may recover the full value of the life of the mother upon an allegation in the petition to the effect that the husband and father refuses to join in the action. This at the time of the filing of the suit and at the time of the trial, may in fact be true. It would be difficult to conceive any just or equitable ground upon which the husband's subsequent right to recover in his own right for the homicide of his wife could be defeated, where, as in this case, he is not made a party to the suit brought by the children.

[3] If we are correct in our conclusion, the plaintiffs cannot maintain this action. It is questionable whether the petition sets forth a cause of action, even if the right of the children to bring this suit is conceded. While it is averred that the mother was riding in the automobile of the Texas Company, with the knowledge and assent of that company, it is very plain to us that this knowledge and assent were in truth and in fact the knowledge and assent of her husband. The corporation is alleged to be a nonresident of the state, and the husband is alleged to be the agent in charge of its place of business in Baldwin county. The petition is to be construed most strongly against the plaintiffs. A fair, and certainly a strict, construction of the allegations made in the petition, would lead to the inference that the husband of the deceased was the only representative of the company in Baldwin county at the time of the death of his wife. It is alleged that the husband of the deceased was acting within the scope of his duties in permitting his wife to ride in the car with him. This is a very broad conclusion. The company ought not to be held liable merely because the husband invited the wife to ride with him in the car. Knowledge and consent, express or implied, upon the part of the company, is essential to the plaintiffs' cause of action. Moreover, the husband and agent must have been acting within the scope of his authority. The facts alleged in the petition, when conclusions are disregarded, hardly make a case entitling the plaintiffs to recover.

Our judgment is not, however, placed upon this ground. There was no special demurrer. Counsel may desire the Supreme Court of this state to pass upon the important question ruled in the headnotes to this opinion. We desire to leave the question unincumbered by any embarrassing observations, and rule directly that the trial judge rightly dismissed

the petition on demurrer, because the children have not, under the law of this state, the right to bring a separate action for the wrongful homicide of the mother, if the husband and father be in life, although he may refuse to join in the action.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(19 Ga. App. 687)

LIVSEY v. GEORGIA RY. & ELECTRIC CO.
(No. 8278.)

(Court of Appeals of Georgia, Division No. 1.
April 5, 1917.)

(Syllabus by the Court.)

1. TRIAL \S 329 — VERDICT — SUPPORT IN PLEADINGS.

The plaintiff can recover only upon the cause of action laid in his petition; and a verdict for the defendant is required when the cause of action thus laid is not proved, although another cause of action in favor of the plaintiff may appear from the defendant's testimony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 774-776, 782.]

2. NEGLIGENCE \S 119(7)—VARIANCE.

In a negligence case the plaintiff is required to set out his cause of action plainly and distinctly, and he cannot recover on account of acts of negligence not alleged in the petition. In such a case it is proper for the trial court so to instruct the jury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 212-216.]

3. NEW TRIAL \S 41(3) — GROUNDS — ELIMINATING ISSUE.

Where the jury find that the defendant is not liable at all, a complaint that the court erred in not submitting, but in eliminating, the question as to the plaintiff's permanent injury, will not require a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 71.]

4. APPEAL AND ERROR \S 1033(5)—HARMLESS ERROR—INSTRUCTION.

The error in stating, in immediate connection, sections 2781 and 4428 of the Civil Code of 1910, without proper explanation, is to qualify the former section by the latter, and in effect to make the defendant liable if the jury should find both parties negligent, notwithstanding the fact that, if the plaintiff exercised ordinary care, he would not have been hurt. Such a charge, if error at all, is beneficial, rather than hurtful, to the plaintiff in an action for personal injuries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4056.]

Error from Superior Court, De Kalb County; O. W. Smith, Judge.

Suit by F. I. Livsey against the Georgia Railway & Electric Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Alonzo Field, of Atlanta, for plaintiff in error. Colquitt & Conyers, of Atlanta, for defendant in error.

GEORGE, J. The plaintiff in error brought suit against the Georgia Railway & Electric Company for personal injuries, alleg-

ing that he was a passenger on one of the cars of the company, and that when the car reached his place of destination in the city of Decatur the car came to a stop, and he undertook to alight from the car, and when he was in the act of alighting the car was negligently and violently moved forward, throwing him to the ground and inflicting upon him certain physical injuries. The defendant contended that the plaintiff alighted from a moving car which had not stopped, but was running between stopping points, and that it was the act of the plaintiff himself which caused his injury. The defendant further contended that the plaintiff was not injured as claimed by him. There was a verdict for the defendant, and the plaintiff excepts to the order overruling his motion for a new trial.

[1, 2] 1, 2. In the present record the evidence for the plaintiff tended to sustain the allegations of his petition, while the evidence offered by the defendant tended to sustain its contentions. The judge charged the jury as follows:

"I charge you further that if Mr. Livsey attempted to step off the car while it was moving, then the jury should find for the defendant company. * * * because he alleges in his declaration that he undertook to debarb from this car after it had stopped, and it was not running at the time, and he says he was thrown off. Now, if he was injured in any other way than the way as alleged by him, then he cannot recover in this case."

He further charged the jury that no verdict in favor of the plaintiff could be returned on account of the failure of the conductor to cause the car to stop, or on account of the failure of the conductor to warn the plaintiff not to attempt to alight from the car while in motion. The plaintiff by his evidence sought to recover solely upon the theory that he undertook to alight from a standing car, and that the starting of the car with a sudden, violent jerk while he was in the act of alighting caused his injury. To meet this allegation and contention of the plaintiff, the defendant proved that the car was moving between stops, and had not come to a stop when the plaintiff voluntarily stepped off of the car. Unless the jury believed that the car came to a stop and started, and threw the plaintiff as alleged in his petition, it is plain that he could not recover. The only act of negligence alleged against the company is that, after having brought its car to a full stop, and while the plaintiff was in the act of alighting, it suddenly and violently caused its car to move forward. The question here involved is not whether the plaintiff could have alleged a cause of action upon the theory that he undertook to leave a slowly moving car, and that a sudden or violent jerk of the car caused his fall, nor whether the conductor in charge of the car was negligent in permitting him to attempt to alight from the car while in motion, but the ques-

tion here is, What were the allegations and contentions of the plaintiff upon which he based his right of recovery?

The court is not required to charge the jury on a wider or broader case than that made by the petition, though the evidence might warrant it were the petition amended. Compare *Doggett v. Simms*, 79 Ga. 253, 4 S. E. 909 (3). Even if the evidence made a good case, unless it be substantially the case alleged in the petition, the complainant ought not to recover. Compare *Rakestraw v. Brogdon*, 56 Ga. 549. It is settled in this state that the plaintiff must recover, if at all, upon the cause of action laid in the petition, and a verdict for the defendant is demanded when the cause of action thus laid is not proven, although another cause of action in favor of the plaintiff against the defendant may appear from the defendant's testimony. *Burdette v. Crawford*, 125 Ga. 577, 54 S. E. 677; *Napier v. Strong*, 19 Ga. App. —, 91 S. E. 579, 581, and cases there cited. The evidence for the plaintiff tended to sustain the contention made in his petition. The evidence for the defendant disproved this contention and established the contention of the defendant, to wit, that the plaintiff undertook to alight from a moving car. No amendment was made by the plaintiff during the progress of the trial. The court properly submitted the issue actually involved under the pleadings and the evidence, and these instructions of the court are not erroneous. "If during the progress of the trial the plaintiff sees that his evidence does not prove the charges of negligence made in his declaration, it is his right to amend the declaration to meet his evidence, provided he does not allege a new cause of action." *Hill v. Callahan*, 82 Ga. 109, 8 S. E. 730. If, during the progress of the trial, the plaintiff desires to take advantage of the defendant's negligence disclosed by the defendant's own evidence, then an appropriate amendment should be offered, specifically charging such negligence. In this case it is unnecessary to invoke the principle of law that the plaintiff's plea and his testimony are to be construed most strongly against him. He plainly and distinctly set forth the act of negligence upon which he relied for a recovery, and the court rightly instructed the jury that he could not recover on account of other negligence, even though such appeared.

[3] 3. In the motion for a new trial the point is made that the court erred in not submitting to the jury the question of the plaintiff's permanent injuries. From an inspection of the whole charge of the court it appears that this contention of the plaintiff in error is not well founded. Conceding it to be well founded, there is no merit in this ground of the motion, for the simple reason that the jury found in favor of the defend-

ant and never reached the question of damages at all. If the defendant is not liable at all, the charge eliminating from the consideration of the jury the particular item of damage on account of permanent injury will not require a new trial. The court instructed the jury to return a verdict for the plaintiff for his lost time and for his decreased capacity to labor, as well as for pain and suffering. The issues in the case were clear-cut and well-defined. The verdict for the defendant can be explained only upon the basis that the jury did not think the defendant liable at all. See *Binder v. Georgia Railway & Electric Co.*, 13 Ga. App. 381 (2) 384, 79 S. E. 216 (2); *McBride v. Georgia Railway & Electric Co.*, 125 Ga. 515, 54 S. E. 674 (1); *Edwards v. Block*, 73 Ga. 450 (3).

[4] 4. The contention is made by plaintiff in error that the court charged in immediate connection the substance of section 2781 and section 4426 of the Civil Code of 1910, without proper explanation. If this be error, the error consists in qualifying the former section by the latter, and the only effect of such a charge is to make the defendant liable if the jury should find both the plaintiff and the defendant negligent, notwithstanding the plaintiff failed to exercise ordinary care, or if, in the exercise of ordinary care he would have avoided injury to himself. The decisions by the Supreme Court are to the effect that a charge confusing the Code sections referred to, without proper explanation, is erroneous for the reason indicated. We are unable to see how this charge, if error at all, was hurtful to the plaintiff. It would seem that it directly benefited him. The verdict is not without evidence to support it, and the trial judge did not err in overruling the motion for a new trial.

Judgment affirmed.

WADE, C. J., and LUKE, J., concur.

(120 Va. 426)

VIRGINIA BLUE RIDGE RY. v. KIDD,
Clerk of Circuit Court.

(Supreme Court of Appeals of Virginia. Jan. 11, 1917.)

TAXATION — 351—TAX ON MORTGAGES—COMPUTATION.

The tax on deeds of trust and mortgages should be, under the proper construction of the statute providing therefor, computed on the principal amount of the bond or other obligations secured by such deeds of trust or mortgages.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 594.]

Original petition by the Virginia Blue Ridge Railway against E. L. Kidd, Clerk of the Circuit Court of Nelson County, for a peremptory writ of mandamus. Writ ordered to issue.

Caskie & Caskie, of Lynchburg, for plaintiff. The Attorney General, for defendant.

PER CURIAM. This day came again the parties, by counsel, and the court having maturely considered the petition of the plaintiff, the answer of the respondent, and arguments of counsel, is of opinion that the tax on deeds of trusts and mortgages should be, under the proper and long recognized construction of the statute providing therefor, computed upon the principal amount of the bond or other obligations secured by such deeds of trust or mortgages.

It is therefore considered that a peremptory writ of mandamus do forthwith issue directed to E. L. Kidd, clerk of the circuit court of Nelson county, requiring and commanding him to admit to record a certain deed of trust or mortgage from the said petitioner to the American Surety & Trust Company, which said deed secured the payment of \$400,000 represented by bonds of the Virginia Blue Ridge Railway payable in 30 years from the 1st day of August, 1916, and bearing interest at the rate of 6 per centum per annum, upon the payment to him of the tax of \$400 and recording fees; but no costs shall be taxed against the said respondent.

And it is further ordered that the service of a copy of this order upon the said respondent shall have the same force and effect as the service of a peremptory writ of mandamus.

(80 W. Va. 34)

Ex parte BEAVERS. (No. 3351.)

(Supreme Court of Appeals of West Virginia.
March 20, 1917.)

(Syllabus by the Court.)

1. DIVORCE \S 269(14) — ALIMONY—CONTEMPT—COMMITMENT.

To obtain his liberty on the ground of his inability to satisfy a decree for alimony, made in a suit for divorce, in which the court entering it had full and complete jurisdiction, a party committed on an attachment for his contumacious refusal to pay the amount so decreed against him must purge himself of the contempt, as far as possible, and make his application for such relief in the court in which he was committed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 763.]

2. HABEAS CORPUS \S 22(2) — RELEASE — RIGHT TO.

Without having done so, and clearly and fully proved his inability to satisfy the decree, he is not entitled to a discharge on a writ of habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 20.]

3. DIVORCE \S 269(13) — ALIMONY — ORDER — SUFFICIENCY.

Lack of a recital, in the order of commitment for such contempt, of a finding of the defendant's ability to pay the amount decreed against him, does not vitiate the order, nor rebut the presumption in favor of the correctness thereof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 762.]

4. DIVORCE \S 269(13)—ALIMONY—CONTEMPT—COMMITMENT.

Lack of a limitation upon the period of imprisonment adjudged by way of execution, to compel satisfaction of a decree for the payment of alimony, does not make it a decree of perpetual imprisonment, nor render the punishment incident thereto cruel or unusual within the meaning of constitutional provisions inhibiting such punishment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 762.]

Original application by C. C. Beavers for a writ of habeas corpus against D. C. Collins, jailer, etc. Writ denied, and petitioner remanded.

Sanders & Crockett and A. G. Fox, all of Bluefield, for petitioner. M. O. Litz, of Welch, for respondent.

POFFENBARGER, J. Seeking liberation from imprisonment by an order made in an attachment for failure and refusal to pay alimony decreed against him, in a suit for divorce, C. C. Beavers obtained a writ of habeas corpus, on his petition exhibiting therewith all the orders made and entered in the cause. The return to the writ relies upon the order of commitment as justification of his detention.

By an order entered April 8, 1914, a divorce a mensa et thoro was awarded his wife, and it was further adjudged, ordered, and decreed that she recover from him the sum of \$1,000, for the maintenance of herself and her eight infant children, and her costs including a \$20 attorney's fee. A decree of absolute divorce was entered March 13, 1915. Nothing having been paid, a rule in contempt was awarded September 17, 1915. An attachment was awarded March 2, 1916, and another June 1, 1916, under which an arrest was made. On a bond in the penalty of \$2,000, conditioned for his appearance June 13, 1916, he was released until that date. On his appearance, he was committed to the jail of McDowell county, until he should satisfy the decree for said sum of money, by an order reciting that he had "failed and refused to pay any of the alimony so decreed against him," and had, "in violation of the order of injunction" awarded against him in the cause, "disposed of all of his property in the state of West Virginia and moved to the state of Virginia." After having remained in jail six months, he was temporarily released on a \$1,000 bond, on account of impairment of his health, due to confinement. At the expiration of the period of liberation prescribed by the bond February 13, 1917, he appeared and was again committed.

The order of commitment was clearly remedial in its purpose. Although it recites violation of an injunction, it cannot be interpreted as resting upon that offense. Its plain purpose is compulsion of payment of the alimony, and that only. It says nothing about the costs or attorney's fees. Payment

of the alimony will fully satisfy the condition of the order and effect the prisoner's liberation.

Alleged inability to pay the amount decreed is the principal ground of relief. Both the verified petition and an affidavit filed, in resistance of the matters set up in the return, assert it. It appears from the latter, however, that the relator could have paid a considerable portion thereof, if he had desired to do so. At the date of the decree, he was the owner of a house and lot worth more than \$2,000. Before that date, he had contracted a sale of this property to one Price. Owing to Price's insolvency, the contract was rescinded and the purchase-money notes returned. Then the property was conveyed to W. F. Harman for a recited cash consideration of \$2,250. This occurred only a few days before entry of the decree and after Price had been enjoined from payment of the purchase money to Beavers. It is admitted that Beavers received \$1,500 in cash from Harman, but he swears it was necessary for him immediately to use \$700 or \$800 of that sum in the payment of debts, and that the residue has been lost in unfortunate business ventures and expended for the necessities of life.

[1] Whether this defense was set up in resistance of the order of commitment does not appear. None of the proceedings except the orders have been brought up. There is a presumption of correctness in favor of the order. 'That the cause of commitment was within the jurisdiction and power of the court is not denied. The order of commitment was made more than two years after his property was sold and, presumptively, after the purchase money was received. If Beavers did not set up and rely upon his lack of ability, in resistance of the order, he should have done so. If he then filed an affidavit, such as he has filed here, or orally testified to its purport and effect, a cross-examination and other evidence may have disclosed falsehood therein, amply justifying the action of the court thereon. His unwillingness to pay, if he could, clearly appears from the circumstances. In anticipation of a decree against him, and to render it unavailing, he attempted to convert his property into money, by a sale to Price. That attempt having been thwarted by an injunction, he rescinded the contract and conveyed to another party, and thus evaded the injunctive process of the court. He makes no pretense of having endeavored to pay the wife a cent of the \$1,500 he admits having received almost contemporaneously with the entry of the decree. He had no intention or desire to pay her anything and was determined to evade it, if possible. His conduct will bear no other interpretation. Any defense he may have made was, no doubt, read in the light of his contumacious conduct. He may have been willful and defiant, refusing

to make any attempt to purge himself of the contempt he had committed. As to all this the petition and affidavit are silent.

[2] The order cannot be reviewed for mere error on a writ of habeas corpus.

"Where the order is made, the process issued, or the judgment or decree rendered by a court having authority or jurisdiction in the matter, neither the regularity of the proceeding nor error committed by the judge or court in the exercise of its jurisdiction can be considered on habeas corpus." Church, *Hab. Cor.*, § 331; Bailey, *Hab. Cor.* p. 265, § 73; Yates v. Lansing, 5 Johns. (N. Y.) 282; *Ex parte Evans*, 42 W. Va. 242, 24 S. E. 388.

However erroneous the court's finding of facts may have been, it cannot be inquired into by this proceeding.

[3] If the inability of the relator to pay the amount decreed against him or any part thereof can be clearly established, whether it existed at the date of the order or not, he may be entitled to a discharge from custody; for the law does not contemplate unreasonable imprisonment by way of punishment, nor imprisonment as process for compulsion of payment, under circumstances rendering obedience of the decree impossible. But the application for relief on that ground should be first made to the court below. A party cannot defy the authority of a court in which he is a litigant, disobey its process and orders, go to jail for his contempt of its authority, and then obtain his liberty from another court, without having made the semblance of an apology. He must submit himself to the authority of the trial court, by purging himself of the contempt, and then make an application to it for such relief as he is entitled to claim. *Ex parte Spencer*, 83 Cal. 460, 23 Pac. 395, 17 Am. St. Rep. 266; *Ex parte Wilson*, 75 Cal. 580, 17 Pac. 698; *Ex parte Cottrell*, 59 Cal. 417; *Galland v. Galland*, 44 Cal. 475, 13 Am. Rep. 167; *Oswald, Contempt*, p. 253.

"It is the court whose mandate has been violated and whose dignity has been brought into disrepute by the commission of the contempt before which relief from punishment should, in the first place, be sought by a motion therein on behalf of the contemnor to vacate the proceedings." 4 Ency. Pl. & Pr. 807; *People v. Murphy*, 1 Daly (N. Y.) 462.

Neither the petition nor the affidavit discloses any submission to the authority of the court below, nor any willingness to submit. While there is no express declaration of defiance or insubordination, there is complaint of alleged injury and wrong done by the court. No disavowal of willful disobedience or intentional disrespect toward the court nor any application to it for liberation is disclosed. The relator has not exhausted his remedy in the court below, nor put himself in a situation to be heard here. He can at least purge himself of his contempt. Whether the court has properly decided he is able to pay or not, he is bound to submit to its authority. He is within its jurisdiction. It is often necessary to submit to erroneous de-

cisions. He cannot make his apology here, nor elsewhere than in the court whose authority he has defied. After having done that and there sought the relief he now asks, he may be in a situation to obtain his discharge here on a writ of habeas corpus.

"Whenever the party charged with a contempt is manifestly unable to perform the act or obey the order for a disobedience to which he is proceeded against, he may successfully interpose, as a defense in such proceedings, said inability to obey." 4 Ency. Pl. & Pr. 790.

Failure of the order to recite a finding of ability to pay does not invalidate it. Under our practice, there is a presumption in favor of the correctness of judgments and decrees entered by courts of general jurisdiction. This is rebutted, of course, by a disclosure of lack of jurisdiction on the face of the record; but a recital of a court's finding of fact is not ordinarily jurisdictional, and lack thereof in the order does not rebut the presumption. Contempt procedure, though drastic, is not statutory; nor is the jurisdiction special or limited. The jurisdiction exercised in this cause is an element or factor of general equity procedure.

[4] Lack of a limitation on the period of imprisonment neither makes the order one of perpetual imprisonment, nor the punishment cruel or unusual. If the relator can pay the amount decreed against him, he may liberate himself at any moment. As the courts sometimes say, he carries his own prison keys. If he cannot pay it, he may procure his release by full and clear proof of the fact; but he cannot trifle with the court having jurisdiction over him. His conduct has raised a strong presumption against the good faith of his defense, which he must clearly rebut, in order to free himself.

For the reasons stated, the prisoner will be remanded to the custody of the jailer of McDowell county.

(80 W. Va. 39)

LUSK v. AMERICAN CENT. INS. CO.
(No. 3224.)

(Supreme Court of Appeals of West Virginia.
March 20, 1917.)

(Syllabus by the Court.)

1. INSURANCE — 229(3) — CANCELLATION OF POLICY—POWER OF AGENCY—RECOVERY.

Where the authority conferred upon an insurance agency by a property owner relates only to the procurement of a policy of fire insurance, which provides that it may be canceled by the company upon five days' notice to the insured, the agency in effecting a cancellation at the direction of the insurer is its representative; and an instruction by the company to the agency, though timely given, to cancel the policy, and the action of the agency on the day before loss by fire in canceling the contract and substituting therefor a policy in another company, knowledge of which is not acquired by or communicated to the insured until after the fire, are ineffectual to discharge the original contract or to defeat recovery thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 503.]

2. INSURANCE — 376(2) — FIRE INSURANCE — WAIVER BY AGENT—STATUTE.

A clause in a fire insurance policy, in the form authorized by section 68, c. 34, Code 1913 (sec. 1430), forbidding waiver by an agent of "any provision or condition" thereof except by written indorsement thereon, relates to provisions and conditions the performance and fulfillment of which are essential to the validity of the contract and its continuance in force, and does not refer to stipulations to be performed after a loss has occurred.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 955.]

3. INSURANCE — 558(1) — FIRE INSURANCE — WAIVER OF PROVISIONS.

Notwithstanding such clause, the condition of the policy requiring notice and formal proofs of loss by the insured may be waived by parol by a local agent empowered to issue policies, collect premiums, and make renewals and cancellations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1376.]

4. INSURANCE — 558(1) — FIRE INSURANCE — NOTICE OF PROOFS OF LOSS—WAIVER.

Such condition is waived by conduct by the insurer or its authorized agent amounting to a recognition of liability, as an assurance or offer of payment of the loss or negotiations for its settlement as if formal proofs actually had been furnished, or if what is so said and done reasonably induce the insured to believe that proofs are not required or necessary and he is influenced thereby to rely in good faith thereon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1382, 1383, 1389, 1390.]

Error to Circuit Court, McDowell County.

Action of assumpsit by L. P. Lusk against the American Central Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Goodykoontz & Scherr, of Williamson, for plaintiff in error. Litz & Harman, of Welch, for defendant in error.

LYNCH, P. Upon a policy of insurance against loss by fire, drawn to cover an office building for one year from August 25, 1914, plaintiff brought assumpsit, and, upon defendant's demurrer to the evidence, recovered the judgment of which it complains. The fire that destroyed the property occurred at 1 o'clock on the morning of July 11, 1915. The grounds of defense are cancellation of the policy, failure to notify the company of the loss, and to furnish proofs of loss.

[1] The policy is the New York standard form, and reserves the right to cancel it by giving five days' notice to the insured. No such notice was given. The only attempt to comply with that provision of the contract was a notice to the Welch Insurance Agency, a copartnership representing defendant in procuring and writing for it policies of insurance in McDowell county, to cancel all policies procured for it through the agency and then in force in that county, among them being the one now in suit. Of this direction it is not contended plaintiff had notice or knowledge from any source whatever.

From the testimony it appears that in lieu of the policy issued by defendant Blakely, the active agent of the Welch agency, substituted a policy of another company on July 10, 1914, and on the evening of that day mailed it to plaintiff at Davy, the situs of the property insured. This policy plaintiff did not receive until July 13th, because of absence from home; and Blakely admitted he would not have received it until after the fire. Devoid as the record is of proof in the slightest degree tending to show the Welch agency had authority to represent plaintiff in the cancellation of the policy and the substitution of another therefor, it cannot be said the attempted cancellation operated to relieve defendant from liability. On the contrary, there is no escape from the conclusion that the agency as to that matter represented defendant alone; and it could not excuse itself from liability by cancellation except upon five days' notice, unless plaintiff waived that requirement. The transactions between plaintiff and the agency prior to the fire related solely to the issuance of the policy sued on. So far as appears, the authority conferred upon it by him was limited to the procurement of that indemnity. Clearly the insurance agency was not the agent of plaintiff to effect a cancellation of that contract, and notice to it by defendant therefor was not notice to the insured, and was ineffective because not communicated to him in compliance with the policy provisions. *Wight v. Royal Insurance Co. (C. C.)* 53 Fed. 340; *Insurance Co. v. Central Railway Co.*, 134 Fed. 794, 87 C. C. A. 300; *Assurance Co. v. Cooper*, 26 Colo. 452, 58 Pac. 592; *Hartford Fire Insurance Co. v. Tewes*, 132 Ill. App. 321; *American Fire Insurance Co. v. Brooks*, 83 Md. 22, 34 Atl. 373; *Snedcor v. Citizens' Insurance Co.*, 106 Mich. 83, 64 N. W. 35. For other cases see note 38 L. R. A. (N. S.) 623. Nothing in evidence discloses any desire, motive, or inducement actuating Lusk to discharge defendant from liability or to effectuate any change in the policy he then had. Nor did the mere retention by him of the substituted policy pending his efforts to secure an adjustment and settlement under the original contract constitute a waiver of want of notice or invalidity of the cancellation. *Quong Tue Sing v. Assurance Corporation*, 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144; *Insurance Companies v. Raden*, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 36.

There is not more plausibility in the contention that plaintiff failed to cause information of the loss to be imparted to defendant. He promptly notified the Welch Agency, through Blakely, who visited Davy on July 12th, saw what the fire had wrought, and to Perry, the special agent of defendant, reported all that was necessary to fix liability under the provision of the policy as to notice of the loss. Besides, according to the testimony of plaintiff, the defendant sent J. F. Hurt, an adjuster, to view the premises after

the fire. Moreover, the Welch agency wrote plaintiff July 13th:

"We have your favor of the 12th inst., advising us of your loss in the recent fire at Davy, and in reply beg to say that we have reported this loss to the company and will have your loss adjusted and paid within a few days."

And Blakely testified:

"I reported the loss in the usual way. * * * I wrote to Mr. Perry, the special agent of the American Central Insurance Company in charge of this section of the state. I told him the conditions and everything in regard to the loss."

The only other defense is based upon the failure to present to the company proofs of loss, by writing under oath, in strict compliance with a condition of the policy therefor. Plaintiff did not furnish any formal proofs of loss.

The loss was total; the destruction complete. No question has arisen as to ownership or incumbrances, or as to the amount of the loss sustained. Formal proofs could not have made these facts more clear; and enough is proved to warrant the inference that defendant was advised as fully and completely of the existence of these facts as it would have been had formal proof thereof been furnished as required by the policy. The testimony renders certain that the Welch Insurance Agency was as to the transactions the agent of the defendant. Blakely, the active manager and secretary-treasurer of the firm, puts that question beyond dispute. The defendant recognized that agency as its representative, and through it procured many contracts of insurance in McDowell county. These contracts the agency had authority to solicit, to write, and execute so as to bind the company, collect and remit premiums, and cancel policies when directed by the insurer or required by the insured. For these purposes the insurance companies represented by the agency supplied it with policies duly signed by them ready for delivery when countersigned by the agency. It was defendant's general agent in the transaction of its business in that locality. In it as such representative plaintiff apparently confided. To it he gave information of the loss, which it imparted to the defendant "in the usual way." Blakely told Perry "the conditions and everything in regard to the loss." But two witnesses testify, plaintiff in his own behalf, and Blakely for defendant; and their testimony does not conflict. They conferred upon the liability of the company, and Blakely assured plaintiff the policy would be paid promptly. These negotiations continued from a few days to three or four months after the fire; Blakely all the time assuring plaintiff the loss would be settled by the company. None of these facts does defendant undertake to controvert; but it is argued that they do not satisfy the condition of the policy requiring proofs of loss, and are insufficient to constitute a waiver of such requirement.

Courts look with disfavor upon attempts by insurers to evade liability by reliance up-

on forfeiture, and such a defense will not be permitted to defeat a just cause of action if there be reasonable ground on which to predicate a waiver of the forfeiture asserted. Although preliminary proofs of loss are made a condition precedent to the right to recover on a policy of insurance, yet, if what is said and done by the insurer, or by an authorized agent on his behalf may reasonably induce the insured to believe that formal compliance is not required, and he is influenced thereby to rely in good faith thereon as a waiver, such conduct will operate to excuse noncompliance. *Peninsular Land Co. v. Franklin Insurance Co.*, 35 W. Va. 666, 14 S. E. 237; *Hartford Fire Insurance Co. v. Keating*, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499; *Kenton Insurance Co. v. Wigginton*, 89 Ky. 330, 12 S. W. 668, 7 L. R. A. 81; *Providence Insurance Co. v. Wolf*, 168 Ind. 690, 80 N. E. 26, 120 Am. St. Rep. 395. Mere silence on the part of the insurer will not constitute a waiver; but if he reasonably induces the assured to believe proofs are not necessary or demanded, the delinquency will not defeat a recovery. In *Hartford Fire Insurance Co. v. Keating*, cited, it was held that if after a loss an agent of the insurer examines into the circumstances of the loss and the value of the property, and states that he will send a check for the amount of the policy, and the assured therefrom understands he will not be required to furnish proofs of loss as stipulated for in the contract, the payment of the indemnity cannot be resisted because of the failure to furnish such proofs. And in the *Kenton Case*, supra, it was said:

"The appellee began to comply with his contract the morning after the fire, and attempted to do everything that was necessary to notify the company of his loss, but delay after delay, resulting more from the action of the company than that of the appellee, prevented the proofs from being made within the 30 days; and that the appellee was lulled into security by the conduct of the company or its agents is too plain a proposition to be controverted. * * * Confiding in the statements of the local agent, and with the full belief that this company was preparing to adjust the loss [he] took no steps to present the proofs, except in the manner stated, and is now met with the defense that the company was delaying payment for the want of the proof of loss. * * * The general doctrine in regard to such conduct on the part of insurance companies can be well applied in this case. The preliminary proof of loss 'will be excused on the ground of waiver by the insurers, if their conduct is such as to induce delay, or to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required.' May on Insurance, § 468."

So a proposal by a life insurance company to settle at a fixed sum named by it will constitute a waiver of proof of death as required by the policy. *McElroy v. Hancock Mutual Life Insurance Co.*, 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

[4] It is a rule well supported by the decisions that recognition of liability by the company, as by an offer to pay all or a part

of the loss, or negotiations for settlement under the policy as if proofs of loss actually had been furnished, will amount to a waiver of formal notice and proofs of loss or of defects therein. *Caledonian Fire Insurance Co. v. Traub*, 86 Md. 86, 37 Atl. 782; *Ætna Insurance Co. v. Shryer*, 85 Ind. 362; *Commercial Fire Insurance Co. v. Allen*, 80 Ala. 571, 1 South. 202; *Lewis v. Monmouth Mutual Fire Insurance Co.*, 52 Me. 492; *Murphy v. North British Insurance Co.*, 70 Mo. App. 78; *Teasdale v. Insurance Co.*, 163 Iowa, 596, 145 N. W. 284, Ann. Cas. 1916A, 591; and valuable note in 39 Ann. Cas. 594.

[2] By the policy sued on it is provided that:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto."

It is contended that this provision forbids a waiver by parol by a local agent. The precedents do not sustain this proposition. A very different construction has become well established in the various states. By the great weight of authority this clause refers only to conditions the fulfillment of which is essential to the validity of the policy at its inception and its continuance in life, and has no reference to stipulations to be performed after a loss has occurred, such as giving notice and furnishing proofs of loss. 14 R. C. L. 1345, 1346; *McCullough v. Ins. Co.*, 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862; *Bernhard v. Insurance Co.*, 79 Conn. 388, 65 Atl. 134, 8 Ann. Cas. 298; *Washburn v. Insurance Co.*, 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311; *Franklin Fire Insurance Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 409; *Phoenix Insurance Co. v. Bowdre*, 67 Miss. 620, 7 South. 596, 19 Am. St. Rep. 326; *Carson v. Insurance Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Dibrell v. Insurance Co.*, 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678.

[3] With a similar degree of unanimity it is held that, notwithstanding the clause quoted, a local agent, such as is the Welch agency, authorized to issue policies, collect premiums and make renewals and cancellations, may by waiver of proofs of loss bind the company. 14 R. C. L. 1158; *Ætna Insurance Co. v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160; *Insurance Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; *Insurance Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77; *McGurk v. Insurance Co.*, 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563. Citing numerous decisions in support of such parol waiver the court in *Washburn v. Insurance Co.*, 110 Iowa, 423, 81 N. W. 707, 80 Am. St. Rep. 311, said:

"This stipulation [prohibiting waiver except by indorsement upon the policy] relates to the conditions and provisions of the policy, and not to their performance; or, as put in numerous authorities, it 'applies only to those conditions and provisions in the policy which relate to the formation and continuance of the contract of insurance, and are essential to the binding force of the contract while it is running, and does not apply to those conditions which are to be performed after the loss has occurred, in order to enable the assured to sue on his contract.' * * * We believe it to have been uniformly so held when attention has been directed to this particular point."

"The conditions contemplated are of the essence of and form a part of, the contract of insurance, upon which its continuing force depends. Under a valid policy liability attaches on the happening of the loss, and evidently the requirement of proofs of loss pertains, not to the provisions of the policy, but to the performance of them. * * * Furnishing proofs [of loss] certainly is of the procedure to enforce the terms of the contract."

Finding no error, we affirm the judgment.

(80 W. Va. 9)

TRUNICK et al. v. TOWN OF NORTHVIEW
et al. (No. 3348.)

(Supreme Court of Appeals of West Virginia.
March 20, 1917.)

(Syllabus by the Court.)

1. MANDAMUS \S 77(3) — POSSESSION OF OFFICE.

One who has been duly elected a member of the common council of a city, town, or village pursuant to chapter 47, Code 1913 (secs. 2382-2494), and the returns of such election have been canvassed, the result ascertained and declared, and a certificate of election has been issued to him, and he has taken the proper oath, is prima facie entitled to the office, and when denied his right mandamus lies to admit him to his seat in such council.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. \S 165.]

2. MUNICIPAL CORPORATIONS \S 84—COUNCIL—DETERMINATION OF ELECTION OF MEMBER.

The council to which such member has been so elected, and not some previous council is the one entitled to further sit in judgment on his election to and qualification for the office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 189-191.]

3. MUNICIPAL CORPORATIONS \S 84—COUNCIL—RIGHT TO OFFICE.

But his prima facie right is not conclusive in a proper proceeding instituted against him to try his right and title to the office.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. \S 189-191.]

Petition by Henry Trunick and others against the Town of Northview and others for writ of mandamus. Peremptory writ issued.

H. W. Harmer and J. E. Law, both of Clarksburg, for petitioners. Homer Strosnider and F. O. Sutton, both of Clarksburg, for respondents.

MILLER, J. By mandamus petitioners seek to be inducted into the office of councilmen, to which they were elected on January 4, 1917, and who, on the canvass of the re-

turns of said election, were declared elected, and to whom certificates of election were duly issued by the proper authority.

In their petition and in the alternative writ they aver that they took and subscribed the proper oath of office, and that they are, and each of them is, duly elected and in every respect qualified as a member of the council of said town, for the term of one year from the 1st day of February, 1917, and until their respective successors be elected and qualified.

[1] Petitioners also aver, and in support thereof exhibit copies of the proceedings of the council, and it is moreover shown by the return of respondents, and by affidavits filed on behalf of both parties, that on January 30, 1917, after the election, canvass of the returns, and the issuance of certificates of election to each of them, respondents met in councilmanic session, and without notice to petitioners undertook to declare their offices vacant, and petitioners disqualified to hold the offices to which they were respectively elected, and to appoint in their stead the respondents Queen, Coulson, and Stull; and that subsequently, on January 31, 1917, at a called meeting, without notice to petitioners, they undertook to re-affirm their action of the previous day, the ground thereof, as recited in the resolutions, being that petitioners had not the requisite property qualifications, prescribed by section 13, of chapter 47 (sec. 2394), Code 1913.

And it is further averred that at a meeting held on February 6, 1917, the first regular meeting of the council for the year for which petitioners were so elected and qualified, and at which meeting the councilmen, so appointed to fill the alleged vacancies declared by the previous resolutions, were present and pretended to act, and without authority, or notice to petitioners, said council undertook to adopt another resolution declaring petitioners disqualified to hold the offices to which they had been so elected. They further aver that at this meeting petitioners appeared in person and by counsel and demanded to be seated as members of said council, but were denied their seats therein by respondents, but they made no appearance, and did not waive notice of the proceedings respecting their offices, and did nothing except to demand their right to be seated.

Respondents have appeared to the alternative writ and moved to quash the same, and also filed their return in writing, in which they challenge the jurisdiction of this court to review by mandamus the actions and proceedings of said council, and contend that certiorari, and not mandamus, is the proper remedy.

Construing section 23, chapter 47 (sec. 2404), of the Code, in connection with section 2, of chapter 110 (sec. 4519), it was decided in State ex rel. Thompson v. McAllister, 38

W. Va. 485, 18 S. E. 770, 24 L. R. A. 343, and again in *Moore v. Holt*, 55 W. Va. 507, 510, 47 S. E. 251, that certiorari, and not mandamus, is the proper remedy, to review the proceedings of a municipal council under said section, and that the council of the city, town, or village has sole and exclusive cognizance thereof, within the limitations prescribed by law. Section 23 is: "All contested elections shall be heard and decided by the council." The facts in *State ex rel. Thompson v. McAllister*, were substantially the same as in this case, and it was decided that the statute covered such cases. Judge Brannon dissented, and in the last paragraph of his opinion, citing authorities, he takes a decided stand against the proposition that certiorari, and not mandamus, is the proper remedy. While the points adjudicated, as stated in the syllabus are correct, we do not think they were properly applied to the facts in that case. The cases cited by Judge Brannon, and other cases, we think, completely demonstrate this conclusion.

We decided in *Martin v. White*, 74 W. Va. 628, 82 S. E. 505, and in *Hutton v. Holt*, Judge, 52 W. Va. 672, 44 S. E. 164, that mandamus does lie to admit one to an office, where a clear legal right thereto is shown. The question presented here is, have petitioners shown that clear legal right which entitles them to their seats? It seems to be well settled by numerous authorities that where one has been elected to an office, the vote canvassed by the proper authorities, the result ascertained, and recorded, and a certificate of election issued to him, and he has taken the oath required and otherwise qualified, he is prima facie entitled to the office, and that his predecessor claiming to hold over until his successor has been duly elected and qualified is a mere intruder, and that mandamus will lie to compel him to surrender the office to the one having the prima facie right. Supervisors of Town of La Pointe v. O'Malley, 46 Wis. 35, 50 N. W. 521; *State ex rel. Butler v. Callahan*, 4 N. D. 481, 61 N. W. 1025; *State ex rel. Moore v. Archibald*, 5 N. D. 359, 66 N. W. 234; *Bridges v. Shalcross*, 6 W. Va. 562; *People ex rel. Evans v. Callaghan*, 83 Ill. 128; *Commonwealth ex rel. Ross v. Baxter*, 35 Pa. 263; *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

[2] Assuming that section 23, chapter 47, Code, has been properly construed, another question presented is, what council is to be the judge of the election and qualification of its own members. Is it the council in office at the time of the election, or the one to which the new member has been elected? Necessarily the council composed of the members in office at the time of the election is the body authorized to canvass the returns of the election and certify the result, but would this council be authorized to sit in

judgment in a contest between conflicting claimants to the office of council in the new body? If so, they might arbitrarily and forever perpetuate themselves in office, and defeat the will of the people as expressed in an election. Supervisors of the Town of La Pointe v. O'Malley, *supra*. We think a proper construction of the statute requires us to hold, in accordance with the decisions in other states, that it is the council to which a member is elected that is to sit in judgment and determine the election and qualification of its own members. The previous council sits only as a canvassing board, to ascertain and record the result of the election as shown by the returns, and is not competent to otherwise judge of the election and qualification of the newly elected members. *Hilton v. Grand Rapids Common Council*, 112 Mich. 500, 70 N. W. 1043; *Jobson v. Bridges*, 84 Va. 298, 55 S. E. 529; *Naumann v. Board of City Canvassers*, 73 Mich. 252, 41 N. W. 267, distinguishing *Weston v. Probate Judge*, 69 Mich. 600, 37 N. W. 698.

[3] Of course the prima facie right shown by the returns of an election and the declaration of the result is not conclusive of the right of one to continue in office, but the prima facie right, as some of the authorities cited hold, entitles him to be inducted into the office, and to remain until his right has by proper proceedings been tried and determined by the proper triers thereof.

For the foregoing reasons we are of opinion to award the writ.

(80 W. Va. 13)

BILLUPS et al. v. WOOLRIDGE. (No. 3073.)
(Supreme Court of Appeals of West Virginia.
March 20, 1917.)

(Syllabus by the Court.)

1. TRIAL ~~§~~ 85 — OBJECTION TO EVIDENCE — SCOPE.

If the testimony of a witness be good in part and responsive, and another part bad and not responsive, objection thereto or a motion to strike out should not be general as to all, but limited to the objectionable part, otherwise the objection or motion should be overruled.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 222-225.]

2. BOUNDARIES ~~§~~ 41—INSTRUCTIONS.

Where on the trial of the title to land the patent and deeds of plaintiffs call for corners or lines of a senior patent under which defendant claims, and only the junior patent is offered in evidence, and the line in controversy is a common line between the lands of the conflicting claimants, the defendant is not prejudiced by an instruction to the jury telling them that in endeavoring to locate the land described in the patent they should search for the footsteps of the surveyor in locating the survey upon which the patent was based.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 206-207.]

3. TRIAL ~~§~~ 193(1)—INSTRUCTIONS—OPINION ON EVIDENCE.

Where on the trial of such action there was only slight variation in the testimony of the

witnesses for the plaintiffs as to the exact point where a corner tree not found was in fact located, and the witnesses for defendant tended in some degree to locate the corner at a different place, an instruction to the jury along with other instructions submitting the fact to the jury, and which told them that if they believed the corner stood at the point designated by the plaintiffs' witness and others, was not subject to the objection that it impliedly told the jury that the one witness was corroborated by others as to the location of the corner.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 436.]

4. APPEAL AND ERROR \S 1064(1)—HARMLESS ERROR—INSTRUCTION.

Plaintiffs' instruction number eight in this case, on the subject of adverse possession, if amenable to the criticism of defendant, that it told the jury plaintiffs were owners of the land unless defendant had acquired title by adverse possession, and that it in effect told the jury that possession which is not hostile in its inception can never become so, as applied to the facts in this case, constituted harmless error not warranting reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Trial, Cent. Dig. § 525.]

Error to Circuit Court, McDowell County. Ejectment by Sallie M. Billups and others against Grat Woolridge. Judgment for plaintiffs, and defendant brings error. Affirmed.

Litz & Harman, and Joseph M. Crockett, all of Welch, for plaintiff in error. Anderson, Strother, Hughes & Curd, of Welch, for defendants in error.

MILLER, J. In ejectment, of the land sued for, about seventy acres, defendant entered a disclaimer to all except about 3.9 acres.

On the trial plaintiffs obtained a verdict and judgment for all the land sued for, and to that judgment defendant sued out in this court the present writ of error.

The material fact in controversy on the trial was the true location of one of the lines between the adjoining tracts. Plaintiffs claimed under a patent from the Commonwealth for 777 acres, dated July 1, 1856. It is conceded, and the evidence tends to show that defendant claims under a prior grant from the Commonwealth for a tract of 104 acres, although that patent was not introduced in evidence, the only title papers introduced by defendant being two recent deeds executed to him, one dated November 11, 1907, from J. S. and Mary Brewster, describing by metes and bounds a tract of 104 acres, the other dated January 6, 1910, from Emily C. Myers, describing two tracts, the first calling for 33½ acres, the second for 15 acres, neither of said deeds making any specific reference to the original patent for the 104 acres. The plaintiffs showed a perfect chain of title back to the patent for the tract of 777 acres, and each side offered evidence as to the location of the lines and corners called for, and also on the subject of

adverse possession, with the result already indicated.

The land in controversy lies on Big Creek, and the call in the title papers of the plaintiffs for the line in controversy, running from the poplar on the side of a hill near said creek, is:

"Thence S. 40° E. 79 poles crossing Big Creek three times to a large spruce pine and beech opposite the lower end of the Crockett Bottom."

This line with the two preceding lines of the 777 acre patent are described as being coincident with the lines of the 104 acre survey; and the two deeds introduced in evidence by the defendant describe the line in controversy in the same way, and as crossing Big Creek three times; so that there is no interlock, and the principal question submitted to the jury was the true location of this boundary line.

The points of error relied on relate to the admission and rejection of evidence, and to certain of the instructions requested by plaintiffs.

The first point is that the court, over defendant's objection, permitted T. R. Myers and W. H. Bowling to testify that John W. Marrs, then deceased, and under whom plaintiffs claimed, had told the witnesses that the property in controversy belonged to him. This objection was based on the rule of evidence affirmed in our cases of *Corbleys v. Ripley*, 22 W. Va. 154, 46 Am. Rep. 502, and *High's Heirs v. Pancake*, 42 W. Va. 602, 26 S. E. 536, and in certain Virginia cases, to the effect that the declaration of a deceased former owner as to the identity of a particular corner or boundary line of land owned by him, though otherwise admissible, are inadmissible, if at the time they were made the facts and circumstances and his situation show that he had an interest to make false representations respecting the same, and that a mere general statement or claim, without reference to corners or marked lines, that certain land was his land, or where the lines would run, or that he owned the land, are never admissible.

[1] The law of these cases is not controverted; but it is contended that the point of objection is not well founded in the evidence. The question propounded by counsel to T. R. Myers was:

"Did your brother, Ballard Myers, ever make any statement to you about the location of that land with respect to his stable through there?"

Over objection, the witness answered:

"Yes, sir; he said that the stable was partly on John Marrs' land. The bottom extended on up there, and he wanted to buy it, and there was such a little of it Mr. Marrs said it wasn't worth making a deed to, and he could move his fence out and use it as long as he wanted it. He told me so; so did Marrs."

That part of the answer relating to what Marrs is supposed to have told the witness is the part now objected to. It will be ob-

served that the question did not call for this part of the answer; and the motion of the defendant to strike out was applied to the whole of the answer and not to the objectionable part of it, and which was entirely voluntary on the part of the witness. In such cases the rule is that if it is desired to correct the error the objection must be limited to the part of the answer or other evidence which is objectionable, otherwise the objection or motion will be properly overruled. *State v. Calhoun*, 67 W. Va. 686, 69 S. E. 1098; *Lynchburg Cotton Mills v. Rives*, 112 Va. 137, 70 S. E. 542.

This evidence was introduced in rebuttal on the question of adverse possession. Another witness for plaintiffs, F. B. Bailey, testified that Ballard Myers had admitted to him that he had built his barn partly on the John Marrs tract, and that Marrs had given him permission to use it as long as he owned the land, and that he need not move his barn. This was legal and competent evidence, relating to the same subject, and as to which there was no conflict. It is evident, therefore, that defendant could not have been prejudiced by the error, if error there was, in the admission of a voluntary statement of the witness Myers, for the result would undoubtedly have been the same. *Hannum v. Hill*, 52 W. Va. 166, 43 S. E. 223; *State v. Davis*, 68 W. Va. 142, 69 S. E. 639, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996.

Respecting the evidence of the witness W. H. Bowling, of the same character, this evidence was stricken out, upon objection, and no doubt if the objection, or motion to strike out, had been limited to the objectionable part of the testimony of the witness Myers, the trial court would have taken similar action.

On the question of adverse possession the defendant had the benefit of all the evidence offered by himself, and we cannot see that he suffered any prejudice by any ruling or action of the court in relation thereto, certainly none of which he can now complain. This question of adverse possession was submitted to the jury, and their decision seems to have been adverse to the contentions of the defendant.

[2] The next point is that the court erred in giving to the jury plaintiffs' instruction number one. The criticism of this instruction is that it told the jury that in endeavoring to locate the land described in the patent they should search for the footsteps of the surveyor in locating the survey upon which the patent was based. It is argued that inasmuch as the only patent offered in evidence was the patent for 777 acres, and it was junior to the patent for the 104 acres, and the former called for and was limited to the true location of the line of the 104 acre tract, the line in dispute, the instruction was misleading and prejudicial to defendant's interests. Defendant did not introduce the patent for the 104 acre tract, but without

objection, the surveyors and other witnesses referred to the calls of the senior patent, and identified the call in the one as alike and coincident with the calls in the other, so far as they relate to the disputed line. Both patents seem to call for the poplar, and as running substantially on the same bearing, crossing Big Creek three times, to the large spruce pine and beech. The surveyor who located the junior survey, therefore, must have followed substantially in the footsteps of the surveyor of the senior patent or older survey, and the instruction was therefore as much to follow the footsteps of the one as the other. We do not see how defendant was prejudiced by this instruction, nor do we see how under the evidence the verdict of the jury could have been otherwise than it was.

[3] The third point relied on is the giving of plaintiffs' instruction number three. This instruction told the jury:

"That in questions of boundary natural objects called for, marked lines and reputed boundaries should be preferred in ascertaining the identity of a tract of land to courses and distances of the calls of the grant or deed. If, therefore, you believe from the evidence that the poplar tree called for in the grant and the deeds introduced in evidence in this case, the location of which is in dispute, stood at the point designated by E. L. Whitley and others, and further believe that the large spruce pine stood at the point designated by the said E. L. Whitley and others, then the line between the said points is the proper location of the line called for in the grant and deeds introduced in evidence, although following the course and distance in said grant and deeds may not take the surveyor to the points where such timbers were located."

The only point made against this instruction is that it impliedly at least told the jury that the witness Whitley was corroborated by other witnesses as to the location of the poplar tree and the spruce pine tree, when the other witnesses introduced by plaintiffs did not concur with Whitley as to the exact location of these corners, and that the jury were misdirected, and the defendant prejudiced thereby. We have read the evidence of the witnesses carefully and do not find substantial variance between them as to the location of these corners. As the trees were not standing, and the witnesses depended upon their recollection as to their exact location there was likely to be slight variation without substantial difference. We are inclined to regard the objection to the instruction as rather hypercritical. Moreover, the instruction implies that there were other witnesses for the defendant who disagreed with those of the plaintiffs as to the true location of these corners, and the question of fact was one for the jury.

[4] Lastly, it is complained that plaintiffs' instruction number eight was erroneous. It told the jury:

"That the possession of land which the law protects is open and notorious possession, and not a secret or a furtive possession, and further, that if adverse possession is held without color

of title, such possession is limited to the portion actually occupied, and that to constitute adverse possession there must be an actual claim of present ownership, accompanied with possession, and possession with mere intent to claim it in the future is not adverse possession, and that adverse possession must be hostile in its inception and continue uninterruptedly for ten years; it must be open, notorious, adverse, exclusive, and must be held during all of such time under a claim of ownership by the occupant; and all of these facts must be proved by a preponderance of the evidence, and the possession, to be adverse, must be such as was consistent with the nature of the property, and is indicative of an honest claim of ownership, and adverse possession is not proved by inference, but must be proved by clear and positive proof, and to constitute adverse possession it must appear from the evidence that what the adverse claimant did on the land was not with the leave or permission of the owner, but was done under a claim of right in himself, and in hostility to the right of the owner; and if you believe from the evidence that Myers entered into possession of any part of the lands in controversy with the consent of Marrs, the owner, for any other purpose except to claim the land as his own, such possession alone, no matter how long it is continued, will never bar the right of the owner to take possession of his land when he sees fit to do so."

The first point of criticism is that the instruction indicated to the jury that the plaintiffs were the owners of the land in dispute, unless defendant had acquired title by adverse possession. Defendant did not undertake to show title back to the Commonwealth. He introduced in evidence only the immediate deeds to himself. Plaintiffs located the disputed line as coincident with that found by the jury, and this not only with reference to the calls of the junior deed or patent but with reference also to the calls of the senior patent, and the defendant seemed to rely largely on the question of adverse possession. The court, at his instance, gave to the jury, an instruction on the subject of adverse possession. We do not think the jury could have been misled to believe that the opinion of the court was that plaintiffs were in fact the owners of the land, the very matter in dispute, and which was submitted to them.

Another point of criticism is that to acquire title by adverse possession, the possession must have been adverse and hostile in its inception, which was in effect to tell the jury that possession which was not hostile in its inception can never become so. We do not think such is the effect of the instruction. As applied to the evidence in this case we think the instruction propounded correct legal propositions. As stated defendant offered no title papers except the immediate deeds to himself, which by their calls limited him to a line running from a poplar and crossing Big Creek three times, or to a stake in the center of the creek at the last crossing, and which the jury located according to the contention of the plaintiffs. There was no evidence of adverse possession on any of the land found for the plaintiffs, which con-

tinued for a sufficient time, or would give notice to the plaintiffs of any adverse holding, and not permissive on the part of the plaintiffs, or those under whom they claim.

For the foregoing reasons the judgment will be affirmed.

(79 W. Va. 365)

SIMPSON v. CARTER COAL CO.

(Supreme Court of Appeals of West Virginia.
Dec. 5, 1916. Rehearing Denied
April 10, 1917.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇐112(1)—INJURIES TO SERVANT—CARE.

A coal company which, knowingly, permits its employes habitually to ride on its coal cars to and from their places of work in the mine is bound to use reasonable care to maintain its tracks and cars in a reasonably safe condition, considering the purpose for which they were designed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 212, 213, 218.]

2. MASTER AND SERVANT ⇐243(5)—INJURIES TO SERVANT—CARE.

A rule warning all persons, who ride upon any incline, car, engine, or motor, that they do so at their own risk does not absolve the company from liability, if it makes no reasonable effort to prevent its employes from so riding.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 763, 764.]

3. MASTER AND SERVANT ⇐88(7)—INJURIES TO SERVANT—RELATION.

In such case the relation of master and servant continues to exist while the employes are riding to and from their work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 150.]

4. MASTER AND SERVANT ⇐201(7)—INJURIES TO SERVANT—LIABILITY.

If the proximate cause of injury to a servant is the combined negligence of the master and a fellow servant, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 526.]

5. MASTER AND SERVANT ⇐201(3)—INJURIES TO SERVANT—LIABILITY.

When the evidence proves that plaintiff was injured by the wrecking of a coal train, on which he was lawfully riding from the mine to the tipple, and that the wreck was caused, in part, by the rapid speed of the motor, and, in part, by the unsafe condition of the road, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 518-523.]

Error to Circuit Court, McDowell County.

Action by Roy Simpson against the Carter Coal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Anderson, Strother, Hughes & Curd, of Welch, and W. B. Kegley, of Wytheville, for plaintiff in error. Stokes & Sale, of Welch, and Lawson Worrell, of Northfork, for defendant in error.

WILLIAMS, P. On the morning of August 10, 1913, Roy Simpson, an employe of defendant, was riding on a trip of loaded cars from

the drift mouth to the coal tippie, when a wreck occurred, and one of his legs was so badly crushed that amputation was necessary. He recovered a judgment for \$2,500, and defendant brings error.

The sufficiency of the declaration was challenged by demurrer, which was overruled, and we think properly so. The drift mouth is a mile or more from the tippie, near which plaintiff and some of the other miners lived. The declaration avers that, in order to go quickly to and from his place of work in the mine, plaintiff was required and permitted to ride the trip; that it was a custom of the miners to do so, well known to defendant; that it was defendant's duty to use reasonable care to provide safe tracks and appliances to be used by plaintiff in going to and from his work, but that it neglected its duty, in that it provided an insecure and defective track over which plaintiff had to ride; that the track was out of gauge, was improperly spiked, and laid on rotten cross-ties, all of which was known, or could have been known to defendant by the use of proper diligence, and which was unknown to plaintiff; that while plaintiff was riding on a trip from his place of work in the mine to the tippie, the track spread and the rails turned, because of the defective track, thereby wrecking the trip and injuring plaintiff. These facts constitute a good cause of action.

[1-3] It is common knowledge that mine tracks and cars are not designed for carrying passengers, but it is equally well known that tired laborers will often ride uncomfortable and even unsafe vehicles rather than walk. Most coal companies have promulgated rules warning their employes against riding on the cars, intended to protect both their employes from injury and themselves from liability therefor. Defendant's rule 14 is as follows:

"All persons who ride upon any incline, or upon any car, engine or motor, do so at their own risk."

There is ample testimony in the record, tending to prove that little effort was made to enforce this rule, especially against the men who worked on the night shift, of whom plaintiff was one. He swears he never saw the rule, and knew nothing of it, and was told by Mr. Altizer, defendant's foreman, who employed him, to catch the trip at the tippie and ride into the mine, and that it was a custom at the mine for all the workmen to ride. Tom Christian, the night foreman, says he found the men all riding the trip, when he was first employed in the mine, and made no effort to stop it; and other witnesses testify to the same facts. True, there is conflicting evidence on this question, but the jury were the judges of its weight. The custom or practice of riding the trip was known, or at least should have been known, to defendant, if it had been reasonably observant; and its failure to enforce the rule proves its acquiescence in its violation. It thus tacitly consented to the use of its coal cars as a means of

conveying the workmen to and from work, and thereby imposed upon itself the obligation to maintain the cars and tracks in a reasonably safe condition, considering the purpose for which such appliances were designed and constructed. It would not be reasonable to expect them to be kept in as safe condition as cars and tracks, built for passenger traffic. According to plaintiff's testimony his contract of employment contemplated his riding to and from work; and, although this is denied, the jury must have accepted it as true, and it establishes the relation of master and servant at the time of the accident, notwithstanding plaintiff's labors for the day had ended. Defendant's duty to him, at that time, was at least equal to its duty to its motorman, so far as it relates to the condition of the tracks. *Petry v. Cabin Creek Consolidated Coal Co.*, 88 S. E. 105.

"The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose." 3 Labatt on Master and Servant, § 923. *Perry, Adm'r, v. Electric Railway*, 72 W. Va. 282, 78 S. E. 692.

"It is the duty of a railroad company carrying a section hand to and from the place where he works to furnish him a reasonably safe place in which to ride." *Chicago, etc., Co. v. O'Donnell*, 213 Ill. 545, 72 N. E. 1133; *Cicalese v. Lehigh, etc., R. Co.*, 75 N. J. Law, 897, 69 Atl. 166; *Heilig v. Railway Co.*, 152 N. C. 469, 67 S. E. 1009; *Texas, etc., R. Co. v. Kelly*, 34 Tex. Civ. App. 21, 80 S. W. 1073; *Thomas v. Wisconsin, etc., Co.*, 108 Minn. 485, 122 N. W. 456, 23 L. R. A. (N. S.) 954; *Parkinson, etc., v. Riley*, 50 Kan. 401, 31 Pac. 1090, 34 Am. St. Rep. 123.

[4, 5] The next question is, Does the evidence prove a breach of duty? Plaintiff was riding a trip of five loaded cars, drawn by a five ton motor, down a 3 per cent. grade. All the witnesses agree that the wreck occurred at a curve, and that the trip was running "pretty fast," but the rate of speed is not otherwise defined by any of them. The motorman did not testify, and some witnesses say he was running at about his usual rate of speed, and that "he generally ran pretty fast." J. R. Booth, who was riding on the trip, swears he was told to go back and take off the brakes, and that he did so, about 500 yards above the place where the wreck occurred. Charles Christian, who lived 300 or 400 yards from the track, but in sight of it, says he saw the trip stop, some 300 or 400 yards from where the cars wrecked, and saw a man go back over the cars, "kicking the brakes off." R. C. Christian, who was also on the trip when it wrecked, says the cars ran something like 60 feet on the ground, after they got off the rails. The foregoing testimony, considered in connection with the material fact, which is not disputed by any witness, that the trip was running "pretty fast," down a steep grade, approaching a curve, proves, by the overwhelming weight of evidence, that the brakes were off, and establishes, as one proximate cause of plaintiff's injury, the negligence of the motorman,

a fellow servant, and would preclude recovery, if there was not other evidence tending to prove there were rotten ties in the curve where the wreck occurred, which did not hold the spikes and caused the rail to turn over and the tracks to spread. If this was true, and the jury had to determine whether it was or not from the conflicting evidence, it established the master's negligence as a contributing cause, making defendant liable. Tom Christian, who spiked the rails down just after the wreck, testified that some of the ties "seemed to be rotten." R. C. Christian also swears there were "some rotten ties." A number of witnesses also testify that other wrecks had occurred at the same place. Hence, notwithstanding the undisputed facts, testified to by some of defendant's witnesses, that the road was built only three years before the accident, with new ties, most of which were oak, and that a heavier motor, hauling a train of 18 or 20 loaded cars, had passed safely over the road, about an hour or so before the wreck, the court cannot say the jury were not justified in finding, upon the conflicting testimony, that the wreck was due, at least in part, to a bad condition of the road. In view of the conflicting testimony, the question of negligence was for the jury to determine. The law is well settled that, if injury to a servant is caused by the combined negligence of the master and a fellow servant, the master is liable. *Lay v. Elk Ridge Coal & Coke Co.*, 64 W. Va. 288, 61 S. E. 156; 4 *Labatt, Master & Servant* (2d Ed.) § 1581, and numerous cases cited in note.

No error was committed by the trial court, prejudicial to defendant, in giving the instruction asked for by plaintiff, or in refusing to give certain others requested by defendant. Some of those given for it state the law even more strongly in its favor than they should have done, especially its instructions Nos. 3 and 8, which limited its liability to the terms of its contract with plaintiff. It may not have expressly contracted to transport him on its cars, to and from his place of work, and yet be liable for his injury. If it knew its employes habitually rode on the trips, and it made no effort to prevent them

from doing so, it would be liable for negligence in failing to furnish a reasonably safe track. *Petry v. Cabin Creek Consolidated Coal Co.*, supra. Defendant's instruction No. 2 was properly refused. It unduly limited the scope of its duty, and its Nos. 4, 9, and 10 give undue effect to the posting of rules and furnishing them to the mine foreman and assistant mine foreman, for distribution among the employes, and were properly rejected. No. 10 was to the effect that the mine foreman could not alter the rules, without defendant's authority and permission to do so, and was not supported by evidence. There is no evidence that the mine foreman changed the rules. They were simply not observed, and almost uniformly violated. Proof of this fact established defendant's acquiescence. A mining company cannot relieve itself from all liability, by adopting and promulgating a set of rules, and intrusting the entire conduct of its mining business, and the enforcement of its rules, to the mine foreman, whose statutory duties have to do with the ventilation and the interior of the mine. This accident happened outside, almost a mile from the drift mouth.

Defendant's motion to set aside the verdict was properly overruled, and the judgment is affirmed.

CHAPMAN et ux. v. WELTON & MILLER.

(Supreme Court of Appeals of Virginia. June 8, 1916.)

Error to Law and Equity Court of City of Richmond.

Action between one Chapman and wife and Welton & Miller. Judgment for Welton & Miller, and Chapman and wife bring error. Affirmed by divided court.

Eugene C. Massie, of Richmond, for plaintiffs in error. Richard Evelyn Byrd, of Richmond, and V. R. Shackelford, of Orange, for defendants in error.

PER CURIAM. Affirmed by divided court.

CARDWELL, J., absent.

